OECD
Organisation for Economic Co-operation and Development

DAF/COMP/WD(2023)113

Unclassified | English - Or. English

2 December 2023

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 29 November 2023

Competition and Innovation: The Role of Innovation in Enforcement Cases– Summaries of contributions

6 December 2023

This document reproduces summaries of contributions submitted for Item 11 of the 141st OECD Competition Committee meeting on 5-8 December 2023.

More documents related to this discussion can be found at
www.oecd.org/competition/the-relationship-between-competition-and-innovation.htm

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JT03533242

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BIAC

BIAC appreciates the opportunity to comment on this important topic.

Innovation is an important and legitimate goal of competition enforcement. Innovation is a cornerstone of economic growth, technological advancement, and societal progress. While competition agencies are not responsible for fostering or engendering innovation, they play an important role in ensuring that the actions of companies, either individually or collectively, do not retard or inhibit the opportunities for innovation. Robust competition also encourages investment in research and development, which fuels technological breakthroughs, drives economic expansion, and expands consumer welfare.

Competition agencies play a role in preserving innovation competition in several areas, including in merger enforcement, behavioral and antitrust cases. The broad scope of enforcement cases make clear that harm to innovation competition is a fully legitimized basis for enforcement under current competition laws, on equal footing with harm to price or output competition. The ability of agencies to challenge harm to innovation competition is, therefore, well established as reflected in the Secretariat Background Note.[1] There are aspects of enforcement in this area, however, that are less well established, including the standard(s) by which an agency must show an effect on innovation competition.

We focus our comments principally on this topic, i.e., the standards applicable to cases based on harm to innovation resulting from mergers or conduct of parties.

Competition cases based on innovation theories are different in some respects from cases based on price or output effects. While both cases require some predictive assessment of future competitive impacts, innovation cases rely exclusively on this basis. Merger cases based on price or output effects, for example, can often test (or approximate) the immediate post-merger profit-maximizing price, or optimal output level, of the combined firm, leading to a more immediate assessment of the likelihood of harm on the current market. Innovation merger cases, however, require a counterfactual that predicts whether and to what degree future innovation will impact the future market. These factors are always case-specific and require deep understanding of market dynamics.

Innovation theories of harm are particularly challenging because they require agencies to discern and distinguish between probabilities, possibilities, and conjecture. In many cases, reasonable minds can differ on what innovation may result, when it will occur, and the impact it may have. Indeed, the innovating parties themselves are often unable to make these predictions or to get them right, with a common theme being a high degree of (over) optimism.[2]

A key issue in enforcement, therefore, is the standard of proof to demonstrate harm to competition based on innovation theories. As we will see, there is no relaxation of the legal standard of proof required for cases based on harm to innovation. There is good reason to

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[1] OECD, The Role of Innovation in Competition Enforcement — Roundtable Background Note (2023), https://www.oecd.org/daf/competition/the-role-of-innovation-in-competition-enforcement-2023.pdf.

[2] See, e.g., Meta Platforms, Inc. v Competition and Markets Authority, [2022] CAT 26, ¶ 108 (CAT) ("Having identified the nature of the dynamic competition, it is necessary to test whether that dynamic is likely to actually manifest itself. We anticipate that the number of identifiable dynamic elements that actually succeed will be vastly outnumbered by the failures.").

maintain the same burden of proof in innovation cases as in cases involving other type of harm like price effects and output reduction. Otherwise, agencies could more easily prevent mergers with more speculative competitive effects than those with more immediate demonstrable effects, which would be a perverse result. This approach will maintain the predictability, transparency and legal certainty which will not only aid businesses in planning, but also promote investment that is likely to spur innovation.

