Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2019)34

Unclassified **English - Or. English**

25 November 2019

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

MERGER CONTROL IN DYNAMIC MARKETS

Summaries of contributions

-- Session III --

5-6 December 2019

This document reproduces summaries of contributions submitted for Session III at the 18th Global Forum on Competition on 5-6 December 2019.

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

JT03455286

Table of Contents

Merger control in dynamic markets **3**
Brazil **4**
Colombia **5**
Chile (FNE) **6**
Egypt **8**
India **9**
Japan **10**
Kenya **11**
Korea **12**
Moldova **13**
Romania **14**
Russian Federation **15**
South Africa **16**
Chinese Taipei **17**
United States **18**

Merger control in dynamic markets

-- Summaries of contributions --

Abstract

This document contains summaries of the various written contributions received for the discussion on "Merger control in dynamic markets" held during the 18th meeting of the Global Forum on Competition in Paris, France (5-6 December 2019, Session III). 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 *.

Brazil

For Cade, one of the challenges of antitrust enforcement in highly innovative markets consists in estimating the long-run effects of antitrust intervention. Particularly, Cade considers important to take into account the extent to which a company will continue having incentives to innovate after the approval of a merger or acquisition.

In the review of dynamic markets, Cade may not rely solely on market share to evaluate the competition effects of a horizontal merger. Cade's Horizontal Merger Guidelines mention as complementary and alternative methods of examination counterfactual analysis, simulations and other factors such as elimination of maverick companies and two-sided markets. Cade's Guidelines also state that the Brazilian antitrust authority may loosen the use of the Herfindahl-Hirschman Index (HHI) when one of the parties is a maverick type of company or presents a disruptive strategy; or when the merger involves a potential or recent entrant to the market involved in the transaction. The Itaú/XP transaction described in this article involved both conditions.

Factors such as maverick role and the fact that the partially acquired company acted as a two-sided platform, with direct and indirect network effects were considered during the analysis of how the merger could affect competition. In that case, Cade also considered XP's dynamic behavior throughout the past years instead of the static picture at the time of the filing, since it had been presenting high growth rates, significantly higher than the market in general, creating a perspective of future market considerably higher than it had at the time of the filing.

In this case, Cade dismissed the use of the HHI as a criterion of causal link between the transaction and possibility of market power exercise, since the use of this index was limited to static aspects of the market at the moment the market share information are collected.

Colombia

The purpose of this contribution is to show how the Superintendence of Industry and Commerce (hereinafter "SIC") has reviewed merger cases that can be considered under the logic of a dynamic market. Dynamic markets are characterized by rapid innovation processes that increase competitive pressures. Thus, the speed of these changes certainly affect market conditions and can produce new market dynamics involving mergers or splits. In this sense, this document presents five experiences of the activity of the SIC.

Chile (FNE)

Merger control entails an economic analysis of the likely effects of the transaction in a relevant market or segment, which is inherently prospective. Such assessment poses challenges to antitrust enforcers, in particular when the transaction is not *brick-and-mortar* but involves dynamic markets. In such cases, while the traditional tools and tests might serve as a useful first indicator of antitrust concerns, it is therefore necessary to rely on additional information on market conditions criteria –such as incentives to innovate and constraints posed by potential competition– in order to assess the real effects of the merger in evolving markets[1]. Those challenges are particularly relevant when the merger involves a 'small economy'[2], such as Chile[3-4].

Chile has a mandatory merger control regime in force since July, 2017 whereby the merging parties must notify the concentration to the antitrust enforcer (*Fiscalía Nacional Económica* or "**FNE**"). A filing is mandatory if both the transaction is a 'merger transaction' (according to one of the hypotheses of cease of independence provided in the local competition law, Law Decree No. 211 or "**DL 211**")[5] and exceeds relevant turnover

[1] Gal, M. (2013), Merger Policy for Small and Micro Jurisdictions, More Pros and Cons of Merger Policy, Swedish Competition Authority, p. 84. "[…] When current market shares are high, as is the case in many mergers in small economies, such indicators might easily lead to a preliminary conclusion that the merger would be harmful to the economy. Yet, especially in small economies a dynamic analysis of relevant markets and especially of potential competition is needed in order to realize the real effects of the merger on one's domestic markets". Available at: http://www.konkurrensverket.se/globalassets/english/research/more-pros-and-cons-of-merger-control.pdf

[2] Either due to the location of parties to the transaction or to the place where the merger poses its effects, due to the 'effects doctrine'.

