Consultation response

Introduction of a Merger Control Framework for Addressing Below-Threshold Mergers

Autorité de la concurrence

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Executive summary

Predictability and legal certainty are crucial for effective merger control, as reaffirmed by the European Court of Justice in *Illumina/Grail*. While concerns over below-threshold transactions have led to increased use of residual jurisdiction or call-in powers, such mechanisms can introduce significant uncertainty, deterring investment and innovation. The *Autorité de la concurrence*'s proposed options—call-in powers, mandatory notification for certain companies, or reliance on existing competition rules—must be carefully assessed. Aligning with international best practices, particularly the International Competition Network (ICN) Recommended Practices, ensures that jurisdiction is exercised only when there is a material local nexus. The honed application of Option 3, which focuses on post-merger enforcement using existing antitrust tools under Articles 101 and 102 TFEU, is the most balanced approach as it avoids unnecessary regulatory burdens while preserving competition enforcement capabilities. To maintain France's attractiveness as an investment hub, any regulatory changes should prioritize simplicity, legal certainty, and global consistency.

Introduction

Predictability is the cornerstone of an effective merger control regime. Recently, the Court of Justice of the European Union (CJEU), in *Illumina/Grail*, stated that European merger control 'was designed to ensure a high degree of predictability and legal certainty'.

Clear and predictable rules and jurisdictional thresholds enable companies and authorities alike to define transactions subject to notification. That predictability is vital as it allows the parties to a transaction, their investors and financiers – but crucially also employees, customers and other stakeholders – to anticipate the jurisdictions involved, the scope and likely timing of regulatory reviews and when a transaction can be consummated. Clear and predictable thresholds ensure that the best placed authorities ultimately have jurisdiction over a case, contributing to effective enforcement of competition rules.

However, the increasing complexity of modern markets has led to concerns about below-threshold mergers that may escape traditional review mechanisms. To address this, mandatory notification regimes are now increasingly complemented by the addition of 'residual jurisdiction', sometimes referred to as the ability of a competition authority to 'call in' a transaction if it does not meet the thresholds for mandatory notification.

Such call-in powers provide competition authorities with a tool to review transactions that fall into a perceived jurisdictional 'gap'. However, they can also undermine predictability and certainty.

It is therefore essential that such call-in powers are designed with focus and caution.

Best Practices for Merger Control

The International Competition Network's (ICN) Recommended Practices (RPs) for merger notification and review procedures provide valuable guidance on how the *Autorité de la concurrence* should design its jurisdictional framework.

The work of the ICN has been of tremendous importance to agencies and companies alike. The sharing of best practices, international convergence on jurisdictional and substantive rules, and the expansion of effective and thoughtful competition law enforcement around the world have provided significant benefits to the business community and consumers alike.

Aligning with the ICN RPs is a powerful tool for international convergence which ensures that transactions are screened by the most relevant authority.

In fact, the ICN RPs advocate that jurisdiction should only be asserted over transactions that have a substantial connection to the reviewing jurisdiction (RP.II.A). The determination of a transaction's nexus to the reviewing jurisdiction should be based on activities in that jurisdiction, measured by reference to the activities of at least two parties to the transaction in the local territory and/or by reference to the activities of the acquired business in the jurisdiction (RP.II.C). The latter criteria are further explained (in Comment 1 to RP.II.C) as requiring 'significant local activities' by each of two parties or a target's 'significant presence in the local territory, such as significant local assets or sales in or into the reviewing jurisdiction'. Further, the ICN RPs (in Comment 3 to RP.II.A) recommends that residual jurisdiction may encompass transaction with 'a material nexus to the jurisdiction… that meet lower, non-mandatory notification thresholds'. As emphasised in the RPs, 'when a jurisdiction maintains residual jurisdiction, it should take steps to address the desire of the parties to the transaction for certainty… [including] restricting the competition authority's ability to exercise residual jurisdiction to a specified, limited period of time after the completion of a transaction'.

As can be seen from the above, mandatory as well as residual jurisdiction should therefore be exercised (i) when a competition authority intends to submit a transaction to its review, (ii) on the basis of a material local nexus with reference to significant local activities by each of the two parties or the target for an acquisition and based on objective and measurable criteria and (iii) for residual jurisdiction, within a specified, limited period of time.

When addressing below-threshold transactions, competition authorities must consider these international best practices as well as wider implications for investment, innovation and growth.

Striking the right balance for certainty

Labelling high-value acquisitions as 'killer acquisitions', for instance, may not correspond to market realities and overlooks the immense contributions that investments into, or acquisitions of, smaller companies or early-stage technologies can make through creating innovation, growth and jobs. Observations about perceived large acquisition values may frequently be misguided as innovative technologies can be further developed through access to capital and economies of scale and therefore possess significant value. Policymakers should be careful to suggest such transactions possess anti-competitive intent.