Brazil

This note examines the enforcement of competition cases involving innovation in Brazil. It first analyses the legal framework, including innovation considerations in the Guidelines for Horizontal Merger Review and the draft Non-Horizontal Merger Guidelines. Second, it reviews three key merger cases and their analysis of innovation effects: Bayer/Monsanto, Itaú/XP Investimentos, and Microsoft/Activision Blizzard. Bayer/Monsanto focused on preserving post-merger innovation competition in agricultural biotech. Itaú/XP recognised the mergers target’s disruptive business model, imposing behavioural remedies. Microsoft/Activision scrutinised impacts on emerging subscription gaming market, where Microsoft held substantial market share. Third, it examines three unilateral conduct cases: Google Scraping, Google AdWords, and Google Shopping. Google Scraping involved scraping of competitors' reviews in shopping comparison, potentially diminishing innovation incentives. Google AdWords concerned multi-homing restrictions on Google's advertising platform. Google Shopping investigated preferential treatment of Google shopping results, raising predatory innovation issues. While these cases demonstrate CADE’s awareness of dynamic competition, concrete methodologies to assess innovation effects remain limited. Regarding mergers, CADE seems reluctant to apply dynamic competition theories of harm, despite reference guides. Regarding conduct cases, additional clarity may be needed in case law concerning evidentiary standards for determining anticompetitive effects on innovation. As digital markets with high innovation rates gain prominence, developing analytical frameworks to evaluate dynamic competition effects will likely be a focus for Brazilian competition policy.

EU

Innovation is key for the economic development and one of the main drivers of growth and employment in the EU economy, that in turn generate clear benefits for consumers' welfare. The relationship between competition and innovation is bi-directional: competitive markets generally promote innovation and innovation can shape and redesign the competitive scenario.

The concept of protection of innovation competition is included in the fundamental rules on competition in the Treaty on the Functioning of the European Union and is then implemented and specified in secondary legislation (regulations, notices and guidelines).

The Commission's decisional practice, both in antitrust and mergers, is consistent with this legislative framework:

1. In antitrust cases, the relevant analysis has focused either on the possible harm to innovation to the detriment of consumers brought about by anticompetitive agreements or abuses of dominance, or on the relevance of innovation in the context of assessing possible objective justifications or efficiencies of specific conducts;
2. In merger cases, the Commission has assessed harm to innovation in both horizontal and non-horizontal transactions, focusing on three main concerns: (i) discontinuation of existing pipeline products, (ii) reduction in future R&D efforts, and (iii) reduction in future product market competition. Moreover, in specific cases, innovation has been taken into account also when assessing the remedies proposed by the parties, in particular when innovation was a key parameter of competition between the parties.

The Commission will continue to consider innovation as an important parameter of competition, in particular in dynamic and fast-moving markets, such as the ones in the present digital world, where success is often determined by the capacity to innovate and to market as soon as possible new products and services.

Finland

The contribution discusses the approach of the Finnish Competition and Consumer Authority ("FCCA") to the role of innovation in competition enforcement. After the short presentation of the framework for assessing innovation related questions, the contribution focuses on the recent amendment to the Competition Act to widen the scope of merger control.

As regards the framework for the mergers, the FCCA applies the SIEC test enabling it, among other things, to assess the elimination of actual and potential competition as well as the restriction of innovation competition. As regards the framework for anti-competitive practices, the national provisions are identical to those of EU, enabling the FCCA, among other things, to assess potential restrictions to technical development or investments as well as potential exemptions, such as those based on the promotion of technical or economic progress. Innovation related questions as theories of harm and efficiency defences are assessed based on general economic principles in accordance with the case law of the Court of Justice of the EU, European Commission's decisional practice as well as other guidance, i.e., guidelines and notices published by the European Commission.

With reference to the amendment to the Competition Act, the FCCA had advocated in different contexts for lower turnover-based thresholds and for a call-in option to enable it to investigate killer acquisitions and harmful concentrations of more traditional markets which fell below thresholds. The joint Nordic report of 2020 recognised competition concerns stemming from killer acquisitions and discussed, among other things, theories of harm related to killer acquisitions and difficulties in assessing their competitive effects. Also, the report recognised that many acquisitions involving small innovative start-ups will not be notified, since they fall below the turnover-based thresholds. Similarly, the FCCA study of 2021 indicated that the thresholds at the time allowed harmful mergers to escape the review and should be lowered as well as the FCCA to be provided with a call-in option to intervene in early-stage killer acquisitions and anticompetitive high-value transactions. A call-in option was further discussed by the Ministry of Economic Affairs and Employment in the Assessment Memorandum of 2022 with different possibilities to execute a potential call-in option, such as a minimum turnover threshold for a target company and a time limit for the FCCA to invoke the call-in option as well as the possibility for a voluntary notification.

