

## – THE FCA’S PROPOSALS FOR CALL-IN POWER AFTER ILLUMINA/GRAIL –

On January 14, 2025, the French Competition Authority (the “**FCA**”) launched a public consultation to explore the introduction of a merger control framework to review below-threshold mergers that could harm competition in France. Stakeholders were invited to submit their observations until February 16, 2025.

### 1. Previous consultations of 2017 and 2018

Since 2017, the FCA assessed various tools to review transactions falling outside the scope of the merger control regime. This included the use of Article 22 referral but not exclusively. Drawing inspiration from existing mechanisms in other jurisdictions,<sup>i</sup> the FCA considered and dismissed potential avenues in 2017 and 2018.

In 2017, the FCA mainly ruled out implementing thresholds based on (i) transaction value; and (ii) market share.

**Thresholds based on transaction value.** According to the FCA, transaction value-based thresholds could have created implementation issues, due to the complexity of assessing the relevant transaction value. Such complexity would have created uncertainty. Some could have notified a significant number of transactions to avoid potential sanctions for non-compliance, regardless of any risk to competition. Additionally, the FCA pointed out a potential risk of “threshold effect”, likely to incentivize undertakings to devise strategies to circumvent notification requirements.

The existence of litigation in Germany in relation to the scope of application of thresholds based on transaction value suggests that such complexity may indeed exist.<sup>ii</sup> By contrast, the experience in the US suggests shows that this solution can be implemented without significant difficulties.

**Thresholds based on market shares.** The FCA considered that market share thresholds would have raised the issue of the market definition at a very early stage.<sup>iii</sup> Defining the relevant market is far from easy for the notifying party, particularly in the absence of any decision-making practice. Furthermore, opting for a market share-based threshold would not empower the NCAs to control non-horizontal mergers, or acquisitions of innovative but nascent targets without any significant market shares on the relevant product market.

**Ex-post control.** In 2018,<sup>iv</sup> the FCA explored without concluding, the introduction of a targeted *ex-post* control regime for addressing mergers that do not meet the thresholds but raised “*substantial competition concerns*” in France. Transactions identified on this basis would be assessed by the FCA under the ordinary national merger control regime. To avoid a lack of legal certainty, the FCA offered to define the notion of “*substantial competition concerns*” under restrictive terms, by means of guidelines, and to limit the duration of the control to a period of between six months and two years.<sup>v</sup> The scope of this regime could be also limited to transactions where companies’ combined worldwide turnover exceed a certain amount, e.g., €150 million.

### 2. A dilemma created by the *Illumina/Grail* judgement

On September 3, 2024, the Court of Justice of the European Union (the “**ECJ**”) issued the *Illumina/Grail* judgement,<sup>vi</sup> and annulled the European Commission (the “**EC**”)’s decision.<sup>vii</sup> The EC had accepted the referral request initially made *inter alia* by the FCA on March 9, 2021 for the review of the transaction under Article 22 of the EU Merger Regulation (the “**EUMR**”).

With *Illumina/Grail*, the FCA and other national competition authorities (“**NCAs**”) had hoped that the EC would review the transaction without having met the turnover thresholds of the EUMR.<sup>viii</sup> Yet,

the ECJ's judgement clarified that referrals under Article 22 EUMR are only valid if NCAs have jurisdiction under their national law, and insisted on the need to safeguard legal certainty.

*Illumina/Grail* findings has been a disappointment for the FCA. Indeed, the FCA had already identified in its public consultation of 2017<sup>x</sup> the so-called Article 22 referral as “*a relevant and proportionate tool*” to apprehend mergers likely to inhibit innovation and strengthen the dominance of certain players in innovative sectors while falling below the French and European notification thresholds.<sup>x</sup>

Coping with the consequences of *Illumina/Grail* ruling, the FCA announced that its concerns regarding mergers which do not meet the notification thresholds but affect competition were “*more relevant than ever to maintain the dynamics of innovation (...)*”, and that it will “*determine the existing or necessary tools to ensure that no merger, including those that are not subject to prior notification, would harm competition on the French territory.*” Therefore, the FCA had declared that it intends “*to make full use of the existing instruments, whether based on Articles 101 and 102 of the TFEU or on equivalent provisions under national law.*”<sup>xi</sup>

### 3. Proposed options of the third consultation

Against this backdrop, the FCA launched a third public consultation, submitting three new possible approaches to below-thresholds mergers.

**Targeted call-in power.**<sup>xii</sup> The FCA would be able to review mergers that do not meet thresholds set out in Article L.430-2 of the French commercial code, based on predefined quantitative and qualitative criteria. *First*, the call-in power would be targeted, *i.e.*, only mergers exceeding a certain amount of turnover in France could be examined. *Second*, the call-in power would be time-limited, *i.e.*, the order to notify could be sent to the parties no later than a limited period of time.

