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Start-ups, killer acquisitions and merger control – Note by Belgium

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This document reproduces a written contribution from Belgium submitted for Item 2 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.
More documents related to this discussion can be found at
http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm

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1. Notification thresholds

What are the merger notification thresholds in your jurisdiction?

1. The undertakings concerned (acquirer and target, or the undertakings acquiring joint control and when relevant the undertaking over which they acquire joint control), should have an aggregate turnover of more than 100 mio euro in Belgium, and at least two of the undertakings concerned should each have a turnover of at least 40 mio euro in Belgium. The turnover of undertakings includes the turnover of controlled and controlling undertakings (art. IV.7 and IV.8 Code of economic law (CEL)).

Have you conducted any studies on the impact of changing thresholds or adding voluntary notification? If so, what did you learn from them?

2. Art. IV.7, §2 CEL requires the BCA to review the thresholds every 3 years (the present act dates from 2 May 2019). The thresholds can be increased by Royal decree discussed in the Council of Ministers and after advise by the BCA. They can only be decreased by an act of Parliament.

3. When reviewed under the previous competition rules, the BCA saw, on balance, no reason to change the thresholds.

Have you investigated the acquisitions of any nascent firms in the last 10 years? How did you come to undertake this investigation?

4. No.

If you did not investigate any such acquisitions, why was that?

5. Because none was notified or needed to be notified.

6. With regard to start-ups, and given the thresholds, only the acquisition of joint control by two or more established undertakings in a new or young company might come within the scope of application of the merger control rules, but such transactions were not notified, and we did not read or hear about them.

7. We also think that real killer acquisitions are less likely to happen between local partners in a smaller jurisdiction, like Belgium. They are more likely to be relevant to the functioning or markets when the acquirer has a multinational footprint.

2. Theories of harm and assessment

Have you assessed an alleged killer acquisition?

8. No

Which other theories of harm have you examined in relation to acquisitions of nascent firms?

9. N/A.

In relation to each of the above, please briefly explain the case and the analysis that you undertook.

10. N/A.

To what extent, if any, did the theory rely on the acquirer's role as a platform?

11. N/A.

Which tools and evidence have you used to assess these theories?

12. N/A.

How did you seek to compensate for not being able to observe the past competitive behaviour of the nascent firm? For example, did you investigate the rationale for the merger in greater depth? Did you interview staff of the nascent firm? Did you use dawn raids (and if so were these effective)?

13. N/A.

If the theory of harm was a potential competition theory: − How did your analysis differ from the analysis you would conduct on potential competition between more mature competitors?

14. N/A.

Have you used valuation analysis to consider the rationale for an apparent price premium on the acquisition that might reflect anticompetitive effects of the transaction?

15. N/A.

Do you look at the acquirer's track record in developing other acquired products?

16. We did not examine a potential 'killer acquisition' case for the abovementioned reasons. But it is fair to assume that we would look at the acquirer's track record.

3. Assessing the counterfactual

How have you sought to inform your expectations of the future development of nascent firms? What tools did you use? − Have you surveyed market analysts or potential investors?

17. N/A.

Do you have any in-house capacity to support the formation of these expectations?

18. We have not recruited any staff members in view of assessing killer acquisitions. Whether we have in-house capacity will depend on the field of activity of the start-up. It may also depend on the assessors to be designated to sit in the College. The president can invite third parties to the hearing when he considers it useful (art. IV.21 CEL on the composition of Colleges and art. IV.65,§4 CEL on hearings).

What counterfactuals on the development of nascent firms have you identified? − Were these in the context of the acquisition of the nascent firm in question, or were they a third party providing a constraining influence?

19. N/A.

Where the merger was cleared, how accurate was your prediction of the development of the nascent firm? Please briefly describe the outcome of any ex-post assessments you have conducted.

20. N/A.

Is there any pattern to the accuracy of your predictions? E.g. a tendency to under/over-estimate the prospects of success when the nascent firm was party to the merger (or a third party)?

21. N/A.

How did you deal with the inevitable uncertainty on the prospects of a nascent firm? What types of evidence did you rely more heavily on? Which types of evidence did you place less emphasis on? And why?

