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Non-price Effects of Mergers - Summaries of Contributions

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This document reproduces summaries of contributions submitted for Item 4 of the 129th meeting of the OECD Competition Committee on 6-8 June 2018.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/non-price-effects-of-mergers.htm>

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Non-price Effects of Mergers- Summaries of Contributions

This document contains summaries of the various written contributions received for the discussion on the Non-price Effects of Mergers (129th meeting of the Competition Committee meeting, 6-8 June 2018). 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 *.

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Argentina

The Argentine competition jurisprudence shows a relatively small number of cases that have dealt with non-price effects in merger analysis. However, several cases recognized dynamic efficiencies as key factors to determine the impact of a merger on the general economic interest, and those efficiencies were generally derived from non-price effects. These effects have to do with product quality and variety, research and development and with the entry of new competitors and the strengthening of existing ones.

The effects on product quality and variety, for example, have served to impose the divestiture of one free-to-air television channel in a certain city of Argentina (Mar del Plata, province of Buenos Aires), in the context of a merger between two media companies (TELEFÓNICA MEDIA/ATLANTIDA COMUNICACIONES, 2000). In this case, the implied non-price effect was one of the main causes that signalled the existence of a competition problem regarding this merger.

In other cases, conversely, the existence of non-price effects has been an element that was considered pro-competitive, and therefore helped the approval of mergers without asking for remedies. That happened in a few cases affecting telecommunications and broadcasting markets, in which mergers were believed to increase investment incentives or synergies between different products. In other cases, it was deemed that a merger was good to increase the level of research and development expenditures, and that was so, for example, in a merger affecting the pharmaceutical market.

One last group of mergers that have been evaluated by the Argentine competition authority, which include the consideration of non-price effects, are those that have taken into account entry effects. Among them, we can find one recent merger (ABI/GRUPO MODELO in 2017) in which it was detected that possible negative price effects were countervailed by the entry of competitors, and that entry had

Australia

The Australian submission focusses predominantly on non-price effects in the context of the Australian Competition and Consumer Commission's (ACCC) merger review function.

The submission uses case studies to illustrate the ACCC's approach to assessing non-price effects in merger reviews in Australia.

The ACCC's approach to merger assessment considers both price and non-price effects on competition and does not emphasize or prioritise either. In assessing both price and non-price effects, the ACCC places most weight on the degree to which claimed effects can be substantiated.

Non-price effects have featured alongside price effects in the ACCC's merger theories of harm. In particular, innovation, quality, variety and service have featured in ACCC merger assessments. To date, privacy has not featured in any ACCC merger review.

The ACCC has found that non-price effects have been more relevant in its assessment of the competitive effects of a merger, rather than in relation to market definition. The ACCC recently considered possible markets for innovation and research and development, but did not reach a concluded view on such potential markets.

The ACCC is currently conducting an inquiry into the impact of digital platforms on the state of competition in media and advertising services. The outcomes of that inquiry will likely inform merger assessment in digital markets in future, including in the areas of privacy and personal data.

*Belgium**

The Belgian competition authority (BCA) has not adopted their own guidelines on the assessment of horizontal and non-horizontal mergers, but the decisions of the Authority follow the relevant guidelines of the European commission. As is the case for the Commission, price effects are the main concern of the Authority, but, in some cases, non-price effects have played a non-negligible role, usually in conjunction with price effects.

In Belgium, four merger cases since 2013 have been approved with commitments that specifically address non-price effects. These include

- A merger of publishing firms (Corelio-Concentra / Mediahuis, 2013) that involved concerns about variety. The College approved the proposed merger after the notifying parties committed to maintain all newspaper titles for at least five years and assured that all titles would have sufficient staff to operate (including an editor in chief).
- A merger of magazine firms (De Persgroep-Sanoma, 2015) where there were concerns that the magazines would become almost identical in substance. De Persgroep committed to ensure that at least 20% of the content of the newly acquired Story would be different from their existing Dag allemaal. The BCA indicated that these remedies were less strict than the Mediahuis merger because the products were different (magazines as opposed to newspapers).
- An acquisition by the incumbent postal operator (which delivered newspapers to homes) of a firm that delivered newspapers to press shops (bpost-AMP, 2016), which involved behavioural remedies to ensure that both channels (home delivery and press shop delivery) would survive, and that the quality of their services would remain. In particular, the delivery time requirement, both for newspapers (not too early), and for press shops (not too late) where discussed in depth.
- The acquisition of a distributor of pharmaceutical products to pharmacies by its competitor (McKesson-Belmedis, 2016) was approved by the BCA subject to a number of remedies: After the merger, only two meaningful competitors would remain in substantial parts of the country, and there was no guarantee that other distributors would be able to deliver pharmaceutical products three times per day. The College therefore accepted the commitment of McKesson to divest a logistics building to favour competition, both on price and non-price aspects.

