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

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1. Introduction

1. Startup acquisitions by dominant incumbents have recently increased and have become a topic of interest to many competition authorities around the world. Certainly, they play an important role in facilitating entrepreneurship and innovation; a considerable number of startups enter markets and develop new products which, often, are inventions designated to improve dominant incumbents' products and technologies, in order to eventually be acquired by the latter.

2. In Egypt, the ability of startups to easily access suitable and sufficient means of finance has always been considered as a major obstacle facing many startups, making acquisitions an important source of finance. Nevertheless, persistent acquisitions of startups by dominant incumbents may lead to countervailing competition concerns. For these reasons, competition authorities must adopt prudent policies when dealing with startup acquisitions by dominant incumbents. On one hand, the adopted policies should not prevent startups from the opportunity to be acquired and therefore gain access to sufficient financing options. On the other hand, competition authorities must intervene when such acquisitions endanger competition and innovation in the markets.

3. The following sections summarize the vision of the Egyptian Competition Authority ("ECA") regarding the policy that might be implemented when dealing with startup acquisitions by dominant incumbents, in the context of the future Egyptian Merger Control Regime ("EMCR") that ECA is currently drafting. Following this introduction, Section (2) illustrates preliminary considerations necessary to better envision the dimensions of startup acquisitions by dominant incumbents. Section (3) explains the jurisdiction ECA might have over killer acquisitions. Section (4) sheds light on the assessment that could be implemented by ECA in its attempt to achieve the desired equilibrium. Section (5) offers the concluding remarks.

2. Preliminary considerations

2.1. General understanding of startup acquisitions

4. Startup acquisitions can appear in two forms: (1) a firm with a product in a given market may acquire a firm developing a potential competing product with the intention to discontinue it[1] and (2) an incumbent firm may acquire another firm with a growing product with the intention to continue developing it under their sole control. Such acquisitions can be considered killer acquisitions when an incumbent firm aims to acquire nascent, innovative firms to preempt future competition. These types of acquisitions usually pose a significant impediment to effective competition and entail adverse effects on market structure, innovation, and the diffusion and rate of startup activity.[2]

[1] Cunningham, Colleen and Ederer, Florian and Ma, Song, Killer Acquisitions (April 19, 2020), p.5. Available at SSRN: https://ssrn.com/abstract=3241707 or http://dx.doi.org/10.2139/ssrn.3241707

[2] Bryan, Kevin and Hovenkamp, Erik, Antitrust Limits on Startup Acquisitions (March 10, 2019), p.2. Available at SSRN: https://ssrn.com/abstract=3350064 or http://dx.doi.org/10.2139/ssrn.3350064

2.2. Balancing competition and innovation

5. The concern with assessing startup acquisitions is striking the right balance between allowing smaller firms to thrive and between exploiting the potential of the acquirer in better developing the technology of the former. This often requires a consideration of static and dynamic efficiencies and assessing current market conditions.[3]

6. On one hand, the efficiency effect dictates that incumbents have stronger incentives to invest, compared to smaller firms, in order to protect monopoly rents.[4] Meaning that the acquiring firms may be more likely to develop the inventions or innovations of smaller startups, as they may have better technology or improved capacity. Moreover, allowing buy-outs can be an incentive for entry and innovation; smaller firms may be motivated to enter the market with motive to develop new products knowing that they have a potential exit strategy and alternative forms of capital.[5] This may be especially true in markets such as the Egyptian market, where ECA will aim to consider the fact that startups may have trouble finding sources of capital. Moreover, one could also argue that the possibility of buying out entrants limits the scope for other, more inefficient entry deterrence strategies, such as excess capacity. Instead, the incumbent faces polarized options of buying out the smaller firm or competing aggressively post-entry and committing not to buy-out eventual entrants.[6] Therefore, the incumbent will waste less resource on such strategies, which limits such socially wasteful behavior. Therefore, allowing for the possibility of buy-out may have dynamic efficiencies of encouraging innovative entry in the long run.

