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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Executive Summary of the Roundtable on The Role of Innovation in Enforcement Cases

Annex to the Summary Record of the 141st Meeting of the Competition Committee

5-6 December 2023

This Executive Summary by the OECD Secretariat contains the key findings from the roundtable on The Role of Innovation in Enforcement Cases held during the 141st meeting of the Competition Committee on 5-6 December 2023.

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Executive Summary of the Roundtable on The Role of Innovation in Enforcement Cases

By the Secretariat¹

On 5 December 2023, the OECD Competition Committee held a roundtable to discuss how competition authorities consider innovation in enforcement cases. The discussion followed the hearing held in June on the theoretical relationship between competition and innovation.

Taking into account the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by the expert panelists, the following key points emerged:

1. There are different ways in which competition authorities deal with innovation and its relationship with competition in their enforcement activities. One of them considers the relationship as static, and reviews if changes in competition impact innovation (incentives-based approach).

When observing what competition authorities have done in their enforcement to assess innovation, three different approaches, which have been used mostly in merger review, can be identified. There is one more traditional, sometimes conceived as static, way in which authorities look at a relevant product market and analyse if a transaction or a practice changes incentives to engage in R&D, as well as potential outcomes for future innovation.

In these cases, competition authorities use traditional theories of harm, usually in well-defined product markets, where they analyse how reduced competition may impact variables such as prices, quantity and innovation. This is the most commonly used approach.

2. Another way to conceive the relationship between competition and innovation is from a dynamic perspective. This means considering if innovation can also impact competition (impact-based approach).

Another way is seeing the relationship between competition and innovation from a dynamic perspective. In this case, authorities use innovation-specific theories of harm to look at the market(s) for innovation, or markets where companies compete in innovation, but where there is not necessarily a well-defined product or service, and see how innovation, directly, is going to be affected by the transaction or conduct. In these theories, competition is then affected by the reduction in innovation.

3. Competition authorities have also considered if changes in innovation can be seen as an efficiency defence for the reduction of competition.

There is a third possibility, which is also very common across competition authorities, and is focused on looking at whether innovation can be understood as a defence of anti-competitive practices or as an efficiency in a merger context and whether it can outweigh the negative effects of the transaction or conduct on competition. This approach assumes an inverse relationship between competition and innovation in which companies aim at justifying their anti-competitive conduct with arguments that the conduct increases innovation in the market.

¹ This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion.

4. One of the reasons for competition authorities taking different approaches is the challenges they face to evaluate innovation while being able to meet the legal test for establishing that a conduct or a transaction is anticompetitive.

Different legal frameworks allow for different considerations on innovation. Some legal systems mention explicitly that innovation is one of the elements on which firms compete or one of the different factors that impact competition while others do not.

Similarly, in some jurisdictions, assessing the impact on innovation and concluding that certain behaviour could reduce innovation levels or effort is sufficient to prove its anticompetitive character. This means that harm on innovation may be sufficient to prohibit a transaction or establish an infringement. However, in other jurisdictions this is not the case, and the competition authority has to prove that the harm to innovation leads to a restriction in competition.

5. The way in which competition authorities conceive the relationship between competition and innovation may impact the result of their assessment, for instance, the design of remedies in merger cases.

Whenever competition authorities have followed an incentives-based approach to discuss effects of reduced competition in innovation, remedy design aims to restore the levels of competition in the market, assuring similar levels of innovation. On the contrary, if competition authorities have followed an impact-based approach, remedies aim at maintaining innovation competition and do not focus on potential innovation of a specific nature but instead in the loss of an innovator.

In the former scenario, the design of remedies depends on the existing or future/pipeline products, involving R&D projects and intellectual property to allow the innovation to enter the market. In the latter, the discussion is broader and involves a complete set of assets that include relevant innovation capabilities to replace the loss of an independent innovator.

6. Other challenges to assess innovation are related to how competition authorities define it and measure it.

When evaluating innovation, challenges may arise in relation to its uncertain nature, difficulties to measure it, and the longer-term perspective needed to account properly for it. Aspects such as the definition of the relevant market, the examination of the structure of a market and the competitive dynamic are strongly affected by the way in which innovation is defined and measured.

One of the most common ways in which competition authorities approach innovation is by looking at R&D budgets and expenditures. However, this does not necessarily capture the whole innovative landscape in a market, as it does not reflect the rate of success of such efforts. Thus, another common measurement, that acts as a complement, is to look at past efforts, for instance, through patent history, which offers information on outcome of innovation efforts. One aspect where there could be more discussion is the quality of innovation.

When studying innovation from a dynamic perspective, another aspect that seems to be relevant to analyse is the capability to innovate, regardless of whether there have been efforts to do so. Internal documents have proven to be very useful in some jurisdictions to assess innovation capabilities, potential competition and, in general, to help competition authorities to understand the dynamics of competition in innovation.

7. Competition authorities agree on the importance of considering innovation in competition enforcement.

The discussion and contributions showed that the practice of competition authorities is evolving. There is a growing convergence on the relevance of taking on board innovation issues and more need to try to find ways to approach innovation in a more dynamic way. This reflects in most jurisdictions either upgrading their laws or following different strategies to be able to better deal with innovation.

From market investigations to amendments in competition laws and regulations, authorities are attempting to incorporate innovation considerations in their assessment of transactions and conduct. This will reflect in future decisions where innovation plays a key role.