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

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This document reproduces a written contribution from Portugal submitted for Item 2 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control.htm>

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1. Introduction

1. Questions over the competitive effects of the acquisition of start-ups or ‘nascent’ firms by dominant incumbents have become a key part of the debate as to how effective merger control regimes have been in protecting competition during a period of increasing profits.
2. This contribution will focus mostly on the question concerning which merger thresholds are appropriate to address these issues, taking into account the AdC’s practical experience with market-share-based notification thresholds and putting forth some considerations regarding the potential theories of harm arising in the acquisition of nascent firms and how to identify the relevant counterfactual in such cases. At the same time, the focus is mainly with respect to the digital economy, which is the main source of recent discussions in merger control, due to the so-called “killer acquisitions” of start-ups by digital behemoths (Facebook, Amazon, Google/Alphabet, and others).

2. Do we need new merger thresholds?

2.1. The current merger control framework in Portugal

3. In Portugal, the current system of mandatory pre-notification of mergers is based on thresholds relying on market shares, companies’ turnover or a combination of both¹. The notification thresholds are as follows:

- Acquisition, creation or reinforcement of a market share of at least 50 per cent in the relevant national market; or,
- Acquisition, creation or reinforcement of a market share of at least 30 per cent but less than 50 per cent, in the relevant national market, provided that the individual turnover of at least two participating undertakings (registered in Portugal) in the preceding financial year exceeds €5 million; or,
- The aggregate turnover of the participating undertakings in Portugal in the preceding financial year is over €100 million, provided that the individual turnover in Portugal of at least two of the undertakings exceeds €5 million.

4. These thresholds aim at striking a balance between three main factors: (i) ensure that mergers that are more likely to raise competition concerns are under the AdC’s scrutiny, (ii) reduce administrative burdens by excluding transactions from merger review which are unlikely to result in significant negative effects on competition, and (iii) the need to take into account the specificities of the Portuguese economy, namely the small scale of many markets².

¹ See Article 37 of the Portuguese Competition Act (Law No. 19/2012, of 8th May).

² See contribution from Portugal to the OECD roundtable on “Jurisdiction Nexus in Merger Control Regimes” (2016) available at [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2016\)28/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2016)28/en/pdf).

2.2. Killer acquisitions: theories of harm and counterfactuals

5. Killer acquisitions³ may not be exclusive to the digital economy. However, serious concerns have been mostly raised with respect to digital markets (see e.g. the 2014 acquisition of the social network WhatsApp by Facebook).

6. In its July 2019 issues paper on “*Digital Ecosystems, Big Data and Algorithms*”⁴, the AdC made several considerations on pre-emptive mergers, killer acquisitions and data-driven mergers. These considerations, aligned with the recent work on the challenges faced by competition policy in the digital economy, provide an account on how to modify the existing theories of harm when dealing with mergers in the digital economy, in particular for cases where the acquirer operates a multi-sided platform and/or an ecosystem that benefits from strong positive network effects that can act as a barrier to entry – see also J. Crémer et al.⁵.

7. It is particularly important to notice that killer acquisitions can be motivated by the need the incumbent finds in “closing the entry point” to the market when faced with a new competitor, even if only potentially so, as the latter could induce consumers to abandon the ‘digital ecosystem’ dominated by the incumbent⁶. It may be a point of contention whether in a killer acquisition the innovation project developed by the acquired undertaking must be discontinued by the acquiring undertaking, or whether the latter will continue developing the project, as that strategy may eventually lead to products promising a significant stream of profits over time.

8. The construction of counterfactual scenarios (i.e., what would likely happen were the merger not take place vs. were the merger to go through) when conducting an *ex-ante* analysis of notified merger operations can be quite challenging, in particular when dealing with digital markets and innovation.

9. Nevertheless, the construction of such counterfactual scenarios can be carried out, for example, by using suitable models of partial equilibrium analysis, widely employed in industrial economics, provided the level of uncertainty over future demand for products that are being offered or may be offered by the merged entity, some of them involving innovative characteristics, is not far superior to what the collected data at the time of such analysis will provide the analyst. Such modelling would likely depend on the results of surveys conducted by experts on demand theory. It would allow for a better projection, or estimation, of future demand for such products, possibly exhibiting novel characteristics sought after by consumers⁷, to be satisfied if only partially, by one or more parties to the merger in the medium term. In this way, a highly uncertain guess work may be avoided and

³ Cunningham et al (2018) define “killer acquisitions” acquisitions of innovative targets by incumbent firms solely to discontinue the target’s innovation projects and preempt future competition. – see Cunningham, C., Ma, S. and F. Ederer (2018). “*Killer Acquisitions*,” Academy of Management Proceedings 1.

