

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

**Summary of Discussion of the Roundtable on Non-price effects of mergers**

**Annex to the Summary Record of the 129th Meeting of the Competition Committee held on  
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This document prepared by the OECD Secretariat is a detailed summary of the discussion held during the 129th meeting of the Competition Committee on 6 June 2018.

More documentation related to this discussion can be found at  
[www.oecd.org/daf/competition/non-price-effects-of-mergers.htm](http://www.oecd.org/daf/competition/non-price-effects-of-mergers.htm)

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## *Summary of the Roundtable Discussion on the Non-Price Effects of Mergers*

By the Secretariat

In June 2018, the OECD Competition Committee held a roundtable discussion on the non-price effects of mergers chaired by Professor Frédéric Jenny. The discussion featured three invited speakers:

- **Susan Creighton**, Partner, Wilson Sonsini Goodrich & Rosati
- **Orla Lynskey**, Assistant Professor of Law, London School of Economics
- **Jorge Padilla**, Senior Managing Director, Compass Lexecon

The Chair introduced the topic by highlighting some of the open questions regarding assessing non-price effects; namely the weight that should be put on them, given that the analytical framework may be less developed than that for price effects, and how to assess these effects in terms of qualitative as well as quantitative evidence. He noted that the discussion would be divided into three parts:

1. The impact of mergers on innovation;
2. The impact of mergers on quality, including variety and privacy;
3. The practical challenges associated with considering non-price effects, in particular quantification and remedies.

To begin, the Chair invited the **Secretariat** to summarise the background note prepared for the discussion. The Secretariat observed that, while non-price effects are mentioned in almost all merger guidelines, they play a central role in only a minority of cases. Examples of non-price effects being the subject of extensive quantitative analysis are even more rare. With respect to innovation, the Secretariat noted that the theoretical and empirical literature is mixed, since a merger may reduce firms' incentives to innovate but could also increase innovation capacity. The background note identifies five broad types of merger effects on innovation: cannibalisation, product market rivalry, innovation rivalry, efficiencies and appropriability. Some past analytical approaches include defining innovation markets based on product pipelines and examining firm R&D capacity. The Secretariat then summarised the issues surrounding quality, which can be conceived as any product characteristic that may be valued by consumers, and which could be harmed by an anticompetitive merger as much as price. Lastly, the Secretariat highlighted practical challenges associated with non-price effects, including determining the mergers in which they are important. In some cases, for example in markets with free services, there are clear indications that non-price competition is central, but this determination may not always be straightforward. Another practical challenge is weighing quantitative pricing evidence relative to qualitative non-price evidence, and determining when to build non-price elements into market definition as opposed to analysis at a later stage.

## 1. The Impact of Mergers on Innovation

The Chair gave the floor to Jorge Padilla to talk about merger theories of harm associated with innovation. **Dr. Padilla** began by emphasising the need to take account of non-price effects, and welcomed in particular a focus on innovation, noting its importance for economic growth more broadly. He observed that despite the academic debate, there is more consensus than there seems to be on the relationship between mergers and innovation, and the key questions right now revolve around adapting tools and techniques to understand the magnitude of innovation effects. The academic literature is providing clarity on the conditions in which a merger will have a negative impact on innovation incentives, and cases in which there will be efficiencies regarding innovation ability. Competition authorities should therefore pay attention to the developments in this literature.

He then went on to discuss the following four key questions:

**First:** whether horizontal mergers can reduce the merging parties' incentives to invest in process and product innovation. Dr. Padilla argued that it may be the case, but depends on the specific conditions of the market. Recent papers, for example by Federico, Valletti and Langus, explain that there are circumstances in which innovators create externalities for their competitors. If this externality were positive, a merger could increase innovation incentives by internalising the externality. Dr. Padilla explained that this externality could also be negative if innovation reduces the expected profitability of a competitor's innovation investments. A merger that caused this externality to be internalised would decrease the overall amount of investment in innovation by the merged entities. This effect may be dominant in some circumstances. He then added that others like Motta and Tarantino have explored the scenario where a horizontal merger may reduce innovation because the merging entities may reduce output to increase prices. An innovation investment that improves margins may therefore be less profitable at a lower level of output. However, this does not mean all horizontal mergers reduce incentives to innovate.

