Organisation for Economic Co-operation and Development

DAF/COMP/WD(2020)58

Unclassified English - Or. English

4 June 2020

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 4 June 2020

Start-ups, killer acquisitions and merger control – Summaries of contributions

11 June 2020

This document reproduces summaries of contributions submitted for Item 2 of the 133rd 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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JT03462584

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Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on start-ups, killer acquisitions and merger control (133rd Meeting of the Competition Committee on 10-16 June 2020). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Belgium

The notification thresholds are at present: acquirer and target 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)). When reviewed under the previous competition rules, the BCA saw, on balance, no reason to change the thresholds.

We did not investigate the acquisitions of any nascent firms since 2013 (establishment of the BCA in its present form) because none was or needed to be notified. We also think that real killer acquisitions are less likely to happen between local partners in a smaller jurisdiction, like Belgium.

Post-merger plans of the target firm's investors are relevant.

It is fair to assume that we would consider to at more than one counterfactual. 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. There is also the question is how the Court of Appeal would review such multiple counterfactuals.

We would consider mainly three efficiencies: First, the acquirer is likely to help further develop the target. Second, the target may further bring an improved experience to the ecosystem of the acquirer, thereby quickly benefiting a large group of customers. And third, seeing that start-ups are acquired is a strong incentive for others to persist to the point where their start-up can be sold.

Acquiring a firm may be easier than hiring key staff 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, especially if they have special incentives not to leave (eg, pledged equity, or other long term incentives). 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.

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, and identify potential overlaps.

BEUC

BEUC strongly supports the OECD's initiative to progress the debate on start-ups, killer acquisitions and merger control. Given the potentially harmful effects on consumers that such mergers may have in terms of choice of goods and services, prices and innovation, BEUC believes that competition agencies must find ways to ensure that acquisitions of start-ups are not anticompetitive. While this is certainly a complex issue, both in theoretical and practical terms, the evidence to date clearly points in the direction of under-enforcement. Inaction is therefore no longer an option.

BEUC recognises that there are no simple solutions to first establishing a mechanism to ensure that potentially harmful acquisitions of nascent rivals are reviewed without catching unnecessary numbers of non-problematic transactions, and second to performing the substantive competition analysis of such transactions. On the former, BEUC considers that a transaction value threshold is likely to be the most useful approach. As regards the substantive analysis, BEUC believes that it will be important not only to evaluate the effects of incumbents buying up potential nascent competitors (horizontal mergers) but also, at least in the digital sector, to include more conglomerate or ecosystem type mergers and leveraging practices. As the merger analysis, including the counterfactual, will be more speculative for acquisitions of nascent rivals than for other transactions, it will be important for agencies to consider a broader range of qualitative and financial evidence.

BEUC would support the idea of introducing a rebuttable presumption that acquisitions of nascent rivals by entrenched dominant companies would be anticompetitive, shifting the burden of proving the contrary on to the merging parties.

BIAC

In recent years, concerns have been raised regarding acquisitions of nascent competitors by larger, well-established players, especially in the tech sector. In particular, concerns have been expressed that innovative upstart tech companies are being acquired by large, incumbent technology platform companies to prevent them from growing into significant independent companies that could impose competitive constraints, or perhaps even unseat, incumbents. Challenges exist, however, in determining whether the nascent competitors would have matured into actual significant competitors. And while hindsight can identify the more and less successful acquired companies, it cannot tell what might have been in the absence of the acquisition.

Various solutions to this challenge have been suggested, including shifting of the burden of proof to the acquiring party to demonstrate lack of anticompetitive effect or, in other words, declaring any acquisition by a company of a certain size or category to be presumptively unlawful irrespective of competitive effects unless it can be proven otherwise. This would apply a principle that, because the ultimate long-term impact of acquisitions of nascent competitors is inherently unpredictable, the ends of preventing "killer acquisitions" is justified by the means of dispensing with competitive analysis. But such an approach would not be consistent with the economic underpinnings of competition law, particularly when sound competition analysis can be brought to bear on the evaluation of such mergers. As this Committee has explored in prior sessions, there is also a risk that preventing mergers of nascent competitors may deter the very start-up activity that leads to important innovation and economic growth.

Decades of merger analysis have provided myriad tools that can help competition authorities to evaluate both the short- and long-term potential of a nascent competitor relative to its larger acquirer. These tools include means of factual, legal and economic analysis that can provide insight on the acquired and acquiring companies in a way that will improve the outcomes of merger review in such cases. This contribution seeks to evaluate a number of those tools, while almost certainly being non-exhaustive. The use of these tools is a preferable approach to non-economic reactions based on speculative approaches.