As proposed in the Government Bill of 2022, the Competition Act was amended, and the turnover-based thresholds were lowered. As of 1 January 2023, a transaction must be notified when the parties' combined turnover in Finland exceeds EUR 100 million, and the turnover of each of at least two parties exceeds EUR 10 million in Finland (previously, the parties' combined worldwide turnover had to exceed EUR 350 million and the turnover from Finland of at least two of the parties had to exceed EUR 20 million each). The new thresholds enable the FCCA to intervene in a larger number of transactions which could have anti-competitive and innovation-impeding effects, such as rapid concentrations of markets falling below previous thresholds. However, the amendment, lacking the call-in option entirely, will not be sufficient to solve the issue with killer acquisitions and high-value transactions, as the thresholds are not low enough to capture the acquisitions of start-ups with limited turnovers, regardless of their high valuation, as well as transactions resulting into significant geographical concentrations. Consequently, the discussion around the call-in option may continue.

Indonesia

Competition law in Indonesia recognizes the importance of technological development. It is believed that healthy business competition will bring new innovations to the market. However, it is important to realize that in market conditions that are not competitive, or highly concentrated, it will be easier for competition barriers to distort the market and hinder technological development. Therefore, Indonesia's Competition Law is clearly stated that businesses are prohibited from using a dominant position directly or indirectly to take action, one of which could limit the market and technological development, or in other words hinder innovation.

Long before the development of the digital economy, ICC had already considered the importance of innovation. In 2013, in its decision, the ICC recommended to the Ministry of State-Owned Enterprises to instruct that every procurement must be carried out using open bidding which provides equal opportunities to competent providers of goods/services including the opportunity to conduct product introductions (trials).

Then in 2017, the ICC sent a letter of recommendation regarding product technology considerations in the bidding for the procurement of an Electronic Road Pricing (ERP) system. The bidding process which was carried out within one year was based on the Regulation of the Governor of Jakarta Province which stipulates that the technology used is Dedicated Short Range Communication (DSRC) frequency 5.8 GHz.

In 2022, ICC also assessed mergers in the telecommunications sector between PT Indosat Tbk and PT Hutchison 3 Indonesia. The merger is intended to create a new world-class digital telecommunications and internet company for Indonesia. In reviewing the merger transaction, ICC found that PT Indosat Tbk will have a better position and will be able to implement 5G technology according to their customers' needs. Without this merger, companies will have difficulty implementing 5G technology due to limited bandwidth.

In 2023, the ICC revised its merger analysis guidelines and innovation will be one of the factors that being analysed in our comprehensive merger assessment stage. The regulation stipulates that ICC shall conduct a comprehensive assessment stage in reviewing the impact of a merger or acquisition transaction, and in analysing whether the transaction potentially causes monopoly practices and unfair business competition or not.

There are different theoretical bases regarding the impact of innovation on business competition in the market. The application of this concept has attracted attention and discussion among economists and experts regarding whether consideration of innovation factors needs to be implemented by competition agencies. Consideration of these impacts is unavoidable in some cases in line with economic and technological developments. Innovation, as one of the non-price factors, particularly those aimed at developing new products, represents an effort by a company to either capture a greater share of an existing market or create an entirely new market in which they will have market power. However, the incentive and ability of companies to undertake these efforts will depend on the rivalry they face in current product markets. Analysis of specific market conditions is needed to understand the potential impact of innovation on business competition in the market. Therefore, business competition agencies need to conduct a case-by-case analysis when considering the impact of innovation in case analysis and merger transaction assessment.

