

Ecosystem Theories of Harm in Digital Mergers Decisions

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Ecosystem theories of harm used by EU regulators: anything new?

- Traditional conglomerate and aftermarket theories of harm are still relevant for digital ecosystems
- Emergence of new ‘sui-generis’ ecosystem theories of harm in decisions by European regulators
 - EC Booking/eTraveli decision or the recent FCO Google decision do not use typical cross market leveraging mechanisms (no joint selling, no bundled pricing, no unforeseen lock-in). Instead:
 - Demand side linkage: EC appears to focus on whether the merger creates a “channel for customer acquisition” → novel way to explain how demand flows from one product to another (Booking/eTraveli; Google/Photomath; Amazon/MGM)
 - Supply side linkage: examine whether the combination of assets creates quality related advantages for at least one user type (German NCA Google decision)
- These alleged mechanisms linking markets can get very close to efficiency generation
- How are these theories of harm assessed?

Assessment of digital ecosystem theories of harm

- Still relevant to check for incentive and ability to adopt anticompetitive behavior.
 - These are the theories of harm in the non-horizontal merger guidelines: bundling, tying, lock-in, 'hold-up'...
- New possible assessment: are there “channels of customer acquisition” enforcers might be concerned about?
 - Are there criteria to distinguish “legitimate” from “illegitimate” acquisition of new customers?
 - Factors assessed by the EC in Booking/eTraveli to assess negative competitive impact of added service/customers:
 - Network effects
 - Must be assessed for relevance (e.g. SeLogger/LogicImmo merger decision in France downplayed impact of network effects)
 - Empirical assessment possible: correlate actual diversion ratios with number of users, surveys
 - Consumer inertia and impediments of choice
 - We probably need to know more about detecting ‘consumer ‘inertia’ and differentiating it from informed choice
 - We will want to identify demand driving features of shared platforms that may explain consumer choice: lower search costs, trust, frictionless experience, personalization..
- Regulators may not be able to avoid the efficiencies discussion for much longer

Efficiencies in digital ecosystems theories of harm

- Efficiencies and “illegitimate advantage”
 - Demand side and supply side possible efficiencies have been treated as a problematic “advantage” over competitors by EU regulators and the EU General Court (EC Android, FCO Google decision)
 - Merger assessment now requires assessing the competitive effects of the efficiencies/advantage generated.

- Assessment of competitive impact of the ‘advantages’
 - Can the advantage be replicated?
 - Who are the possible entrants and do the efficiencies/advantage generate a barrier to entry?
 - Should we account for evolution and trends in the provision of relevant services?

- Merger assessment must take into account competitive harm and countervailing efficiencies. How to do the balancing ?

Final Remarks

Digital ecosystems will become increasingly common

Extensive literature showing the addition of connections and sides is a natural way of expansion for digital platforms

The strategy may be necessary to respond to cross-sectoral competitive threats

Strategy may be value enhancing competition

Careful merger assessment is needed on a case-by-case basis including

- A better integration of efficiencies in the analysis
- More evidence on the drivers of consumer choice to distinguish harm from benefit
- A forward-looking assessment of competitive dynamics and potential entry