Organisation for Economic Co-operation and Development

DAF/COMP/M(2020)1/ANN3/FINAL

Unclassified

English - Or. English

29 October 2021

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Summary of discussion of the roundtable on Start-ups, killer acquisitions and merger control

Annex to the Summary Record of the 133rd Meeting of the Competition Committee, held virtually on 10-16 June 2020

12 June 2020

This document is the summary of discussion of the Roundtable on Start-ups, killer acquisitions and merger control held during the 133rd meeting of the Competition Committee.

More documents related to this discussion can be found at:
www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03484086

Summary of discussion of the roundtable on Start-ups, killer acquisitions and merger control

On 11 June 2020, the Competition Committee held a roundtable on start-ups, killer acquisitions and merger control chaired by Professor Frédéric Jenny.

The Chair introduced the topic and noted the extensive attention it received, especially since the paper "Killer Acquisitions" co-authored by expert speaker Colleen Cunningham was published, and the increase in cases involving the acquisitions of nascent firms. The Chair introduced the four expert speakers who took part in the discussion and submitted video contributions in preparation for the roundtable: **Colleen Cunnnigham**, Assistant Professor, London Business School; **Amelia Fletcher**, Professor of Competition Policy, Centre for Competition Policy (CCP) and Norwich Business School, University of East Anglia, who was a member the United Kingdom's Digital Competition Expert Panel (the Furman Panel); **Erik Hovenkamp**, Assistant Professor, University of Southern California, who published a number of papers on start-up mergers and merger remedies; and **Wim Holterman**, Professor of Business Valuation (University of Groningen) and Partner at Value Insights, who has years of experience in strategic, financial and valuation advising. The **Chair** thanked the Secretariat for the background paper. He asked the four experts to summarise their most important message. He also explained that the discussion will then be structured around three themes: a few examples of country experience with killer acquisitions and mergers with nascent firms; the questions of how to determine which transactions merit review and of how to perform the analysis; and finally the question of how to design competition law in order to properly address such mergers.

Colleen Cunningham noted her research provides empirical evidence of the existence and prevalence of killer acquisitions, i.e. the acquisitions and subsequent termination of nascent competitors by incumbents. According to conservative estimates, 6% of mergers in the pharmaceutical industry are killer acquisitions.

Amelia Fletcher stressed the inherently high level of uncertainty in assessing such mergers, especially as regards predicting the counterfactual. The goal is to strike the right balance between error costs and find a midway point between the current merger test and the presumption of harm approach.

Eric Hovenkamp noted there is contradictory evidence regarding antitrust intervention's effect on innovation, and that it is incorrect to simply assume intervention discourages innovation.

Wim Holterman stated that the evaluation may provide an indication that the acquisition is harmful to competition, provided it has been carried out in detail and the underlying information is available. However, even such an evaluation is highly uncertain and speculative.

The Chair asked the United States to discuss the legal basis for challenging the mergers under discussion, and to elaborate on the types of evidence that can establish their illegality.

The United States Federal Trade Commission explained that the Government bears the burden of proof. In the Clayton Act merger case and the Sherman Act monopolization case they respectively need proof of the lessened competition due to the merger and of the monopoly power and anti-competitive conduct. Some of the traditional tools, which focus on current market data, are of limited value when future competition is involved. The counterfactual is therefore based on different kinds of evidence such as real-world

indications today of future competition, ordinary course of business documents, especially those used to make business decisions, and the testimony of customers and market participants. These types of evidence were used to challenge gene sequencing monopolist Illumina's proposed acquisition of PacBio. In particular, customer testimony was important because in these kinds of cases customers' support is necessary for the competitor's success.

A careful case-by-case approach, which considers the totality of evidence and its consistency in predicting the counterfactual, reduces the risk of condemning benign mergers and of affecting innovation.

