

Something Old, Something New, Something Pending Appeal:
Theories of Harm in EU Merger Review
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Innovation as a theory of harm

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*The views and opinions expressed do not necessarily
reflect the views of Econic Partners or its clients.*

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Introduction

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The Guidelines recognise **pro-** and **anti-**innovation effects



“Mergers may enhance competitiveness and growth. Mergers can contribute to innovation by enabling firms to enter new markets or drive activity on existing ones[.]” – Para. 2

“Procompetitive mergers strengthen the internal market by delivering tangible benefits, such as promoting innovation[.]” – Para 7

“In cases where a transaction involves a small innovative company [...] the Commission in principle does not find a SIEC in relation to any theory of harm.” – Para 192

“[Merger control] allows for the preservation of green innovation competition.” – Para 9

“Non-price competition can encompass a variety of parameters [...] including [...] investment, innovation, privacy, sustainability [and] resilience.” — Para. 20

A recent ex-post study measured the impact of mergers...

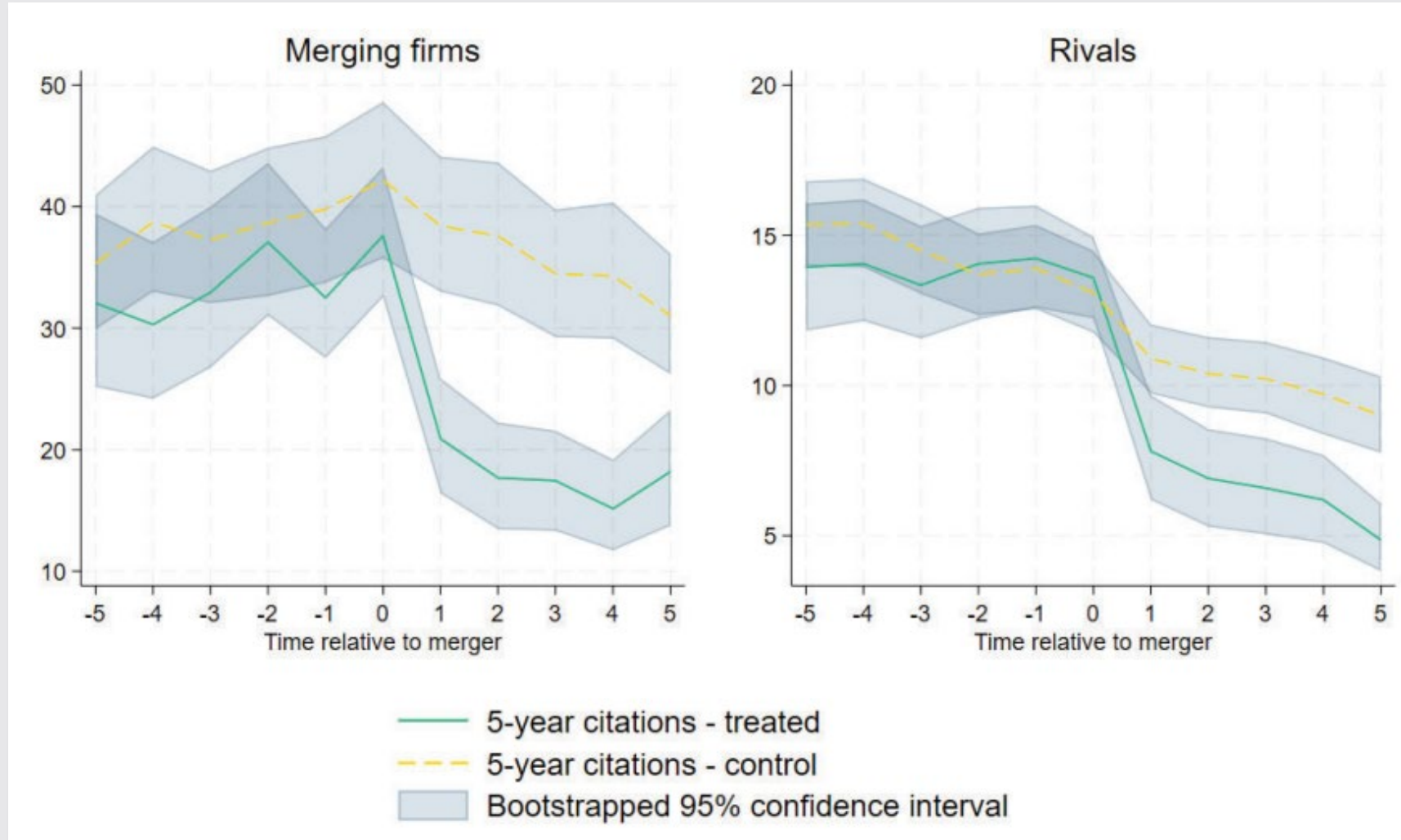
Study on the impact of mergers reviewed by the European Commission on innovation and markups