In this context, the *Autorité de la concurrence*'s assessment of below-threshold mergers must keep predictability and good governance at the core of merger control to support France's attractiveness and growth. The *Autorité*'s public consultation proposes three options to address below-threshold transactions:

- Option 1: A new call-in power

- Option 2: A mandatory notification regime for certain companies
- Option 3: investigating mergers with a potential anti-competitive effect under Art. 101/102

While Option 3 would be the preferred option, another option would be establishing a threshold that captures transactions of a certain significance with a connection to France, taking inspiration from Austria and Germany's recent changes based on transaction value combined with strong local nexus requirements. This approach provides better legal certainty through clear, measurable criteria while effectively capturing significant transactions that might otherwise escape scrutiny under traditional turnover-based tests. Particularly in the digital and innovative sectors, where companies may have limited turnover but substantial market impact, value thresholds have proven effective in jurisdictions like Germany and Austria. The German model, for instance, has a €400 million threshold combined with substantial domestic operations requirements, which allows the German authority to target strategically important transactions without creating undue regulatory burden. It is important to stress however that such an option requires clear and predictable criteria to establish a strong nexus to France, so as to avoid uncertainty and over-enforcement. The Draghi Report suggested adopting this approach to address complexities related to screening below-threshold transactions.

There is an international consensus that merger control should be effective, efficient and timely. This is not only clear from the RPs developed within the ICN but also within the OECD. The OECD Council, in its 2005 Recommendation on Merger Review, stressed the need for member countries to use 'clear and objective criteria to determine whether and when a merger must be notified or, in countries without mandatory notification requirements, whether and when a merger will qualify for review'.

Ultimately, in light of the ECJ's judgement in *Illumina/Grail*, Member States should refrain from adopting measures that would go against reaffirmed EU legal principles, particularly in relation to the "effectiveness, predictability and legal certainty that must be guaranteed to the parties to a concentration" (see para. 206 of the *Illumina/Grail* judgment), and should consider whether their measures would go against or weaken these principles as well as the one-stop-shop principle.

Comments on the proposed options

Option 1: A call-in power for the *Autorité* based on quantitative and qualitative criteria

Call-in powers introduce uncertainty, even when coupled with quantitative and qualitative criteria. Transactions, particularly in high-growth industries, typically occur with quick and strict deal timelines. Unanticipated delays during the clearance phase can cause investors to abandon a transaction. The multiplication of new merger control thresholds in the EU, in particular sometimes based on unclear criteria and/or discretionary call-in powers, increases complexity for companies contemplating international transactions, raising costs, time and resources, and can deter deal-making. This increased complexity will ultimately lead to years of litigation.

Whatever legislative changes the *Autorité* considers need to be considered globally to prevent legal uncertainty that may arrive from jurisdictional rules that introduce uncertainty for investments outside of French territory. Similarly, the *Autorité* should consider the impact that these rules could have on European and French companies when they are involved in investments globally.

The introduction of qualitative criteria in the jurisdictional analysis also raises concerns, as such criteria will inherently require a substantive assessment – and thereby some discretion and/or uncertainty – and may be instrumentalised by ill-disposed competitors to disrupt or delay a merger. This may unduly disadvantage smaller players with less substantial resources to devote to defending attacks from competitors during the regulatory review.

The proposed turnover threshold could reduce uncertainty, if properly designed, but still expose companies with large footprints in France to discretionary call-in in almost every transaction. This risks having a chilling effect on investments in France by international companies.

With a cumulative approach, firms with a very large turnover in France (particularly global firms), would see almost every transaction they engage in subject to discretionary call-in as long as the other party makes a *de minimis* amount of revenue in France. This would undermine the intent of this approach to preserve legal certainty for companies by subjecting deals with a limited or non-existent nexus in France to discretionary call-in. Linking the turnover threshold **to each party's respective turnover in France**, instead of their cumulative turnover, would avoid creating an essentially universal call-in risk on companies with large turnover in France. Likewise, such a jurisdictional threshold would not comply with the ICN RPs and thus not correspond to internationally accepted best practice

For such a proposal to be implemented, the *Autorité* must apply a clear and narrowly defined 'nexus' requirement based on significant local activities by two parties or a target company, and based on objective (quantitative, not qualitative) grounds. This is particularly the case in relation to nascent technologies or early-stage pipelines, with no existing commercial position in France, and for which there is no certainty as to whether they may, one day, lead to a successful product, let alone eventually reach the French market.