Japan

Regarding competition and innovation, the JFTC launched the Study Group, consisting of relevant knowledgeable experts, in March 2023, based on the belief that ensuring a competitive environment that can promote innovation is an important and current policy challenges in competition policy and that it is important to properly evaluate the impact of long-term efficiency (competitive benefits) of innovation. The Study Group conducted a study on theoretical and systematic summarization of impact mechanisms that corporate conduct and other factors have on innovation based on economic knowledge, and then compiled an interim report.

The Report raised individual behavior types, on which economics field have accumulated relatively large amounts of knowledge, and which are considered useful for analyzing other behavior types and deepening understanding across types. These individual behavior types specifically are mergers (horizontal, vertical, and conglomerate) and joint R&D. Furthermore, the Study Group considered and summarized their impact mechanisms on innovation, as well as summarized basic and common viewpoints in studying impact of various types of corporate conduct on innovation.

R&D incentive toward innovation stems from the difference between profit expected to gain in the future if R&D is conducted and profit expected to gain if R&D is not conducted. The more the former compared with the latter, the larger R&D incentive is; and the less the former compared with the latter, the smaller R&D incentive is. A corporate conduct affects such differences between these expected returns in participants and non-participants (competitors), thus affecting the R&D incentives of the respective firms. In addition, “R&D-related fields”, such as the actor's internal business/profit conditions, competitive environment, market structure, affects how large the expected returns will be, and corporate conduct brings about unambiguous situational changes to these fields. Therefore, the Study Group focused on these fields and summarized impact mechanisms.

In addition, the JFTC analyzes the impact on innovation in individual cases as necessary. In one example, in the merger case of Lam Research and KLA-Tencor, the JFTC found that the possibility that confidential information regarding the R&D of a third party held by one party could be used for product development of the other party owing to the merger could decrease incentives for joint R&D involving the third party. The merging companies ultimately withdrew their merger plan.

Kazakhstan

The text outlines practical applications of innovation in digital markets, focusing on algorithmic pricing in the taxi services and airline industries in Kazakhstan. It highlights concerns about anti-competitive practices, such as a dominant taxi service aggregator imposing high commissions, leading to increased taxi fares and potential economic coordination investigations. In the airline sector, the use of dynamic pricing by the national carrier, holding a monopoly position, raises concerns addressed through collaboration with the Ministry of Transport to establish pricing rules.

Issues in digital market antimonopoly legislation compliance are identified, including challenges in assessing market dominance and potential price coordination among market participants. The current competition legislation allows scrutiny of digital platforms for abuse of dominant positions or price coordination in an effort to maintain fair competition.

Mexico

In this contribution, the IFT exemplifies how it considers the impact of innovation and technological advances in the light of the competition policy, as well as the regulatory policy.

Enforcement is carried out with a central focus on the end users' benefit, seeking to establish competitive conditions for operators, thus fostering the innovation process, as well as economic and social development.

The IFT's Investigative Authority recently conducted a study on digital platforms and their business models, which highlights how the Big Five or Big Tech (GAFAM: Google (Alphabet), Amazon, Facebook (Meta), Apple y Microsoft) have revolutionized the economy, online behavior, as well as in the daily lives of people in Mexico and around the world.

In the contribution, the role of innovation on digital platforms; in the relevant market definition; in efficiencies; in the management of the radio spectrum; and in telecommunications networks and services, is analyzed.

Poland

Innovation is a critical factor that Polish Competition Authority considers when enforcing antitrust regulations. The role of innovation in enforcement of competition cases is multifaceted, touching on aspects such as market dynamics, consumer welfare, and the competitive process. This contribution delves into the intricacies of how innovation influences and is influenced by competition law enforcement, guided by practical examples from the Polish market and enforcement by the Office of Competition and Consumer Protection in Poland (UOKiK). It starts with an introductory section that sets the stage for the subsequent analysis (**1.**). The body of the contribution is then structured to progressively address specific cases that illustrate the interplay between competitive harm and innovation (**1.1. – 1.3**). The text then transitions to a broader discussion on the role of innovation as a legitimate justification within competition law, examining how innovative efforts can be viewed through the lens of legal and economic justification for certain market practices (**2.**). Subsequently, the focus shifts to an examination of how innovation influences the definition of relevant markets and the assessment of market power, incorporating a critical analysis of the traditional approach to market definition in light of innovation dynamics (**3.**).

