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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Global Forum on Competition

MERGER CONTROL IN DYNAMIC MARKETS

- Executive Summary -

6 December 2019

This executive summary by the OECD Secretariat contains the key findings from the discussion held during Session III of the 18th meeting of the Global Forum on Competition on 5-6 December 2019.

More documents related to this discussion can be found at: oe.cd/mcdym.

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Executive Summary

By the Secretariat[*]

On 6 December 2019, the Global Forum on Competition held a discussion on merger control in dynamic markets.

Considering the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by delegates and experts during the roundtable and breakout sessions, the following key points emerged:

(1) Competition authorities have been increasingly challenged by the complex and rapidly changing market dynamics observed in some economic sectors, where tensions arise in merger control, between the time horizon considered by agencies in their assessment of mergers, which is usually fairly short, and the inherent dynamism of the sector.

Merger control in dynamic markets is challenging. Enforcement decisions depend on an effects-based analysis of the likely future effects of the merger. As these sectors are typically characterised by high entry and exit rates, as well as innovation that continuously disrupts existing business models, it is increasingly harder for authorities to predict how markets will evolve in order to support merger decisions.

Traditional merger assessment tools tend to focus on the recent-past or current state of the market to assess the future effects of the merger. In dynamic markets, however, short-term effects may not be the best indicators of how dynamic markets will evolve post-merger. In dynamic markets such as high-technology, consumer services and online retail markets, firms compete on factors such as innovation and new product and service development. In looking beyond the traditional static structure-conduct-performance (SCP) framework, considering the dynamic effects of mergers on market structure, business conduct and market performance over a long timeframe can reduce the risk of enforcement errors, including the risk of false positives and false negatives.

(2) The merger review process can be adapted to identify and account for potential economic effects of dynamic mergers over a longer timeframe.

Merger assessment tools are flexible and can be adapted to assess competitive effects of dynamic mergers. If the relevant time frame is extended, the long term interests of consumers may be better protected. However, legal uncertainty can arise if the review process is not sufficiently predictable and evidence-based but authorities can develop guidance and best practices to help address this.

[*] This executive summary does not necessarily represent the consensus view of the Competition Committee. It does however identify key points from the discussion at the Roundtable on Merger Control in Dynamic Markets, including the views of the experts, the delegates' oral and written contributions and the background note prepared by the OECD Secretariat.

Some practical measures to assess dynamic effects include analysing the substitutability of products and capabilities, looking at the evolution of market shares over time, evaluating barriers to entry and exit in a market, and adapting standard pricing pressure tests to quantify competitive effects on innovation. Market definition is less important in dynamic markets.

The long-term impact of mergers on consumer welfare is ambiguous and must be assessed on a case-by-case basis. Mergers may lessen competition on both static and dynamic dimensions, but they may also produce short and long-term efficiency effects. The risk of net consumer harm is greater for horizontal mergers that combine close substitutes with substantial entry barriers, while vertical and conglomerate mergers rarely pose competitive concerns.

(3) Dynamic efficiency claims deserve special consideration, as they may be more likely to bring benefits to consumers than static efficiencies

Mergers that raise immediate competitive concerns may still have a positive net effect on consumer and total welfare in the long term, as long as efficiency gains are sufficiently large to compensate for any temporary loss of competition. In addition to static efficiencies, in dynamic markets, mergers may enhance competition through dynamic efficiencies. Efficiency gains can however be difficult to quantify and prove, for example, due to indirect benefits they bring to consumers. Important dynamic efficiency effects of mergers include innovation incentives such as economies of scale in R&D and appropriation of innovation spillovers and profitable exit strategies such as the failing firm defence and entrepreneurial exit. Efficiencies should be merger specific, verifiable and passed on to consumers.

(4) Structural remedies can address dynamic effects that lead to both price and non-price potential harm, including harm to innovation.

Authorities can use both structural and behavioural remedies to address competitive concerns of mergers, without compromising important efficiency effects. Formulating appropriate remedies in dynamic markets remains challenging. In a dynamic market, the evolution of the market is highly uncertain and so more flexible remedies may be required. Structural remedies are preferred and may address dynamic anti-competitive effects of horizontal mergers without compromising dynamic efficiencies. By requiring the merging firms to divest overlapping innovation resources without close substitutes, structural remedies are sometimes less restrictive than a full prohibition decision. Whenever the dynamic effects of the merger are uncertain, authorities might consider designing flexible remedies where execution is conditional on the realisation of future market events. Authorities may need to work closely with other jurisdictions and sector regulators to co-ordinate and design appropriate remedies.