However, this could increase legal uncertainty for companies. A restrictive and exhaustive list of qualitative and quantitative criteria would be key to help mitigate this risk.

**Mandatory notification for undertakings holding a certain market power.**<sup>xiii</sup> The FCA suggested adding an “*alternative criterion*” to Article L. 430-2 of the French commercial code, requiring certain companies to notify their transactions, when they have been subject of (i) a merger control prohibition decision or a clearance decision subject to commitment, (ii) a decision imposing fines or commitments for anticompetitive practices pursuant to Article 102 TFEU, or (iii) a gatekeeper designation by the EC under the DMA. The obligation to submit the merger to the FCA would be subject to both temporal limits, as the prior decisions would have to have been issued within a certain period of time, and geographical limits, in order to avoid notification with no local nexus in France.

Yet, such an avenue could fail to meet the FCA's objectives (had *Illumina* been found dominant?), whilst creating red tape for some companies (such as grocery retailers, which have all found to be dominant in some local market).

**Enforcement of anticompetitive practices rules.** The FCA proposes to apply the *Towercast*<sup>xiv</sup> and *Practices in the meat-rendering sector*<sup>xv</sup> rulings case law to mergers that do not exceed national thresholds, but imply abuses of dominance (*Towercast* case) or anticompetitive agreements (*meat rendering* case). Consequently, the FCA would assess mergers likely to harm competition on the basis of Article 101 and 102 TFEU.

It should be noted that the FCA presents this as an option, whereas the ECJ, in *Towercast*, makes it an obligation.<sup>xvi</sup>

**An outcome to watch.** In parallel, the French legislator is reviewing a bill to raise the national turnover thresholds from 50m€ to 80m€<sup>xvii</sup>, while the FCA has already extended the simplified

notification procedure to transactions that would not be liable, prima facie, to raise anticompetitive issues. This suggests that the FCA's intention would be to focus on small, but potential risky mergers, such as those emerging in nascent and high added-value sectors. In other words and to put it a little bit bluntly, the FCA would ideally like to cherry-pick transactions it needs to review.

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- i The transaction value-based thresholds are in force in Germany and Austria, while the *ex-post* tool is used in Sweden, the United Kingdom and the United States.
- ii Cases VI Kart 2/24 (V) and VI Kart 3/24 (V), see press release of February 26, 2025.
- iii *Contrôle des concentrations, L'Autorité de la concurrence lance une réflexion pour moderniser et simplifier le droit des concentrations*, Public consultation of October 20, 2017, original text, see page 4.
- iv *Modernization and simplification of merger control*, Press release of June 7, 2018, English translation available on the FCA's website.
- v This timeframe would differ from the model in force in the United States, where authorities can intervene without time limit, even several years after the merger filing has been completed. See *Réforme du droit des concentrations et contrôle ex post*, Summary of the public consultation of 2018, Page 2.
- vi ECJ, Judgement of September 3, 2024, *Illumina and GRAIL and Commission*, Joined Cases C-611/22 and C-625/22.
- vii EC Decision of April 19, 2021, *accepting the request of the FCA to examine the concentration relating to the acquisition by Illumina, Inc. of sole control over Grail, Inc.* (M.10188 – Illumina/Grail).
- viii To fulfil the second condition of Article 22 EUMR, the merger must affect trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.
- ix *Contrôle des concentrations, L'Autorité de la concurrence lance une réflexion pour moderniser et simplifier le droit des concentrations*, Public consultation of October 20, 2017, original text, see page 4.
- x *The Autorité de la concurrence takes note of the Illumina / Grail judgment by the Court of Justice of the European Union*, Press release of September 3, 2024, English translation available on the FCA's website.
- xi *Ibid.*
- xii This option is inspired from pre-existing mechanisms in Denmark, Hungary, Ireland, Italy, Island, Latvia, Lithuania, Norway, Slovenia and Sweden.
- xiii This option is inspired by the mechanism in force in Switzerland.
- xiv ECJ, Judgement of March 16, 2023, *Towercast v Autorité de la concurrence and Ministère de l'Économie*, C-449/21; and Paris Court of Appeal, Judgement of June 27, 2024, RG n°20/04300.
- xvi In particular because of the direct application of Article 102 TFEU in national law, see ECJ, Judgement of March 16, 2023, *Towercast*, para. 58.
- xvii *Projet de loi de simplification de la vie économique*, Bill n° 550 (2023-2024) presented on April 24, 2024 to the French Council of Ministers.