**Second:** whether a structural presumption regarding innovation effects should be applied similar to that regarding price effects. Dr. Padilla emphasised the mixed findings of academic research, and the importance of a merger's particular characteristics in determining its innovation impact. Thus, there should in his view be no structural presumption.

**Third:** whether horizontal mergers can affect the ability of firms to innovate. Dr. Padilla stated that a merger may create efficiencies by allowing entities to join their complementary skills and benefit from combining their investment capacity.

**Fourth:** how competition authorities and courts should balance potential anticompetitive and procompetitive innovation effects. He suggested that much of the debate on innovation and mergers is driven by questions about which party should have the burden of proof. He proposed that merging parties be required to demonstrate how the merger improves their ability to innovate, and in particular the verifiability, indispensability, and magnitude of the alleged efficiencies. Competition authorities should for their part be required to assess the net effect of the merger on innovation incentives as part of the competitive assessment.

Dr. Padilla then proceeded to the issue of quality effects. He emphasised the similarities with innovation effects, indicating that a structural presumption should likewise be avoided given the mixed research on how mergers affect incentives and ability to invest in quality. For instance, a merger could mean that the firms are more likely to introduce a new variety. Therefore, Dr. Padilla proposed that competition authorities should consider the net

incentive effects of a merger, while the parties should face the burden of demonstrating positive merger effects on ability to provide a given level of quality.

At that point, the **Chair** invited Japan to elaborate on the case of a vertical merger in the semiconductor industry, where the Japan Fair Trade Commission (JFTC) concluded that the merger would reduce the incentives to innovate within the firm and to form R&D joint-ventures with other firms in the industry.

**Japan** described the Lam Research/KLA-Tencor Corporation merger. The JFTC considered that the merger would restrict competition in the semiconductor equipment market mainly because of its foreclosure effects, and also because of the possible transfer of confidential information from KLA to Lam. The merger would also impede joint activities between the merging parties and other manufacturers, which could be harmful to innovation. Japan also pointed out that the JFTC finds that merging parties only rarely meet the requirements for the acceptance of efficiencies, namely that they are merger-specific, feasible, and contribute to users' welfare. The delegate clarified, however, that this does not preclude the possibility that parties could prove efficiencies and noted that the literature mentioned by Dr. Padilla could be useful.

The **Chair** then asked the United States to explain how it assesses the impact of mergers on innovation that is focused on new products not yet part of an identifiable product pipeline, and how it assesses innovation efficiencies.

**United States** responded by noting that the analysis of innovation is characterised by uncertainty because it lacks the quantitative tools that are available for price effects. However, innovation also drives economic growth and is an important dimension to consider in merger review. While the theoretical framework shapes the United States agencies' approach, there is an emphasis on case-specific facts when assessing innovation effects. With respect to efficiencies, the delegation quoted from the US Horizontal Merger Guidelines, which recognise that mergers may increase firms' ability to appropriate the gains of their innovations, depending on intellectual property conditions. In addition, the delegate noted that the Guidelines indicate that innovation cost savings may not be recognisable efficiencies if they are difficult to verify or result from an anticompetitive reduction in innovation activities.

**Dr. Padilla** expressed his agreement with the view that the analysis of innovation effects should always be case-specific, noting that the literature can only offer guidance. The Chair then turned to BIAC and asked it to confirm whether it agrees with such a case-by-case approach, given its concerns about a negative presumption about the effect of mergers on innovation.

**BIAC** began by recognising the importance of non-price competition and indicated that, in some cases, mergers may be unfavourable to innovation. However, the delegate opined that the current academic understanding of the impact of mergers on innovation does not support the application of a structural presumption. BIAC then explained that it identified two problems regarding the approach to innovation in merger review: one in relation to the vagueness with which literature identifies cases that give rise to anti-competitive concerns (often a merger between two of a limited number of innovators); the other concerning the de facto assumption in some cases that mergers harm innovation, whereas a concurrent assessment of positives and negatives would be more appropriate.

In terms of solutions to these concerns, BIAC indicated that it would be helpful for horizontal guidelines to clearly define the circumstances in which innovation concerns

would arise. This would help the merging parties identify important documents, and better understand the priority areas of competition authority focus.

The **Chair** then turned to the European Union and asked whether concerns about negative presumptions are overblown.