The Department of Justice remarked that while the best available evidence in this context is obtained from internal documents and market participants' testimony, litigating a case on this basis is challenging. These challenges are manifest in an ongoing merger case of Sabre, the largest of three global distribution systems, which are digital platforms that provide airfare distribution services to airlines and flight information and other services to travel agencies; and Farelogix, an innovative company that provides modernized airfare distribution services to airlines. The DOJ sought to block Sabre's purchase of Farelogix on the grounds it would eliminate a disruptive competitor. The court, however, declined to enjoin the merger, and, while resolving most factual findings in favour of the Government, ruled that since Sabre serves two sides of the market (airlines and travel agencies) while Farelogix only serves one (airlines), the latter does not impose sufficient competition on Sabre. The case is under appeal.

The Chair then asked the United Kingdom to share its experience with the Illumina-PacBio Merger, which was ultimately abandoned by the parties, and to discuss the use of valuation analysis.

The United Kingdom explained the merger was in the emerging and innovative field of DNA sequencing. While Illumina is very dominant, PacBio is also considered an active player despite being smaller. Determining whether the parties are current or future competitors was a challenge, considering each one of them employed different sequencing technologies. The investigation revealed expectations of increased competition and competitive interaction in the future. In such a dynamic market, one should look at the dynamic context and explore the development of innovation and markets, while being aware that uncertainty does not imply the unlikelihood of competition concerns.

Regarding evidence, internal documents which contained the parties' analysis of their next moves and of the market's progression were useful to predict market development. The valuation exercise is useful in terms of understating the parties' incentive to enter the transaction and their predictions for the future. Mergers that involve a target with a small market share can still create problems, especially when the target is one of the acquirer's closest competitors and there is a limited pool of competitors.

Finally, international co-operation with other authorities investigating the same case can be useful and the Competition and Markets Authority appreciated its cooperation with the USFTC in this case.

The Chair gave the floor to the European Union to discuss the adequacy of current merger control instruments, any differences that should be considered in the analysis in cases where the target firm is to be integrated into the purchasing firm, and whether any enforcement gaps exist.

The European Union acknowledges there may be an issue with some high value transactions failing to meet turnover thresholds or failing the nexus tests. It is unclear, however, whether any of the unnotified high-value transactions would have merited

intervention. Moving to a value-based threshold poses significant challenges and could lead to an influx of notifications. It is premature to change the turnover thresholds, however, the European Commission will continue to monitor the situation.

The Commission has adequate tools to meet the challenges of assessing mergers with nascent firms. However, predicting both the post-integration scenario and the counterfactual is a challenge. In this respect, the Commission relies especially on the parties' internal documents that precede the merger announcement, but also on third parties' internal documents and submissions, on the views of industry analysts, and on public statements. Establishing the counterfactual is however less important when the target already exerts a significant constrain on the purchaser. The same methods apply to the assessment of the benefits of the merger and their balancing against the anticompetitive harm.

The Chair noted the US and EU's reliance on internal documents sends a clear message to firms to control said documents contents. In relation to the EU submission, he mentioned that the Ukrainian contribution discusses the Temania-Evo merger between two online traders that integrated their operations. He then asked Columbia to discuss its experience with a case involving fitness centres.

Columbia briefly described its merger notification procedure and its thresholds based on turnover, assets, and market share, and then discussed the details of the Body Tech-Action Fitness merger, where the former, which operates a large network of gyms, purchased the latter, a nascent low-cost format gym operator. While both parties offered differentiated services, the analysis showed they were competitors, and the transaction raised concerns of increased market concentration, potential elimination of inter-firm competition and strengthening of potential network effects. These concerns were resolved through the sale of several of the parties' gyms and the imposition of conduct remedies aimed at maintaining both brands' independence.

Columbia believes the notification thresholds currently in place can capture alleged killer acquisitions.

The Chair asked the experts whether they had any comments on the first part of the discussion.

Colleen Cunningham agrees that uncertainty is a core feature in this context, and noted it was interesting to hear about different types of evidence used to address it. However, some types of evidence, such as customer testimony, cannot be relied on in cases of mergers with firms in the pre-market stage.