[3] See Bauducco, S & Caprioli, F. (2011), Optimal Fiscal Policy in a Small Open Economy with Limited Commitment, Central Bank of Chile Working Papers Nº 644, available at: http://www.bcentral.cl/web/guest/-/optimal-fiscal-policy-in-a-small-open-economy-with-limited-commitme-2; Cerda, R., Silva-Uribe, A. & Valente, J.T. (2016) Economic Uncertainty Impact in a Small Open Economy: The Case of Chile (No.25, pp. 1-28), Clapes UC. Available at https://clapesuc.cl/assets/uploads/2016/10/15-02-17-iec-eu_chile_paper_edited281116.pdf.

[4] From a competition policy perspective, Chile can be qualified as a small economy, since it generally shares its main elements being an independent economy, with small and concentrated markets. Following Michael S. Gal, a small economy can be defined by "the dispersion of its population over a comparatively large geographic area […]; monopolistic or oligopolistic structures in most of their industries" and "high entry barriers and below-MES (minimum efficient scale) levels of production.", in Gal, M. (2003), Competition Policy for small market economies. Harvard University Press, p.2, 14.

[5] Chile's competition rules are set out in Statutory Decree (Decreto con Fuerza de Ley) No.1 laying down the consolidated, co-ordinated and standardized text of Decree Law (Decreto Ley) No. 211 of 1973, published in the Official Gazette of 7 March 2005, amended by Law No. 20.945 of 30 August 2016. Article 47º of DL 211 provides four hypotheses of cease of independence: "Any fact, act or convention, or a set of them, through which two or more undertakings that are not part of the same business group and being previously independent from each other, cease their independence in any scope of their activities, through any of the following means: a) Merging, regardless the corporate

thresholds[6]. The FNE can decide whether to clear the merger without remedies, accept commitments from the parties, or also to prohibit transactions that are able to 'substantially lessen competition', which is the legal test included in the law[7].

Within this new mandatory merger control regime, the FNE has faced relevant challenges reviewing concentrations with effects in Chile involving dynamic markets, either local or global. First, from a procedural standpoint, regarding the possibility to review mergers and acquisitions in which the target does not surpass relevant turnover thresholds. Second, from a substantive perspective, concerning the relevant time frame of intervention, considering when –and whether– to intervene in evolving markets through merger remedies or prohibitions, and applying the relevant criteria to better assess the likely effects of a merger and flexibility in the applicable tools. Third, regarding multijurisdictional transactions, challenges have been raised considering that reviewing jurisdictions may reach opposite rulings bearing the local context and the assessment of global dynamic considerations and tools.

organization of the merging entities or of the merged entity; b) The direct or indirect acquisition of rights that allow to individually or jointly exert a decisive influence or control over other party's management; c) Through the association under any manner to establish an independent undertaking, different from them, that carries out its duties in a lasting basis; and d) The acquisition, by one or more and under any title, of the control over the other party's assets".

[6] The thresholds are provided in Exempted Resolution (Resolución Exenta) No. 157, dated 25 March, 2019, issued by the FNE.

[7] Such assessment is executed in accordance to the following procedure: (i) Once the notification is complete, the FNE opens a thirty-days investigation (Phase I) to assess the transaction, in which the FNE can clear the merger without conditions, approve it subject to the commitments offered by the parties or extend the investigation for a ninety-days period (Phase II). After that period, the FNE can approve the merger, with or without commitments or, it can block the transaction if it substantially lessens competition. If the merger is blocked, the parties can appeal the decision to the Competition Tribunal (Tribunal de Defensa de la Libre Competencia or "**TDLC**").

Egypt

When assessing a transaction in the form of a merger or acquisition, the Egyptian Competition Authority ("ECA") uses a combination of static and dynamic tools in order to capture the current dynamics of the market and predict how these will evolve. This guarantees ECA's preventive role by ensuring that mergers and acquisitions do not cause irreversible harm on competition, such as the creation of a non-contestable dominant position.

This is especially true in the digital economy – a rapidly-evolving sector contingent on the emergence of high-technology – which encompasses online platforms and e-commerce alternatives. To reach an ex-ante decision regarding a merger or acquisition taking place on the digital economy, ECA takes into account the features of this nascent industry and its importance in Egypt, and uses its jurisdiction and general policy to analyze the transaction through a combination of static and dynamic tools.