The delegate of the **European Union** stated that these concerns do not apply to the two cases that sparked much of the discussion on innovation effects, Dow/DuPont and Bayer/Monsanto, or in general, since the Commission does not apply a structural presumption. While there may be some similarities to price theories of harm, the analysis can be more complex (e.g. analysing increased innovation incentives due to the internalisation of innovation spill overs). Further, while the limited number of innovators was an element of the assessment in Dow/DuPont, this was only part of the large amounts of evidence considered in assessing the factual circumstances of the case.

To continue, the delegate noted that while reference is often made to harm to innovation incentives, innovation concerns also imply the potential loss of future product market competition. The consumer welfare standard necessitates that competition authorities consider whether a merger relaxes future product market competition. The delegate emphasised the continuing importance of a case-by-case analysis to determine whether a merger may lead to such an outcome.

The **Chair** then asked New Zealand to explain how it assesses market dynamism, included as a non-price dimension of competition mentioned in its contribution.

**New Zealand** explained mergers require a forward-looking focus, as parties may claim for instance that their markets are fast-changing and likely to see new entry from digital firms in the near future. The delegate emphasised the importance of conducting a fact-specific analysis to ensure that sufficient rivalry would exist in the post-merger market, including with respect to the imminent entry of new competitors. One case considered by the New Zealand Commerce Commission in 2014 involved the merger of two online travel booking platforms, which the Commission approved based on the likely entry of a competitor with a different business model, (which was successful in other jurisdictions). The delegate noted that other mergers were blocked despite arguments by the parties regarding innovation and rapidly changing markets, including in the telecom and motor vehicle sales platforms. In the latter case, one of the merging parties was the most likely entrant in the other party's market, and so the merger was not approved given the associated concerns about market dynamics.

The Chair closed the discussion on innovation by inviting Germany to take the floor. In its contribution.

**Germany** explained that recent merger control decisions of the Bundeskartellamt addressed innovation, particularly in the context of competition dynamics, potential competition in online markets, and future product markets. In one case involving paid online dating platforms, the Bundeskartellamt observed that multihoming among users and the emergence of fast-growing innovative business models reduced the risks of market tipping and of significant market power, leading to the clearance of the merger. To define the market in that case, the Bundeskartellamt chose not to differentiate among mobile apps or website-based platforms, or among different business and payment models, since consumers considered them interchangeable, but did exclude other social networks such as Facebook. The delegate observed that this case illustrated the importance of identifiable innovation dynamics and the need to avoid general assumptions.

## 2. The Impact of Mergers on Quality

The Chair invited Susan Creighton to provide an introduction to the assessment of quality dimensions of mergers, including variety.

**Susan Creighton** began by referring to a section of the Secretariat's Background Note, which focuses on the nature of quality rivalry among firms, and its relation to price rivalry. She approached these questions with a focus on the high-tech sector, where there is some overlap between product variety and innovation competition, something which is reflected in the US 2010 Merger Guidelines.

In her view, there are three fact patterns that commonly arise in the high-tech sector: (1) competition on product design, which resembles innovation competition, and for which price competition is a second order effect; and two other patterns resembling quality competition: (2) multisided markets, where there may be pricing competition on one side of the market, but on a free side of the platform, competition occurs in terms of quality or innovation, with companies trying to add features or differentiate their products to attract consumers; and (3) cases where the product is not offered on a platform but there is an immense amount of quality competition being conducted to gain consumer adoption.

Ms. Creighton emphasized that, in any event, the interesting question is how Competition authorities should deal with that kind of non-price competition. The US has made progress in terms of giving parties greater guidance, and observed that one study has documented an increase in references to innovation and quality competition in US antitrust agency documents. However, in applying the concept of "innovation markets", there are significant challenges associated with identifying participants in the market, given the absence of meaningful market shares or tools such as the SSNIP test. While the concept seems to have worked well in the pharmaceutical sector, it is not clear how it could be applied to some tech sector acquisitions where non-price competition does not appear to have been the focus of extensive analysis.