An empirical investigation

Dr. Joel Stiebale and Dr. Florian Szücs

Coverage	3,825 merger cases between 1990 and 2024, with data for merging parties and rivals
Measure of innovation	Citation-weighted patent applications using data from PATSTAT
Markups	Use financial accounts from Orbis to estimate firm-level markups over marginal costs
Methodology	Compare changes in outcomes for merging parties and rivals with a control group

... and finds innovation declines post-merger



What do the Merger Guidelines say about innovation?

A merger may result in a **SIEC** either if it significantly:

- impedes the innovation competition process by eliminating competition between the merging firms,
- impedes the overall innovation capabilities and efforts in the industry or
- alters the parameters of competition in future product markets.

The Guidelines set out two forms of innovation competition:

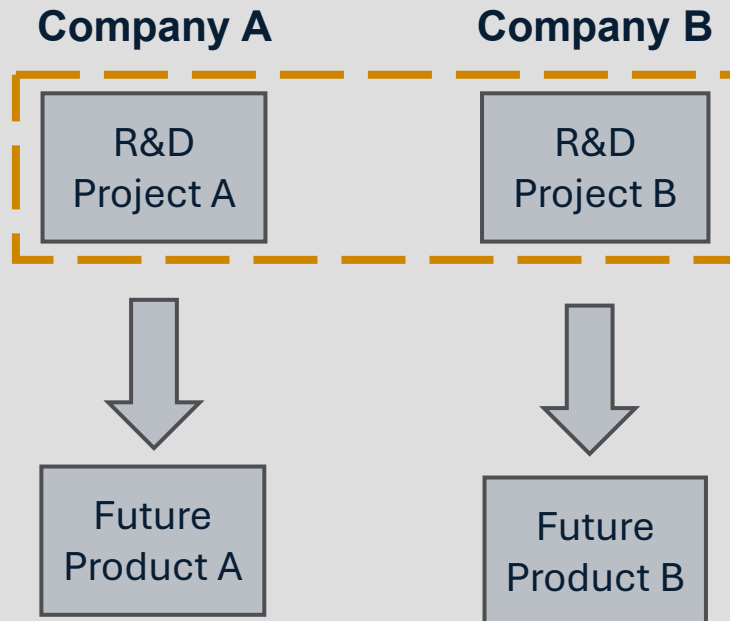
- Specific innovation competition
- General innovation competition

Loss of specific innovation competition

The EC sets out two circumstances for an SIEC...

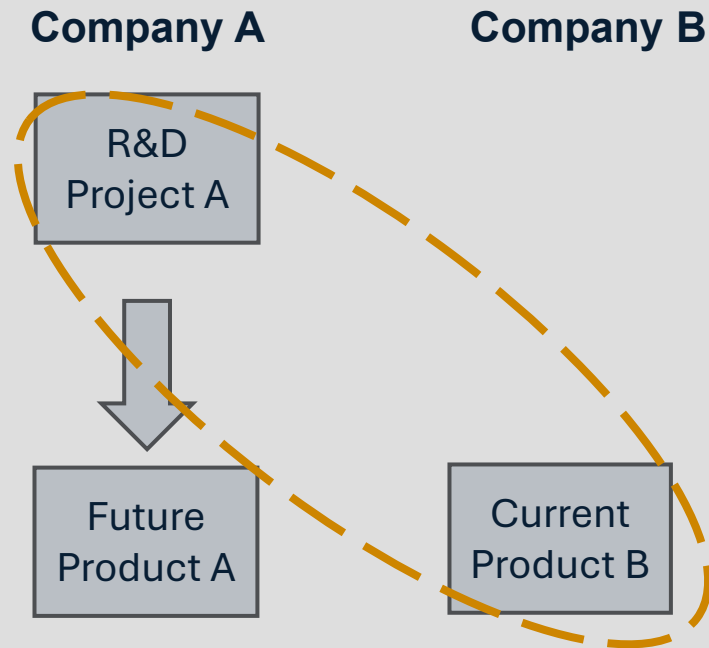
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An overlap exists between **R&D projects**