Spain

This contribution by the Spanish National Markets and Competition Commission (CNMC)[3] addresses the topic of the Roundtable on "The role of innovation in enforcement cases" to be hosted by the OECD in December 2023.

To that end, it relies on the CNMC's experience in assessing innovation, an area where the CNMC has been especially active in in the field of merger control. The Spanish Competition Act provides a horizontal framework for the assessment of mergers, both in procedural and substantive terms. Our market share threshold for notification has proven useful to capture mergers in dynamic and rapidly evolving markets where innovation plays a key role, which we would have not captured only on the basis of our turnover threshold. In our practice, we have had the opportunity to assess innovation as a key competitive variable.

This framework has allowed the CNMC to gain knowledge and experience in assessing mergers in some sectors (like online food delivery, online legal publications and databases, software and other platforms, etc.) where innovation is key to the competitive assessment.

[3] This contribution has been prepared by the staff of the CNMC and shall not be regarded as the official position of the CNMC unless it refers to CNMC approved documents

Chinese Taipei

This paper discusses relevant regulations that may apply to innovation issues in merger and other competition cases. It also provides case examples to illustrate how the Chinese Taipei Fair Trade Commission (hereinafter referred to as the 'CTFTC') evaluates effects of innovation on competition in its enforcement activities.

The CTFTC has published the Guidelines on Handling Merger Filings (the 'Merger Guidelines'). Under the Merger Guidelines the CTFTC may consider the likelihood of technological advancement enabling the merging parties to engage in cross-industry operations when reviewing conglomerate mergers. In terms of horizontal and vertical mergers, innovation has been considered as other factors that may impact competition under the catch-all provisions of the Merger Guidelines. In response to emerging fintech business models, the 'Regulations for the Examination of Financial Holding Company Merger Cases' provides that the impact of innovation on financial services will be taken into account. Furthermore, an innovation-based concerted action may qualify for an exemption under the Fair Trade Act if it is approved by the CTFTC. Under the 'Guidelines on Technology Licensing Arrangements', the CTFTC may also assess innovation markets when reviewing technology licensing arrangements.

In terms of merger cases, the CTFTC concluded that a proposed merger in 2018 by Neo Solar Power Energy and two other solar cell and module manufacturers, would enhance research and development and innovation capacities of the merging parties and promote development and innovation in relevant industries. In 2022 the CTFTC did not block a proposed merger among eTreego and three other businesses given that technologies for EV charging were still evolving in Chinese Taipei and the proposed merger was unlikely to lead to a substantial lessening of competition. Between 2019 and 2020, the CTFTC did not block three joint ventures of online-only banks – Next Bank, Line Bank and Rakuten Bank. In 2021, three businesses including FamilyMart notified a merger to the CTFTC to jointly establish a new e-payment institution. The CTFTC's decision suggested that this proposed merger would facilitate the formation of an ecosystem driven by the e-payment institution. For a merger proposed by financial holding companies in 2020, the CTFTC acknowledged that financial holding companies were all expected to take action in fintech related innovative activities and this proposed merger was unlikely to eliminate competition in the 'fintech-related innovation market', and lead to less commitment to innovate.

Regarding cartel cases, eight state-controlled banks including First Commercial bank submitted an application to the CTFTC in 2011 for an exemption of a proposed concerted action to form a 'Pan-Public Bank Credit Card Alliance'. While innovation was not explicitly noted in the application, the CTFTC found that the market shares of the applicants was not significant and the proposed alliance was likely to incentivize competing issuing institutions to actively engage in innovation to maintain competitiveness. The CTFTC approved the application since it would inject new momentum in the credit card market, facilitating effective competition

The digital economy has been a key priority sector in terms of competition law enforcement and policy implementation. Technological innovation has brought challenges to market definition. In addition to evaluating the impact of innovation on product markets, technology markets composed of substitutable technologies for innovation and innovation markets where relevant R&D activities occur should be also taken into account when investigating and dealing with innovation related cases. To ensure appropriate assessment of innovation effects on competition, competition agencies will be required to assess the

‘net’ effects in individual cases. Moreover, in response to the emerging competition issues in the digital economy and the application of the ‘potential competition’ in its competitive assessment of the post-merger markets, the CTFTC continues to observe international trends and refine considerations and guiding principles for its enforcement actions in the highly dynamic digital economy. This will seek to achieve a balanced outcome by taking into consideration both positive and negative effects of innovation.

