

Unclassified

English - Or. English

24 May 2023

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

Theories of Harm for Digital Mergers – Note by Chinese Taipei

16 June 2023

This document reproduces a written contribution from Chinese Taipei submitted for Item 8 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm>

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03519591

Chinese Taipei

1. This paper outlines challenges facing the Chinese Taipei Fair Trade Commission (hereinafter referred to as the “CTFTC”) for merger review in digital markets. It also presents case studies with applicable theories of harm and key aspects of their assessments.

1. Introduction: policy development

2. To respond to competition issues emerging in the digital economy, the CTFTC dedicated itself to preparing a White Paper on Competition Policy in the Digital Economy (the White Paper) in 2021. Following the consultation process as well as a number of internal and external meetings, the CTFTC released the final version of the White Paper on December 20, 2022.¹ The White Paper covers the most prominent competition issues in the digital economy. These issues include, but are not limited to, market definition, market power assessment, self-preferencing of platform operators, tie-in sales and price discrimination as well as data privacy and algorithms. In the White Paper, the CTFTC aims to point out its general views and guiding principles for businesses to navigate compliance challenges in the ever-changing world of technology.

2. Challenges of reviewing digital mergers

3. In the digital economy, competition occurs between ecosystems rather than between individual products. Through horizontal and non-horizontal mergers, technologies, goods and services that seem to be initially unrelated may be combined to facilitate businesses to provide more integrated products. Given the interplay of the characteristics of the digital economy – increased network effects, data-driven growth, near zero marginal cost of production and cross-border competition, digital markets present themselves as distinct from traditional markets. These can be observed in respect of sources of entry barriers, competition elements, levels of product diversity and differentiation as well as evolving paths for markets.

2.1. Challenges of defining relevant markets

4. Market definition is a complex task, and the characteristics of digital markets make it even more complicated. Since the digital economy is mainly driven by innovation, and competition among ecosystems is highly dynamic, businesses tend to acquire key technologies, data or distribution channels from market participants instead of acquiring their direct rivals in the same markets.

5. The main purpose of market definition is to examine and evaluate competition constraints and concerns. As a result, in a digital industry, defining a wider (product or geographic) market sometimes may help develop a more informed understanding of the potential or actual impacts from a proposed merger on each relevant and adjacent market. This approach can sometimes blur the conventional distinction between horizontal and non-

¹ See press release, available at <https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=179&docid=17352>; Summary of White Paper in English version, available at <https://www.ftc.gov.tw/upload/46909b24-e97f-460e-a26b-51f423ea3209.pdf>.

horizontal mergers. However, considering the nature of dynamic competition, the scope of market subject to material competition is not necessary to be restricted to a narrowly defined “horizontal” market. It may not be very meaningful to overly emphasize the importance of classifying a merger as horizontal or non-horizontal.

2.2. Challenges of competition assessment

6. Traditionally, assessing impacts of horizontal mergers, either in terms of unilateral effects or coordinated effects, focus mainly on price effects. In the digital economy, such price effects may not be easily observed. Given skewed pricing strategies widely used by platform operators, they often adjust prices on their service portfolios rather than on a specific side of the platform. Moreover, in the digital economy, consumers are normally offered services/products at a price of zero. Non-price competition, including product diversification, quality of products/services and consumer choices have become increasingly important, enabling platform operators to have broadening flexibility when designing their pricing structures.

7. When competition assessment switches its focus to an expanding scope of market competition and dynamic competition among ecosystems, market power does not simply refer to a business’ ability to manipulate prices of individual products, but its impact on product diversity and differentiation. Mergers in digital markets do not usually meet strict criteria of horizontal mergers set out in current competition law. Competition concerns around digital mergers are whether they will lead to market foreclosure, impediment of innovation or misuse of market power. In other words, competition assessment will shift from price impacts to businesses’ abilities to control resources critical to competition (e.g. data), and the likelihood of exclusionary practices, for example killer acquisitions or any conduct that may restrict or distort potential competition.

3. Theories of harm for digital mergers

3.1. Killer acquisitions and the concept of potential competition

8. Theories of harm for killer acquisitions have been of great interest to the CTFTC in recent years. It has been challenging to prove whether a killer acquisition is designed to eliminate potential competitors. Tactical intentions behind businesses’ strategies of mergers and acquisitions (M&A) may only be able to be observed over a longer period.

9. Furthermore, the effect of startup acquisitions on innovation is also on the radar. The prospect of being acquired is one of the noticeable incentives for startup companies to be willing to invest in innovation. In the future, positive effects on technological innovation will also be considered when the CTFTC assesses the competition impact of a killer acquisition. For example, assets, technologies, talents or intellectual property rights of the acquired party will be incorporated into the acquiring party’s ecosystem. They can be used to improve products and technologies of the acquiring company, and then support further innovation of the acquiring party.