22. N/A.

What are your views on the merits of addressing this uncertainty by considering the magnitude of a merger's impact on more than one counterfactual (e.g. in scenarios in which the nascent competitor thrives, either in isolation or after acquisition by a different firm, as well as scenarios in which it fails to develop)?

23. Considering more than one counterfactual is an option that the BCA would certainly consider. But this approach raises a number of questions such as the likelihood that the nascent firm thrives, and how this likelihood is factored in the reasoning (and the BCA would look at other authorities' approach in this respect). Another question is how the Court of Appeal would review such multiple counterfactuals.

4. Efficiencies

Which types of efficiencies might result from the acquisition of nascent firms?

24. First of all, the acquirer is likely to help further develop the target. Past experience shows that nascent firms can benefit from their inclusion in ecosystems with a proven experience in marketing of products and monetization of data, concepts and communities. Such development is most likely to benefit consumers, when priced appropriately (even if in the longer run, the development of the nascent firm can reinforce an eventual dominant position of the combined entity).

25. Second, the target may further bring an improved experience to the ecosystem of the acquirer, thereby quickly benefiting a large group of customers.

26. Finally, seeing that start-ups are acquired is a strong incentive for others to persist to the point where their start-up can be sold.

If there are dynamic efficiencies, which types of innovation would they incentivise? And would this improve allocative efficiency?

27. Innovation can take a number of forms: already developed innovations can be exploited to improve the experience of customers of the target, or the acquirer. Moreover, combining teams can bring further innovations. In both cases, this would improve allocative efficiency.

How should agencies treat the incentive to invest in innovating to create the ability to bargain for a share of persistent monopoly profit? Should it be distinguished from the incentive for disruptive innovation that replaces the incumbent and earns a new monopoly profit, or the incentive for incremental innovation that might earn an oligopoly profit (and if so how?)

28. Both types of innovations are likely to be beneficial for consumers, and should therefore be welcomed by competition authorities. Moreover, it is not always possible to assess ex ante whether an innovation disruptive or incremental.

In the case of so-called 'Acqui-hire' transactions – why do firm choose to acquire rather than recruit? How do they ensure that the acqui-hired staff do not simply leave?

29. Acquiring a firm may be easier for a number of reasons. First, it is often difficult for the acquirer to convince a group of people to make the same move at the same moment. This is especially the case for some members of the team, who may have special incentives not to leave (eg, pledged equity, or other long term incentives). If talents in the team complement each other, the acquirer may be especially keen to attract the entire team.

30. Second, from the hired personnel's perspective, small innovating firms may be particularly attractive to their members of staff. It may be difficult to convince such members of staff to move to the acquirer, unless all other members of the team move. The acquirer may be confronted to a coordination game: the staff would not be willing to move, unless others do, making it more difficult to convince each member of staff individually.

Are the post-merger plans of the target firm's investors relevant (e.g. serial innovators)? If so why?

31. Yes. To some extent this issue is not specific to potential killer acquisitions as we showed recently by referring (in a dif-in-dif study) to the track record of the acquirer after previous acquisitions in a merger case that was abandoned after opening a second phase investigation (not yet published).

32. We should add that a distinction is likely to be made between a start-up that has already some a history of market presence and a start-up that has no track record or presence on any market.

- Unless the acquirer causes specific competition concerns, the acquisition of a start-up without market presence is likely to benefit of a quasi (refutable) presumption of admissibility. And even if the acquirer causes concerns, one can expect that we would examine whether it is likely that there will be acquirers that present fewer competition law problems, provided that an acquisition is sufficiently likely.
- When there is a track record, the analysis may rely on this track-record, to identify potential overlaps.

33. Not that, in potentially disrupting industries, business plans are not always credible. Business plans can for instance be excessively ambitious. Many sellers engage in some kind of window-dressing, but in disruptive industries, they may focus on an objectively not very plausible outcome.

How can agencies best determine which efficiencies are specific to the proposed acquisition?

34. The answer to this question is likely to depend on the specifics of the case.

If acquisitions are considered to be anticompetitive, what evidence might be required of firms to demonstrate these efficiencies?

35. Track records, business plans and budgets to the extent that they are sufficiently convincing.