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COMPETITION COMMITTEE

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Global Forum on Competition

MERGER CONTROL IN DYNAMIC MARKETS

-- Session III -- Call for country contributions

This document is a call for country contributions for Session III of the Global Forum on Competition to be held on 5-6 December 2019. GFC participants are invited to submit their contributions by **31 October 2019** at the latest.

More documentation related to this discussion can be found at: oe.cd/2Fu.

JT03450095

TO ALL GLOBAL FORUM PARTICIPANTS

RE: Roundtable on "Merger Control in Dynamic Markets"

18th Global Forum on Competition (5 and 6 December 2019)

Dear GFC participant,

On 6 December 2019, the OECD Global Forum on Competition will hold a roundtable on ***Merger Control in Dynamic Markets***. I am writing to you in order to provide you with some information about the topic and organisation of the roundtable, as well as to invite you to submit a **written contribution** describing the experience of your authority in dealing with dynamic aspects of mergers.

The modern competition dynamics observed in rapidly-evolving sectors, such as services and high-technology, have been increasingly challenging the work of competition authorities all around the world. Unlike traditional industries that suffer little changes over time, including the extraction of natural resources or production of raw materials, more modern sectors are characterised by higher entry and exit rates, as well as continuous processes of innovation that systematically disrupt existing business models and create entirely new markets. In such a dynamic environment, it is very difficult to make predictions about how markets will evolve in order to support regulatory interventions and enforcement decisions, especially when such actions require a case-by-case analysis of the facts at hand.

One of the enforcement areas that has been greatly challenged by rapid market dynamics is precisely merger review, where enforcement decisions fundamentally depend on an effects-based analysis of the likely future effects of the merger. Yet, many of the merger review tools currently available tend to rely on a relatively static view of competition, often focusing on the recent-past or current state of the market, instead of forwardly looking at how the market might evolve post-merger. Examples of this static approach include some possible overuse of static measures of concentration by some authorities (such as market shares), a frequent reluctance in accepting efficiency claims that are not immediately verifiable in the short-run, or even an over reliance on behavioural remedies that do not adapt to changes in market conditions over time.

In light of the increasingly recognised importance of dynamic competition – that is, competition as an evolutionary process – in a growing number of economic sectors, a fundamental question arises: **what is the relevant timeframe of merger review?** In other words, should competition authorities assess the likely effects that a merger will have in one year, five years, or in a ten year time period? More importantly, is the relevant timeframe of analysis the same for all markets and, if not, what factors determine how much authorities should look into the future? When addressing these questions, it is important to consider that while defining a longer timeframe may improve the economic relevance of merger analysis, it also may also increase enforcement unpredictability and legal uncertainty due to the inherent difficulties of predicting future effects.

Once the relevant timeframe of analysis is defined, the question that naturally follows is **how to adapt the review process to assess a merger in a dynamic market** during the specified time period. This may require authorities to go through the different stages of merger review and consider whether the tools currently used in practice need to be adapted or complemented with more modern tools. Again, when determining the best approach to deal with dynamic effects of mergers, one should consider that flexible tools and discretionary powers can deal better with rapidly-changing market conditions, but excessive discretion can also lead to an inefficient waste of resources and unjustified enforcement decisions.

In order to address these important challenges and to discuss the right balance so much needed to deal with dynamic markets, I propose structuring the roundtable in the following way. Firstly, we will have a three-hour plenary session about the timeframe of analysis and the assessment of dynamic effects within merger review. This session will benefit from presentations by expert speakers who will share their own views, followed by an open discussion between panellists and all delegates who wish to spontaneously intervene. After the plenary session, we will hold three parallel breakout sessions where delegates will have the opportunity to make a short presentation or intervention about the practical challenges of considering dynamic effects in different stages of merger review: (1) assessment of competition; (2) analysis of efficiency claims; and (3) design of remedies.

- **Breakout Session 1** will focus on the **competitive assessment of mergers** in a dynamic environment, discussing the usefulness and limitations of traditional tools such as market definition, measures of concentration and price pressure indicators. This session will also debate additional tools and information that might be relevant to assess potential competition, as well as to evaluate dynamic effects of the merger in the relevant market or in future markets. Moreover, this discussion should consider difficulties in adapting these tools to the relevant timeframe of the analysis.
- **Breakout Session 2** will discuss **efficiency claims** in dynamic markets, namely those that take the form of product and process innovations, long-term investment, future entry or even the creation of new markets. A fundamental concern in this session is to determine the conditions under which such efficiency claims should be accepted by authorities, particularly given the difficulties of evaluating whether a non-immediate efficiency effect is verifiable. Additional important considerations include how to quantify dynamic efficiencies and how to weigh them against shorter-term effects on competition.
- **Breakout Session 3** will be devoted to the design of **remedies** that may help addressing competitive concerns without necessarily compromising dynamic efficiency gains. Important topics for debate within this session include the identification of the types of remedies that are more effective in addressing competitive concerns in dynamic markets; the definition of the appropriate time-length for the remedies; and the consideration of introducing review clauses and other mechanisms, in order to allow the remedies to adapt to changes in market conditions.