We note that these merger tools should not be employed as a means of policing concerns about dominance that may exist independent of a specific transaction; to the extent that abuses of dominance occur, those concerns should be addressed under separate statutory authority granted to agencies.

In addition, this article touches on notification thresholds as a means to detect potentially problematic transactions in this area, exploring whether alternative, purchase price based, notification thresholds are justified and, if so, what conditions should be considered in implementing alternative notification measures.

Colombia

This submission contributes to the debate on killer acquisitions and merger control by answering from the Colombian jurisdiction perspective and experience to the questions of (i) the effectiveness of our current notification thresholds to capture and further 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. We conclude that Colombian current notification thresholds are most likely to capture alleged killer acquisitions by important market agents when the conditions of the transaction fall within the scope of the those that according to the law may raise potential competition concerns.

Egypt

Startup acquisitions by dominant incumbents certainly play an important role in facilitating entrepreneurship and innovation. A considerable amount of startups enter markets and develop new products which, more often than not, are inventions designated to improve dominant incumbents' products and technologies, in order to be eventually acquired by the latter.

In Egypt, access to sustainable financial resources is generally considered a major obstacle for promising firms. Therefore, such acquisitions may be compelling to struggling startups. Nevertheless, persistent acquisitions of startups by dominant incumbents may lead to countervailing competition concerns.

The Egyptian Competition Authority ("ECA") is of the view that startups should not be categorically denied the opportunity to be acquired. Nevertheless, ECA is in favor of an antitrust policy that enables competition authorities to intervene in situations where a highly dominant incumbent acquires a startup that is considered a potential competitor or whose technology could plausibly influence competition if rivals are excluded from using it.

ECA is currently working on drafting amendments to Law No. 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices ("ECL"). The proposed reform will encompass several pillars, among which is the introduction of Egypt's first Merger Control Regime ("EMCR"), which gives special attention to startup acquisitions

When assessing whether a startup acquisition by a dominant incumbent is likely to harm or restrict the freedom of competition, ECA will follow the assessment process pursued in other merger cases. ECA initiates by identifying the theories of harm, applying the relevant counterfactual test and then assessing any efficiency claims put forward by the parties. ECA recognises 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 anticompetitive and procompetitive effects of startup acquisitions, special attention will be given to efficiency gains.

In drafting its ECMR, ECA is carefully weighing the benefits and drawbacks of different notification criteria, aiming to ensure that anticompetitive 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 out, while creating notification standards that are suitable for the current state of Egyptian competition law and policy.

EU

Acquisitions of nascent, innovative companies by strong incumbents is a topical issue in the field of merger control. Such acquisitions raise a number of issues, both on jurisdiction and substantive assessment.

Regarding jurisdiction, the EU merger control requires notifications of all concentrations which meet specified turnover-based thresholds. Small, young targets may not yet generate significant sales to meet those thresholds. In the EU, the notification obligation is supplemented by the referral system, whereby the European Commission may review concentrations, which do not meet the notification thresholds, on the basis of referrals from national competition authorities of EU Member States. In the past, the Commission has reviewed a number of relevant transactions falling below its thresholds after referrals by Member States. The Commission is carrying out an assessment of whether the current EU regime with turnover-based thresholds allows to sufficiently capture important acquisitions of low-turnover targets which may have an impact on competition.

The substantive analysis of acquisitions of small, innovative targets by large incumbents raises complex issues, such as (a) identifying the plausible theories of harm, (b) measuring market power, (c) establishing the right counterfactual, and (d) assessing potential competition and effects on innovation. Compared to other concentrations, in killer acquisitions or acquisitions of nascent competitors, these issues are often more pronounced or take a distinct form, as for instance, the markets may be characterised by the presence of platforms and their specific dynamics. The Commission assesses each case on its own merits, relying on its existing tools and further developing its analytical framework of acquisitions of innovative targets by larger companies. In the Commission's experience, the main concepts and tools of EU merger control appear sufficiently flexible and sound to cope with these challenges.

Germany

The latest debates on effective merger control focus on acquisitions of start-ups or nascent firms by rivals. This article does not intend to contribute to the different theories of harm this topic entails; it is the logical precondition for any meaningful competitive assessment of a merger's actual effects on the market structure that potentially harmful acquisitions do not escape the prism of merger control in the first place.

A transaction value threshold introduces the obligation to notify acquisitions with regard to which the turnover generated by the target does not reflect the case's importance for competition. This enables enforcers to examine cases that may turn out to be killer acquisitions or otherwise detrimental to competition, especially in innovative industries.