If the *Autorité* chooses to pursue this option, it should consider introducing an option for informal consultation before a deal is signed, as long as it is able to provide certainty on a fast and defined timetable. This aligns with ICN RP.III.D. Consistent with this, any such process should not require significant amounts of detailed information or internal documents to be produced by the parties: it should not be an avenue for obtaining (close to) equivalent information contained in a full filing.

Option 2: A new mandatory notification threshold based on the existence of a prior decision of the *Autorité* or the European Commission (i) to prohibit or clear a merger subject to commitments, (ii) to impose a fine or accepting commitments in the event of anticompetitive practices on the basis of Article 102 TFEU or Article L. 420-2 of the French Commercial Code or (iii) when one of the parties

to the merger has been designated as a gatekeeper by the European Commission under the Digital Markets Act (DMA)

Option 2 is somewhat clearer, by only targeting companies based on previous antitrust and merger decisions linked to French territory or the market concerned by the transaction. Similarly, the criterion would be subject to time-limits, to prevent permanently prejudicing against certain companies.

However, each situation has several problematic elements.

The mandatory-notification requirement, described in (i), for companies that received prohibitions or accepted commitments on previous transactions is disproportionate and addresses irrelevant markets. Most companies are active in multiple product lines across different national markets. Accordingly, commitments and prohibitions are tied to a specific product and its context within a specific market. Subjecting all of a company's transactions to mandatory notification just because a specific product was deemed to have an impact on a specific market is disproportionate. This option would be better if tailored to only apply to transactions within a sector in which a company has previously received prohibitions or commitments on within France.

Similarly, the mandatory-notification requirement, described in (ii), for companies that had Art. 102 cases that ended with commitment decisions is disproportionate. Commitment decisions do not conclusively define relevant markets or establish dominance of the undertaking concerned. In addition, if an Art. 102 commitments case had such repercussions on a company, this could disincentivise if from offering and agreeing commitments. Introducing such a merger notification requirement would retroactively alter the terms and implications of past commitments agreed between a company and an authority.

Both cases amount to a presumption that any merger by a party that has previously been subject to antitrust enforcement generates anticompetitive effects, which is contradictory to EUCJ's case law focusing on an effects-based approach to competition enforcement.

Commitments agreed with competition authorities – either in merger or antitrust proceedings – by definition eliminate competition concerns that may have been identified. Similarly, prohibiting a merger prevents the emergence of a company that could behave in a way negatively affecting competition. Requiring a notification for any company having faced such outcome following proceedings with the *Autorité* or EU Commission is unjustified.

As such, and in alignment with the Swiss dominance threshold which inspired the *Autorité*, the only viable solution with respect to both options (i) and (ii) would be to subject the notification requirement to a prior merger control clearance/prohibition decision, or an abuse of dominance infringement decision, that concerns the same relevant market as the transaction (or at most a market upstream or downstream), and that moreover is final and non-appealable. A time limit preventing reliance on outdated decisions (e.g., those older than five years) should also be considered in light of natural market changes.

In the situation of a gatekeeper, described in (iii), including all firms designated as gatekeepers under the DMA may be unnecessarily broad, discriminatory and duplicative. It seems to rely on an unproven assumption that companies designated as gatekeepers are more likely to have anti-competitive mergers.

The current proposal would require a gatekeeper to notify all transactions in France to the *Autorité*, regardless of whether it is related to the core platform service for which it received its gatekeeper designation. Likewise, it would require the Gatekeeper to notify all transactions related to its core platform service, including transactions without a French nexus and those that may be non-notifiable in other jurisdictions. This is unnecessarily broad and should be limited to **transactions in France related to the core platform service for which the gatekeeper has been designated.** This will limit gatekeepers from having to notify the full breadth of transactions they engage in—most of which are unrelated to their gatekeeper designations.

In any case, imposing a mandatory notification requirement on gatekeepers seems inconsistent with Article 1(5) of the DMA that explicitly prohibits national governments to impose further obligations on ‘gatekeepers’ for the simple reason they have been designated under the DMA. It is duplicative, as Article 14(a) of the DMA already requires gatekeepers to notify the European Commission of relevant concentrations. Article 14(a) of the DMA is sufficient for the purpose of capturing below-threshold transactions, by being broad and lacking a jurisdictional nexus requirement, meaning that gatekeepers must even notify transactions without a European aspect.