7. On the other hand, new innovations by the smaller firm may be short-lived – the replacement effect dictates that the incumbent may have lower incentives to invest in the future development of the smaller firm's technology.[7] In other words, the incumbent, although they may have superior capabilities, may not be interested in developing the inventions or innovations of the acquired startup. This is also known as the cannibalization effect, where absent the merger, the acquiring party may have found it profitable to innovate due to the profit it would gain from competing undertakings.[8] However, given the merger, the latter profit would not be a gain, reducing the incentive for the merged firm to innovate. Moreover, such product innovation may not occur in the first place; the possibility of being bought out will instead encourage entrants to simply imitate the incumbent's innovation. In that context, allowing buy-outs may encourage inefficient entry; firms may enter even when expected revenues are less than investment costs, barely

[3] For a discussion on how ECA attempts to balance static and dynamic efficiencies, see: Merger Control in Dynamic Markets, OECD Global Forum on Competition, Contribution by Egypt, 6 December 2019. Available at: https://one.oecd.org/document/DAF/COMP/GF/WD(2019)22/en/pdf

[4] Ex-post Assessment of Merger Control Decisions in Digital Markets, Lear report to the CMA, June 2019, p. 7. Available at: https://www.learlab.com/publication/ex-post-assessment-of-merger-control-decisions-indigital-markets/

[5] Jason Furman, Unlocking Digital Competition: Report of the Digital Competition Expert Panel, March 2019, p. 108.

[6] Eric Rasmusen, Entry for Buyout, Journal of Industrial Economics, No. 36, 1988, 281-299.

[7] Ex-post Assessment of Merger Control Decisions in Digital Markets, Lear report to the CMA, June 2019, p. 135. Available at: https://www.learlab.com/publication/ex-post-assessment-of-merger-control-decisions-indigital-markets/.

[8] Ibid, p. 7.

remaining on the market until acquired.[9] In other words, allowing buy-outs seems to encourage rent-seeking behavior, where smaller firms inefficiently produce goods similar to that of the incumbent until they are bought out. These effects concerning reduced innovation and inefficient entry may ultimately have an overall negative effect on consumer welfare.

8. For that reason, ECA has carefully considered this tradeoff when amending its merger law and notification thresholds, where it aims to establish a framework that considers the static conditions of the market as well as the potential impact on innovation and consumer welfare.

3. Jurisdiction

9. The following section illustrates how ECA might have jurisdiction over startup acquisitions by dominant incumbents, first through focusing on the future EMCR that might be adopted, followed by a discussion of the notification thresholds that might be applied in relation to startup acquisitions by dominant incumbents.

3.1. Future EMCR

10. Since 2016, Egypt has been undergoing major economic reform in cooperation with the International Monetary Fund (IMF).[10] The proposed reform program has resulted in significant changes in Egypt's economic landscape. This has been reflected by Egypt's economic growth rate, which has been growing steadily at 5.5%. In addition, the reform package resulted in a primary surplus of 2% of GDP for the fiscal year 2018/2019.[11]

11. Given the role of competition law and policy in improving Egypt's economic freedom and performance, considerable reform to Law No. 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices ("ECL") is required to enhance Egypt's productive capacity and thus its international performance indicators. For this reason, ECA is currently drafting fundamental amendments to ECL. The proposed reform will encompass many pillars, among which is the introduction of the first EMCR.

12. Notably, small and medium sized enterprises ("SMEs") have usually been perceived as a dynamic force for sustained economic growth and job creation in developing countries; there are around 2.5 million SMEs representing around 98% of all industrial facilities in Egypt and employing around 47% of this sector's labor.[12] ECA believes that special attention should be brought to startup acquisitions under the future EMCR. The

[9] Ibid, p. 7.

[10] International Monetary Fund (IMF), Press release regarding IMF approval of a three-year extended arrangement under the Extended Fund Facility. Available at:

http://www.mof.gov.eg/MOFGallerySource/Arabic/PDF/Government%20Program/Egypt-%20Program%202016.pdf

[11] International Monetary Fund (IMF), IMF and Egypt Frequently Asked Questions, 2019. Available at: https://www.imf.org/en/Countries/EGY/Egypt-qandas

[12] The Egyptian Center for Public Policy Studies, Small and Medium Sized Enterprises in Egypt: Current State and Challenges, p. 2.

following subsections will illustrate ECA's vision regarding startup acquisitions and will especially tackle the question of notification thresholds.