Given the new threshold, mergers are now subject to merger control in Germany if, in addition to the current requirements relating to turnover thresholds, the value of a consideration exceeds 400 million euros and the company, or a part of the company, that is to be acquired shows significant domestic activity in Germany. With regard to the elements included in the novel provision, the interpretation of (i) the value of the consideration and (ii) the extent of domestic operations is of particular interest to practitioners.

The practicability of those notification criteria is reflected in the decisional practice of the Bundeskartellamt and was *inter alia* tested in the *PayPal/Honey* case. Due to the existence of a broad range of competitive constraints on the relevant markets and the lack of horizontal overlaps, the transaction could be cleared without an in-depth investigation.

A transaction value threshold does not replace a thorough competitive assessment or a solid theory of harm but it can ensure that the focus of merger control is shifted to takeovers of low turnover unicorn firms in their infancy. However, the Bundeskartellamt has so far not come across a critical case notified on the basis of the transaction value threshold.

Irrespective of the statutory evaluation of the German transaction value threshold to be carried out in 2020, it can already be seen that the number of additional notifications resulting from the new provision is only in the single-digit range, which is why the legislator's assumption in this regard has proven to be correct.

Israel

Over the last decade the Israeli high-tech ecosystem has grown rapidly. In 2019, there were approximately 121 M&A transactions involving Israeli parties with a total value of $12.4 billion, a record high value. Many of these transactions are in digital markets. These markets are often characterised by substantial economies of scale and scope, and many of them have significant network externalities. These characteristics suggest that digital markets tend to suffer from high barriers to entry and therefore, the incumbent, which is not threatened by immediate competition, is likely to maintain (or increase) it's dominance in the market. In addition, conglomerate competition concerns should be more carefully looked into, particularly, in digital markets (as opposed to other markets).

In its contribution, the Israel Competition Authority proposes a basic and rough model – presented here for the first time – which classifies transactions into two categories: "Green" and "Yellow". The transactions classified "Green", are identified as transactions which are not expected to require a different review other than the ordinary competition review in brick and mortar markets; transactions classified "Yellow", are identified as those which require an enhanced review into the additional competitive concerns which might particularly arise in digital markets. The Classification is based on the characteristics of the acquired product and on the acquirer's main motives for the acquisition. The purpose of the model is to provide a simple tool to identify start-up acquisitions which should require an enhanced review, as opposed to those that are not expected to raise competitive concerns other than traditional merger review concerns.

To provide a first validation of the model, we apply it to 21 transactions of Israeli high tech companies that were acquired by the five big tech companies: Google, Amazon, Facebook, Apple and Microsoft from 2014 to 2019.

The next step of our study will be to examine what in fact happened to such acquired companies, post-acquisition. Accordingly, we intend to examine if there is a significant phenomenon of killer acquisitions, or if there are mergers which harm competition but were not identified as having the potential to do so.

Japan

Recently, having recognised not just killer acquisition issue in some sectors such as pharmaceutical sector but also the fact that some digital platforms tend to rapidly grow up to monopolise and oligopolise their market through acquiring start-ups and utilising their data assets, the JFTC published the fundamental principles (2018) which proposed some action plans including the one responding to digital platforms' acquisition of start-ups and various assets necessary to bring about huge innovations, together with the other ministries related to economic policy and telecommunication.

Based on such proposals, the JFTC amended the Merger Guidelines (2019), by clarifying what kind of factors to bear in mind to review whether acquisitions of potential competitors including start-ups would substantially restrain competition in the market. For instance, four dimensions of data (variety, volume, velocity and value) will be taken into consideration in reviewing the merged entity's competitive advantage.

At the same time, the JFTC amended the Procedure Policies (2019), under which recommending merging parties in certain types of a notification-free merger plan to have a voluntary consultation with it, the JFTC will request them to submit the related documents and review them.

Furthermore, this contribution paper introduces recent merger cases; a pharmaceutical case and a digital platform case.

Norway

The Norwegian Competition Authority has three tools to enable efficient merger control: i) general turnover based notification rules, ii) the power to order notification of transactions not covered by the mandatory notification rules, and iii) the power to impose disclosure requirements on individual firms.

In the NCA's experience, both the second and the third tool mentioned above are valuable and useful supplements to the regular merger notification thresholds. Traditionally, these tools have allowed the NCA to monitor acquisitions affecting local markets or oligopolistic market structures, and to intervene against such acquisitions when justified. However, these tools may also prove particularly useful with regard to acquisitions of start-ups or "nascent" firms as they enable the NCA to identify and assess such transactions in a timely and effective manner.

This contribution describes the legal background, some of the instances where these two tools have been used and the NCA's experiences. First, a description of the general turnover based notification rules and some considerations behind the currently applicable turnover thresholds is provided.

