U.S. Chamber of Commerce

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Public Consultation on the Introduction of a Merger Control Framework for Addressing Below-threshold Mergers

The Chamber of Commerce of the United States of America ("Chamber") is the largest business advocacy organization in the world, operating in over 50 countries to promote free enterprise and advance trade and investment, representing companies of every size and from every sector.

The Chamber is also a leading business voice on international competition policy. We support the International Competition Network and its principles of non-discrimination and procedural due process for all competitors in all jurisdictions. We regularly engage with competition agencies and policymakers around the globe on best practices and sound policy frameworks to promote trade, support economic growth, and foster innovation. Moreover, the Chamber is at the forefront of shaping digital economy policies globally, including data privacy, cross-border data flows, cybersecurity, digital trade, artificial intelligence, and e-commerce.

The Chamber is pleased to offer comments on the Autorité's merger review consultation. As explained more fully below, we believe that France's existing merger review system works well and question whether the consultation has laid out a persuasive case for change. Beyond that, and in keeping with the government's finding that "legal certainty for companies" is central to an effective merger review framework, we have concerns that both Option 1 and Option 2 would reduce certainty for the business community, and that Option 2 would improperly target foreign companies, particularly U.S. companies. Instead, we believe that the Autorité could address its concerns through less burdensome approaches, such as Option 3, in order to maintain France's status as an open place for business.

France's Existing Merger Review System Is Sound

As decades of history have shown, mergers can benefit the market and the consumer by creating increases in product quality and decreases in price. Mergers can also eliminate barriers to entry and spur innovation by allowing smaller companies to obtain critical financing and technical expertise. Considering the economic benefits that mergers generate, they should generally be encouraged as a catalyst of market innovation.

In keeping with these principles, we respectfully question the premise of this consultation, which carries the risk of chilling procompetitive transactions, to the detriment of French consumers and businesses. Accordingly, we encourage the

government to think carefully about whether there is a genuine need to revise the Autorité's existing merger review framework.

Option 3 seems most consistent with maintaining a watchful eye to ensure consummated mergers do not result in harm to competition within France. It appropriately would limit the scope of action of the Autorité to the enforcement against anticompetitive practices that arise, following the implementation of a merger. On the basis on Articles 101 and 102, under the Treaty of Functioning of the European Union, the Autorité is empowered, after the merger's implementation and within the applicable limitation period, to bring an enforcement proceeding. An approach such as this one, has been endorsed by the European courts. Accordingly, Option 3 would not require any change to the legal framework currently applicable in France.

Legal Certainty and Predictability Are Critical to An Effective Competition Framework

The Chamber supports a policy that maintains France's existing competition framework and recommends alignment with the Draghi Report's advice to avoid "drastic changes". At most, adjustments should modestly refine the regulatory apparatus to accommodate the "evolving economic thinking of the digital age". As such, any proposed shifts in merger policy should be clear, objective, and predictable, ensuring companies have certainty about when to file and how long they can expect to wait for review.

Additionally, given the ECJ's clear statement in the Illumina/Grail case that the European Commission's previous interpretation of Article 22 "undermine[d] the effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration," it is important that any revisions preserve the predictability and certainty of the French regime.

Unfortunately, both Options 1 and 2 introduce uncertainty into the process. Discretionary call-in powers, of course, necessarily introduce uncertainty. Via its terms, Option 1 would introduce both quantitative *and* qualitative criteria into France's merger control regime, namely allowing for review of unspecified mergers that "threaten to significantly affect competition on the French territory". The meaning of this is unclear. Similarly, Option 2 would tie mandatory notification to a designating as a gatekeeper by the European Commission under the Digital Markets Act (DMA), a process that itself has been fraught with uncertainty and criticism.

Indeed, the Chamber is **especially concerned** that Option 2, if operationalized, would target U.S. companies that have been the focus of the DMA. This proposal bears no relationship or relevance to the hypothetical policy concerns brought about by the Illumina/Grail transaction that served as the impetus for the consultation. Adoption on Option 2, therefore, has no sound basis for consideration. Targeting

specific companies for disparate treatment is antithetical to the proper role of competition enforcement.

To reduce uncertainty, any call-in powers should be cabined by very clear and objective criteria. A turnover threshold would fit this bill, but it should be based on the French turnover of each of the parties respectively, not their combined turnover. For companies that have a very big turnover in France, in particular larger foreign firms, almost any deal with a company that has even a de minimis amount of revenue in France would trip the threshold. This would result in deals that have limited or no nexus with France being subject to discretionary call-in.

As the proposal suggests, one way to mitigate this uncertainty is to apply a "nexus" requirement, which would align with the recommended best practices identified by the International Competition Network. This requirement would ensure that the examined transaction involves parties sufficiently engaged in the local economy to justify asserting jurisdictional authority over their decisions. However, the definition must be clear and narrowly cabined. The definitions of "nexus" used by other jurisdictions are often nebulous and broad. While this grants broad discretion to the relevant jurisdictional regulator, it considerably reduces predictability and certainty for the merging parties. Any definition of "nexus" must therefore be clearly defined and no broader than necessary to capture problematic deals. The creation of a consultation right may be helpful, but it must be able to provide certainty on a fast and defined timetable.

Finally, Option 1 and Option 2 are fraught with significant geopolitical risk. Both hold the potential to draw intense international scrutiny as Option 1 is likely to result in arbitrarily calling-in foreign transactions and the use of Option 2 would clearly target American companies. Globally, it is important that merger review remain jurisdictionally focused, guided by respect for international comity, and avoid extraterritorial application.

Policymakers in the United States are increasingly concerned with the treatment U.S. companies receive in foreign markets. Many European policies are under growing scrutiny for the uniquely and highly questionable impact they have on American businesses. Enforcement actions brought under Option 1 or any use of Option 2 would only serve to complicate trade relations and invite retaliation.

In the current economic and political climate, markets and market-participants need legal certainty and independence to unleash their innovative potential. However, instead of legal certainty and independence, the suggested changes of Option 1 and Option 2 would invite disruption and create new opportunities for questionable governmental intervention in markets. The proposed changes also threaten the time-honored principle of comity that has undergirded the international competition system for decades.

France Has Less Burdensome Means of Achieving its Goals

As we have explained, France should continue implementing its existing competition framework. Should you have concerns concerning whether the existing framework to address new developments in the market is adequate, the Chamber encourages the Autorité to embrace less disruptive alternatives, such as via interjurisdictional coordination and increasing the level of voluntary notification requests. Both options should allow the Autorité to evaluate more proposed transactions without the expense of burdening the overwhelming number of below-threshold transactions that raise no competitive concerns.

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The Chamber thanks the Autorité for the opportunity to provide these comments. We would welcome further engagement with interested agencies and policymakers in the coming months.

Sincerely,

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