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

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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. The growth of digital players through the acquisition of young innovative companies, or "startups", has accelerated in recent years.

2. For instance, between 2008 and May 2019, Google acquired 168 companies, some with high growth and innovation potential. For instance, it acquired Waze for navigation services, YouTube for videos, DoubleClick and AdMob for online advertising[1]. As for Facebook, it has taken over 71 companies (some of the largest include Instagram in 2012 and WhatsApp in 2014)[2]. On 15 May 2020, Facebook announced the acquisition of Giphy, the leading gif publisher and supplier, which could be integrated into Instagram[3].

3. Over the last ten years, Google, Apple, Facebook, Amazon and Microsoft have made over 400 acquisitions globally, 250 of which were in the past five years alone[4].

4. However, these highly aggressive external growth strategies implemented by digital companies are not neutral from a competition standpoint.

5. These transactions can be particularly detrimental to innovation, especially in terms of its availability and incentive to innovate. They can also have major structural effects on how these markets operate by creating a "winner takes all" situation and "gatekeeper" statuses.

6. The industry's major platforms in particular derive their strength not just from their internal growth, but also from an aggressive strategic acquisitions policy. This lets them broaden their field of intervention and expand their growth into other sectors or merge with young startups or established companies. These acquisitions often enable the buyer to integrate the activities of young startups into their own ecosystem. The aim of the takeover may also be to acquire a community of potential users or technical or human skills that are rare in the market. As such, the consequence of these acquisitions, even if this was not the objective from the start, can be to dry up the labour market when the expert human resources available are often scarce and invaluable.

7. The issue identified is not limited to "predatory acquisitions" in the strict sense of the term, the sole aim of which is to prevent the emergence of a potential competitor and "eliminate" it or the products or services it was developing. This type of situation exists, particularly in the pharmaceutical industry, and dries up a source of innovation that could have benefited both competition and consumers. However, this definition does not cover all the strategies implemented by tech giants. Given the diversity of these situations, "predatory acquisition" should be broadly understood to cover all the aggressive external growth strategies which firms with a strong position on the market implement against innovative companies, whether for the purpose of "putting an innovation to sleep" or strengthening their business, mainly in the digital sector, but also in other sectors, such as pharmaceuticals.

[1] Lear Lab Report, "*Ex-post Assessment of Merger Control Decisions in Digital Markets"*, May 2019.

[2] Ibid.

[3] https://about.fb.com/news/2020/05/welcome-giphy/

[4] Furman Report, page 12.

8. However, for most of these transactions, despite the risks that they can entail in terms of competition, very few have been reviewed by competition authorities[5].

9. This situation can be explained by the fact that many competition authorities rely on turnover thresholds for notification in order to only review transactions of a certain size.

10. The *Authorité de la concurrence* has jurisdiction when the following three conditions are met[6]: (i) the total pre-tax worldwide turnover of all the companies or groups of legal persons who are parties to the merger exceeds €150 million; (ii) the total pre-tax turnover generated in France by at least two of the companies or groups of legal persons or individuals concerned exceeds €50 million; (iii) the transaction is not within the European Union's jurisdiction.

11. However, these "predatory acquisitions" often take place at an early stage in the life of the acquisition target and concern emerging companies that have not or have just introduced their innovation onto the market and have not yet made a profit. The potential of these players has therefore not yet materialised with a turnover that would cause these transactions to be reviewed by competition authorities.

12. Given the significant structuring risks that these transactions can present, the *Autorité de la concurrence* decided to look into the possibility of implementing specific notification thresholds in order to assess this type of transaction and what these specific thresholds would be[7]. These various consultations convinced France that specific notification mechanisms were needed for "below-threshold" mergers.

13. In response to the challenges raised by predatory acquisitions, the *Autorité de la concurrence* and the French government led several exercises to improve merger control (I) and formulate specific recommendations to contribute to the European debate on reforming merger control (II).

1. Public consultations to modernise and improve merger control

1.1. An initial public consultation to assess the current state of merger control in France

14. In 2016, as co-chair of the mergers working group of the International Competition Network, the *Autorité de la concurrence* had already organised a workshop in Paris on merger notification thresholds. In October 2017, nearly ten years after the 2008 reform endowing it with the power to authorise business mergers, the *Autorité de la concurrence* launched general reflection on the consistency of the legislative framework for merger control at a national level and set out to perform a qualitative assessment of its work in this area. Its goal was to assess its current practices, identify the problems encountered by various stakeholders in implementing procedures, and consider possible changes to be made to the *Autorité de la concurrence*'s practices, as well as the legislative and regulatory framework.