The Chair then moved on to the second part of the discussion which centred on identifying problematic acquisitions and on methods of establishing the counterfactual. He turned to BEUC, whose contribution asserts that the acquisition of start-ups has exacerbated the increase in concentration levels; that a high purchase price likely indicates the purchasing firm believes the acquired firm is competitively relevant; that the analysis should explore not only the counterfactual of the start-up's development into an independent player absent the merger, but also whether its purchase by a third party would be less harmful; and finally that a presumption against a dominant firm's acquisition of a nascent firm should be adopted, and that the parties bear the burden of demonstrating good reasons to allow such a merger.

BEUC stressed that the topic is important to consumers for threefold reasons. Market concentration and profitability in digital and other markets has increased; many jurisdictions proved unable to systematically review acquisitions of start-ups despite research indicating the materiality of the issue; and finally merging firms, and not

consumers, enjoy the benefit of the doubt, even in sensitive sectors such as digital and life sciences.

BEUC advocates for a transaction value threshold, since a high purchase price for a company with a minimal turnover may indicate the target is competitively relevant and the loss of competition is material. However, not every transaction that meets the threshold necessarily raises substantive issues.

BEUC believes new approaches regarding the counterfactual and the burden of proof should be considered. Regarding the counterfactual, the question should be whether the start-up would be a credible independent player and an effective constraint absent an acquisition, or alternatively whether the acquisition by another company would result in less competitive harm. In this respect, it would be important for agencies to consider relying on broader ranges of qualitative evidence, including internal documents from a broader range of players, and on valuations and other types of financial evidence. Finally, BEUC supports introducing a rebuttable presumption that nascent rival acquisitions by entrenched dominant companies would be anticompetitive.

The Chair noted Israel's contribution presumes killer acquisitions and acquisitions of nascent firms are unlikely to raise concerns and suggests a methodology to determine which mergers merit in-depth review.

Israel rejects the assumption killer acquisitions are a significant problem. The Israel Competition Authority is currently conducting a study of Israeli start-ups' acquisitions by the five big tech companies in the last five years in order to assess whether there the phenomenon exists and its prevalence.

While the study is yet incomplete, the data gathered has informed the ICA's initial consideration of a two-dimension methodology for determining which transactions merit review. The first dimension relates to the characteristics of the acquired product, and distinguishes between interface products, which cannot operate independently and are specifically designed to complement one or more specific platforms, and standalone products. The acquisition of the former type of product is unlikely to raise concerns, while the latter may merit more attention. The second dimension relates to the three main motivations to acquire a start-up: first, the desire to hire a well-functioning team of skilled tech workers (acquihiring); second, the desire to acquire developed technologies; and third, the desire to acquire valuable data and user information. Acquihiring is generally less concerning than the purchase of data. This does not imply the latter kind of transaction merits intervention, but only that if it turns out that killer acquisitions are a phenomenon that should be addressed, these considerations can assist in prioritising cases.

Preliminary results indicate most transactions were motivated by the desire to acquire technology, and that there was a considerable number of transactions involving either interface or standalone products.

The Chair then turned to BIAC to share its view regarding the adequacy of current regimes to address killer acquisitions and the analysis of the counterfactual and competitive concerns.

BIAC believes competition authorities have a wide range of useful tools that should not be cast aside. Forensic tools can be employed in order to avoid basing predictions on mere speculation. These are general valuation factors, nascent competitor factors and dominant company factors.

As the traditional logic is applicable in this context, it is useful to start by evaluating whether the nascent firm is the purchaser's competitor or potential competitor, whether they have a vertical relationship or whether they operate in neighbouring markets.

While reviewing the nascent company's business plans it is important to assess whether they are viable, in particular whether it has the technology to fulfil the plan; on the flip side, one should consider whether the acquiring company has the necessary resources to fulfil that plan, since lack of complementary technologies could be cause for concern. It is also important to consider whether the nascent company planned on expanding into a platform giant, or whether it set more modest goals; whether IP or regulatory challenges could impair its ability of reaching commercial success; and whether there exists an alternative pathway for the nascent company absent the merger. Agencies should consider the nascent company's cash position and cash flow prospects. Purchase of a start-up that ran through its investment cash without generating value is often a "salvage" transaction.