ECA may find it necessary to intervene, under Articles 6, 7, and/or 8 of the Egyptian Competition Law ("ECL"), in cases where a transaction – in the form of a merger or acquisition – may lead to irreversible harm on the competitive landscape, mainly through the creation of a non-contestable dominant position. ECA finds that it may be exceptionally necessary to intervene in transactions that may result in the creation of a concentration on growing, developing dynamic sectors, as harm as such sectors may be irreversible due to their nascent nature.

The main parameters ECA employs in order to conduct a thorough analysis that is static as well as dynamic are: product substitutability, market concentration, potential entry, and efficiencies, all in an appropriate timeframe.

In some cases, ECA may find remedies proposed by parties to a transaction sufficient to alleviate the potential harm on competition. When applying to transactions taking place on dynamic markets, ECA is cautious not to manipulate or slow down the natural dynamics of such markets and that it does not accept remedies that regulate a monopoly rather than promote competition. Proposed commitments must be verifiable, transaction-specific and passed on to consumers. Moreover, given the dynamic nature of the markets in question, any commitments must be assessed and updated periodically.

ECA aims to capture market dynamics by employing a combination of static and dynamic tools, ensuring that its review of mergers and acquisitions in dynamic digital markets is contemporary and up-to-date with the new realities of the digital world. This is ultimately, ECA's raison-d'être: protecting the freedom of competition – which, in recent times, necessitates a thorough understanding of nascent, disruptive, and dynamic markets.

India

The Competition Act, 2002 (**Act**) provides for *ex ante* regulation of 'combinations' in India. The term 'combination' has been defined as mergers, acquisitions or amalgamations of enterprises that meet the prescribed financial thresholds. A combination shall not take effect for a period of two-hundred and ten (210) days from the date of notification or earlier approval by the Competition Commission of India (**Commission**).

In each case notified, the Commission considers the relevant factors including innovation, efficiencies, likely elimination of vigorous competition and vertical integration. The Commission is further guided by the preamble of the Act, which states that the Commission has been established keeping in view the economic development of the country.

In the current information age, many markets, especially in the digital space, are dynamic and are evolving rapidly. Therefore, at the time of undertaking competition assessment of combinations, the Commission factors in the dynamic / innovation nature of Information Technology, Telecommunications, e-commerce, platform markets, Pharmaceuticals, agriculture technology *etc*. Nevertheless, the broad framework for assessment of mergers concerning these markets would broadly remain same, in addition, the potential competitive constraints posed by evolution of new technologies are factored in. On the aspect of timeframe, to assess the effects of merger in a market though there is no fixed metric, this timeframe in general is relatively shorter in the case of dynamic markets. Given that dynamic / innovation efficiencies require trade-off between better investment in technology and higher costs in short-run, qualitative assessment of this trade-off involves studying development of concerned market for past few years and also, predicting evolution of the market in the near future. Needless to say that the Commission is faced with an arduous task on judging the suitability of the remedy to be imposed, as generally, behavioural remedies are imposed in such dynamic / innovation combinations, if required.

Japan

Recently, it has become necessary to pay much more attention to how market environments would change or what kind of developments could most possibly occur in the markets in the near future, when competition authorities conduct merger reviews. Particularly in the digital markets where a large number of new products and services are emerging one after another, it is necessary to take technological developments into account when defining the relevant markets and evaluating the factors concerned in the merger reviews.

In this regard, the Japan Fair Trade Commission has effectively conducted merger reviews, considering various dynamic factors in the markets such as rapid developments in technology and competitive pressures from potential competitors, based on the "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination", and will continue to do so to ensure competition in the markets.

Kenya

The Competition Authority of Kenya ('the Authority') has powers to safeguard competition by among others regulating market structure which involves analysis of mergers. In Kenya, the Authority considers dynamic effects when assessing the level of competition in a market, for example future entry and exit. The Authority due to the demand to develop a dynamic competition perspective away from the traditional market definition updated its Merger Guidelines in July 2019 by incorporating adaptive regulations that promote innovation.

In addition, the Authority remains open to the consideration of emerging trends in market definition based on constantly evolving dynamics associated with; digital markets, big data, multi-sided platforms, non-price effects of conduct, arrangements or mergers (such as innovation, variety and quality) and/or other market developments.