2

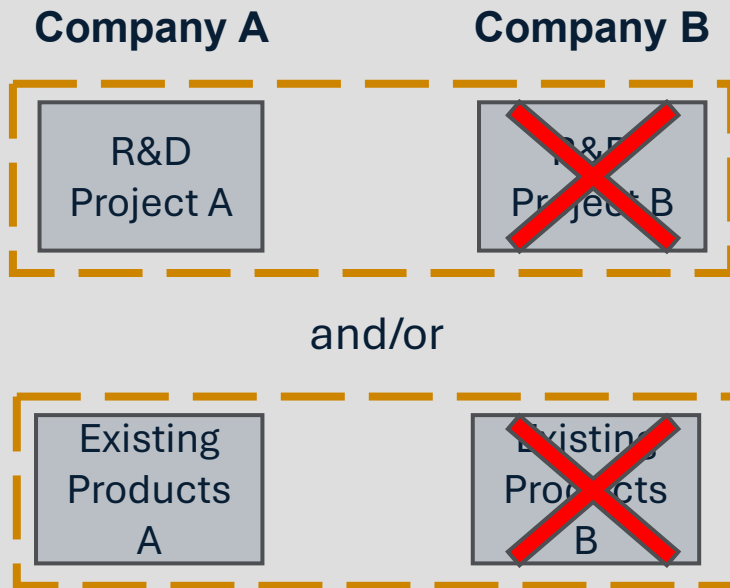
An overlap exists between **R&D projects** and **existing products**



... and two potential theories of harm

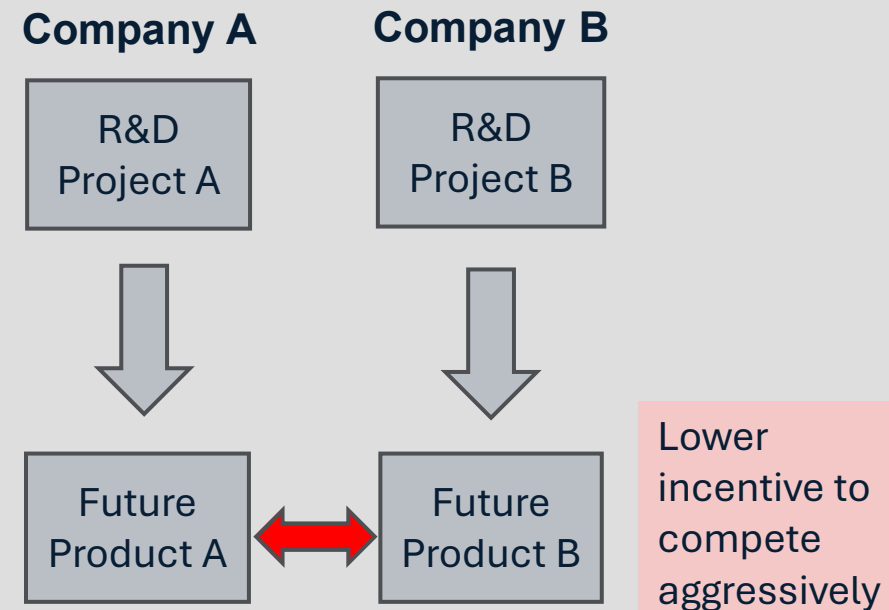
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Killer / reverse killer acquisition