Beyond the innovation markets concept, Ms Creighton noted that, in 1997, the United States added an exposition of efficiency defences acknowledging the possibility that a merger might generate innovation and other non-price efficiencies. However, there was an impression that innovation efficiencies could be substantial but, generally, less verifiable and that they could also originate from anticompetitive output reductions. The current 2010 Guidelines are a big step forward, as they include a joint section on innovation and product variety. However, the framework remains limited, and does not offer clarity on analytical approaches that remain the subject of debate. She expressed the view that the current economic evidence does not support scepticism about the efficiency effects of mergers on innovation or quality, and there may in fact be more empirical verification for these efficiencies than for cost efficiencies. In closing, Ms. Creighton opined that the current state of guidance creates uncertainty among the parties and may also limit the ability of agencies to carry out their work when non-price innovation is involved.

The Chair then turned to **Mexico** to discuss indicators that non-price competition is important, and specifically whether the presence of differentiation is one such indicator. The Federal Institute of Telecommunications (IFT) indicated that in its experience, non-price competition has been particularly important in markets with differentiated product sub-services, and where technology, advertising and high fixed costs (barriers to entry) play an important role. When evaluating the effects of a merger, the delegate noted that the IFT considers how price and non-price elements interact in the competitive process. In some recent merger cases in the media sector, non-price effects included variety and media

diversity, whereas in mergers in the telecommunications sector an important issue was quality. The IFT used both structural and behavioural remedies (regarding access to networks, or decreasing variety of content) in response to these concerns.

Next, the Chair gave the floor to the Netherlands to share its experience with quality in merger reviews. The delegate from the **Netherlands** explained that the Dutch competition authority has devoted a significant amount of effort to examine the effects of mergers in the hospitals sector. Their post-merger studies on the impact of hospital mergers found that promised efficiencies and synergies in terms of quality did not necessarily occur. This work has complemented a broader set of advocacy work involving competition in the healthcare sector in the Netherlands.

The Chair then turned to Australia and asked it to elaborate on its strategy for addressing non-price effects, including a recent merger in the broadcast television sector which involved content that was free for consumers but which had non-price effects. **Australia** indicated that non-price effect considerations have long been reflected in their merger law, guidelines, and decisions of judicial bodies. The Merger Guidelines in particular recognise the concept of quality as an important form of competition and they envisage that references to raising prices as an exercise of market power should also be taken to include non-price effects. The Guidelines further deal with non-price effects in sections referring to market definition and vertical foreclosure.

Additionally, the delegate noted that legislation requires the Australian Competition and Consumer Commission to take a number of factors into account, namely quality and variety, among others including growth, innovation and product differentiation. Issues of variety in media mergers, for example, have mostly been treated as elements of product differentiation. In terms of analysis, Australia has looked at quality and variety merger effects through qualitative assessments, including traditional qualitative interviews, reviewing the documents of the merging firms and their competitors, and on rare occasions customer surveys (to better understand preferences and options). The delegate observed that internal documents are generally the most useful piece of evidence to understand the nature and closeness of non-price competition, as well as the importance of potential future competition (particularly when product development and differentiation is concerned).

### 3. The Relevance of Data Protection and Privacy

The Chair then turned to the subject of privacy, which he observed is on the minds of many competition authorities. In particular, there are questions about whether it is an element of quality and, if so, how it should be assessed in merger review. He invited Professor Orla Lysnskey to provide an introduction to the topic.

**Orla Lysnskey** started by explaining that data protection and privacy have different normative weights in various legal systems, ranging the status of constitutional principles to an area that is not regulated at all. Despite these divergences, there is some global convergence around core data privacy principles, as embodied in initiatives of the European Union (GDPR succeeding the 1995 Data Protection Directive), the United States (Federal Privacy Act of 1974), the OECD (privacy principles dating back to the late 1970s), and the Council of Europe (Convention of 1981).

Professor Lysnskey noted that the intensity of personal data processing has increased, and data has become a key input for various goods and services, meaning it has economic relevance for competitive assessments. At the same time, consumers are becoming

concerned about the loss of control over their personal information. Professor Lynskey also noted that the EU Data Protection Supervisor has been calling for increased cooperation between data protection consumer protection and competition authorities, particularly in the context of data driven mergers, in order to ensure that there is a holistic enforcement of these various policy objectives and of these various areas of law.