Russian Federation

Adapting control over economic concentration to new economic realities has been a top priority for many Competition Authorities for several years now, including the FAS Russia. Challenges related to the globalisation of trade, digitalisation of the economy and the emergence of an increasing number of "breakthrough" innovations pose goals for Competition Authorities to review existing merger control tools.

The emergence of start-ups on the market that offer innovative developments and are ready to change the architecture of markets in the short term is a serious challenge for major players who quite rightly do not want to lose their market power. One solution to this problem is to take over such start-ups with the deliberate purpose of stopping their activities, in other words, "killing" them. The anticompetitive nature of such transactions is obvious: they slow down the innovative development of industries, strengthen the positions of dominant companies and increase economic concentration in the relevant market.

At the same time such transactions often do not come to the "eyeshot" of Competition Authorities because they do not meet the threshold criteria for state control over economic concentration. Changing approaches to the consideration of such transactions is an urgent task.

The FAS Russia is fully aware of the need to adapt antimonopoly regulation to changing economic realities. To date, the FAS Russia has prepared a comprehensive draft of amendments to the Russian antimonopoly legislation which following the established tradition is called the "Fifth Antimonopoly Package". The "Fifth Antimonopoly Package" is more focused on the introduction of tools and mechanisms for regulating digital markets in the antimonopoly legislation.

The adoption of the "Fifth Antimonopoly Package" will allow the FAS Russia to improve its law enforcement practice in monitoring economic concentration in digital markets. These amendments will allow antimonopoly control of M&A in digital markets including killer acquisitions of start-ups by large corporations.

Spain

Some jurisdictions, including Spain, in the framework of Merger analysis have an additional threshold in place, besides turnover, that takes into account the market shares of the companies concerned. This type of threshold has proven to be particularly effective to capture many mergers in the digital sphere.

That market shares assessment, associated to a static scenario, is typically being complemented by an analysis of other features of the relevant market, such as its expanding or dynamic nature, barriers to entry and expansion, the competitive dynamics and business models as well as the regulatory context of which the practices or transactions are a part.

This contribution describes the main features in the identification and analysis of killer acquisitions in competition proceedings carried out by the CNMC, focusing on notification thresholds, theories of harm, counterfactual assessment, efficiencies and some initial conclusions.

A case-by-case and context-specific analysis for mergers, together with a specific consideration to the role that data may play is of particular relevance in digital markets.

Ukraine

The thresholds for notifying the Antimonopoly Committee of Ukraine (hereinafter – AMCU) on mergers are set forth by the Article 24 of the Law of Ukraine "On Protection of Economic Competition". In 2016 these thresholds were reviewed and increased.

These changes were made in order to reduce an administrative pressure on businesses, to avoid deterioration of AMCU resources on investigating transactions with minimal potential impact on competition and to create conditions for new investors to enter Ukrainian markets.

The AMCU is aware that some companies may purchase potential competitors before the acquisition reaches the threshold, seeing such businesses as a future threat. Which means, such acquisitions may have the ultimate goal of eliminating future competition. However, the thresholds that were in place until 2016 were too low and their increase was justified.

According to our opinion, killer acquisitions have an impact on future developments and innovations, and there are two options for development after the acquisition:

1. The Acquirer may eliminate a nascent competitor by gaining qualified personnel for his company and benefits from future innovations (especially in IT sector).

2. After the acquisition, the Acquirer may obtain the targeted company in order to support and to further develop it while using the innovations of the purchased firm.

As an example of such acquisition could serve the obtaining by Temania Enterprises Ltd. (Rozetka Group - online platform for retail trade of goods and services Rozetka.ua) of the EVO group, which owned the following online platforms: Prom.ua, Bigl.ua, Satu.kz, Tiu.ru, Deal.by, Kabanchik.ua, Crafta.ua, Shafa.ua.

In the course of case consideration, the AMCU analysed the presence of competition between online trading platforms and found that most online services (classifieds, global/international platforms, social networks, Google Shopping) can be considered as market competitors. However, most e-commerce market participants in recent years have combined several different formats and there are no clear and distinct boundaries that would allow to distinguish marketplace, online store, bulletin board and other similar services with high confidence. Besides that, the Rozetka Group announced that it does not plan to change business model of the EVO Group (objects of acquisition) in the next 3 years after the mergers, i.e. objects of acquisition will continue to provide services to promote goods (works, services) on the Internet through online platforms.

Based on the results of the case investigation the AMCU determined that this merger does not lead to monopolisation or significant restriction of competition, and by a decision of September 13, 2018, cleared the merger.