

Highlights From OECD Roundtable On Conglomerate Mergers

By **David Pearl** (July 13, 2020)

On June 10, the Organization for Economic Cooperation and Development's competition committee held a roundtable with several antitrust authorities to explore issues and trends in the conglomerate effects of mergers, particularly with respect to digital platforms.

While the OECD kept the roundtable itself off-the-record, it has made available on the OECD website background materials, submissions and videos of speaker presentations, each of which is discussed below.



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OECD Secretariat Background Note

As the secretariat describes them:

[C]onglomerate effects arise when the products of the merging firms are not in the same product market, nor are they inputs or outputs of one another. Such mergers could enable tying and bundling strategies that foreclose competition, enable price discrimination, or soften competition among firms.[1]

The note posits that characteristics it views as endemic to digital platforms, such as economies of scale and scope, low marginal costs, and network effects, may exacerbate the risk of traditional tying and bundling harms in conglomerate mergers.[2]

Theories the note offers as unique to digital platforms include "envelopment,"[3] under which a dominant player in one platform market leverages its strength into a second platform market by virtue of overlapping user bases, or the development of branded product ecosystems that increase entry barriers by requiring competitors to enter multiple markets at once.[4]

The note recognizes that many of the same features of digital platforms it identifies as creating risk of harm also have the potential for creating significant efficiencies.[5] And it identifies limited evidence of harm from digital platform conglomerate mergers after surveying the empirical evidence, though it encourages further research on this front.[6]

Allowing that "conglomerate effects of mergers are likely to emerge in only a small set of cases," the note nonetheless urges authorities to remain vigilant when reviewing conglomerate mergers involving digital platforms and to consider behavioral remedies when appropriate.[7]

The U.S. Submission

The U.S. submission explains that the U.S. Department of Justice and Federal Trade Commission "typically do not view [conglomerate] mergers through a distinct lens," finding that the current framework for vertical and horizontal effects in mergers is fully capable of capturing conglomerate theories of harm.[8] Indeed, the submission states that "[c]onglomerate mergers that raise neither vertical nor horizontal concerns are unlikely to be problematic under U.S. merger law." [9]

In line with its lack of a specialized conglomerate framework, the U.S. submission does not

single out digital conduct for special mention or theories of harm. The U.S. submission does, however, underscore the importance of keeping abreast of new developments in economics and endorses studies of consummated mergers as a means to "uncover new mechanisms of harm." [10]

The European Union Submission

According to the EU submission, under EU law, conglomerate mergers can give rise to "a significant impediment to effective competition" through either noncoordinated or coordinated effects. [11] The European Commission's foreclosure framework assesses conglomerate effects on a similar line to vertical effects, with the main theories of harm usually a combination of bundling, tying or other exclusionary practices. [12]

The EC conducts an "ability-incentive-effect" analysis, querying whether the merged firm would have the ability to foreclose, the economic incentive to do so, and whether the strategy would have a significant detrimental effect on consumers. [13] Even though the EC generally prefers structural remedies, it has been willing to impose behavioral ones in the conglomerate context to address competition concerns. [14]

The EU submission characterizes conglomerate mergers in the digital platform context as a topic of ongoing debate in the EU. [15] The submission cites to the recent competition policy for the digital era report, [16] which calls for a closer look at barriers to entry linked to network effects or the use of data and potential or actual competitive constraints exercised by platforms within their ecosystems.

According to the EU submission, the report recommends greater scrutiny of acquisitions in which a "dominant platform or ecosystem acquires a target with a low turnover but a large or fast-growing user base and high future market potential." [17]

Other Submissions

Submissions by other countries highlight similar themes in conglomerate merger analysis, including a focus on tying and bundling theories, as well as the importance of market power determinations in assessing conglomerate effects.

Most acknowledge that conglomerate mergers are predominantly pro-competitive and that instances of actual foreclosure of adverse effects to competition are rare. Accordingly, like that of the U.S., many submissions counsel caution in the merger review process.