Brazil

Non-price effects such as impacts on quality, innovation, and technological or economic development are relevant elements to be considered in the merger review process in Brazil. Article 88, §6º, of Law 12.529/2011 (Brazilian Competition Law) establishes that even mergers resulting in some negative impacts could be authorized in the following circumstances: the merger enhances productivity or competitiveness, results in higher quality goods and services, or propitiates efficiencies or technological and economic development; subject to the condition that those benefits are substantially shared with consumers. Brazilian guidelines on horizontal mergers also mention that CADE shall evaluate if a merger changes other relevant competition elements besides prices, such as innovation and quality.

CADE has never rejected or required remedies in a merger based exclusively on non-price effects. However, the Brazilian competition authority in recent merger cases has been increasingly considering those effects. Variables such as quality and innovation have been important dimensions of remedies recently adopted. The contribution provides some examples of recent case law in which CADE has considered non-price effects as important elements in the merger review process.

Canada

Canada's Competition Bureau's ("Bureau") is committed to protecting all forms of competition, and recognizes the important role that factors such as quality, innovation and service play within the economy. The Bureau's Merger Enforcement Guidelines ("MEGs") provide guidance regarding the factors that may be considered during a merger review. The MEGs state "In general, when evaluating the competitive effects of a merger, the Bureau's primary concerns are price and output. The Bureau also assesses the effects of the merger on other dimensions of competition, such as quality, product choice, service, innovation and advertising – especially in markets in which there is significant non-price competition."

The submission pays particular attention to how the Bureau analyzes the potential impact that a transaction may have on innovation in the market. Innovation has been a key priority for the Bureau as outlined in its 2015-2018 Strategic Vision. The Bureau's MEGs state "A merger may facilitate the exercise of market power by impeding the process of change and innovation. For example, when a merger eliminates an innovative firm that presents a serious threat to incumbents, the merger may hinder or delay the introduction of new products, processes, marketing approaches, and aggressive research and development initiatives or business methods."

The submission outlines case examples relating to the Bureau's assessment of non-price effects. For instance, in the *Tervita* case, the Supreme Court of Canada held that the Bureau must quantify by estimation all quantifiable anti-competitive effects, where an efficiencies defence has been raised, in order to determine if total efficiencies offset the total anti-competitive effects of a merger. In its decision in the *Toronto Real Estate Board* case, the Canadian Competition Tribunal's acceptance of qualitative evidence to show non-price effects in an abuse of dominance case supports the importance of protecting competition on non-price dimensions such as quality, product choice, service, innovation and advertising.

The submission also provides detail on the Bureau's process for quantifying all reasonably quantifiable effects and outlines the processes and formal models the Bureau may use to guide innovation analysis. Where direct quantification in the relevant market is difficult, the Bureau may supplement its analysis using natural experiments.

The Bureau strives to quantify all reasonably quantifiable anti-competitive effects from a merger, including any non-price effects. In situations where non-price effects cannot be quantified, the Canadian courts have recognised the importance of qualitative evidence, in particular given the role dynamic competition plays in the economy.

Chile*

The Chilean competition authority (FNE) internal guidelines mention the possibility that the anticompetitive risks of a horizontal merger involve competitive variables other than price. In most cases, the merger analysis does not require giving special treatment to non-price effects, since the conclusions obtained via the conventional quantitative tools, which are typically framed in terms of price effects, can be extrapolated to other competitive variables. However, there are certain markets that require special instruments, either because competition is more intensive in other variables or because price competition does not apply. In Chile, there have been two cases of this kind:

- **Merger between Cine Hoyts and Cinemundo (2012):** The economic assessment of this merger involved several econometric tests aimed at evaluating the transaction's effects on prices and quality of service. Specifically, a regression analysis was used to estimate the merging firms' incentives to raise prices. These findings were validated with a difference-in-differences analysis using an event study (the entry of a competing cinema complex in a 2008). This analysis suggested that the most significant unilateral effect of the merger involved harm to quality of service (rather than prices), a conclusion that was consistent with the qualitative data collected during the investigation (including comments from firm executives).
- **Joint venture between banks for the administration of Automated Teller Machines or ATMs (2015):** In the Chilean ATM system works, clients face no cash withdrawal costs, regardless of whether the bank that owns the ATM where the transaction is being made (the acquiring bank) is the bank of the person in question. Thus, competition between ATM providers is based primarily on the extensiveness of their network rather than prices.