The Authority has handled several transactions regarding digital markets which have pointed to an inadequacy in the Law and guidelines in entirety in dealing with cases of the digital nature. These cases have involved markets such as general advertising, classified advertising, job advertising, banner advertising, taxi-hailing apps and online payment platforms, among others.

In conclusion, competition agencies while addressing dynamic markets, need to consider how to best protect citizens, ensure fair markets and enforce regulations while allowing new technologies and business to thrive. This requires considering the implementation of adaptive regulation; regulatory sandboxes; outcome-based regulation; risk-weighted regulation; and collaborative regulation.

Korea

The M&A review of the Korea Fair Trade Commission (hereinafter referred to as the "KFTC") is conducted in accordance with Article 7 of the Monopoly Regulation and Fair Trade Act (hereinafter referred to as the "MRFTA") and the Merger Review Guidelines (hereinafter referred to as the "Merger Guidelines"). Article 7 of the MRFTA stipulates that M&As shall be prohibited if they substantially lessen competition, and the Merger Guidelines provide detailed standards for review.

The Merger Guidelines have two functions in general. First, the Merger Guidelines provide detailed criteria to determine whether a certain "M&A substantially restricts competition" under Article 7 of the MRFTA. In the case of horizontal mergers, for example, the Merger Guidelines provide specific factors to be considered for assessing anti-competitive effects including unilateral effect, coordinated effect and an increase in buyer's power, etc. Referring to the Merger Guidelines, case handlers can find grounds for evaluating competitive concerns, and merging parties can prepare their rationales for defense and predict the result of the review.

Second, the Merger Guidelines provide grounds for closing investigation early in the process when a merger does not have any competitive concern. The KFTC's Merger Guidelines describe six cases when the mergers can be examined under the simplified review mechanism. Moreover, even if a merger in question does not fall under the six cases, a merger investigation can still be terminated in the early stage like the simplified review when the merger belongs to the safe harbor based on the Herfindahl-Hirschman Index. This plays an important role in practice, considering that the KFTC has to deal with 600~700 merger cases a year with its limited manpower.

While dynamic and innovation-based industries such as semiconductor, IT devices, etc. have had great impact on the Korean economy, the Merger Guidelines did not have criteria specifically to assess the dynamic effects of mergers influencing on innovation competition. Without such criteria in place, competition authorities may have difficulties in making thorough investigation on anti-competitive mergers or closing more expeditiously on mergers of little competition concerns.

In order to address this problem, the KFTC amended the Merger Guidelines in February 2019 to add new criteria for assessing dynamic effects of mergers that can stifle innovation competition. The KFTC drafted the amendments based on the review on the merger guidelines of the US and the EU, and the related merger cases reviewed at home and abroad. This report covers the changes made to the Merger Guidelines and a merger case reviewed the KFTC to discuss the issues on how to assess competitive effects in dynamic markets.

Moldova

The last decade has seen a growing need for innovation in many industries worldwide. Innovation certainly makes economies more dynamic and competitive, but it can pose challenges for legislative and regulatory bodies trying to keep pace with rapidly evolving businesses. This could be a short description of the current status of dynamic competition in dynamic markets.

High technology market and services market are the sectors where competition dynamics is mostly observed. Experience of Competition Council of Republic of Moldova is focused mostly on mergers in retail sector, being one of the most competitive industries in the country, with players acquiring companies or shares in order to develop the business and to fortify their position on the relevant markets. A rough estimation is that over 50% of the mergers take place in this sector. Even if not included in the shortlist as being a dynamic market, we consider retail sector as being a dynamic market, as well, taking into consideration the need of continuous improvement and adjustment to the market demands.

In the ICT sector, Competition Council of Republic of Moldova assessed a few mergers during the last year, showing us that it is a market with high investment and development interest. About 25% of transactions take place on this field. This being taken into consideration, also, taking into account the current development of the Moldova IT Park in Chisinau.

The communication sector, part of the ICT industry is to be taken into consideration as being a dynamic market. Nowadays, smartphones being component part of our daily routine, the need to provide innovative and qualitative services and products to the costumers is the main challenge. One of the main challenge's authority has while assessing transaction on the markets is to determine the future impact of the merger on the market and the evolution of the business. Also, the market on which the merger is planned to produce effects was challenging to visualize, as customer demands are evolving, and the real need of the market is not very predictable.