I strongly encourage you to submit a written contribution that provides examples of merger investigations, ex-post assessments of decisions and other studies such as sector inquires that are particularly illustrative of the challenges of reviewing mergers in dynamic markets, or which provide success stories and lessons learned. In order to assist you with the preparation of your contribution I refer you to the **Secretariat Issues Note** on the subject which will be circulated on O.N.E in the coming months, to the **suggested bibliography** included at the end of this letter and to the **list of questions** included in the Annex. The list in the Annex is not exhaustive and you are encouraged to raise and address other issues in your submissions and during the discussion. I also strongly encourage you to discuss and comment on your relevant enforcement experience in this area.

The OECD webpage on "Merger Control in Dynamic Markets" (long URL: http://www.oecd.org/competition/globalforum/merger-control-in-dynamic-markets.htm and short URL: oe.cd/2Fu), will be the primary vehicle for conveying documentation and related links on this subject. It will become available on the main roundtables page at www.oecd.org/competition/roundtables. Unless explicitly requested not to do so, the Secretariat will reproduce all written contributions on the site.

I would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. I invite you to submit such a short summary (no more than one page) together with your contribution. Alternatively the Secretariat will produce one, but given the time constraints you might not be in a position to check it before distribution on O.N.E.

In order to ensure an effective preparation of the breakout sessions, I would be grateful if you could inform the Secretariat by **Friday 13 September 2019** at the latest if (1) you are planning to make a written contribution on the topic and (2) whether you would like to make a presentation in one of the breakout sessions, particularly focusing on your case experience. Written submissions are due by **Thursday 31 October 2019** and failure to meet this deadline may result in your contribution not being distributed to delegates via O.N.E. in a timely fashion in advance of the meeting.

All communications regarding the documentation for this roundtable should be sent to Ms Angelique Servin (Email: Angelique.SERVIN@oecd.org). Please address all substantive queries relating to this discussion to Mr. Pedro Gonzaga (Email: Pedro.GONZAGA@oecd.org) and Ms. Lynn Robertson (Email: Lynn.ROBERTSON@oecd.org).

ANNEX I - Suggested Questions for Consideration in Country Submissions Session on Merger Control in Dynamic Markets

This Annex includes a list of suggested questions for consideration in preparing your submission. A submission does not need to cover every listed question. Based on your experience, you may wish to address other issues that are not listed here. You should also discuss relevant cases where appropriate to illustrate your answers. Please prepare a submission as an integrated essay rather than a list of answers to questions.

Breakout Session 1: Competitive Assessment of Mergers in Dynamic Markets

1. Do you consider dynamic effects when assessing the level of competition in a market (e.g. future entry and exit, product and process innovations, creation of new markets, possibility that a merger triggers other mergers in the future, etc.)?

2. What tools do you use to assess the level of competition (e.g. market definition, concentration, price pressure indexes)? What kind of difficulties do you face when assessing competitive effects in fast-evolving markets, and how do you overcome these challenges?

3. Do you apply different approaches according to the dynamic nature of the market? In what industries do you consider more likely to find dynamic markets? How do you identify and diagnose that a market is dynamic?

4. During your investigation, do you consider competitive pressure posed by potential competition? If so, how fast would a potential competitor have to enter the market for you to consider it as a relevant source of competitive pressure? What additional factors (e.g. entry costs, barriers to expansion, switching costs, etc.) do you consider in you assessment?

5. In what timeframe do you analyse the competitive effects of the merger (e.g. two years, five years, ten years, etc.)? Do you shorten or extend this timeframe depending on the market dynamics?

Breakout Session 2: Efficiency Claims in Dynamic Markets

1. Does your authority consider dynamic efficiencies in the assessment of a merger? If yes, what are typical dynamic efficiency claims that you are likely to accept (e.g. greater appropriation of product and process innovations, cost savings in R&D, promotion of market entry, long-term synergies, etc.)?

2. What kind of challenges do you usually face when assessing dynamic efficiencies (e.g. difficulties in assessing whether they are verifiable, merger-specific, etc.)? Has your agency rejected such efficiency claims? If yes, on what ground did you refuse them?

3. Do you quantify dynamic efficiencies or do you use a more qualitative analysis? How do you weigh dynamic efficiencies against the risk of shorter-term harm on competition?

Breakout Session 3: Remedies in Dynamic Markets

1. What kind of remedies do you impose if a merger is likely to impede dynamic competition in rapidly-changing markets? Could you please also describe what challenges, if any, arise when designing remedies in an unpredictable or uncertain environment?

2. Do you have any experience designing remedies that try to accommodate dynamic efficiencies while addressing competitive concerns in the short or medium term? What principles did you apply in the design of such remedies?

3. In case of behavioural remedies, for what period do you impose them? Do you impose different or shorter time periods for remedies in highly dynamic markets?

4. Do you usually introduce revision clauses when designing remedies? If yes, please describe in what circumstances you include revisions. After how many years do you conduct the first revision of the imposed remedies?

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