FNE expressed concerns that the joint venture that would result in concentration of ATMs that were previously competing for transactions could have created incentives to uninstall machines and dampened incentives to install new machines. The FNE tested this idea with two empirical exercises: the first one identified the relevant area of competition by measuring the scope of the impact on the number of transactions of nearby machines caused by the installation or uninstallation of an ATM. The second showed that the share of ATMs that the acquiring bank has in the surrounding area of a given ATM, as defined by the first empirical exercise, had a significant and positive effect on the probability of uninstalling the ATM.

Chinese Taipei

The Fair Trade Commission (FTC) reviews merger cases based on its assessment of the overall economic benefits and disadvantages resulting from competition restraints. The Fair Trade Commission Disposal Directions on Handling Merger Filings (Merger Directions) lists the factors to be taken into consideration by the FTC when determining the competition restraints for different types of mergers and the overall economic benefits. Administrative rules for the cable TV, telecommunications, digital convergence, and financial industries further provide factors that should be taken into consideration when the FTC determines the overall economic benefits of mergers in the above industries, such as innovation, quality and product diversity. Except for unilateral effects and coordinated effects that may involve price effects of the merger, the factors listed by the Merger Directions and administrative rules for specific industries are mostly non-price effects. Hence, the FTC usually considers non-price effects when determining the competition restraints and overall economic benefits of mergers. If the FTC deems it necessary to attach conditions or undertakings to the merger to ensure that the overall economic benefits are greater than the disadvantages resulting from the competition restraints, the conditions or undertakings may be related to the results of evaluating the non-price effects.

*Consumers International**

Non-price effects in mergers are a regular part of standard analytical approaches. Their individual salience differs case by case and is largely driven by the claims made by merging parties, their customers/consumers and rivals. Competition authorities will occasionally identify other non-price factors in their analysis, though this is less usual.

The place and relevance of non-price factors rests in the area of consumer choice and price. If quality or innovation claims are to be accepted in a merger case, they must only be done so if in the post-merger market, the consumer or customer can decide whether the strategy succeeds or not. If the market is restricted such that a strategy of raising prices in return for claimed quality gains can succeed independent of consumers, then the merger will damage consumer welfare.

In summary:

- Non-price effects are common and often analytically non-controversial for competition authorities
- For consumers the key test is whether a claimed strategy of ‘improving quality’ or ‘innovation’ can be advanced independent of the state of competition in the post-merger market
- Claims for ‘innovation’ or ‘quality’ should always be assessed relative to the ability of consumers, not merged firms, being able to choose winning strategies
- Competition authorities need to identify new metrics to assess the price consumers pay (in data transfer and access) in ‘free’ digital markets
- Only through quantifying the price consumers pay for ‘free’ goods will authorities be able to properly assess digital markets
- Competition authorities should apply existing approaches to digital markets by quantifying ‘price’ before considering different approaches to assessing mergers in these markets.

EU

Competition between firms takes place on price as well as on non-price elements. Mergers can have a negative or, in case of efficiencies, positive impact on both elements. With the growth of the digital economy, non-price effects of mergers are likely to become even more important.

Under the EU merger control framework, non-price effects of mergers are put on an equal footing with price effects. Mergers leading to a significant impediment to effective competition (SIEC) are to be declared incompatible with the internal market. The guidelines published by the European Commission clarify that the finding of a SIEC can, among others, be based on price, output, choice, quality or innovation. They also recognize that non-price efficiencies of a merger can be taken into account as offsetting the competitive harm.

In its recent practice, the Commission reviewed non-price elements in its assessment of the relevant markets, during the competitive assessment of the merger as well as potential efficiencies. The paper illustrates the impact of non-price elements in the context of defining the relevant product markets in the cases of *Microsoft/ LinkedIn*, *Microsoft/ Skype* and *Facebook/ WhatsApp*. Examples for the assessment of non-price elements within the review of the relevant geographic market are *Outokumpu/ Inoxum*, *Huntsman/ Rockwood*, *RHI/ Magnesita* and *Munksjö/ Ahlstrom*.