3.2. Notification thresholds

13. Due to the low annual turnover normally generated by startups, acquisitions of startups by dominant incumbents are unlikely to satisfy traditional merger notification thresholds, thus preventing competition authorities from intervening. For instance, the acquisition of WhatsApp by Facebook in 2014 did not reach the EU turnover thresholds, and the European Commission was only able to review the acquisition following a referral from Member States.[13] Therefore, one may argue that applying traditional thresholds to startups acquisitions is equal to adopting a *laissez-faire* regime which may result, in leading dominant incumbents to persistently buy startups with the aim of eliminating a potential competitor or preventing existing competitors from using the startup technology or invention, thus increasing differentiation and keeping its leading position in the market. A reasonable policy response to startup acquisitions must ensure that competition authorities exercise certain scrutiny over such transactions.

14. Subsequently, in order to capture startup acquisitions by dominant incumbents which may significantly impede competition, ECA identifies three possible policy options:

1. Introducing new notification thresholds made specifically for startup acquisitions;
2. Introducing a notification threshold exception which entails that the acquirer must notify ECA of any startup acquisition it is involved in regardless of the parties' turnover and value of assets or the transaction value; or
3. Including startup acquisitions on the category of non-notifiable concentrations for which parties do not have to notify startup acquisitions *ex ante*, but where ECA reserves the right to review and challenge such concentrations up to a certain period after their completion. This regime might be complemented with the introduction of a voluntary notification system.

15. In the following subsections, the strengths and weaknesses of each of the aforementioned policy options will be illustrated as well as their degree of appropriateness to the Egyptian competition law and policy.

3.2.1. First policy option: introducing additional thresholds

16. Among policy suggestions in response to startup acquisitions, some countries have proposed lowering existing notification thresholds based on turnover and/or introducing additional thresholds based on transaction value in order to capture startup acquisitions. In 2017, Germany[14] and Austria[15] introduced additional notification thresholds based on transaction value.

17. ECA views lowering existing notification thresholds and/or introducing additional thresholds to be the most straightforward policy that can be introduced to capture startup acquisitions that may cause competition concerns. In addition, introducing supplementary thresholds permits competition authorities to cover startup acquisitions that may occur in

[13] European Competition Commission, Facebook/Whatsapp, Case No. COMP/M.7217, 2014.

[14] Bundeskartellamt, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG).

[15] The explanatory memorandum to the Austrian Cartel and Competition Law Amendment Act 2017.

different industries instead of limiting their jurisdiction to transactions which occur in the digital market. Furthermore, regarding the administrative burden that may be faced by competition authorities or by the undertakings to the transaction, according to the German and Austrian experience, adopting such policy has not led to any exorbitant administrative burdens.[16]

18. ECA believes that introducing additional merger thresholds can be considered amongst the most efficient policies that can be followed to deal with startup acquisitions as it allows competition authorities to reach the necessary equilibrium between intervening when there are serious doubts that startup acquisitions may lead to adverse effects on competition, and preserving legal certainty. However, considering the current state of the Egyptian competition law and policy, this policy could be difficult to apply in Egypt in the near future. The future EMCR, if adopted, will be the first merger control regime to be applied in Egypt. This implies that ECA will naturally lack the necessary data it requires to set additional notification thresholds specific to startup acquisitions. Such data includes the average value of transactions and/or the average turnovers of the parties involved. For this reason, it would be unlikely that this policy option could be adopted by ECA.

3.2.2. Second policy option: introduction of an exception to the notification thresholds specific to startup acquisitions

19. The second policy option is the introduction of an exception to the notification thresholds specific to startup acquisitions. Adopting such policy requires dominant acquirers to notify competition authorities of any startup acquisition they intend to accomplish independently of the transaction value or the turnover of the merging parties.

