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Non-price Effects of Mergers - Note by the United States

6 June 2018

This document reproduces a written contribution from the United States submitted for Item 4 of the 129th OECD Competition committee meeting on 6-8 June 2018.

More documents related to this discussion can be found at www.oecd.org/daf/competition/non-price-effects-of-mergers.htm.

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investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition.[3]

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14. Some hospital mergers, including those that raise competitive concerns, may yield meaningful clinical quality improvements and cost savings that might not be possible without the merger. Taking this into account, the analysis of a proposed merger includes a thorough assessment of the potential benefits and efficiencies, as well as the disadvantages and harms resulting from a reduction in competition. Those benefits are then weighed against the likely adverse effects. In general, the Agencies may decline to challenge transactions that might raise competitive concerns when there is compelling evidence that the likely benefits of the transaction would be of sufficient magnitude to offset the potential harm from lost competition. It should be noted, however, that the greater the likelihood or magnitude of harm from a proposed merger, the more likely or

5. Innovation as a non-price consideration in merger review

19. Competition drives firms to innovate, and a merger may substantially lessen competition in violation of U.S. law by reducing or eliminating innovative activity that would result in higher quality products or greater product variety. The Agencies may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail but for the merger[23]; the Agencies will also consider whether a merger will increase the incentive or ability of a firm to engage in innovation competition. Innovation in the form of new products or new competitors can also alleviate any short-run competitive concerns.[24] A fact-based analysis of likely competitive effects takes into account changing market conditions and likely future competition to determine whether a proposed transaction is likely to slow, enhance, or have a neutral effect on the pace of innovation.

20. Competition-driven innovation may produce superior products, and a merger that eliminates that competitive dynamic may deny customers the benefits of that rivalry in the future.[25] The Agencies may consider whether a merger is likely to diminish innovation competition by reducing the incentive for the merged firm to (1) continue with an existing product development effort or (2) initiate development of new products.

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high-volume non-lithography semiconductor equipment.[33] The DOJ conducted an extensive investigation that found that the existing competitive overlap between specific equipment offered by the two firms was emblematic of a broader competition to develop

the appropriate collection of assets and capabilities, necessary to be successful developers of new equipment.[34]

8. Innovation efficiencies

29. A merger of two innovative firms may lead to an increase in innovative activity relative to the status quo, and these merger-specific efficiencies may outweigh the potential for harm due to an elimination of competition between them. Section 10 of the Horizontal Merger Guidelines discusses how to treat innovation efficiencies:

> When considering the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research and development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation. Research and development cost savings may be substantial and yet not be cognizable efficiencies because they are difficult to verify or result from anticompetitive reductions in innovative activities.

30. Sometimes, reduced incentives to innovate may not be a cause for competitive concern if the merger increases the merged HUP¶V DELOLW\ WR FRQGXFW 5 successfully. For instance, the Commission closed its investigation of a consummated merger of two large pharmaceutical companies after concluding that, on balance, the merger was likely to be procompetitive by speeding up on-going efforts at each firm to develop the first drug to treat Pompe disease a rare, often fatal, disease affecting infants and children.[38]

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