Countries vary in their experience with digital platform conglomerate mergers, so a number of them do not address these mergers in any detail. [18]

Others, like Japan, which has engaged in several market studies related to digital platforms, devote more space to digital platform conglomerate mergers in particular. Japan's submission describes the Japanese Fair Trade Commission's merger guidelines as having been amended in December 2019 expressly to address:

competitive concerns of conglomerates mergers especially in digital related cases as well as some features related to digital economy, such as multisided markets, competition in quality, network effects and value of data. [19]

Under the amended guidelines, the JFTC will take into consideration that "digital platforms may easily enter into other different markets, rapidly develop new services covering several

markets in an integrated way, and also provide services connecting business-to-customers [sic] in several ways ... by analysing customers' preferences of products/services with information-technology such as Big-data, IoT and AI." [20]

Outside the country submissions, there were mixed reactions to the question of whether digital platform conglomerate mergers warrant special scrutiny. The business at OECD submission questions the notion that merger enforcement represents the proper way to deal with the potential harms identified as associated with digital platform conglomeration mergers. It argues that conduct enforcement would be the better way to handle the sorts of tying and bundling concerns identified in submissions, since authorities can evaluate "conduct actually implemented by the parties rather than theorizing about potential violations of the law." [21]

In her presentation, Facebook Inc. economist Eliana Garces critiques the view that special presumptions of harm should apply to digital platforms and suggests that conglomerate frameworks may be inappropriate for digital ecosystems since many of the products therein might not exist absent the platform. [22] By contrast, in his submission and presentation, Telecom Paris professor Marc Bourreau proposes a number of changes to EU competition policy to address digital platforms, including treating big data as an essential facility. [23]

Commentary

Competition authorities around the world are focused on digital platforms and whether they have missed some unique harms due to shortcomings of existing competition law and policy. While authorities should regularly assess the efficacy of their tools in response to changing conditions, creating a special standard for conglomerate mergers involving digital platforms raises several questions.

First, is it actually the case that existing tools are insufficient to address the harms identified at the OECD roundtable? Most merger review standards already permit authorities to take into account nonprice effects and sources of potential competition, and as the OECD recognized, there exists limited evidence of harm from digital platform conglomerate mergers. Moreover, authorities can already address foreclosure through tying and bundling, as Business at OECD explains, through enforcement actions outside the merger context.

Second, is consumer welfare actually being reduced by the conduct at issue? In many cases, the conduct identified as a harm actually provides meaningful benefits to consumers – consider, for example, whether concerns about branded ecosystems underplay the benefit to consumers of a convenient one-stop shop.

Finally, shouldn't merger review law be of general applicability? Imposing stricter presumptions on only one class of market participant will not stop mergers, but it could remove the most efficient acquirer from the equation, resulting in sub-optimal outcomes that end up hurting consumers.

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[1] Note by the Secretariat, Roundtable on Conglomerate Effects of Mergers - Background Note, DAF/COMP(2020)2, [https://one.oecd.org/document/DAF/COMP\(2020\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)2/en/pdf).

[2] Id. at ¶ 58.

[3] Id. at ¶ 61–65, citing inter alia Condorelli, D. and J. Padilla (2019), Harnessing Platform Envelopment Through Privacy Policy Tying, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504025. Condorelli and Padilla articulate a specific form of envelopment they refer to as privacy policy tying, whereby a digital platform leverages user consent to collect data granted in one platform market into another platform market with overlapping users.

[4] Id. at ¶ 65.

[5] Id. at ¶ 67-73.

[6] Id. at ¶ 12–17.

[7] Id. at ¶ 117.

[8] See Note by the United States, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)7/en/pdf).

[9] Id. at ¶ 3.

[10] See id. ¶ 19-21.

[11] Id. ¶ 8.

[12] Id. ¶ 10–16.

[13] Id. ¶ 15.

[14] Id. ¶ 30.

[15] Id. ¶ 84–88.

[16] Report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, available at <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

[17] Note by the European Union, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)8/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)8/en/pdf), ¶ 86

[18] See e.g., Note by Brazil, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)9/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)9/en/pdf); Note by Turkey, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)56/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)56/en/pdf).

[19] Note by Japan, DAF/COMP/WD(2020)3, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)3/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)3/en/pdf), ¶ 3.

[20] Id. at ¶ 8.

[21] Note by BIAC, DAF/COMP(2020)12, [https://one.oecd.org/document/DAF/COMP/WD\(2020\)12/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)12/en/pdf), ¶ 31-32.

[22] Eliana Garces on New Theories of Harm Regarding Conglomerate Mergers, available at <https://www.youtube.com/watch?v=WQpE7I-KExI>.

[23] Marc Bourreau on Digital Conglomerate Mergers and Potential Competition Concerns, available at <https://www.youtube.com/watch?v=FjWyz1L64FI>.