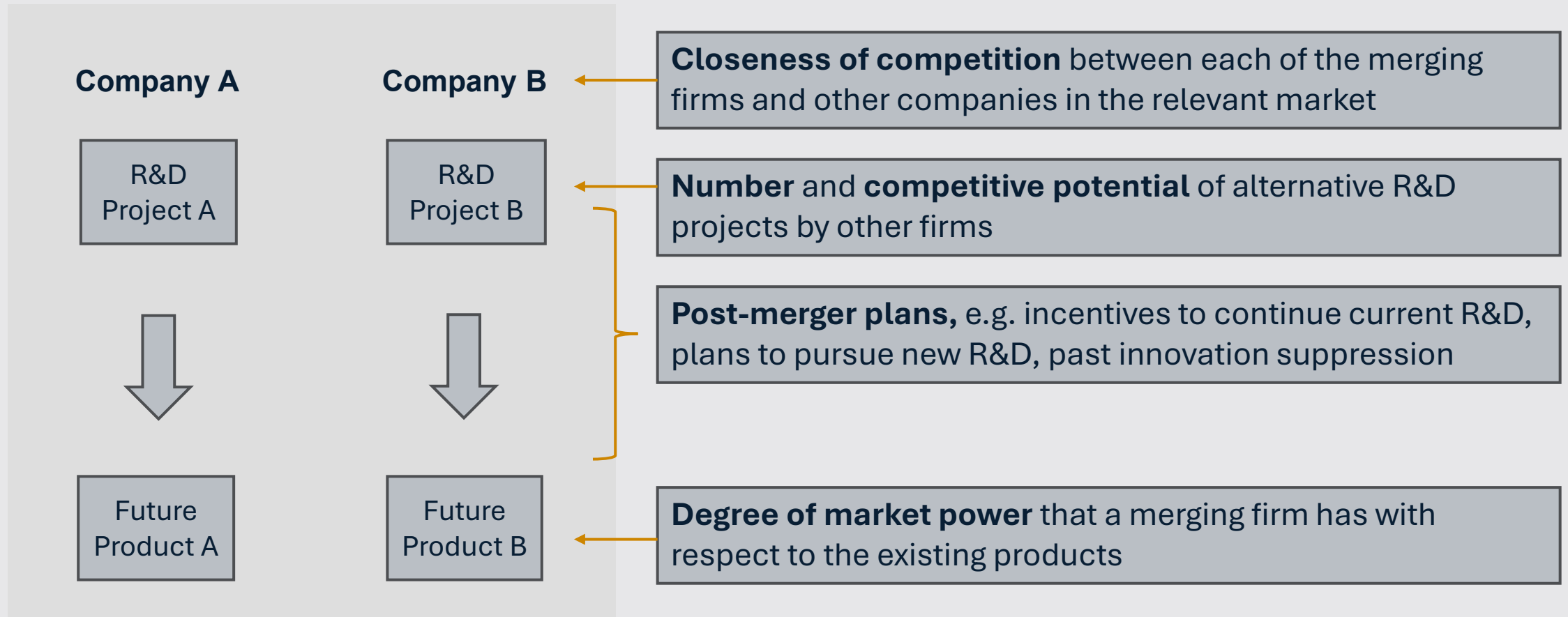


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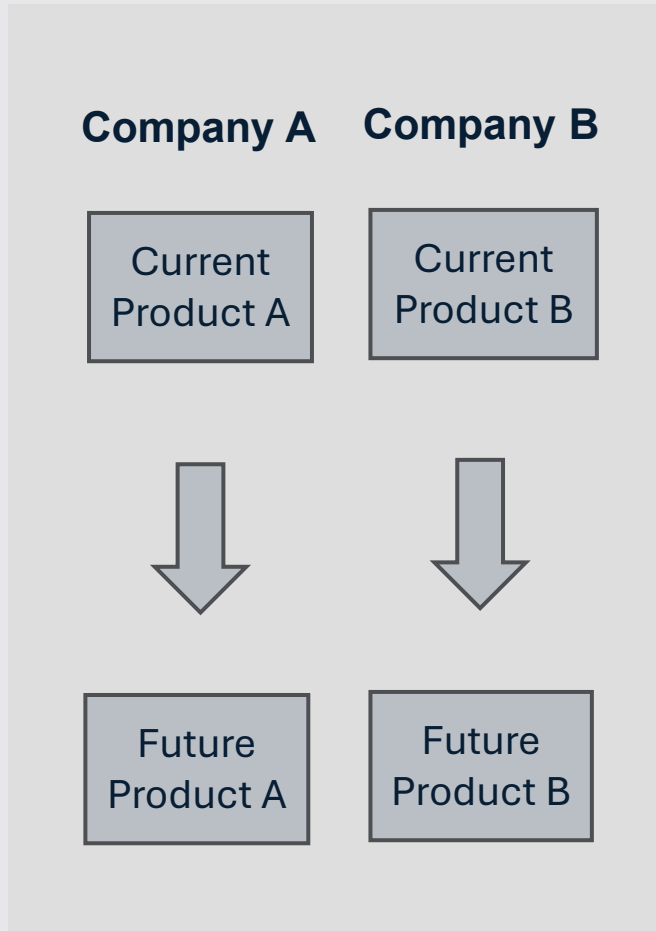
Adverse impact even if both products are brought to market