Within the competitive assessment, non-price elements that have been reviewed by the Commission include the likely effects of a merger on such parameters as innovation, quality, as well as data protection and privacy.

Innovation aspects have, for example, often been relevant in the pharmaceutical and medical device sectors. Examples of such cases discussed in the paper include *J&J/ Actelion* and *Novartis/ GlaxoSmithKline's oncology business*. Other cases in which innovation has been reviewed include *Deutsche Börse/ NYSE Euronext* and *General Electric/ Alstom*. Most recently, innovation concerns played an important role in two cases in the agrochemical industry: *Dow/ DuPont* and *Bayer/ Monsanto*.

Quality elements have also played an important role in a number of cases. They have mainly been relevant to assess the closeness of competition between the merging parties – be it in the airline industry (*Ryanair/ Aer Lingus*), telecommunications (*Telefónica Deutschland/ E-Plus*) or in data clearing services (*Syniverse/ Mach*) – or in vertical mergers when the impact of a foreclosure strategy on the quality of a competing product is discussed (as in *Liberty Global/ W&W/ De Vijver Media*).

Even though data protection and privacy are, as such, not a matter for EU competition law, they can also be relevant for the merger analysis as an element of quality (as in *Facebook/ WhatsApp*) or in the context of data being an asset or input for other services (as in *Microsoft/ LinkedIn*).

Non-price related efficiencies are taken into account if they are beneficial for consumers, merger-specific and verifiable. The issue of non-price benefits has arisen in a number of recent mergers between mobile operators, in *Dow/ DuPont* and *Bayer/ Monsanto*, in *Microsoft/ Yahoo Search Business*, as well as in *TomTom/ TeleAtlas*.

Germany

When the Bundeskartellamt reviews a merger by applying the SIEC test its assessment considers both price and non-price effects. The relevance of the latter has increased in the recent decisional practice.

A merger's impact on competition in innovation is a typical non-price effect. A less competitive and less innovative market structure may result in price-based effects and a loss of quality at the same time. Past merger control decisions of the Bundeskartellamt addressed innovation i.a. in the context of market dynamic, potential competition in online markets and merger-driven efficiencies.

For “free” products or services the definition of the relevant market may also be based on non-price factors. In applying the concept of demand-side substitutability on multi-sided platforms, the Bundeskartellamt considers it possible to regard different market sides as a single market if the product or service in question provides an intermediary service and both user groups are understood as consumers of this service with essentially the same needs.

The 9th Amendment of German competition law provided some criteria for the assessment of market power (network effects, multi-homing and switching costs, economies of scale, access to competition-relevant data and innovation-driven competitive pressure) and a new transaction-value-based merger control threshold aimed to cover mergers that concern innovative market entrants or disruptive technologies. The novel criteria are reflected in the recent decisional practice.

In regulated markets with little room for price competition merger control may focus on efficient competition in quality within the regulatory framework. The Bundeskartellamt launched a sector inquiry into the hospital service markets to examine and analyse the competitive conditions in the sector.

*Indonesia**

Non-price impact analysis has become an issue of concern to the international community in merger analysis, particularly in countries with advanced competition regimes and a mandatory pre-merger notification approach. But the approach cannot be fully implemented in Indonesia. The legal approach of Indonesian competition law is quite different from other countries, because it still adheres to the mandatory regime of post-merger notification and voluntary pre-merger consultation. The law does not embrace an approach whereby companies may seek an exception to the merger, even if it has a positive impact on society. Exemptions given are those listed in the law.

The assessment of mergers and acquisitions by Indonesian competition authorities comprises 5 types of analysis, namely (i) market concentration; (ii) entry barrier; (iii) potential anti-competitive behavior; (iv) efficiency; and (v) bankruptcy. Bankruptcy may be the only non-price effect considered in merger analysis in Indonesia. In these cases, the impact of a firm exiting the market on consumer welfare will be analysed, and may alleviate any competition concerns identified.

The use of a non-price impact approach in merger review will provide additional costs and expenses for merging companies. This is because the burden of proof is on the merging companies, who are required to demonstrate that the merger will have a positive impact on the national economy or society. Data problems also pose an issue with non-price effects approach, as it will incur additional costs for the authorities to convince themselves of the merits or non-price effects of a merger.