Next, Professor Lynskey explained that data can play a role in competitive assessments as a barrier to entry (depending on the availability of alternative sources of a similar volume and variety of data) but that she would be focusing her presentation on personal data that can be linked to an individual. There are at least two ways, in her view, that data protection and privacy can be relevant for competitive assessments:

- *First* data privacy can constitute a dimension of quality competition, and a point of differentiation among firms. When seeking to assess a potential reduction in quality due to a merger, data protection legislation could be used to provide some normative guidance as to what a reduction of overall data quality or data protection would look like. Professor Lynskey noted the example of various cases examined by the EU Commission (Google/Sanofi joint venture, Microsoft/LinkedIn merger), which considered data protection quality to be a parameter of competition but did not find any adverse effects from the transactions in question. She also commented on the decision regarding the Facebook/WhatsApp merger, which recognised that the two firms could be differentiated based on the level of data protection and privacy they offered, but which did not consider the effects of the merger on these parameters for consumers. For example, she noted that some consumers that had opted for WhatsApp because of its more limited access to personal data compared to Facebook Messenger, and this was not considered in the competitive assessment.
- The *second* way in which data protection can be incorporated into a competitive assessment is as part of the competitive backdrop, or legal landscape against which competition authorities will make their assessment. Data protection has a hybrid function. It is not solely a fundamental right but it also attempts to prevent market failure in markets involving information asymmetries. Competition authorities should not assume that the presence of data protection or privacy legislation automatically means that markets involving consumer data are functioning properly, or that there are no impediments to consumers to exercising choice in this area.

As a last point, Professor Lynskey indicated that data protection is in many aspects distinct from privacy. Distinguishing between the two is relevant in the context of assessing merger effects. This is because data protection principles are easier to identify, isolate, and quantify than privacy. Privacy is more subjective and closely linked to fundamental rights.

**Jorge Padilla** then responded to Professor Lynskey's presentation by noting that, consistent with his first presentation, if data privacy can be understood as a dimension of quality, mergers can potentially have an anticompetitive impact on the parties' incentives to ensure privacy. The impact on their ability to ensure privacy may be less clear. However, from an academic perspective, he is particularly concerned about mergers that allow firms to develop unique databases that can be used to raise prices or to discriminate more effectively. To illustrate, he provided the example of a buyer and a seller (a bilateral monopoly). If both sides do not have complete information (the buyer does not know the seller's production costs, and the seller does not know the buyer's valuation), the side that best conceals its private information will generally have the best result in a negotiation. However, supposing that only one of the parties has relevant knowledge, i.e. the seller

knows what the maximum price the buyer is willing to pay is, the negotiated price may be close to the monopoly price. This model explains why sellers try to learn about consumer valuations through developments that allow them to look at consumers' search activity, browsing history, responses to targeted ads, location etc. Interestingly, it is the combination of such data that enables sellers to identify buyers' willingness to pay and, thus, to exercise market power more effectively. The magnitude of this effect depends on various factors, and could result in either higher overall prices or, perhaps more likely, price discrimination. These strategies have already been implemented in e-commerce markets and could soon be observed in banking markets.

#### 4. Practical Challenges Linked to Quantification of Non-price Effects and Remedies

The Chair then introduced the next topic: practical challenges that competition authorities face when non-price dimensions of competition may be involved. Susan Creighton was invited to open this discussion.

**Susan Creighton** opined that economics does not provide a basis for the apparent scepticism of competition authorities regarding non-price efficiencies, emphasising that there should be no unidirectional presumption about non-price effects akin to the presumption regarding price effects. Further, she noted that the benefits of dynamic competition are widely recognised, and can significantly overcome short-term price effects. As a result, Ms. Creighton supported the proposal of some economists to consider non-price harms and efficiencies together. She identified three potential reasons why there may be a hesitation to do so among competition authorities.

1. Unlike cost-efficiencies, non-price efficiencies cannot be easily quantified. Empirical studies could be used to address the scepticism.
2. As regards innovation in particular, the time dimension over which effects may manifest themselves may go beyond the normal horizon that competition authorities tend to look at.
3. The subjectivity of non-price efficiency claims may be another concern. Ms. Creighton noted that two key questions may arise in the minds of competition authorities, first "is this really why the parties are doing this", and second "if so, will these benefits actually occur." With respect to the first question, Ms. Creighton indicated that competition authorities are experienced and skilled at establishing the reason for the merger (e.g. through the review of internal documents). Further, answering this question is also a part of understanding more traditional price effects.