20. This policy would permit ECA to reduce the obstacle they may face with the lack of data, which would be encountered in the first policy option. However, this approach would not only target startup acquisitions that may restrict competition and innovation, namely killer acquisitions, but would also require notification of acquisitions of other startups with low turnover that will unlikely raise competition concerns. The increased number of merger cases may therefore considerably raise the administrative burden faced by both competition authorities and merging parties; the increase in merger notifications might prevent competition authorities to allocate enough resources to investigate acquisitions and the merger control process might be costly for startups. In addition, this policy might result in deterring acquisitions that do not pose a threat to competition, which might have repercussions on innovation and the incentives of new small companies to enter markets in the first place, as described in the discussion on efficiencies above.[17]

21. Therefore, adopting such policy must be accompanied by providing a definition for killer startup acquisitions for which mandatory notification is required, in order to narrow the scope of the applicability of the notification thresholds exception. However, the introduction of such a policy will place the merging parties under an obligation to notify competition authorities their transactions *ex ante*, this definition must be based on quantitative criteria in order to preserve legal certainty.

[16] The Austrian Federal Competition Authority (Bundeswettbewerbsbehörde), Digitisation, Transaction Value Thresholds in Merger Control and Associated Challenges, Contribution on Shaping Competition Policy in the Era of Digitilization, 2018, p. 5.

[17] Mats Holmström, Jorge Padilla, Robin Stitzing, and Pekka Sääskilahti, Killer Acquisitions? The Debate on Merger Control for Digital Markets, 2019, p.13.

22. ECA believes that this would not be suitable policy, considering the current state of Egyptian competition law and policy. In fact, introducing exceptions to notification thresholds without forging the limits for such exception may lead to an increase in the number of merger cases and might increase the administrative burden on ECA, which, subsequently, might cause bureaucratic inefficiency. Simultaneously, introducing a definition to startup acquisitions that should be notifiable to ECA based on quantitative criteria would be considerably difficult and using qualitative criteria might undermine legal certainty. For these reasons, this policy would be unlikely adopted by ECA.

3.2.3. Third policy option: including startup acquisitions by dominant incumbents among non-notifiable concentrations that can be reviewed by ECA

23. The third policy proposition consists of including startup acquisitions among non-notifiable concentrations that ECA can review. This policy implies that startup acquisitions are generally non-notifiable transactions over which ECA has jurisdiction to review and challenge up to a certain time-period after their consummation.[18] This regime would allow ECA to avoid the large administrative burden it may face if it treated startup acquisitions by dominant incumbent as an exception to the traditional thresholds on which an *ex ante* merger control regime is consistently applied. Meanwhile, this policy would not introduce any notification obligation on the merging parties and thus preserves legal certainty. Additionally, and importantly, the time period during which ECA can intervene would be relatively short as to not risk rendering a decision that would be too late to enforce.

24. Moreover, in order to provide clearance and transparency to both legal and business communities, ECA might specify the factors to be taken into account when deciding to review or challenge a startup acquisition. These factors might include the following:

1. The degree of market power of the acquirer: the acquirer must have a significant degree of market power, as ECA is of the view that the acquiring firm's market power could be a reasonably effective indicator for the risk of harm that would result from a transaction;
2. The size of the target firm: if the acquiring firm is a small or medium sized enterprise within the meaning of the Egyptian law, special attention will be brought to the transaction;
3. The time of the occurrence of the acquisition: the acquisition must occur early in the product life cycle, where prospects of further innovation and development are likely;
4. There are serious concerns that the acquired technology could plausibly have an appreciable impact on competition if it is used exclusively by the acquirer;
5. There are serious concerns that the acquisition's sole objective is to discontinue the target innovative projects and preempt future competition and/or eliminate a future disruptive competitor.

25. Some of the aforementioned factors are unavoidably speculative. While it may be challenging to decide when to intervene, ECA believes that this not a justification for adopting a *laissez-faire* regime that permits dominant firms to absorb all emergent startups.

[18] Some merger control regimes confer to competition authorities a general right to review and challenge non-notifiable concentrations up to certain period of their completion. ECA considers limiting its right to review and challenge non-notifiable concentrations to certain categories of transactions, and startup acquisitions would be included among those categories.

ECA believes that the most efficient policy to be adopted by competition authorities is to acknowledge that even though there are unavoidable uncertainties (regarding the determination of when to intervene), intervention, regardless of the outcome, is necessary, especially given the anti-competitive effects that have been found to be associated with startup acquisitions, discussed throughout this paper.