Italy

The experience of the Italian Competition Authority (the Authority or AGCM) in assessing non-price effects of mergers has so far been focused on more traditional aspects such as variety, quality and investment, while the practice in dealing with effects related to innovation or privacy is still limited and has occurred outside the merger review context.

Recent transactions in publishing sector affected by the digitalization process have brought to the Authority's attention the importance of considering also competition dimensions other than price which can be industry specific - such as terms for payment and returns policy, but also the quality, variety and "visibility" of editorial production - and can affect players at different level of the value chain. Similarly, in assessing mergers between retail distributors other variables such as product range and mix, the "shopping experience" and ex-ante and ex-post services were considered to be key drivers for competition.

In publishing sector mergers, non-price elements have been generally considered at the stage of assessing the competitive effects of the transactions (unilateral and/or co-ordinated effects), while in evaluating mergers between retailers the analysis of other competitive variables was carried out at an earlier stage, when deciding whether the various distribution channels should be considered to be subject to the similar competition conditions and therefore under the same relevant market.

In the AGCM view, the precise balancing between price and non-price effects may be difficult to carry out in practice, particularly if they move in different directions or affect customers in different ways. Furthermore, in mergers with vertical dimension, foreclosure effects may play an important role in the balancing exercise although any quantification of such effects may prove hard to measure. However, in the Authority's experience well-tailored merger remedies may help address negative non-price effects; being often of behavioural nature, the remedies imposed by the Authority in such cases have been limited in duration in order to account for the continuing evolution of the markets.

The Authority has not dealt yet with innovation markets and the use of personal data in the context of merger review although these non-price effects are likely to play an increasing role in future. In this regard, competition agencies entrusted with consumer protection powers like the Authority might be better placed in addressing the challenges of digital markets since the dual competences enable significant synergies and a better understanding of new competition concerns related to innovation and the use of personal data.

Japan

The Antimonopoly Act (AMA) prohibits mergers which would substantially restrain “competition” in any relevant market. Tokyo High Court stated that “competition” includes not only “price” competition but also competition on “quality, volume, and various other terms”. It is therefore obvious that Japan Fair Trade Commission (JFTC) has considered non-price effects of merger in its merger review.

JFTC has several merger cases where it took non-price effects into account. In “*Yahoo/Ikyu*” case (2015), Yahoo Japan Corporation (Yahoo) which operates online travel reservation services planned to acquire all shares of Ikyu Corporation (Ikyu) which operates the same services. JFTC defined the “online travel reservation services” market based on demand-side substitutability and supply-side substitutability of the concerned services.

In “*Lam/KLA*” case (2016), Lam Research Corporation (Lam), which manufactures and sells a part of semiconductor equipment for executing manufacturing process (manufacturing-equipment) and KLA-Tencor Corporation (KLA), which manufactured and sold a part of semiconductor equipment for inspection of execution of manufacturing process (inspection-equipment) planned to integrate their businesses. JFTC concluded that the merger would substantially restrain competition based on the fact that it could cause sharing of confidential information between merging parties, which could finally create an adverse impact on R&D competition, as well as possible input foreclosure.

Korea

Recently, competition authorities are discussing the need to consider not only 'price effects' but also 'non-price effects' when reviewing mergers. In this paper, the implications of the non-price effect and the reasons why the effects should be quantified and considered in merger review are discussed.

Due to the subjectivity and measurement difficulties of the non-price effects, there have been not many cases where these effects were explicitly considered in merger review. However, empirical studies showed that the relationship between the quality of goods or services and the level of competition does not always go in one direction. What this suggests is that the non-price effects should be quantified in certain merger cases when assessing the anti-competitive effects.

In the contribution, the KFTC introduces a case that reflects both the price and non-price effects while balancing the anti-competitive effects and the efficiency-enhancing effects of the joint venture between airlines. In this case, the KFTC uses the QSI model to quantify the non-price effects.

Mexico (IFT)

The Federal Telecommunications Institute (IFT) identifies in concentration authorization procedures to what extent concentrations in the telecommunications and broadcasting sectors could have anticompetitive effects according to the Federal Economic Competition Law (LFCE).

The characteristics of the markets and of the concentrations are reviewed according to the IFT's experience, including the stages in which the analysis of the non-price effects takes place.

Since the LFCE grants the IFT flexibility to identify, analyze and evaluate non-price effects and does not distinguish between them, they are evaluated on a case-by-case basis. When evaluating the effects of a concentration, the IFT focuses on identifying how the price and non-price elements interact in the competition processes of the markets involved and how it can change them if the concentration is carried out.