As for the buyer, dominance is important but obviously insufficient grounds for intervention. It is unlikely to encounter plans to kill the target, but one can examine the buyer's strategic plans to incorporate the target. Internal documents may be inconsistent with strategic plans, and the latter should be prioritized over statements in internal documents. Agencies should also consider whether the acquisition encourages the buyer to introduce new products, such as those required to fill gaps in incumbents' portfolios.

Finally, BIAC does not principally object to alternative notification thresholds based on deal valuation but emphasizes that agencies seeking changes to thresholds to better capture nascent acquisitions should ensure jurisdictional nexus scanners are well met, well-articulated and are administrable.

The Chair noted Japan has been studying various aspects of the digital economy and formulating new policy in recent years and has gained relevant experience while dealing with the Takeda-Shire merger. He asked Japan to explain how it establishes whether an acquisition of a nascent firm is anticompetitive.

Japan agrees with the view that start-ups can promote future technologies and benefit consumers.

The recently amended merger guidelines elaborate on the relevant factors for assessing mergers. In particular, it is necessary to consider whether the merger would reduce the incentive to innovate, for example where the merger would result in the termination of the target company's development of products that compete with those of the purchasing firm. In addition, the Japan Fair Trade Commission now recognizes the importance of considering the variety, volume, velocity and value of data more carefully, as the concentration of data can lead to competitive concerns.

While the Takeda-Shire merger did not involve an acquisition of a start-up or nascent firm, it is nevertheless relevant because, in addition to being actual competitors in various markets for prescription drugs, both companies were potential competitors in emerging markets, as both were in the process of developing competing anti-integrin inhibitors. The investigation revealed Takeda had already received approval to launch its product in Japan, while Shire was in the process of obtaining similar approval in the EU and US. The merger was approved since the JFTC was convinced Shire had no plans to launch its product in Japan and because other pharmaceutical companies were exerting competitive pressure.

The Chair asked Belgium to explain which efficiencies should be considered in this context.

Belgium noted that nascent firms' mergers with dominant firms, that are more likely to be problematic, are usually dealt with by the European Commission. However, the Belgian Competition Authority has had some experience with small scale transactions, which has informed its view on efficiencies. One recognized efficiency is the development of the target, as in some cases, absent a merger, the target would have no future. Another

efficiency, which may be less frequent, is the contribution to the acquirer's ecosystem and to the benefit of consumers. Finally, often, the only manner for young entrepreneurs to cash in is by selling their firm, and this is a significant incentive for them to take risks and work hard.

The Chair noted that the question whether competition authorities should consider the last type of efficiency mentioned by Belgium in a particular transaction was discussed the day before in the roundtable on conglomerate mergers. He then asked the experts to comment on competition authorities' practice and methodology, and to respond to Spain's question whether the methodology should be adapted to the specific sector and if so, what models should be followed.

Amelia Fletcher found Israel's contribution interesting, in particular the distinctions between interface and standalone technologies and between the purchase of data or employees. She noted, however, that these distinctions do not resolve questions of product complementarity and substitutability, and that there may be different theories of harm to consider in any type of case. For example, if a standalone product is purchased the killer theory is relevant; however, if the target is an interface product, then a reverse killer theory of harm can be asserted.

BIAC's point about assessing whether a standalone player would be able to expand is important, however, it is wrong to assume that concerns arise only if the purchased player becomes a giant. As apparent from the Sabre-Farelogix and Illumina-PacBio cases, small competitors can exert significant competitive constraints in markets with little competition.

There are two different theories of harm related to interface products. The first one is that the purchase could tip the market towards monopolisation; the other one is that the purchase could preclude other platforms' access to the acquired technology. This concern relates to BEUC's suggestion to consider alternative mergers, as well as to compulsory licencing remedies. From a competition standpoint it may be best for an interface product firm to remain independent and have incentives to cooperate with all platforms.