26. Furthermore, this policy might be complemented by a voluntary notification system in order to encourage dominant firms to notify ECA of their proposed acquisitions of emergent startups and engage with ECA in pre-notification discussions if desired. This system would also help ECA to collect considerable data regarding startup acquisitions in Egypt, perhaps eventually making one of the above two policy options possible, and would forge a sort of continuous discussion between ECA and the legal and business communities for better understanding of ECA's perceptions and competitive concerns that might exist.

27. Adopting the third policy option will allow ECA to achieve certain equilibrium between preserving legal certainty and intervening when startup acquisitions by dominant incumbents endanger competition and innovation in the markets. Accordingly, it is the most appropriate policy for many reasons. First, unlike the second policy option, treating startup acquisitions as non-notifiable concentrations (but reserving the right for ECA to review them) does not impose on the parties an obligation to notify. This eliminates uncertainty for the merging parties as to whether or not they have to notify ECA, especially in the absence of a definition for notifiable startup acquisitions based on quantitative criteria. Uncertainty is further reduced as, under such a policy, it would be made clear that ECA will not review startup acquisitions unless it has serious doubts that the acquired technology could have an impact on competition if it is used exclusively by the acquirer or if the acquisition's sole objective is to discontinue the startup innovation. In other words, by giving firms the ability to notify themselves as well as preserving ECA's right to intervene (on the basis of certain criteria), this policy both minimizes the responsibility on undertakings to notify as well as empowers ECA to intervene when necessary. Second, adopting this policy will help ECA collect the necessary data, enabling it to determine additional thresholds specific to startup acquisitions in order to adopt the first policy option in the future.

28. Therefore, this policy, if adopted, will be a transitory policy which will allow ECA to collect the necessary data in order to introduce additional thresholds in the future. Meanwhile, it will ensure that ECA has the power to exercise certain scrutiny over startup acquisitions, minimizing the anti-competitive effects that may result from their occurrence.

3.3. Final remarks on ECA's future plans regarding notification thresholds

29. ECA is not of the view that any startup be categorically denied the opportunity to be acquired. Nevertheless, ECA is in favor of an antitrust policy which enables competition authorities to intervene in situations where a highly dominant incumbent acquires a startup that is considered as a potential competitor or whose technology could plausibly influence competition if rivals are excluded from using it. Despite legal uncertainties that might be generated by such policy, ECA admits that intervention is necessary in order to protect competition and innovation. The remits of this intervention are discussed in the following section.

4. Assessment

30. Several factors contribute to ECA's assessment of the acquirer's purchase decisions and their impact on pipeline competition. The following section discusses how ECA plans

to assess notified or discovered startup acquisitions in the future, namely, plausible theories of harm, methods of analyzing the counterfactual, the assessment of efficiency rationales as derogations to certain competition concerns and the possible remedies that could be considered.

4.1. Theories of harm associated with startup acquisitions

31. ECA focuses on two main theories of harm with respect to startup acquisitions by dominant incumbent: the "killer acquisitions" theory and the theory that the dominant undertaking will use the acquired startup to entrench its dominant position.

32. Firstly, according to the killer acquisitions theory, acquisition of startups by dominant incumbents may result in the "*early elimination of a potential rival*" before it gets a chance to grow into a significant competitive force. Indeed, absent the transaction, the startup may have grown and developed into a significant competitive constraint on the dominant incumbent. This is the prevailing theory of harm concerning startup acquisitions: that incumbent firms preempt future competition by acquiring potential rivals before they can pose a threat. As a result, the transaction would increase prices compared to the counterfactual in which it would have faced direct competition from the startup.[19]

33. The second theory of harm is related to the fact that the combination of the startup and dominant incumbent's resources might award the dominant incumbent considerable competitive advantages over its rivals.[20] In this case, the dominant incumbent will use the acquired startup technology or invention exclusively, which will prevent its rivals from using it. Consequently, this would strengthen the incumbent's dominance in the market and would increase differentiation between the incumbent and its rivals, thus preserving its leading position in the market.

34. Other theories of harm include, but are not limited to, increasing barriers to entry in the event the startup acquisition creates a dominant position or entrenches an existing one, and loss of innovation.

4.2. Assessing the counterfactual

35. The test ECA generally employs in assessing counterfactuals is a 'but for' test. The parameters of each assessment rest on the facts of the case and when the concentration is notified (*ex ante* or *ex post*).