The European Commission has already objected to a Member State imposing further obligations on designated gatekeepers and provided a clear interpretation of article 1(5) of the DMA: “Article 1(5) DMA does not allow for this possibility in cases where the obligations deriving from national laws in the sense of Article 1(5) DMA are directly related to the status of a gatekeeper within the meaning of the DMA. The DMA only envisages national legislation where Member States intend to adopt legislation of general application, which would aim at different objectives than the DMA, and which would not link the application of these obligations to the status of gatekeeper within the meaning of the DMA.”[1]

Additionally while article 14(a) limits notification requirements to concentrations where the gatekeeper is an acquirer, the *Autorité*’s approach would capture transactions where the gatekeeper is either the buyer or the seller. Given that gatekeeper designations are linked to a company’s size and market power, requiring notifications of gatekeepers’ divestitures does not make sense.

Option 2 would undermine the fundamental principle of equality among companies by introducing arbitrary and discriminatory rules into the French merger control regime. This approach directly conflicts with the existing legal framework established by French lawmakers, which ensures all businesses are subject to uniform and objective standards. Such a departure from equal treatment would compromise the integrity and fairness of France's well-established merger control system.

[1] https://technical-regulation-information-system.ec.europa.eu/en/notification/25302

Option 3: Limit the scope of action of the *Autorité* to the enforcement of provisions on anticompetitive practices (anticompetitive agreements and abuse of dominant position) after the implementation of the merger concerned

As demonstrated above, any attempt to capture below-threshold mergers would introduce significant uncertainty to the detriment of France's attractiveness as an investment destination.

Introducing this uncertainty is unnecessary given that the potential anti-competitive risks would be mitigated by the *Autorité*'s, and European Commission's, ability to robustly enforce any potential anticompetitive aspects of a transaction when they become material under existing competition tools, such as Articles 101 and 102 TFEU and their French equivalent (potentially combined with interim measures).

Subjecting below-threshold mergers, which lack an immediate impact on competition, to call-in disproportionately harms the smaller party. In many cases, start-ups lack the resources and means to comply with complex or unpredictable reviews. More fundamentally, such companies often have limited cash runways, the frequent need to get access to much needed resources to move to the next stage of their development, and protracted merger reviews combined with suspensory obligations can threaten the very solvency of these companies.[2] This disincentivises innovative M&A activity and prevents small companies from growing and prevents innovative products and services from reaching the market.

Focusing resources, instead, on enforcing substantiated concerns of anticompetitive practices after the implementation of the merger significantly reduces hesitations and, at worst, abandoned growth opportunities caused by an unpredictable call-in environment.

However, with the Draghi Report citing the use of Article 101 and 102 TFEU for below-threshold mergers as a source of an 'increasingly complex and uncertain' merger control environment, significant work remains to ensure that these articles are used in an efficient and targeted manner. Article 101 and 102 TFEU investigations are burdensome and unpredictable for companies and authorities alike and increasing their efficiency will support Europe's competitiveness. In this respect, it is essential that, should the *Autorité* decide to use Articles 101 and 102 TFEU combined with interim measures to capture transactions, where the mere fact of acquiring a target may constitute an infringement of Articles 101 or 102 TFEU, the *Autorité* must establish clear guidelines specifying the specific circumstances—which must remain exceptional—under which it may do so, as well as safeguard mechanisms to limit the initiation of proceedings to a very short period of time following closing so as to not reintroduce legal uncertainty for companies.

[2] It is sometimes argued that this is an issue of moral hazard. However, this is not the case where the liquidity issues have resulted from the highly uncertain nature of a call-in regime rather than where a seller has selected an acquirer that: (i) triggers clear merger control review thresholds; and (ii) gives rise to substantive issues that need exploring in a protracted review.

Conclusion

The *Autorité*'s proposed approaches to below-threshold mergers each contain unique risks to the attractiveness of French and international start-ups and nascent technologies or early pipelines, as well as the appetite for large companies to consider transactions linked to France.

Instead of choosing options 1 or 2, the *Autorité* should opt to focus on option 3 to prevent unexpected consequences caused by imposing a discretionary call-in power or mandatory notification regime. Option 3 is grounded in the case law of the CJEU and avoids imposing further unjustified regulatory obligations on businesses.

In any case, the *Autorité* must pursue this revision with simplification and predictability in mind. Efforts to require the mandatory notification of below-threshold mergers adds to an increasingly complex and unpredictable regulatory environment in and out of competition law. The EU Strategic Compass noted that 'many signal that the complexity, variety, and duration of permitting and administrative procedures make Europe a less attractive location for investment, compared to other regions' calling on 'all the EU, national, and local institutions [to] make a major effort to produce simpler rules and to accelerate the speed of administrative procedures'. With its assessment of below-threshold transactions, the *Autorité* has an opportunity to put this principle into practice.