Colleen Cunningham found Israel's classification interesting but also wondered how this classification is linked to the core questions of potential competition and the competitiveness of the market. She too stressed that killer acquisitions are not the only competition concern related to nascent firm acquisition, and that one should consider other theories of harm like reverse killer acquisitions, shelving of products, and non-compete and non-disclosure agreements in the context of acquihires.

She agrees with BIAC's point regarding the establishment of a counterfactual; however, she emphasised the endemic uncertainties related to the analysis of potential competition and the counterfactual. She also noted that in pharmaceuticals it is possible to define the innovations target market, whereas in the tech sector this is not necessarily the case. The discussion about the burden of proof has likely come to the forefront because the kind of unbiased data available in the pharmaceutical industry, which is necessary for establishing a counterfactual, is lacking in the tech industry. It is difficult to piece together internal documents from different sources in order to have a clear understanding of the competitiveness of the market and identities of potential competitors.

The Chair noted that business models in the digital economy are completely different, and do not necessarily rely on firms but rather on ecosystems as the basic units of competition. On the demand side, service complementarity is not necessarily at the same level as in other types of markets. There may be a need to adapt to a new model of competition analysis. He gave the floor to Erik Hovenkamp.

Erik Hovenkamp agreed that the Israeli proposal is interesting, but also stated that focusing only on killer acquisition may be a too narrow point of view. There are good reasons to believe killer acquisitions are less prevalent in tech. Some reasons, such as the difficulty to define markets, were already discussed. Another reason is that competition in pharmaceuticals is intense even with few firms; as a result, there is an incentive to pay large sums of money for a firm that is not going to be used.

Regarding BIAC's contribution, he questioned the weight attributed to the rigid and binary distinction between horizontal and vertical acquisitions in the tech industry. It is often hard to determine whether technologies are substitutes, even if they are fully developed, and sometimes products can be both substitutes and complements at the same time, e.g. internet browsers and operating systems.

As for adapting the analysis to the industry, antitrust analysis must always be contextual. For example, network effects are significant in platform markets, and these and other novel economic features of platforms should be considered. It would be wrong to create a presumption that platform conduct is benign, as seems to be the ruling in the Amex case in the US.

Wim Holterman addressed the point made about a high purchase price being an indication of competitive harm. He explained the purchase price depends on the firm's standalone value and on the premium the purchaser is willing to pay for certain synergies, which may also include competitive harm. A detailed evaluation would provide strategic information and could indicate harmful elements. However, acquisitions of high growth companies often contain vague elements. For example, the acquiring firm may have a strategy of acquiring many firms, with the risk of some of the mergers' failing.

The standalone value is also difficult to assess because it is essentially the counterfactual under discussion. Ninety percent of start-ups do not survive ten years, and many firms are designed to be acquired, and not to develop standalone products. The existence of an alternative buyer could be a factor in valuation.

The Chair questioned whether valuation is helpful at all considering it is difficult to determine both the standalone value and the premium. He moved on to the last part of the discussion concerning the design of a system that would allow competition authorities to review the mergers under discussion. He noted that Spain has a market share notification threshold, which Spain believes is useful in this context. However, Spain investigated four potential killer acquisition and cleared them, and the Chair wondered whether Spain could have avoided devoting resources to these mergers.

Spain noted that mergers with start-ups and nascent firms may not meet turnover thresholds. Lowering these will cause an influx of notifications and switching to transaction value-based thresholds will raise nexus issues. Market share thresholds, such as the one in place in Spain, target mergers that affect a given market while turnover thresholds target mergers that affect the economy as a whole. Uncertainties regarding market definitions can be resolved by communicating with the competition authority.

The market share threshold has been especially useful in the digital sphere. The Facebook-WhatsApp merger did not meet turnover thresholds; however, Spain was able to refer the merger to the European Commission because it triggered the market share threshold. About 50% of notified mergers in Spain meet the market share threshold alone and 90% of the problematic mergers trigger that threshold. Note, however, that the threshold is merely a starting point, which is complemented by an in-depth evaluation.