Turkey

Undertakings do not always compete on price alone, but also on many non-price factors such as variety, quality, pre-sales and after-sales services, as well as on innovation - by developing new products or improving existing products. Therefore, the Turkish Competition Authority (TCA) as well as other competition authorities attach importance to innovation as a competition parameter.

In its recent amendments to the competition legislation, the TCA has established a roadmap on how innovation should be addressed in investigations and merger cases. Accordingly, the essential effect of undertakings' conduct on innovation depends on the nature of the innovation activities, the structure of the relevant product markets, the dynamics of innovation competition in the market, and the importance attributed to innovation by undertakings and consumers. In determining the importance of innovation in the market, the size of R&D investments of undertakings, the importance of intellectual property rights or the economic rationale for the merger may also be taken into account. However, in an analysis of the dynamics of innovation competition, the extent to which the undertakings' innovation activities overlap or are complementary, the extent to which they create competitive pressure on the merged firm, and the obstacles to the conduct of innovation activities are important. This assessment will be based on the undertakings' innovation capacities taking into account variables such as the number and quality of patents, the number of R&D laboratories and the number of R&D employees, rather than their market shares in the relevant product market.

When we look at the country practice, it can be said that innovation is encouraged by many public policies due to the critical importance of innovation on economic growth and consumer welfare. Therefore, even if the Board's decisions so far do not include detailed assessments of innovation, it is inevitable that the number of related cases will increase.

United States

The U.S. federal antitrust agencies (the Antitrust Division of the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (together, "the Agencies")), have long recognized the vital role competition plays in driving innovation, and that protecting competition and innovation is critical for promoting growth in an economy.[4] When firms compete, they strive to gain an edge in the market by creating new or better products and services, introducing more attractive features, reducing costs, or adopting new technology for distribution of products. This leads to technological advancements, increased variety of goods or services, quality improvements, and increased productivity that benefit society as a whole.

The U.S. antitrust laws protect all dimensions of competition and the competitive process, including innovation. When conducting investigations, the Agencies start by determining how competition presents itself in the market. Recognizing that competition often plays out in the form of rivalry to innovate, the Agencies regularly consider and assess the potential impact on innovation in their enforcement programs. A "threat to innovation is anticompetitive in its own right,"[5] and the Agencies may bring an enforcement action based on adverse innovation effects.[6]

This paper focuses on innovation considerations in U.S. merger analysis. It first describes some of the ways mergers may raise innovation-related concerns, as reflected in the Agencies' joint Draft Merger Guidelines ("Draft Guidelines"), which were released for public comment in July 2023. It next discusses examples of proposed mergers where the Agencies have identified adverse competitive effects related to innovation. It then describes some recent additions to the toolkit the Agencies use to identify and address threats to innovation-based competition more broadly. These include expanding Agency expertise to understand evolving markets, updating the merger notification form to reflect forward-looking competition, and collaborating with other agencies to employ a "whole of government" approach to promoting competition and innovation.

[4] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) at § 6.4 Innovation and Product Variety (noting that competition "often spurs firms to innovate."); The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ *(noting that* "Economists find that as competition declines, productivity growth slows, business investment and innovation decline, and income, wealth, and racial inequality widen.").

[5] *United States v. Anthem, Inc.*, 855 F.3d 345, 361 (D.C. Cir. 2017).

[6] Horizontal Merger Guidelines, § 6.4, Innovation and Product Variety (2010) https://www.justice.gov/atr/horizontal-merger-guidelines-08192010; U.S. Dep't of Justice and Fed. Trade Comm'n, Draft Merger Guidelines (2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.