The ICT industry in Republic of Moldova is rapidly evolving, being one of the most dynamic markets, with players from the country and external companies as well. Competition is high; nevertheless, development opportunities are present on the market. The dynamism of the sector, beside the entry interest and low barriers is proved also by the figures showing the industries positive contribution for GDP. For the last year, retail sector contributed with more then 12% at forming the GDP. ICT sector is also an important stakeholder, contributing with more then 5% at GDP total value. Almost one fifth of the total GDP is the impact value of these 2 dynamic and investment attractive industries. Concluding, our assumption is that ex-post analysis of the mergers are one of the best solutions to monitor the impact on the market and the post-merger effects, while the assessment process is yet challenging, compared with traditional industries.

Romania

In merger control, the applicable national rules are in line to the European merger control framework. Romanian Competition Council (RCC) is active in all European Competition Network structures and always takes into consideration EC decisions for relevant market definitions, market power assessment in various fields, and also for accepting and evaluating commitments in merger cases.

In today's economy, merger cases involving big international undertakings rarely involve just horizontal issues. When RCC assesses a merger, it always pays attention to the vertical component, as well as to the merger portfolio and the conglomerate effects.

With the rapid advancement of technology in recent years, the online environment has become an essential sector in the economy, both at national and regional / global levels. Online platforms improve consumers' access to products and services, help new businesses enter the market and existing ones to develop, as the development of internet infrastructure has allowed, in the economic ensemble, the accelerated expansion of online businesses, both in terms of supply and demand, and also geographically.

Understanding the competitive mechanisms in the digital market, how online businesses work, is essential for competition authorities to prevent or limit possible negative effects of anti-competitive facts.

In this particular sector, RCC's more noticeable merger case, thoroughly described in current submission, concerned a transaction approved with commitments (RCC analyzed the new sales channel developments and how they are competing or/and how they are substitutable).

Russian Federation

Recently there has been a rapid increase in the number and scale of merger transactions all over the world, including Russia, the effects of which influence global markets.

In Russia, the creation and reorganization of commercial organizations, inter alia mergers and acquisitions, is regulated by Article 27 of the Federal Law of July 26, 2016 No. 135-FZ "On Protection of Competition" (hereinafter – Law on Protection of Competition), which also sets which transactions require prior consent of the antimonopoly authority.

Provisions on mergers are also included in other legal documents of Russian legislation. For example, according to Chapter 4 of the Civil Code of the Russian Federation, in circumstances defined by law, the reorganization of the legal entities in the form of the merger, affiliation or transformation shall be effected only upon the consent of the authorized state bodies (Paragraph 3 Article 57 of the Civil Code of the Russian Federation). In case of the merger of the legal entities, the rights and duties of every one of them shall pass to the newly emerged legal entity in conformity with the transfer deed. (Clause 1 Article 58 of the Civil Code of the Russian Federation).

Evaluation of mergers in dynamic markets is complex and multifactorial. At the same time, the current assessment of such mergers, as well as their prospective assessment (in sight of 5-10 years) may be hampered by the lack of the necessary information available to the antimonopoly body on prospective technologies and business practices of the merger parties based on these technologies.

At present, the FAS Russia does not have enough effective tools to ensure control of compliance with remedies by foreign economic entities, which is a necessary element of a balanced system of protection of competition in dynamic markets in the digital economy, which is less affected by state borders.

These conclusions served as one of the bases for development of the "Fifth Antimonopoly Package" drafted by the FAS Russia and aimed at adapting the Russian antimonopoly legislation to the changes that the economy undergoes in the process of digitalization and innovative development.

South Africa

The submission sets out the Competition Commission of South Africa's ("CCSA") response to the call by the Organisation of Economic Cooperation and Development ("OECD") for written submissions to inform the Roundtable discussion on investigations into Merger Control in Dynamic Markets to be held on the 5-6th December 2019.

The Roundtable will look at issues arising in merger investigations in dynamic markets, particularly given the increasingly recognised importance of dynamic competition in a growing number of economic sectors.

The South Africa Competition Authorities take into account dynamic effects when assessing the level of competition in a market, by considering the dynamic characteristics of the market, including growth, innovation and product differentiation when determining whether a merger will likely result in a substantial prevention or lessening of competition.

In particular, the submission pays focus on the elements relating to CCSA's experience in: (i) in the assessment of mergers in dynamic environment, (ii) the efficiency claims raised in dynamic markets, and (iii) the design of remedies that address competitive concerns without compromising dynamic efficiency gains.