The Guidelines set out a range of evidence



Mergers can **decrease** incentives to innovate in two main ways



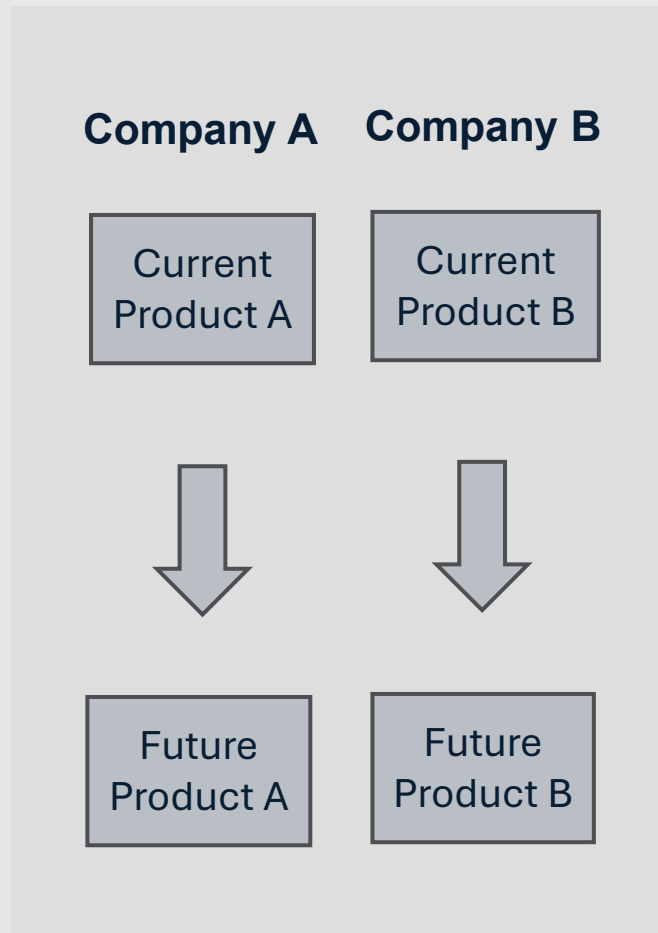
Innovation externality:

- Company A's benefit from R&D is through the cannibalisation of rivals' sales.
- The merger internalises Company A and B's sales.
- Reducing A's and B's incentives to innovate.

Price coordination effect:

- Merger may reduce competition in both the current product market and/or the future product market.
- Thereby increasing pre- and post-innovation profits.
- If post-innovation profits increase more, the incentives to innovate increase, and vice versa.

Mergers can **increase** incentives to innovate in three main ways



Access to each other's innovations:

- The parties gain access to each other's R&D advances.
- If one succeeds in developing a new product, the other also benefits.

Market expansion effect:

- When advances increase total adoption, post-innovation profits increase, both with and without the merger.
- They may increase more with the merger if the probability of achieving innovations is higher thanks to the parties accessing each other's innovations.

Internalisation of knowledge spillovers:

- The merger internalises involuntary knowledge spillovers.
- Mergers can help them capture more of the benefits of their R&D.

Loss of general innovation competition

Theory of harm

Overlap within an “**innovation space**” or within an **industry**

Company A

Company B

Innovation
Capabilities

Innovation
Capabilities

Company A

Company B

R&D
Organisations

R&D
Organisations

Reducing the pressure to innovate
on competitors with similar
innovation capabilities or R&D
organisations



Reducing the likelihood that
consumers will benefit from new or
improved products and processes

The Guidelines set out a range of evidence

Overlap within an “**innovation space**” or within an **industry**

Company A

Company B

Innovation
Capabilities

Innovation
Capabilities

Company A

Company B

R&D
Organisations

R&D
Organisations

- Sufficient **number** of competitors with innovation capabilities or R&D organisations
- Characteristics of the relevant innovation space
- **Closeness** between the merging firms and other competing innovators
- Whether one of the merging firms is an **important innovative force**

Three questions for an innovation theory of harm

Three questions for an innovation theory of harm

What is the competitive constraint?

Specific innovation rivalry / broader innovation capability / future product competition

How does the merger change it?

↑ or ↓ ability to innovate / ↑ or ↓ incentive to innovate
What evidence can be used to support this?

What happens in the counterfactual?

What innovation, investment or future competition would occur absent the merger?

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