

Unclassified

English - Or. English

20 March 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Executive Summary of the Roundtable on Theories of Harm for Digital Mergers**

**Annex to the Summary Record of the 140th Meeting of the Competition Committee held on 14-16 June 2023**

16 June 2023

This Executive Summary by the OECD Secretariat contains the key findings from the discussion of the roundtable on Theories of Harm for Digital Mergers, held during the 140th meeting of the Competition Committee on 14-16 June 2023.'

More documents related to this roundtable can be found at  
[www.oecd.org/fr/daf/concurrence/theories-of-harm-for-digital-mergers.htm](http://www.oecd.org/fr/daf/concurrence/theories-of-harm-for-digital-mergers.htm)

Please contact Mr Antonio Capobianco if you have questions about this document.  
Email: [Antonio.CAPOBIANCO@oecd.org](mailto:Antonio.CAPOBIANCO@oecd.org).

**JT03539869**

## *Executive Summary of the Roundtable on Theories of Harm for Digital Mergers*

By the Secretariat<sup>1</sup>

On 16 June 2023, the OECD Competition Committee held a meeting to discuss the topic of theories of harm for digital mergers. Considering the background note prepared by the OECD Secretariat, the written contributions and the discussion, the following key points emerged:

### **1. To date, competition authorities have largely relied on traditional theories of harm to assess digital mergers.**

Overall, at least until recently, very few mergers in digital markets assessed by competition authorities have been proven to raise competition concerns. This raises the question of whether, in fact, no competition issues exist, or whether existing theories of harm may not be adequate to capture the competitive harms from mergers in these markets.

To date, digital mergers have been primarily assessed using traditional horizontal, vertical and conglomerate theories of harm. The question of which categories have been used more or less frequently depends in part on how digital mergers are defined and varies by jurisdiction. The underlying competition concerns for competition authorities have tended to be similar to those raised by mergers in more traditional markets, namely, horizontal mergers raising concerns about harms to actual or potential competition, and non-horizontal mergers raising concerns about input foreclosure and the potential for leveraging through bundling or tying.

### **2. Competition authorities have already adapted traditional theories of harm to a certain extent to take into account the characteristics of digital markets, which can heighten or alleviate competition concerns in different circumstances.**

When traditional theories of harm are adapted to reflect the characteristics of digital markets, these characteristics can both amplify or lessen competition concerns, and this has already played out in practice. For example, the existence of network effects can heighten concerns as it can facilitate establishment of market power. This was a factor in the Japanese authority's horizontal theory of harm in respect of a merger between two competing suppliers of code-based payment services. The important role of data in digital markets also adds additional complexity. As such, the possibility for a merger to confer an anti-competitive data advantage on the merging parties, which can occur in both horizontal and non-horizontal mergers, also featured prominently in theories of harm.

On the other hand, the ability of users to multi-home can mitigate concerns that would otherwise arise from a traditional horizontal theory of harm. For example, when assessing a merger between two directly competing food delivery platforms, the Romanian authority developed a theory of harm that the merger could lead to coordination between the remaining platforms. However, it ultimately determined that the presence of multi-homing on both sides of the two-sided platform made this unlikely. Further, the presence of a Big Tech platform in the market can alleviate concerns raised by a traditional horizontal theory of harm involving two direct competitors and harm to actual competition, because the

---

<sup>1</sup> This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion, the delegates' written submissions, and the panellists' presentations.

merger may actually assist in preventing the market from tipping to the platform as a result of network effects.

Theories focused on potential competition may also play a more prominent role in digital markets given their innovative and dynamic nature. For example, in the US, while potential competition theories of harm have existed conceptually for a long time, they had not been deployed in practice in recent history prior to the FTC's effort to block the Meta/Within merger. Potential competition theories in digital markets often involve consideration of whether a smaller or even nascent firm could have, in the absence of the merger, developed into a viable competitor to the acquirer. They can also encompass theories around killer acquisition, which, while often discussed in the context of digital markets have rarely been used in practice, and reverse killer acquisitions, which some consider may be more prevalent.