The National Commission on Markets and Competition believes it benefited from looking into the cases mentioned in its contribution, two of which were resolved with commitments.

In one case, a dominant platform committed to removing exclusivity clauses, which enabled restaurants to contract with new entrants. Another interesting case involves a merger between two companies who were engaged in research and development of a vaccine for the Zika virus, which was dismissed considering both companies were at early stages of research and that many competitors in research already existed.

Spain's regime ensures most potentially anticompetitive mergers, including potential killer acquisitions, are assessed. The market share threshold has allowed the CNMC to intervene and resolve competitive concerns in many merger cases that would not have been notified under the turnover threshold.

The Chair asked why Spain resisted the pressure to adopt absolute value thresholds.

Spain reiterated that the market share threshold was very useful in the past, for example in the pharmaceutical and digital sectors, where mergers that merited investigation were notified solely under this threshold, and that it will continue to be useful in the future.

The Chair noted that Portugal's position was similar, because of its concerns about small markets where small but very dominant firms would not necessarily meet an absolute value threshold - a relevant concern in this context. The Chair turned to Norway, whose system relies on three elements: a notification threshold, a power to order transactions that fail to meet thresholds be notified, and a power to mandate that certain firms notify of any merger they are party to.

Norway explained that turnover thresholds have increased and are relatively high, and that without the power to bring mergers that do not meet these thresholds to review, many potentially harmful transactions would have gone unnoticed. These powers are useful in particular for regulating the acquisition of start-ups and nascent firms. The Norwegian Competition Authority is currently considering imposing extended disclosure requirements on firms in digital markets.

The NCA uses its power to subject a particular transaction to review when there are reasonable grounds competition may be affected. Information about such transaction may come from other jurisdictions currently reviewing the transaction, through the media, tip-offs or complaints. Admittedly, the NCA is not aware of every problematic transaction, and may miss the 3-month deadline for intervention. However, imposing extended notification requirements in certain markets can alleviate these concerns. In addition, the NCA's organization in market divisions, each of which is responsible for monitoring certain sectors, enables it to react to the acquisition of nascent firms in an efficient and timely manner.

In response to the Chair's follow-up questions, Norway clarified that decisions to impose extended notification requirements are public and have never been contested. Such requirements have been imposed in markets for waste management, newspapers, garden centres and accounting systems. Failure to meet these requirements can result in considerable fines.

The Chair asked for Germany's views on the reliability of the valuation threshold introduced in 2017, and on its usefulness, considering every merger notified under this threshold was cleared in phase 1.

Germany explained its threshold covers transactions whose value exceeds 400 million Euro, provided the target has significant local activity. Different criteria are applied in different sectors to assess the target's nexus to Germany, for example, in the digital sector, criteria such as daily or monthly active users or unique users' frequency of access to a website, are used.

Overall, the introduction of the value threshold has only brought 11 cases, mainly in the digital and pharmaceutical sectors. For example, PayPal's acquisition of Honey for 3.6 billion Euro was subject to review, which focused on German users. While no concerns were raised, given the presence of other providers in the market and recent new entries, it is beneficial to have a threshold that provides an opportunity to analyse such cases.

Regarding valuation, it is important to analyse how the consideration was calculated, but it is only an indication and cannot replace an assessment of competitive harm.

It appears that the traditional toolbox is insufficient in this context, and that authorities should consider addressing these issues both with merger and abuse control tools. The upcoming amendment to the German competition law is aimed to promote competition in the digital space.

The Chair asked Germany whether the nexus requirement limits competition authorities' ability to address some anticompetitive transactions, considering, for example, technologies developed by companies with no local nexus can threaten local firms.

Germany has taken part in formulating ICN recommended practices, in which nexus consideration are a key element. Germany's jurisdiction ends at its borders, and it hopes to cooperate with colleagues in other competition authorities who are looking into transactions that are not subject to review in Germany.

