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EU merger control and innovation effects

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OECD - Global Forum on Competition 29 October 2015
Session III "The impact of disruptive innovations on competition law enforcement"

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EU legal framework to assess negative innovation effects

- Protect competition not only to ensure lower prices or increased output, but also product quality, variety and innovation ➔important competitive dimension
- Assess innovation potential of merging firms regardless of their current market positions
- For potential competition:
  - (i) Show significant competitive constraint exerted by potential competitor or likelihood it would become an effective competitive force
  - (ii) Absence of sufficient number of other potential competitors

Horizontal mergers

- Merger can lead to loss of innovation by eliminating innovative (pipeline) products
- Concerns remedied in number of pharmaceutical and medical devices mergers regarding pipeline products (late-stage clinical trials)
- In *Novartis/ GloaxoSmithKline's oncology business*, Commission found merger to reduce innovation as Novartis would likely abandon early-stage clinical trials for treating certain cancers
- Remedy: Novartis divests drug and commits to co-fund development of existing and new clinical studies

Non-horizontal mergers

- Harm to ability of merged entity's rivals to innovate
- *Intel/ McAfee*: combination of chips and security software
- Remedy:
  - Preserves beneficial effects of merger (allowing for combination of chips with security software)
  - But ensures that Intel cannot block other security software providers from accessing its chips and interoperability information

  ➔Allows third parties to innovate on Intel platform

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Positive innovation effects: efficiencies

- Positive innovation effects assessed as efficiencies. Must be (i) likely to be passed-on to consumers, (ii) verifiable, and (iii) merger-specific
- In *TomTom/ TeleAtlas*, innovation efficiencies acknowledged as at least partly merger-specific and beneficial to consumers (improve quality and timing of TeleAtlas map creation by using TomTom's users' GPS information)
- No definitive conclusion as to verifiability

Conclusion

- EU legal framework for merger control explicitly addresses a merger's positive and/or negative effects on innovation
- Remedies to address:
  - Loss of innovation may involve divestiture of (pipeline) products
  - Harm to third parties' ability to innovate may also involve access remedies or other non-divestiture remedies
- For more detail as well as additional case studies, see contribution by the European Commission DAF/COMP/GF/WD(2015)39 of 15 October 2015