36. Currently, ECA assesses both *ex ante* and *ex post* counterfactuals. That being said, the bulk of ECA's impact assessments are *ex post*, pending the promulgation of the EMCR.

37. Under the EMCR, ECA acknowledges the *status quo ante* (the state of affairs prior to the execution of a given transaction) as the default *ex ante* counterfactual. Often, ECA also acquires data before the implementation of the notified concentration as a base for the 'but for' test. Overall, ECA aims to employ a more dynamic approach in assessing transactions where market changes are reasonably foreseeable. One example outlined in the EMCR is the failing firm defence (an exception to the prescribed turnover thresholds).

[19] Tristan Lécuyer, Digital conglomerates and killer acquisitions – A discussion of the competitive effects of start-up acquisitions by digital platforms, Concurrences, No. 1, 2020, p. 42. Available at:

https://www.concurrences.com/en/review/issues/no-1-2020/law-economics/digital-conglomerates-and-killer-acquisitions-a-discussion-of-the-competitive-92964-en

[20] Ibid.

In this scenario, the status quo ante is no longer the relevant counterfactual. Instead, due to the non-execution of the transaction, the target firm will exit the relevant market, substantially lessening competition for reasons unrelated to the notified concentration. In such cases, ECA compares the impact of the notified concentration with those of its hypothetical exit.

38. ECA takes a more speculative approach when assessing *ex post* realized outcomes with *ex post* counterfactuals; it must speculate as to what would have occurred in the absence of the acquisition, a method entailing the assessment of multiple scenarios. This is done on a case-by-case basis by simulating likely market outcomes through a combination of economic models and analyzing similar case precedent in other jurisdictions.

39. In this context, it may also be relevant to briefly reference ECA's assessment of regional ride-hailing firm Careem by its international counterpart, Uber in order to explore how ECA has assessed the counterfactual in its past investigation of buy-outs of smaller competitors by relatively dominant incumbents, *ex ante*. It should be noted, that a) ECA analyzed the transaction as an anti-competitive agreement between competitors under Article 6 ECL (the equivalent of Article 101 TFEU), and that b) ECA did not necessarily assess the transaction as a killer or startup acquisition. Nevertheless, it may be useful for the purposes of this paper to discuss ECA's approach in analyzing the counterfactual in one of its biggest merger investigations.

40. ECA set an assumption that but for the acquisition, the status quo ante would have prevailed (that Careem would have remained on the market). ECA then analyzed this assumption against each of its theories of harm, where it assessed whether each respective theory would have taken place either way in the counterfactual.

41. In order to further test the counterfactual and envision what the competitive landscape would have looked like but for the transaction, ECA collected data from the parties and tested market concentration using the Herfindahl-Hirschman Index.[21] Furthermore, ECA reached out to international players offering the same service in other jurisdictions to test whether or not they would have considered entering the market but for the transaction. This assisted ECA ground its theories and carefully analyze them against the counterfactual.

42. In a more specific sense, ECA found it necessary to study the innovations that Careem brought to the Egyptian market as a long-term competitor of Uber to test whether or not these innovations would be further developed by Uber in the post-transaction scenario. Careem is generally regarded to introduce features and "innovations" pertaining to the regional culture, as it is widely viewed as the more local brand.[22] By analyzing Uber's internal and public documents (such as their public offering prospectus), ECA found that these aspects were indeed valuable to the market. ECA then analyzed whether these

[21] This analytical tool reflects market concentration under current market conditions. A further measure associated with the HHI is the delta, which is the change in market concentration following a merger. However, ECA acknowledges that the HHI does not provide a full picture of the competitive situation, as it does not take into account important features of a market such as closeness of competition, barriers to entry, or capacity constraints. Moreover, ECA notes that the HHI may not serve as a useful tool when assessing killer acquisitions, as changes in market concentration would be minimal in cases where the acquired startup has a small market share to begin with. However, the HHI was used in the Uber/Careem transaction since, again, it was not considered a killer acquisitions.