The non-price effects of six relevant cases are analyzed:

- Licenses for non-commercial free-to-air radio in localities of the states of Sinaloa and Coahuila;
- Concessions transfers for the assignment of commercial radio in localities of the state of Chiapas;
- The acquisition of DirecTV by AT&T
- The acquisition of Televisión Internacional (of Grupo Multimedios) by Grupo Televisa
- The MVS / Telcel concentration
- The AT&T / Time Warner concentration

New Zealand

The Commerce Commission (Commission) considers that any assessment of competitive effects in merger analysis extends to include not only price, but also effects such as a reduction in quality, range, level of innovation, service or any other element of competition valued by customers. This recognises that firms compete on a range of dimensions in addition to price, and that customers benefit from this competition.

In considering how mergers are likely to impact on competition, the Commission considers both price and non-price effects throughout the merger assessment. Non-price elements of competition are often considered when defining the relevant markets, understanding how competition takes place, consumer preferences, as well as the likely effects of a merger.

In practice the Commission typically considers the materiality of the effects in terms of whether and to what extent customers value those elements of competition. The Commission has found in a number of merger reviews that harm to competition would manifest in material non-price effects as well as price effects.

The Commission is not generally required to quantify non-price effects (or, for that matter, price effects) when considering a merger under the SLC test for non-notified mergers under s.47 or where merging parties have applied for clearance. However, New Zealand has a relatively unique ‘authorisation’ regime, under which the Commission can assess whether a merger would result in ‘such a benefit to the public’ that it should be permitted despite resulting in a substantial lessening of competition.

In these particular circumstances, the New Zealand courts have held that the Commission should attempt so far as possible to quantify the benefits and detriments of the merger, including non-price effects. However, the courts have also established that quantification is not a necessary part of the analysis, and that unquantified effects may be material in their own right, rather than merely supplementary to price effects.

Previous merger decisions by both the Commission and the courts have considered the competitiveness of a firm’s “PQRS package” and how the merger may change the ability and incentives of firms in the market to alter that package. This analysis has included how firms compete to build customer relationships; customers’ differing service requirements; market dynamism; and the plurality of supply.

The assessment of non-price effects in the context of the authorisation regime is a topic which is currently before the Court of Appeal of New Zealand.

*Norway**

Non-price effects are frequently mentioned in the Norwegian Competition Authority's (NCA) merger decisions, but very rarely actually analysed in any detail. Only three of the 15 phase 2 merger cases between 2015 and 2018 involved close scrutiny of non-price effects. In these three cases, however, the analysis was mainly a qualitative assessment of likely non-price effects based on internal documents and anecdotal evidence. Thus, the NCA has not conducted any quantitative analysis of non-price effects in the recent merger cases, and there has been no attempt to integrate quality effects into the standard UPP framework when this framework has been applied in the merger assessment.

Non-price effects of mergers have got increasing attention among practitioners and academics concerned with competition policy in recent years. A key concern is that ignoring non-price effects may result in harmful mergers being cleared (type 1 errors) but possibly also prohibition of beneficial mergers (type 2 error) when the non-price effects go in the opposite direction of the price effects. Results from studies simulating the likely effects of blocked mergers show that merger effects can be largely biased when ignoring non-price effects.

There have been significant developments in the literature on UPP analysis on non-price effects. A first result is to reinterpret the UPP formula in terms of quality-adjusted prices instead of nominal prices. However, this approach has been criticised on the grounds that it assumes quality to be fixed. Further developments of the first-order approach to merger analysis have developed a so-called upward quality pressure (UQP) index, but simulation results show that this index often fails to predict the likely quality effects of a merger. Thus, there remains work to be done in order to accurately account for non-price (quality) effects within the UPP framework.

Since many of the mergers are likely to involve significant non-price effects, there is great scope for further development of practical tools for competition authorities in the merger assessment. However, these developments need to account for measurement issues related to non-price variables, and resource and time limits that most competition authorities face in the merger control.

*Russian Federation**

In many markets, the merger between an established enterprise and an innovative start-up has little impact on the existing market structure because of the small proportion of a start-up enterprise in the market or the lack of horizontal duplication. However, in digital markets, such a merger can lead to differentiated access to data and increase the concentration of data related to this market if the start-up company has access to large amounts of data (gained, for example, in another market).

