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

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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

Please contact Mr Chris PIKE if you have questions about this document.
[Email: Chris.PIKE@oecd.org]

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Colombia

1. We will briefly contribute to the present debate by answering from our jurisdictions perspective and experience to the questions of (i) the effectiveness of our current notification thresholds to evaluate alleged killer acquisitions and (ii) the assessment of competitive effects of mergers that involve the acquisition of a nascent firm by an important market agent that was conducted by the Colombian Competition Authority in a case.

1. Overview

2. A commonly agreed archetype of a killer acquisition considers a dominant incumbent that acquires an entrant, nascent firm or a company that is in the first stage of operations within the relevant market ecosystem. Whether it be for easier expansion or entry motives or by means of the start-ups actually wanting to be acquired by the dominant firms, killer acquisitions have raised the attention of competition authorities around the globe.

3. These dynamics have been widely recognized by academics, authorities and practitioners mainly in the pharmaceutical industry and in the technology sector. The risks to competition and innovation of these types of acquisitions are associated with the prospect of loss of potential competition and with the need of incumbents to protect existing market power. These insights raise awareness over the significance of these acquisitions in the abovementioned contexts but also beyond those specific settings. The incentives that drive these transactions are to be cautiously considered because they are likely to be seen as troublesome to competition goals and to the particular interest of the entrant firm.

4. The challenges regarding the assessment of the competitive effects of these particular acquisitions have been associated with the degree of efficiency and adequacy of the tools and the merger thresholds that each competition authority currently has. A thought into a possible solution that covers an evaluation of those specific killer acquisitions that were not screened by competition authorities suggests, among others, a revision of the current thresholds. Such task may as well require the revision of the underlying considerations that motivated the definition of those thresholds in the first place.

5. It should be considered for the present debate that notification thresholds should screen out those transactions that are unlikely to result in appreciable effects in a given jurisdiction. This, however, does not rule out the possibility of the authority to broaden its study whenever a transaction in principle fit for a notification and not for evaluation has a common factual basis to the situations described earlier. Notwithstanding, our jurisdiction's thresholds based on objective factors allow the competition authority to screen possible killer acquisitions.

2. Thresholds

6. In accordance with the provisions of Article 4 of Law 155 of 1959, as amended by Article 9 of Law 1340 of 2009, merger control in Colombia proceeds when the parties concerned are dedicated to the same economic activity (horizontal merger) or when they participate in the same vertical value chain (vertical merger), either directly, through subsidiaries or branches, or as a result of exports into Colombia.

7. The parties must inform the Competition Authority about their projected transaction when: (i) together or individually considered, had during the year prior to the transaction an operational income or total assets higher than the amount previously fixed by the Colombian Competition Authority; or (ii) together or individually considered, had during the year prior to the transaction total assets higher than the amount previously fixed.

8. Pursuant to the law, each year, the Superintendence of Industry and Commerce (SIC) shall establish the operational income and assets above which companies are obliged to report a transaction prior to its execution in terms of the current monthly legal minimum wages in force.

9. Through the Resolution No. 76544 of December 27 of 2019, the Colombian Competition Authority established in SIXTY THOUSAND MINIMUM MONTHLY LEGAL WAGES IN FORCE (60,000) the operational income and total assets that will be considered to report an integration operation, effective from January 1, 2020 until December 31, 2020.

10. Additionally, the law established that if the combined market share of the parties in the relevant market in Colombia is 20% or greater, the transaction will be subject to a pre-evaluation procedure. If the market share of the parties is less than 20% the transaction will be subject to a fast track procedure known as a simple notice.

11. In this sense, it is clear for this Superintendence that those cases where an important company in the market intends to acquire a start-up company must be informed to the Competition Authority for its corresponding study. If the acquiring company is an important market agent, it would be expected that its total assets and/or operating revenues would exceed the threshold set by the entity and the 20% of market share, and therefore they must report the respective operation. Then, current thresholds will allow the SIC to review allegedly killer acquisitions.

3. Assessment

12. In December 2017, through File No. 17-432344, an application for integration between two fitness centers, INVERSIONES EN RECREACIÓN DEPORTE Y SALUD S.A.-BODYTECH and ACTION FITNESS S.A.S., was filed to the Competition authority. BODYTECH is a recognized brand with a robust network of gyms in Colombia.

13. We considered that this merger operation could be an alleged "killer acquisition", because ACTION FITNESS gyms, which were intended to be acquired by BODYTECH, corresponded to a low-cost format, a segment in which the acquiring company had no participation. Therefore, with the merger operation, BODYTECH would continue with its brand and would expand its business and begin to participate into ACTION FITNESS' line of work through the acquiring brand. A format that began to represent an important competition to BODYTECH at the time of the projected merger.

14. As part of the merger assessment, in order to corroborate the information provided by the participants and to investigate the market under analysis, it was necessary to conduct inspections to the city of Medellín, Antioquia (headquarters of the gyms that were the object of the operation). With these inspections, the competitors that should be recognized as such were actually verified and quantitative information was gathered for the purposes of reconstructing the structure of the markets. In this case, five (5) isochrones were analyzed. In the course of the analysis it was established that with the transaction there would be a significant concentration in some isochrones, so it was considered necessary to

carry out a conditioning meeting with the parties. A structural condition was imposed requiring BODYTECH to carry out the sale of some of their gyms.

15. In this regard, the participants did not agree with the structural conditions proposed by the Superintendence, in which disinvestment was a necessary condition for carrying out the integration operation and withdrew from the process. For this reason, it was not necessary to carry out a further analysis in this case.