[22] ECA's Assessment of the Acquisition of Careem by Uber, Egyptian Competition Authority, December 2019, p. 59. Available at: https://www.docdroid.net/GXSIQ7c/ecas-assessment-of-the-acquisition-of-careem-inc-by-uber-technologies-incnon-confidential1-pdf

innovations would be encouraged or diminished in the post-transaction scenario. Indeed, and while not necessarily considering the transaction a killer acquisition, ECA's theories of harm included the diminishing of these features. ECA ultimately resolved this issue through the commitments it placed on Uber related to improving quality, introducing a new technology previously only available abroad, and dedicating a number of engineers to the Egyptian market.

43. While it may be too soon to tell, as the transaction was cleared with conditions in December 2019, ECA has so far not seen a decline or diminish of the quality aspects Careem offered, perhaps largely due to the commitments set in place.

44. However, it should be noted that while the future ECMR employs similar means of assessing the counterfactual in the case of startup acquisitions, such assessment was arguably easier to carry out in the case of Uber/Careem. Careem was already an established competitor at the time of the transaction rather than a nascent startup, making it easier to assess the features of innovations it had already brought on to the market. Therefore, it is worth considering that in the case of actual killer acquisitions, it may be more difficult to envision the dynamic efficiencies that would have resulted in the counterfactual. Nevertheless, ECA intends, when assessing a startup acquisition, to follow the above approach, where it will set a counterfactual and test it by collecting data from the parties, test market concentration, survey market players and potential investors, as well as study the potential of the startup in question (using the parties' own opinions when possible) to see whether it predicts this potential to be realized or diminished after the transaction.

4.3. Assessing efficiency defenses

45. Parties to a transaction are likely to argue for efficiencies that may result from the transaction, which ECA would then assess. Notably, ECA considers that, in the context of startup acquisitions, authorities should assess efficiency gains more seriously than when assessing as traditional efficiency defences, as efficiency gains of startup acquisitions are "much more realistic" than in traditional unilateral markets.[23] In assessing efficiency gains, ECA relies on the definition of economic efficiencies in Article 2 of the current ECL, which dictates that any proposed gains would have to include reduced marginal costs, better quality, increased quantity, and/or the introduction of new products.

46. Drawing on the above, the key efficiency is the one embodied in the theory of the efficiency effect: that the incumbent, given that the replacement effect does not materialize, may have greater resources than the startup to develop its innovations and products. In brief, empirical economic literature suggests that the unilateral effects of mergers on innovation are usually anti-competitive; a number of studies conclude that neither price nor quality are improved post-horizontal transactions.[24] In fact, one study finds that the new entity will often find it optimal to increase prices in the short-run, especially in the absence of decreased price competition, in order to innovate in the future.[25] This requires that, as described above, competition authorities carefully balance static and dynamic efficiencies that may result from a transaction, deciding on a trade-off between lower prices and increased innovation in the future.

[23] Ibid, p. 136.

[24] Ibid.

[25] Federica et al., Horizontal mergers and product innovation, International Journal of Industrial Organization, No. 59, 2018, pp. 1-23.

47. An interesting efficiency argument is one where an acquiring firm argues that it will better utilize the inventors of the smaller firm. One study of the pharmaceutical sector addresses this issue, showing that following an acquisition, a significant majority of employees, or inventors, will move to another undertaking. [26] In fact, the productivity of the remaining employees is even shown to decrease. [27] In turn, the study also found no evidence that new technologies of the acquired firms were redeployed by the acquired firm. For that reason, it seems that "acqui-hiring" is likely not to lead to efficiencies for the market either.

48. Another interesting finding demonstrates that domestic firms usually improve when bought out by multi-nationals. This would depend on the costs and benefits of the innovation process as well as the initial characteristics of the acquiring firm. As described previously, ECA would naturally assess these two factors, as well as the additional fact that the option of being bought out may be a motive for Egyptian startups looking for varied sources of capital.[28]

49. Therefore, combined with the above discussion of balancing the risk of under and over-regulating such acquisitions and keeping in mind the efficiencies described therein as well as ECA's method of identifying theories of harm and of assessing the counterfactual, ECA would consider, on a case by case basis, efficiency gains seriously and closely.