In terms of non-horizontal theories, input foreclosure theories have frequently centred around degradation of access to 'virtual' inputs such as APIs, operating systems or data, while leveraging theories have focused on the ability of a platform to achieve technical tying through platform design or pre-installation practices.

However, while theories of harm have been adapted some extent to reflect digital market characteristics, the extent to which broader ecosystem effects have been taken into account has been limited, at least until recently.

### **3. When developing theories of harm for digital mergers it is important to consider the unique organisational structure of digital platforms, which influences the way in which they compete.**

Certain organisational features of digital platforms' and their monetisation strategies influence platforms' incentives and the way in which they compete, and this can change over the course of a platform's development. For example, in their early stages, platforms are incentivised to encourage complementary innovation (while diminishing innovation in substitution) to add value to their core offerings, while in maturity, they are incentivised to become more closed in order to limit access to data and maintain control over the evolution of their ecosystems. As such, after surviving competition and the market tipping, platforms can move from being foundations for growth and innovation, to bottlenecks.

Further, with many digital markets being multi-sided in nature, it is important that sufficient focus is placed on the non-customer-facing side, given that this is where the product or services are often ultimately monetised while they are provided to consumers for 'free'.

Theories of harm for digital mergers should therefore be developed within this organisational context and there may be value in considering strategic management literature to better understand digital platforms' underlying business strategies.

### **4. Views are mixed on whether it is appropriate to move further away from traditional theories, including through the development of ecosystem-based theories.**

Some experts are of the view that adapting traditional theories of harm does not go far enough, particularly in terms of assessing the impact of a merger on a broader ecosystem. Certain authorities have already started to incorporate broader ecosystem effects into their theories of harm, including Brazil in its assessment of the Microsoft/Activision merger. However, there is also a contrary view that traditional theories of harm can be appropriately tailored to allow for a thorough analysis of digital mergers, and any enforcement gap would need to be identified in clear and unambiguous terms before moving away from established practices and applying 'new' theories of harm such as ecosystem theories.

Other non-price aspects of competition which some experts consider there should be greater focus on include innovation and privacy. These have been incorporated into theories of harm to a limited extent already in some jurisdictions.

Some experts also consider that theories of harm may need to be adjusted to reflect the longer-term impact on competition, as the efficiencies gained by a merger in the short term may be offset by competitive harms over the longer term as a result of markets ‘tipping’. However, others consider that the innovative nature of digital markets makes longer-term predictions even more speculative than in traditional markets.

**5. Further adapting theories of harm or developing new theories for digital mergers will involve acceptance of a greater degree of uncertainty, which may make it difficult for authorities to intervene in mergers given existing legal tests and standards of proof.**

The potential competitive impacts of digital mergers may already be more uncertain and difficult to predict than those in traditional markets because of the dynamic and innovative nature of digital markets. Further adapting theories of harm to focus more on non-price aspects of competition or developing new theories of harm such as those based around ecosystem effects is likely to require acceptance of an even greater level of uncertainty.

For example, a digital merger may give the merged firm an increased capacity to collect consumer data, which could lead to privacy degradations. However, the ‘privacy as a quality’ framework is not straightforward as there are multiple dimensions of quality and increases to privacy protection may come at a cost to other aspects of quality.

As such, if competition authorities move forward with ‘new’ theories which may be better suited to capturing competitive harms in digital markets, it may become increasingly difficult to prove their cases with sufficient certainty to meet the requisite legal standard. This difficulty may be exacerbated in conglomerate mergers, which are generally assumed to not raise competitive concerns and for which there is therefore generally a higher bar for proving otherwise. As such, the existing legal tests and/or standards of proof may present a challenge to assessing digital mergers.

There was a concern that if authorities are too hesitant to act because of this added uncertainty, it may become too late to prevent competitive harms given the dynamics of digital markets.

The ‘balance of probabilities’ test that is used in some jurisdictions may therefore not be the optimal threshold for assessing digital mergers and the ‘balance of harms’ approach may be preferable, as it will allow authorities to consider outcomes that are unlikely but could have a significant impact. However, others consider that the current legal tests and appropriate for digital mergers and that existing merger regimes are flexible enough to allow authorities to comprehensively assess digital mergers in this context.

.