[5] For example, Google/DoubleClick (COMP), FB/WhatsApp (COMP), FB/Instagram (OFT), Google/Waze (OFT).

[6] Specific thresholds (lower) apply to the retail industry and overseas territories in order for the *Autorité de la concurrence* to review transactions which would otherwise be beyond its control.

[7] Public consultations on 20 October 2017 on modernising and simplifying merger control, and on 7 June 2018 on the plan to introduce an ex post merger control mechanism (https://www.autoritedelaconcurrence.fr/fr/consultations-publiques).

15. This reflection particularly focused on simplifying merger procedures, by adapting the simplified procedure, on the role of merger control trustees and the opportunity to create a new case for merger control to handle transactions likely to raise competition problems and that currently are not subject to merger control, by deliberately leaving the range of possible options wide open (transaction value threshold, market share threshold, etc.).

16. The *Autorité de la concurrence* therefore conducted a review of the cases submitted to it in the past to determine whether the notification thresholds were still appropriate and whether they led it to review an excessive number of transactions, or whether conversely, some mergers that potentially raised competition issues had escaped its attention.

17. The vast public consultation generated a large number of extensive contributions on the appropriateness of creating new cases for merger control. These contributions came from a diverse range of national and international players (trustees, law firms, businesses and organisations such as APDC, AFEP, MEDEF, ICC France, IBA, ABA, etc.). The large majority of respondents considered that the thresholds set in France were acceptable and a number of them, mainly law firms and MEDEF, stated that creating alternative indicators should address the shortcomings of current thresholds. In general, the respondents opposed the introduction of a transaction value threshold. Furthermore, all the contributors who responded to the subject rejected the market share threshold. Finally, some respondents who were generally reluctant to the possibility of ex post control, felt that if this type of control was ever to be put in place, it would need to apply to certain clearly defined transactions, within a limited time period and allow for the parties to voluntarily submit their transaction.

18. Given these contributions and its own analysis, the *Autorité de la concurrence* decided on potential legislative changes and presented recommendations for simplifying and modernising merger control. Among the three options presented, i.e. the addition of a transaction value threshold, the introduction of a market share threshold and the creation of specific ex ante and ex post merger control, the *Autorité de la concurrence* preferred the last option. The French government also ruled out the first two options and came out in favour of an ex-ante control power relating specifically to the projects of certain players (structuring platforms) and which would be implemented by the European Commission.

19. The *Autorité de la concurrence* and the French government considered that the introduction of a new case of control for mergers based on the transaction value was not justified for the French economy on the grounds that such a threshold would not be precise enough, would create too great a need for clarification on the part of companies and would neither make it possible to be sufficiently exhaustive nor be certain that the potentially most sensitive transactions in terms of competition law do not evade control. Introducing a transaction value threshold was therefore ruled out.

20. In addition, *the Autorité de la concurrence* decided that the market share threshold raises legal uncertainty related to market delineation, especially for innovative markets, and could lead to cases of gun jumping. It had been rightly abandoned in the past.

21. However, the *Autorité de la concurrence* and the French government considered that introducing specific merger control authority based on models practiced in other countries[8] was an option to be explored on the grounds that the solution would allow to intervene in a targeted manner. Only a limited number of potentially problematic transactions would be controlled, while ensuring that the potentially most sensitive and strategically important transactions would be reviewed and that legal uncertainty would be limited for companies through the implementation of strict accompanying measures. The

[8] In the United States, the United Kingdom and Sweden, for example.

effectiveness of merger control would thus be guaranteed by extending limited control to only respond according to the identified problems.

1.2. Consultation on the creation of new merger control

22. As a second step, following the lessons learned from the first consultation, the *Autorité de la concurrence* launched a second public consultation in 2018 inviting feedback on a document detailing the potential framework for specific ex ante and ex post merger control.

23. The *Autorité de la concurrence*'s initiative was welcomed by all the respondents from law and consulting firms, businesses and associations. However, the majority of respondents fundamentally expressed distrust of this new control.

24. The majority of lawyers and bar associations disapproved of the system, with the notable exception of the ABA. However the responses from businesses were more contrasted. AFEP and ICC France were opposed, MEDEF stated that its members were divided (with a majority opposed) and a minority of businesses welcomed the creation of such a mechanism.