In this case, when assessing possible competition restrictions resulting from a merger, competition authorities may need to carefully examine the advantages of the new organization, gained through combining different sets of data. In particular, a combination of different data sets can create competition problems if the combination of data does not allow competitors to copy (reproduce) information extracted from it.

In three recent mergers (Dow/DuPont, ChemChina/Syngenta and Bayer/Monstanto), FAS Russia has analysed the implications on innovation, in terms of patents, big data, and the creation of closed systems that unite unconnected horizontal or vertical markets to maximize profits through the use of a dominant position on one of them. This approach involved:

- consideration of innovation markets in close relationship with the markets of the end product sold to consumers
- evaluation of technologies and know-how available to the companies that enable them to significantly increase their market share in the short and medium term due to the synergetic effect, while assessing the available technologies in the context of horizontal, vertical and conglomerate integration (for example, the availability of unique technologies, databases that allow for accelerated selection, creation of package solutions, including IT solutions that affect the consolidation of demand of the end user and restrict access of potential competitors to the seed market and to the adjacent markets)
- assessment of the impact of the proposed transaction on the innovation market both in terms of the ability to limit the access of potential competitors to innovative products, and of the impact on the development of innovations in the national market

Ukraine

The Antimonopoly Committee of Ukraine (AMCU) provides answers to questions related to assessment of mergers based on examination of non-price effects.

The maximum price effect is mostly a goal of mergers in the markets involving a limited range of goods which are not significantly improvable as compared to competitors, unless significant investment is made (for example: the retail market for petroleum products or some natural monopolies markets). Although, the telecommunication services market may be an exception, where certain services, e.g. access to the Internet may be improved by offering extra services which would significantly raise the demand of consumers but would not require any considerable investment from market operators.

In all other cases, in markets with a significant range of goods, works, and services the merger parties aim at obtaining the greatest non-price effect by increasing the benefits of the merger party (buyer) in quality, service (including distribution and marketing), innovation, a range of products. Thus, in process of handling merger applications, such non-price effects are paid special attention by AMCU. On the other hand, it is difficult to single out certain non-price effects which are reviewed more frequently, as such effects are examined by AMCU if structural preconditions for oligopoly in the relevant market are identified, on a case-by case basis.

Non-price merger effects analysis begins at the Ist stage of merger application consideration. Such analysis are determined by the following factors: market type (conventional or innovative); level of competition in this market; efficiency of the given merger for the market.

At the II stage, merger review procedure involves, from time to time, analysis of non-price effects as extra evidence if potential negative price effect on the market is detected (e.g., examination of merger effects on the geographical market with only 2 participants: a buyer and a target company would involve analysis of non-price effects such as range of goods and their interchangeability).

Examples of recent cases considered by the Committee:

1. The case of acquisition by company «K» of 50%+ majority votes in company «Z». National markets of differentiated products were involved in this case: medium density fiberboard, high density fiberboard and different types of this products (polished, unpolished, laminated), also merger parties carry out activities in the vertical markets. Merger approval was granted with the commitments imposed on the buyer which will remove the negative impact of merger on competition;
2. The case of acquisition by company «B» of company «M». The case involved national markets of: seeds of agricultural crops and vegetables, in particular cucumbers; chemical means of plant protection (pesticides) - herbicides (selective, nonselective). Merger approval was granted with the commitments imposed on the buyer which will remove the negative impact of merger on competition.

*United Kingdom**

The non-price effects (NPEs) that the Competition and Markets Authority (CMA) considers in merger review depend on the theories of harm identified. CMA guidelines refer to quantity, service quality, product range, product quality and innovation.

Dynamic NPEs are most likely to be considered where product and/or process innovation are important to the merger parties' competitive offering and when the merger occurs at the level at which decisions on investment and innovation are made. There are particular challenges in considering digital markets that are rapidly changing and/or where network effects are so strong that an incumbent with market power's purchase of a nascent firm in an adjacent market could have long lasting effects in preventing a competitor emerging.

The CMA considers there are two main risks in recognising dynamic non-price effects in merger reviews. First, there may be greater uncertainty associated with such effects since it may be more difficult to test dynamic theories of harm: as a result, there is a risk of the SLC decision being wrong if dynamic effects are under- or over-estimated. Second, there is a risk of not placing sufficient weight on dynamic effects simply because they are uncertain and more difficult to quantify. Given the importance of dynamic competition and innovation to consumer welfare, it is very important as the CMA Chairman has noted to take them into account, ie to be 'roughly right rather than exactly wrong'.¹

The CMA will consider static NPEs when the rivalry that is relevant to the assessment of the merger is focussed on one or more of quality, range and service instead of, or as well as, on price. Such circumstances include: when price competition is non-existent or unimportant; to assess rivalry at a local level when the firms have uniform national prices; two-sided markets where one side does not pay; and vertical mergers, where the theory of harm relates to a foreclosure strategy involving non-price effects.