4.4. Remedies

50. ECA may find it fitting, in some cases, to address a startup acquisition by imposing remedies on the merging parties. While traditional merger remedies may, in some cases, prove to be the appropriate tools for the mitigation of anti-competitive harms resulting from a startup acquisition, ECA finds that remedies pertaining to startup acquisitions must be designed in a way that addresses the specific theories of harm associated with them.

51. Referring to the above, the two main theories of harm associated with startup acquisitions are that the incumbent will cease to develop the innovations or inventions of the acquired startup or that the incumbent will use the technology of the acquired startup exclusively.

52. In relation to the first harm, a remedy committing the incumbent to continue to develop the startup's technology may be appropriate, especially in scenarios where the promising technology of the startup is a clear and promising. ECA would then be able to identify this technology and generally require the incumbent not terminate it. This may be through commitments to dedicate a certain number of employees to the project or to allocate a certain amount of investment towards it. ECA would then follow up with the incumbent, in monitoring, to ensure that they put in place best efforts to develop this technology. It should also be noted that such a commitment would only be put in place when reasonable; this remedy may be difficult to impose in cases where the "promising innovation" cannot be clearly identified, and therefore may only be appropriate in some cases.

26 Colleen Cunningham et al., Killer Acquisitions, 2018. Available at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707

[27] Ibid.

[28] Guadalupe et al., Innovation and Foreign Ownership, American Economic Review 2012, Vol. 102, No. 7, 2012, pp. 3594-3927.

53. As for the second theory of harm, the exclusivity issue can be resolved by compulsory licensing, by which the incumbent would be required to license the acquired technology to other actual (or potential) competitors, ensuring that they benefit from it as well. Such licensing would take place on appropriate terms (fair, reasonable and non-discriminatory terms, "FRAND"). Moreover, it would reduce the unilateral market power of the acquiring party, as well as ensure that the acquisition does not delay the potential development of the market as a whole. Compulsory licensing may allow competition authorities to achieve a desired equilibrium by ensuring that market players have access to the startup's technology, and unsurprisingly, impacting consumer welfare positively, since there would be greater diffusion.[29]

54. This intuition of sharing relevant technology is also the reason why data-sharing commitments are increasingly popular. In some cases, especially with transactions taking place on the digital economy, it may be appropriate to require the incumbent to share certain types of data with other competitors or new entrants. This would encourage entry in markets that are highly dependent on data. A similar remedy would be that of interoperability, which also encourages entry as well as reduces the likelihood of the market tipping towards the incumbent. Of course, such remedies would only be implemented after a careful study of the types of data that are important to the market as well as of the consequences of sharing such data with competitors.

55. In summary, ECA may find that the appropriate way to address a startup acquisition is by imposing tailored, modern remedies to resolve the potential anti-competitive harms that may result from such a transaction.

4.5. Final remarks regarding assessment

56. When assessing whether a startup acquisition by dominant incumbent is likely to significantly harm or restrict the freedom of competition, ECA will follow the assessment that will be normally pursued in other merger cases, commencing by identifying the theories of harm, applying the counterfactual test, assessing the efficiency claims put forward by the parties, and considering possible remedies. ECA recognizes that safeguarding innovation is widely used as a justification for over-enforcement, and that in doing so, authorities may preemptively block such acquisitions. Therefore, in order to conduct well-informed assessments that adequately weigh anti-competitive and procompetitive effects of startup acquisitions, special attention will be given to efficiency gains.

5. Conclusion

57. It is quite evident that authorities must strike a balance between under and over-enforcement in the context of startup acquisitions. Otherwise, decisions may lead to inefficient diffusion and direction of startup activity, which is detrimental to innovation and consumer choice. In drafting its ECMR, ECA is carefully weighing the benefits and drawbacks of the different options of notification criteria, aiming overall to ensure that anti-competitive startup acquisitions are captured at an early stage. Similarly, ECA has studied speculative innovation theories of harm and their relevant counterfactuals – as well as possible efficiency defences and remedies – ensuring that the law amendments will allow ECA to assess these factors adequately. Overall, ECA aims to enact an approach that both balances the need for intervention and the need for granting startups the right to be bought

[29] Kevin A.Bryan and Erick Hovenkamp, Antitrust Limits on Startup Acquisitions, 2019, p 13.

out, while creating notification standards that are adequate and appropriate for the current state of Egyptian competition law and policy.