25. Besides these positions, the discussions that arose from the consultation helped clarify the possible ways of implementing the planned control. The respondents were interested in a number of topics, including the definition of "substantial competition concerns", the starting point of the referral, timeframes, thresholds, implementation of a voluntary notification or prior declaration system, interim measures, and corrective measures.

2. France's recommendations to make better use of existing competition law tools and introduce control mechanisms specific to the digital economy

26. As a follow-up to the discussions during its public consultations, the *Autorité de la concurrence* published a contribution to the debate on competition policy and digital challenges in February 2020[9]. The document reiterates the challenges posed by the digital sector and recommends a series of measures applied to both anticompetitive practices and merger control.

27. While emphasising the adequacy of competition law for apprehending the conduct of platforms, France notes a series of merger control solutions aimed at making better use of existing tools, both in France and at a European level, and introducing control mechanisms specific to the digital economy.

2.1. Solutions under current law concerning below-threshold merger control: greater use of Article 22 of Council Regulation (EC) No 139/2004

28. The French government and the *Autorité de la concurrence* support the proposal for greater use of Article 22 of EU Regulation 139/2004.

29. Indeed, one proposed option would be to make more frequent use of the mechanism provided for in Article 22 of the European Merger Regulation[10].

[9] Mentioned above.

[10] Council Regulation (EC) No 139/2004.

30. This article enables a national competition authority to request that the European Commission examine a merger that does not have a European dimension but would affect trade between Member States and threaten to significantly affect competition within the territory of the Member State or States making the request.

31. There is currently little or no use of this mechanism. The *Autorité de la concurrence* considers that the request under these provisions would enable national authorities to ask the European Commission to review a limited number of mergers that are below the notification thresholds but that would raise significant competition issues.

32. This option would have the advantage of being implemented under current law and falling within the framework of existing dialogue between national competition authorities and the European Commission for the review of notifiable mergers.

2.2. The introduction of merger control mechanisms specific to the digital economy

33. Under current law, the *Autorité de la concurrence* does not have specific thresholds for predatory or "consolidating" acquisitions in the digital economy. Faced with this legal loophole, the French government supports the implementation of a mandatory prior information mechanism of the European Commission for acquisitions involving structuring platforms. On its part, the *Autorité de la concurrence* recommends a twofold mechanism involving prior information on one hand and ex ante or ex post control on the other hand.

2.2.1. Introduction of a requirement to give information of certain mergers applicable to "structuring" platforms that may trigger control

34. The French government supports the establishment of an obligation to inform the European Commission that would apply to all mergers within the meaning of Article 3 of Regulation No 139/2004 implemented within Europe by "structuring" platforms. For its part, the *Autorité de la concurrence* proposes the establishment of a mechanism for mandatory reporting to the European Commission or the competition authorities concerned.

35. The *Autorité de la concurrence* proposed a legal definition of structuring platforms by drawing from the work and initiatives carried out on the subject over the last several months[11] in order to provide a legal definition of these players, which can be grouped under the term "structuring digital platforms". In addition, the French government is currently drawing up a proposal to define structuring platforms with a view to establishing a common European definition of these players.

36. The definition of a "structuring" platform proposed would be divided into three stages in order to (i) recognise companies engaged in online intermediation activities, (ii) target the strategic nature of their conduct in the market that they dominate, as well as other markets (these are factors that characterise their market power and which enable them play a role in access to certain markets ('gatekeeper' role) and in the functioning of certain markets ('regulator' role), and (iii) consider the importance that these platforms play for market players, whether they are competitors, users of their services or third-parties who need access to the services offered by these structuring platforms to assess certain markets and develop their own activities.

37. This general definition may be supplemented by guidelines to specify each of the three stages of the definition and, in particular, the way in which the importance of the

[11] Crémer, Furman and Stigler reports, as well as the initiatives of the competition authorities of Germany (bill currently being discussed) and Benelux.

operator is assessed with regard to its size, financial capacity, user community and/or data which it holds.

38. A structuring digital platform could be defined as: a company that provides online intermediation services for exchanging, buying or selling goods, content or services, and who holds structuring market power because of its size, financial capacity, user community and/or the data that it holds, enabling it to control access to or significantly affect the functioning of the market(s) in which it operates, with regard to its competitors, users and/or third-party companies that depend on access to the services it offers for their own economic activity.

39. The obligation to inform the Commission and/or relevant competition authorities would be a relatively light requirement that would avoid placing a disproportionate burden on companies and would only concern a list of players pre-defined according to objective criteria. In cases where a merger implemented by one of these players could bring about competition risks, the competition authority concerned could request that they be notified for review in the framework of merger control. This obligation is inspired by a mechanism that already exists in Norway and would be an additional capability for the competition authority concerned among the options submitted for public consultation.