⁴ Available in ENG at: http://www.concorrencia.pt/vEN/Estudos_e_Publicacoes/Estudos_Economicos/Other/Pages/Digital-Ecosystems-Executive-Summary.aspx?lst=1

⁵ J. Crémer, Y-A de Montjoye, H. Schweitzer, Report for the EC “*Competition policy for the digital era*”, 2019.

⁶ See AdC’s March 2019 issues paper (op. cit.), para. 109, p. 25, and the discussion therein. See also M. Bourreau & A. De Streel (2019): “*Digital Conglomerates and EU Competition Policy*”, CERRE, March. By ‘digital ecosystem’ we mean a ‘digital conglomerate’ and a set of products being supplied by a platform to multiple sides.

⁷ This approach to consumer demand theory was pioneered by the paper by the 1966 paper by Kelvin Lancaster titled “*A New Approach to Consumer Theory*”, published in the Journal of Political Economy, Vol. 74, No. 2, pp. 132-157.

would provide a better assessment of future market shares, enabling a more rigorous *ex-ante* analysis of the likely impact of the notified merger on competition.

2.3. The current Portuguese merger control notification threshold criteria

10. Competition agencies have been faced with the increasing economic importance of the digital economy, including social networks as collectors of massive amounts of valuable personal data from their users. Mergers involving firms operating in the digital economy are likely to become more numerous as well as controversial, among other reasons because some of these mergers may not meet turnover-based notification thresholds given the low turnover of the merger target and despite involving a very high purchasing value⁸.

11. Contrary to other jurisdictions within the EU, the current notification criteria in Portugal consider both the turnover and market shares in the relevant (national) markets as proxies for the overall economic weight of the merger operation and its significance in the affected relevant markets. In this context, it seems less likely that the killer acquisitions will not be caught by a notification threshold criterion that includes market shares.

12. In 2015 the AdC received a notification of a proposed merger involving two digital platforms of classified ads (OLX and CustoJusto) which was eventually withdrawn during phase II of the investigation. While this was not necessarily a potential killer acquisition, this case constitutes a good example of the role of the notification threshold based on market shares in digital markets, as the turnover threshold would not have led to the notification of the transaction.

13. To conclude, the current merger notification thresholds in the Portuguese Competition Act appear suitable to address at least some of the issues raised by killer acquisitions.

3. Concluding remarks

14. In Portugal, the current system of mandatory pre-notification of mergers is based on market shares and companies turnover. These thresholds, in place since 2012, aim at striking a balance between three main factors: (i) ensure that mergers that are more likely to raise competition concerns are under the Portuguese Competition Authority's scrutiny, (ii) reduce administrative burdens by excluding transactions from merger review which are unlikely to result in significant negative effects on competition, and (iii) the need to take into account the specificities of the Portuguese economy, namely the small scale of many markets.

⁸ The 2014 acquisition of WhatsApp by Facebook (assessed by the EU Commission in Case M.7217) for US\$ 19 billion was one of the first mergers sparking controversy. This acquisition fell outside the thresholds of Article 1 of the EU Merger Regulation no. 139/2004, but was ultimately referred to the Commission pursuant to Article 4(5) thereof. Looking at the table below, coupled with the type of economic activities both firms have been engaged in, it is not surprising why Facebook regarded WhatsApp as such an interesting acquisition:

Annual revenue (US\$ 10 ⁶)	2012	2013	2014	2015	2016	2017	2018	2019	Annualized growth rate (2012-2014)	Annualized growth rate (2015-2019)
Facebook	3711	5089	12466	17928	27638	40653	55838	70697	83,28%	40,92%
WhatsApp	3,82	10,21	15,29	n.a.	n.a.	n.a.	n.a.	n.a.	200,01%	n.a.

Source: www.statista.com.

15. The AdC is fully aware of the challenges posed by mergers in the digital economy, notably those relating to the definition of relevant markets in digital ecosystems or conglomerates. In addition, the assessment of market power and the development of theories of harm better suited to deal with digital mergers also pose challenges. This is true for example in situations when multi-sided platforms play a significant role and where incumbent platforms enjoy economies of scale and scope, as well as sizeable network effects.

16. In any event, using thresholds based on market shares may, to some extent, mitigate the issues related to killer acquisitions, by increasing the likelihood that at least some of these mergers will meet the notification thresholds, including in the digital markets, as shown by the AdC practical experience regarding such markets.