Several cases will be discussed, with particular attention to merger cases involved in sectors such as some services markets, high-technology sectors and most modern digital markets. Such sectors experience high barriers to entry and exit, continuous process of product innovation typified by huge capital budgets on research and development ("R&D"), which processes of innovation continuously disrupt existing business models and creates entirely new markets.

Chinese Taipei

This paper presents the existing merger regime in Chinese Taipei, and highlights important considerations and certain approaches to competition assessment when the Fair Trade Commission (hereinafter referred to as the "FTC") reviews merger notifications in fast-changing industries. Several case examples in this paper underline the impact of different market conditions on the FTC's decisions.

The "overall economic benefit" and "disadvantages resulting from competition restraint" are the FTC's assessment criteria in reviewing merger notifications. The Merger Guidelines provide details on a number of considerations, including the FTC's evaluation of anti-competitive effects and overall economic interests. Nevertheless, the FTC may take different approaches in its competition assessments to address the characteristics of industries in question, particularly in fast-changing industries.

United States

In the United States, courts and antitrust enforcers regularly confront mergers in dynamic industries, such as those involving high-technology goods and services. Such mergers are reviewed according to the same basic framework that guides merger analysis in any other industry. Section 7 of the Clayton Act prohibits mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly." Under this standard, the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (together, the Agencies) seek not only to stop imminent anticompetitive effects, but to be forward-looking and stop potential restraints on competition "in their incipiency." Other provisions of the antitrust laws may also apply to such mergers, such as Section 2 of the Sherman Act, which prohibits monopolization, attempted monopolization, and conspiracy to monopolize.

The Agencies take a careful, fact-based approach to assessing the competitive effects of any merger, focusing on the particular economic characteristics and dynamics of the markets affected by the transaction. To that end, the Agencies conduct thorough factual investigations, including economic analysis, review of relevant documents, and interviews with the parties, customers, and competitors. Throughout this process, the Agencies recognize that market conditions and industry structure can be highly dynamic: accordingly, the staff of the Agencies avoid relying solely on static metrics. For example, current market shares may overstate or understate future competitive significance of industry participants, particularly in industries where innovation and new product development are key elements of competition.

The Agencies consider both price and non-price competitive effects in their analyses. For example, in dynamic industries, firms often compete on the basis of innovation and new product development. The 2010 Horizontal Merger Guidelines, which provide the framework for the Agencies' analysis, recognize the importance of these dimensions of competition.

In dynamic industries and markets, the Agencies recognize that it is particularly important to evaluate the effects of a merger on future competition. Current U.S. antitrust law recognizes that firms can be significant competitors even if they are not both currently producing substitute products or services, where there is reason to believe that the firms could or would offer such substitutes in the future. And this implies, for example, that mergers in dynamic industries can raise "potential competition" concerns where a firm buys a company that is planning to, or would likely have the ability and incentive to, enter its market to compete directly (or when there is evidence that the acquiring firm is likely to enter the target's market).

In dynamic industries and markets, the Agencies also recognize that competition from new, innovative, and disruptive entrants—including those with unusual business models—may be highly significant to competition and consumers, and that the elimination of such competition may cause significant harm. In appropriate cases, accordingly, the Agencies often evaluate whether a merger may lessen competition by eliminating a "maverick" firm, i.e., a firm that plays a disruptive role in the market to the benefit of customers. For example, if one of the merging firms has a strong incumbency position, or participates in a small oligopoly of strong firms, and the other merging firm threatens to disrupt market conditions with a new technology or business model, their merger can result in a substantial lessening of competition. This may be the case even if the maverick player is a relatively new entrant or has only a modest market share.

The Agencies also recognize that dynamic markets are sometimes distinguished by fast-paced, innovative, and valuable product or service improvements, as rivals improve their offerings to satisfy the demands of consumers. When parties can show that a merger will significantly improve the ability and incentive of competitors to offer such benefits to consumers, the Agencies will take such efficiencies into account during merger analysis.

In appropriate cases, mergers in dynamic industries may be cleared subject to remedies that are tailored to address price and non-price potential harm, including harm to innovation. Generally speaking, the Agencies prefer structural remedies—e.g., divestiture of a business unit—over behavioral remedies. This may be especially important in dynamic industries, when there is a risk that behavioral remedies could constrain a firm's behavior in ways that will impede its ability to respond efficiently to changing market conditions in the interests of consumers.