2.2.2. Introduction of a control mechanism that can be implemented at the initiative of a competition authority

40. The *Autorité de la concurrence* proposes adding a control mechanism to the current mandatory notification thresholds that can be implemented at the initiative of a competition authority on the basis of competition monitoring. This system already exists in several European countries (Estonia, Hungary, Ireland, Lithuania, Norway and Sweden) as well as in the United States and Japan. The Government, for its part, is studying the advisability of setting up such a control mechanism, which could be implemented on the initiative of the European Commission.

41. Under this mechanism, competition authorities could require the parties to notify a merger, either ex ante or ex post, where the three following conditions are met: (i) all the companies or groups of legal persons or individuals who are parties to the merger have a total worldwide turnover greater than €150 million; (ii) the transaction raises substantial competition concerns identified in the area concerned and, where applicable (iii) the transaction does not fall within the jurisdiction of the European Commission.

42. In order to ensure legal certainty for companies, the mechanism would be governed by clear guidelines, with a definition of the concept of "substantial competition concerns" as well as the applicable procedure, and a timeframe, after which ex post review would no longer be possible. A period of 12 months could be considered. The competition authority would review the notification within a set timeframe, which would be the same as in the standard notification procedure defined in Regulation 139/2004 or in national provisions, where applicable.

43. The companies concerned would also have the ability to voluntarily notify these mergers to the relevant competition authorities ex ante before the transaction, in order to remove any doubt about the European Commission or the competition authority potentially intervening.

44. Beyond the question of how competition authorities can be notified of these transactions, France also considers it pertinent to reflect on how competitive analysis is applied to them.

45. Competitive analysis faced with the characteristics of the digital economy would of course require certain adaptations. Analysis tools in particular could be perfected or updated in terms of taking into consideration the potential competition, the impact of the transaction on the various factors relevant for the consumer (beyond price effects), the role of data ownership or large user communities in expanding market power, the temporal scope of the current analysis, which could be extended in order to better anticipate changes in the relevant market(s).

46. Numerous competition authorities and States are in the process of exploring these issues, which is why France maintains that all of these reflections call for a coordinated response at the international and European levels.

47. Significant headway has already been made at an international level. The *Autorité de la concurrence* has thus been able to conduct dialogue at the highest levels, at the initiative of the French presidency of the G7, which led to the first common position reached by G7 Competition Authorities on issues raised by the digital economy.

48. Under the French presidency of the G7, the competition authorities of the G7 countries (Germany, Canada, the United States, France, Italy, Japan, United Kingdom), together with the European Commission, reached a Common Understanding of G7 Competition Authorities on "Competition and the Digital Economy (henceforth the "Common Understanding")[12], adopted on 5 June 2019 in Paris and shared with the G7 finance ministers during their meetings on 17 and 18 July 2019 in Chantilly.

49. The Common Understanding outlines their joint perspective on the role of competition law in the digital economy around the following key points: (i) competitive markets are key to well-functioning economies and the numerous benefits of the digital economy, which fuel innovation and economic growth, can best be realised if digital markets remain competitive; (ii) competition law is flexible and can and should adapt to the challenges posed by the digital economy; (iii) governments should assess whether policies or regulations unnecessarily restrict competition in digital markets; (iv) given the borderless nature of the digital economy, it is important to promote greater international cooperation and convergence in the application of competition laws.

50. Pursuing this dialogue with the G7 could allow certain issues, such as predatory acquisitions, to be explored in greater detail. Discussions within international bodies such as the Competition Committee of the Organisation for Economic Cooperation and Development or the International Competition Network also contribute to the development of coherent and effective competition policies to meet the challenges of the digital economy.

51. The European Commission also plays an important role. Its strategy for a digital single market[13] has already led to various initiatives that will be pursued with the current revision of the Commission Notice on the definition of the relevant market, and the forthcoming negotiation of the Digital Services Act[14].

52. Finally, it can be expected that the covid-19 health crisis currently affecting many countries will lead to intensified acquisitions due to the looming economic crisis. The issue

[12] https://www.autoritedelaconcurrence.fr/sites/default/files/2019-11/g7_common_understanding.pdf

[13] Digital Single Market.

[14] Digital Services Act.

of mergers below notification thresholds could therefore become even more important, making the merger control tool, including specific mechanisms for transactions below turnover thresholds, all the more necessary.