10. Until now, the CTFTC has not applied a specific theory of harm to assess a killer acquisition. Under Point 12 of its Merger Guidelines², the CTFTC is required to evaluate

² Point 12 of the CTFTC’s Guidelines on Handling Merger Filings provide that: “The FTC considers the following factors when reviewing conglomerate mergers: (1) The possibility of regulatory changes and its impact on business operations of the merging parties across different industries; (2) The likelihood of technological advancement enabling the merging parties to engage in cross-

the impact from conglomerate mergers on potential competition by reviewing regulatory rules, technological advancement and plans between merging parties for cross-sector collaboration prior to the proposed M&A. The CTFTC has thus gained some experience around potential competition when reviewing conglomerate mergers. When the likelihood of potential competition between merging parties is considered substantial, further analysis of the adverse effects on competition is needed. Factors included in the competition assessment vary with major competitive effects of the merger under review. Namely, the CTFTC will examine whether it is similar to a horizontal or vertical merger, and then apply the corresponding reviewing framework to assess its overall competitive effects.

3.1.1. Case Study 1: Proposed acquisition of Communications Global Certification Inc. by Google Inc.

11. At the end of September 2017, HTC Corporation announced that it would sell its ODM team to Google Inc. following a deal worth \$1.1 billion US dollars. Google planned to acquire HTC's employees who had been working to design and manufacture Pixel smartphones and HTC's intellectual property under non-exclusive license agreements. In this deal, Google would indirectly acquire 100% of shares of a HTC wholly-owned subsidiary i.e. Communications Global Certification Inc. ("CGC"). The proposed acquisition was considered as a conglomerate merger as the merging parties did not compete with each other or operate at different stages of the supply chain. Google's main businesses covered internet search services, mobile operating systems (OS) and online advertisements, while CGC provided terminal certification and testing services. This acquisition did not include HTC's smartphone production lines.

12. The CTFTC concluded that there was no substantial potential competition between the merging parties based on the following findings:

- CGC provided certification and testing services for mobile devices. Any certification service provider that met the criteria set by the regulatory agency – the National Communication Commission ("NCC") could be delegated by the NCC to test and verify telecommunications terminal equipment. The investigation showed that there were 30 firms eligible for providing the services. It suggested that the criteria set by the regulatory agency did not create entry barriers in the certification and testing service market. Added to this, widely-available equipment and mature technologies for testing and certification services had been commonly used by relevant businesses. The likelihood of Google independently entering into the certification and testing market would not increase with regulatory changes or technological progress.
- Google and its subsidiaries did not have any plan to enter the certification and testing market to compete with CGC before or after this proposed acquisition of CGC. Google had made long-term investments involving a large amount of money in developing its Android OS and exclusive apps to enable them to be accepted widely by mobile device manufacturers and users. CGC did not have experiences and resources required for the development of a mobile OS and apps with similar features. It was unlikely for CGC to enter the mobile OS market and the mobile application market in the short run. No evidence showed that Google perceived CGC as a potential competitor.

industry operations; (3) Respective cross-industry development projects that the merging parties have prior to the proposed merger; (4) Other factors substantially impacting on the likelihood of potential competition."

3.2. Competitive advantages in the era of big data

13. In digital markets, businesses have been engaging in a race for effective innovation of business models to acquire or maintain their dominant positions. Accessing large data sets has become a key basis if businesses want to keep up with or surpass their competitors, particularly for platform operators. Platform operators are in a superior position to increase their profits and enhance their competitive advantages due to indirect network externalities. As they are at the center of data ecosystems, application of data and data analysis will further amplify the impact of network effects. Platform operators with more users are able to access a larger amount of data to improve the quality of services and offer more precise targeting in advertising than their rivals.

14. Nevertheless, the accumulation of vast amounts of data or its concentration does not necessarily lead to a rise in market power. Data is classified as an information good that is inherently not scarce or rivalrous. A platform operator with a large base of users can collect more data while data from the same user can be used by other firms simultaneously. The value of the data will not be depleted since it is used repeatedly. In addition to this, data collection, analysis and application can be completed at nearly the same time, inferring a short lifecycle of valuable data. In short, accumulating long-term historical data will not warrant that a business gains competitive advantages.

15. The CTFTC will take various factors into account to evaluate the role of data in market competition. The CTFTC will identify how likely data itself can be substituted and how the data might be used to confer competitive advantage. The CTFTC will also consider whether data can be duplicated, whether it can be collected from multiple sources, substitutability of different datasets, and whether data is served as a key input to the market. Whether a business is capable of processing, analyzing and acting on collected data is also counted as part of the competition assessment to see if the data-driven competitive advantages can be realized.

3.2.1. Case Study 2: Creation of a joint venture for internet-only banking – LINE Bank

16. To accelerate digital transformation and financial innovation and promote inclusive finance in the banking sector, the Financial Supervisory Commission (“FSC”) relaxed the regulatory barriers for the establishment of internet-only banks in 2018. In this context, 7 firms filed a proposed joint venture of LINE Bank to the FSC for approval. These firms included LINE Financial, four banks and two telecommunication companies. Since this proposed joint venture met thresholds and criteria of merger notifications under the Fair Trade Act, the merging parties were obligated to report it to the CTFTC.

