



## What is a theory of harm?

Broadly, a theory of harm in a competition law case explains why a particular type of conduct constitutes a breach of competition law with reference to the relevant legal tests, and explains in particular why that conduct causes harm to competition that should be prohibited.

If you intend to take further steps in relation to conduct that you suspect may constitute a breach of EU competition law, it is likely that you will need to explain your theory of harm as part of engaging with one (or both) of the two means of enforcement of competition law, namely public enforcement and private enforcement.

## Why is a theory of harm important in competition law cases?

A theory of harm in a competition law case has two main purposes. It helps to explain:

1. Why a particular type of conduct satisfies the relevant legal tests in order to constitute an infringement of competition law, and in particular why it causes harm to competition that should be prohibited.
2. Why a competition authority should devote its resources to investigating this conduct.

## Developing a theory of harm: general points

There are some general points that it may be helpful to keep in mind when developing a theory of harm in a competition law case:

It is important to develop a theory of harm in a way that is specific to your particular case, and in a way that explains how the relevant legal tests are satisfied.

It is not sufficient to explain, as part of a theory of harm, that there has been harm to competition in general as a result of particular conduct. This is because there is a range of conduct that might harm competition in some way, but not all of this conduct necessarily constitutes a breach of competition law.

It may not be necessary to demonstrate actual harm to competition. In a number of cases, it may be sufficient to show that conduct has the potential to harm competition. This will depend on the relevant legal test that applies to the conduct at issue.

Your theory of harm should aim to consider and explain the counterfactual: this is the competitive situation that would have existed without the anti-competitive conduct.

## What types of effects on competition could be included in a theory of harm?

It is important that a theory of harm explains how competition has been harmed as a result of the conduct at issue. In particular, it is likely to be helpful to explain how the that conduct harms consumers. The types of effects on competition that could be relied upon as part of a theory of harm might include:

Negative effects on price (i.e. higher prices charged to consumers); and/or

Negative effects on quality, innovation or consumer choice.