NPEs may potentially be considered at all stages of merger review at Phase 1 and Phase 2 of a CMA investigation (including market definition, competitive assessment and efficiencies). The CMA believes that broadly the same evidence is relevant to market definition where rivalry is focussed on non-price factors as where it is focussed on price.

The broad categories of evidence the CMA considers in merger cases are: the parties' documents; submissions and documents (including relevant industry reports) from third parties (mainly customers and competitors); data collected from the parties and third parties (eg quantities supplied, prices, margins, quality, range, investment which may be in fixed assets, working capital, research and development); and consumer surveys.

The CMA agrees price is easier to measure than some non-price elements, such as quality of service. However, the CMA has found indirect measures of quality that can be used in quantitative work. Moreover, some quantitative techniques can be used irrespective of whether rivalry is focussed on price or non-price aspects (e.g. market shares, diversion ratios² and GUPPI³ - though if price competition is unimportant, GUPPI estimates would relate to the post-merger incentive to deteriorate quality, range, etc.).

¹ [Speech by David Currie on the role of competition in stimulating innovation at the Concurrences Innovation Economics Conference, King's College London, 2017.](#)

² If competition on price was unimportant, diversion ratios would relate to customers' response to a deterioration in non-price aspects of the offer. The CMA often measures diversion ratios using a

*United States**

Many products and services have one or more unique attributes that give rise to competition based on price and non-price factors, such as quality, reliability, durability, and method of distribution. Consumers may thus be willing to pay more for their preferred mix of price and non-price attributes, and competition in these non-price attributes can be a significant aspect of market competition.

Competition among independent firms can produce both price and non-price benefits to consumers. Mergers often enable the merged firm to reduce its costs and become more efficient, which, in turn, may lead to lower prices, higher quality products, or investments in innovation. Antitrust enforcement by the Federal Trade Commission or the Department of Justice (the Agencies) is primarily directed at those mergers that are likely to create or enhance the merged firm's ability — either unilaterally or through coordination with rivals — to exercise market power and thereby reduce consumer welfare. The US Horizontal Merger Guidelines explicitly recognize non-price factors of competition, and how these elements factor into the Agencies' merger review.

Mergers between manufacturers of close substitutes may pose a risk of increased prices. The merged firm could, sometimes, instead reduce the quality (or the average fit of attributes to customer preferences), which can sometimes be thought of as an increase in the "quality-adjusted price." When it is possible to conceptualize the impact of a merger that may potentially affect both price and quality in terms of an adjusted price, the usual price-centric analytical framework in the Guidelines can be employed.

Acquisitions may diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger. This is a type of unilateral effect that could take the form of reduced incentives to continue with an existing product-development effort, or reduced incentive to initiate development of new products.

Mergers may also generate efficiencies that produce non-price benefits, such as improved quality, enhanced service, new products, or stronger incentives and ability to engage in, or increase, innovative efforts. The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any market. In some instances, this may include out-of-market efficiencies that are inextricably linked with efficiencies in the relevant market. In addition, mergers that increase product variety by encouraging the merged firm to reposition its products to be more differentiated are unlikely to be anticompetitive.

Non-price factors often are considered by the Agencies and courts in defining the relevant market affected by the merger. A merger that may reduce incentives to provide these valuable features may lead to a reduction in non-price competition. Evidence of the

forced diversion question from a customer survey (ie asking customers what they would do if a particular firm outlet or firm was no longer operating) for practical reasons. This question is not affected by whether rivalry is price or non-price focussed.

³ Gross Upward Pricing Pressure Index. In some earlier cases, the CMA's predecessors have calculated illustrative price rises rather than GUPPI.

extent of direct competition between the products sold by the merger parties on non-price factors is often the same evidence relied on to determine customer substitution relevant to the hypothetical monopolist test.

In many cases, an examination of the merger's potential non-price effects will not be different from the examination of the potential price effects. However, because non-price effects tend to be non-quantitative in nature, the Agencies rely less on formal empirical models and more on qualitative evidence to assess the non-price effects of a merger.