The Chair gave the floor to Korea.

Korea shared that a pre-announcement of legislation related to the topic under discussion was made. The growth of the digital economy in Korea has led the Korean Fair Trade Commission to push for reform of its merger notification and review regime, to introduce a transaction value threshold and to improve rules related to market definition, and analysis of market concentration and anticompetitive effects. If the bill is passed, gaps concerning control of killer acquisitions may be filled.

The Chair noted that France has been active in this context especially at the G7 and EU levels.

France's propositions are based on discussions conducted since 2017 with the private sector and the antitrust community. The first proposition is to enable national competition authorities to refer transactions that do not meet notifications thresholds to the European Commission, provided they raise significant competitive concerns. The second is to empower competition authorities to impose extended notification requirements on firms operating digital platforms; as is the case in Norway, competition authorities would be empowered to review notified mergers that raise competitive concerns before they are consummated. Finally, France proposes to introduce a substantive notification threshold by empowering competition authorities to require either *ex-ante* or *ex-post* merger notification, provided that a certain global turnover threshold is met; that the merger raises significant competition concerns; and that it is not subject to review by the European Commission.

The Chair noted Egypt is contemplating introducing merger control, and is considering which thresholds to implement, considering some of them are not easily adaptable in Egypt.

Egypt is currently drafting fundamental amendments to Egyptian competition law, and the proposed reform will introduce merger control for the first time. Acquisitions are an important source of finance for Egyptian start-ups considering their limited access to other sources. Policy should strike a balance between granting opportunities for start-ups to be acquired and preventing harm to competition. The Egyptian Competition Authority considered implementing additional notification thresholds but rejected this proposition as

it lacks the necessary data to implement them. The option to require notification of all transactions was also rejected on the grounds that it would result in the notification of benign transactions and raise administrative burdens. The third option to forgo notifications, but to empower the ECA to intervene within a certain timeframe, will strike a balance between legal certainty and the protection of competition. Over time, the ECA will be able to collect data to consider whether specific thresholds should be implemented in the context of start-up acquisitions.

The Chair asked the experts for their final comments.

Wim Holterman repeated his view that evaluation may provide useful information and indications, but that it is sometimes very speculative. It certainly merits assessment, but it cannot give definitive answers.

Erik Hovenkamp noted that some competitive concerns can be addressed in retrospect, for example through a monopolization claim challenging a pattern of acquisitions. Having a set of transactions to review may help resolve uncertainties.

Colleen Cunningham noted it is unclear whether the argument that the prospect of being acquired leads to more *ex-ante* innovation is correct. This issue is currently being studied and there is evidence that merges have led to negative effects on innovation by the merging parties and other incumbents. Some research suggests that acquisitions in the tech sector have led to drying up of certain venture capital funding. Finally, even if innovation was stimulated, the types of innovation generated are likely to be less novel, less innovative and less original.

Amelia Fletcher noted the discussion centred around bringing transactions to merger control, and that there needs to be additional discussion on the substantive test. The paper by the Secretariat proposed expected harm tests, which resemble the balance of harm test proposed in the Furman review, which she believes is quite practical. Another striking issue which was brought up by Erik Hovenkamp is the lack of action in cases where incumbents purchase a series of nascent competitors one after the other. Further work could be done to consider the treatment of a set of mergers as a single merger.

The Chair noted that while there are competition concerns related to the purchase of nascent firms, theories are a bit speculative and fragile, especially regarding effects on innovation. *Ex-post* enforcement may be the solution, however, that also depends on local jurisdiction's sensitivity to type I and type II errors. Israel and BIAC's contributions provided a framework for identifying mergers that warrant more attention, though additional elements should be considered. Further attention should also be devoted to the substantive tests. Finally, it seems clear that there is no unique institutional solution, and that local conditions are relevant. Countries that can catch these mergers seem content, but there is little evidence that problematic mergers are being reviewed. To conclude, it is unclear whether these mergers really raise significant concerns, however, the current framework may prevent us from understanding their real impact.