17. Of the merging parties, LINE Financial Taiwan Limited (“LINE Financial”) is an affiliate of the LINE Group that owns the most popular messaging app - LINE APP in Chinese Taipei. The LINE Group has built its ecosystem comprising mobile payment, online shopping and mobile marketing. This has enabled the LINE Group to collect large amount of data, which includes users’ digital footprints (browsing history for example). In the merger review process, the merger filing revealed that they planned to make use of the LINE APP to connect customers of LINE Bank to the LINE ecosystem and claimed that it would help meet various customers’ needs in their daily life. LINE Bank was thus likely to collect and analyze specific data such as customer preferences and relevance of social networks to identify characteristics of target customers, provide products serving customers’ needs and further integrate the data into the customers’ credit-scoring system of LINE Bank.

18. A potential competition concern arose - whether the proposed joint venture would enable LINE Bank to leverage the LINE Group's data-driven competitive advantages and prevent rival companies from competing. The CTFTC considered the following aspects in its assessment:

- Personal information was typically not considered as exclusive because it could be collected by the majority of internet-related service providers. A customer's long-term digital footprint collected by a specific platform could help it to offer more personalized services by pinpointing individual users' characteristics, habits and preferences. While such information may be considered as exclusive data, its value could diminish rapidly in a very short period of time.
- It showed that LINE Bank might be able to leverage the customers' data owned by the LINE Group to identify customers' needs and provide more customer-orientated services. However, this did not stop internet-only banks and conventional banks from collecting customers' data through different sources. In addition to their own databases across different industries, competitors in the financial sector could partner with their affiliates in the same business groups or cooperate with data companies, which included messaging apps other than LINE APP, social media, search engines and shopping websites to access user data.
- As noted above, the LINE Group had a trove of data, but LINE Bank's competitors could gather data from other sources or collect substitute data. Additionally, whether the LINE Group's data trove could bring about the anticipated competitive advantages still hinges on LINE Group's capability of processing, analyzing and applying the data. Hence, the CTFTC concluded that in comparison with its competitors, LINE Group's trove of data itself did not guarantee that LINE Bank would enjoy unduplicable or insurmountable competitive advantages in the sector.

3.3. The interface between protection of personal data and competition law

19. Despite no universal rules in the field of competition laws, a general understanding around personal data is that protection of personal data can be taken into account as a non-price competition parameter when assessing "quality." Alternatively, the level of personal data protection can be used as a parameter when conducting competition assessment, such as the breadth and depth of personal data being collected and used, the accessibility of current privacy policy, and whether privacy-enhancing technologies have been adopted.

20. Competition concerns around personal data protection may arise in certain M&A activities. In a merger between businesses with different levels of personal data protection in place and where user data is a critical part of their inputs, it may raise doubts about whether the overall degree of personal data protection post-merger could be as sufficient as its per-merger level. For the business with a better safeguarding mechanism for personal data, the merger may incentivize it to discontinue the original mechanism. The degree of users' privacy protection is likely to be reduced after such M&A activities and the merging parties may collect more user data, or transfer user data to third parties beyond those that users could reasonably foresee.

21. The CTFTC has attempted to include privacy protection as an element of product quality in the assessment, which has also served for the purpose of considering whether/how the assessment can be integrated with its current merger review process.

22. The joint venture of an internet-only bank - LINE Bank, is one recent example. The CTFTC will assess whether the proposed merger is likely to eliminate competitive constraints concerning personal data protection posed by merging parties on each other.

Before evaluating the impact of a proposed merger on personal data protection and on “competition based on privacy protection,” the CTFTC will look into whether the merging parties have been engaging in non-price (quality) competition in regards to personal data protection. In the case where such competition exists, the CTFTC will take further steps to assess the positive and negative impacts on privacy from the merger.

23. The CTFTC takes a more cautious view on competition interventions into platform operators’ breach of privacy protections due to the respective mandates of the competition agency and privacy regulators. Instead, the CTFTC expresses its views on privacy-related issues in individual cases. In the above-mentioned joint venture, the CTFTC concluded that the proposed joint venture did not restrict or eliminate “competition based on privacy protection,” and reminded the merging parties to abide by the Personal Data Protection Act.

4. Future directions in law enforcement

24. Competition in the digital economy is distinct from the traditional economy. Conventional analytical methods and approaches may not always be applicable when conducting competition assessment in data-driven markets. For example, a traditional competition assessment in a merger review process has centered around short-term price impacts, but it is often not the case in digital mergers. Competition enforcement agencies should have a broader perspective to measure market competition. A longer-term and non-price evaluation should be given more weight when assessing anti-competitive impacts from digital mergers, horizontal as well as non-horizontal.

25. Given the complex nature of emerging issues around the digital economy, the CTFTC adopts an issue-driven approach as its best enforcement principle at this stage. This approach allows the CTFTC to define and solve problems on a case-by-case basis, develop new analytical tools under its existing analytical framework, and further clarify legal criteria of anti-competitive practices as well as the application of theories of harm. The CTFTC will remain vigilant to keep up with the latest developments in domestic and international digital economies and periodically review its enforcement standards.