With respect to the second question, however, Ms. Creighton expressed the view that it is not appropriate for agencies to discount potential efficiencies on the grounds that the parties may not succeed in achieving them. In particular, there is in her opinion no empirical basis for this scepticism, and authorities should recognise that they may not be better placed to assess the likelihood of success than the parties that are taking the risk of entering into the transaction. Given the benefits of dynamic competition, a presumed scepticism on the ability of parties to achieve these efficiencies could do more harm than good. Given the current state of competition authority tools, there may in fact be a greater risk of type 2 errors than type 1 errors.

Ms Creighton then provided two examples to illustrate what is, in her view, the potential for competition authorities to apply thinking on pricing to non-price effects, with a corresponding risk of error. The first example, the Zillow/Trulia merger, involved two firms that were the largest two companies of their type, which could entail competition concerns. However, a more holistic view of the market would show that both companies were disrupting a broader market involving conventional real estate agents to the benefit of consumers, and that the merger could increase their ability to do so. Ms. Creighton opined that the US Guidelines limited the ability of the agencies to recognise these efficiencies, although the merger was cleared nonetheless. The second example she mentioned was the Facebook/Instagram merger. In its review of that deal, the Office of Fair Trading (OFT) specifically considered whether Instagram might become a social networking competitor to Facebook. Whereas the OFT flagged in its decision a form of non-price competition on the free side, it immediately proceeded to analyse the question as one of whether the merger would have an effect on online display advertising. The OFT concluded that there were numerous competitors for both brand and transactional advertising, and since Instagram generated little revenue, no pricing effect was likely.

Both cases demonstrate in Ms. Creighton's view the lack of an analytical framework for approaching non-price effects, which can make the merger review process more difficult for authorities and then lead to concerns among market participants of a lack of competition authority transparency.

The **Chair** added that the Facebook/Instagram case may also illustrate how challenging it is for authorities to accurately predict disruptive innovations in digital markets. He then invited Norway to take the floor.

**Norway** agreed that a case-by-case analysis is necessary when assessing non-price effects and that there are no simple rules to follow. For example, adapting UPP analysis to quality is still a work in progress. The delegate noted that non-price competition seems to be particularly important in industries with heavy investments in R&D (e.g. pharmaceuticals and chemicals), industries where consumers care a lot about quality (e.g. soft drinks) and industries where prices are regulated (e.g. health care). Continuing, the delegate suggested that there are three elements necessary to make an assessment of non-price effects: quantification or at least fact-finding, internal documents, and a relevant theory to guide the analysis. For example, the delegate described a consumer goods sector merger, in which internal documents were instructive about the rivalry between the merging firms. In this case, the authority quantitatively analysed the price effect, which it predicted would be negative, but using qualitative evidence identified a negative innovation effect as well.

Next, the **Chair** recognised Consumers International for its contribution, which mentioned the idea that data could be considered the price consumers pay to digital platforms that are ostensibly free. The Chair invited Consumers International to elaborate how such a price could be analysed relative to other price and non-price effects.

**Consumers International** indicated that in e-commerce markets, price can be much more complicated and less transparent to consumers; specifically, it can either be a one-off payment or a constant stream of value delivered by consumers in the form of consumer data. This value is cumulative given network and long-term tracking effects, and can be delivered in perpetuity without consumers' awareness. Thus, relative to offline markets, e-commerce markets involve an exchange that is either opaque or unknowable for consumers. Assessing mergers that involve the combination of data sets can be similarly complicated for authorities, since the gains from the combined data set may not be known at the time of the transaction. However, there are clear consumer protection concerns when individual

data is being matched, for example by motor vehicle insurance and online mapping companies. Further, the non-price gains from such transactions may be minimal. To conclude, Consumers International recommended that Competition authorities consider the “fair share test” as a useful yardstick for measuring non-price effects of mergers. This would involve looking at how consumers will contribute to non-price benefits from a merger, and compare that with the claimed benefits of the merger for consumers, to ensure that future innovation benefits will directly improve consumer welfare.

The Chair then turned to the **United Kingdom**, which has had substantial experience in analysing non-price effects. The delegate from the United Kingdom indicated that dynamic non-price parameters such as quality, range and service can become particularly important when price competition is limited (for example with public services such as hospitals or regulated markets such as pharmacies). The evidence relied upon for this assessment generally includes document submissions from the parties, customers and competitors, as well as available consumer surveys. In terms of measuring non-price effects, some elements of quality of service are easier to quantify than others, and the Competition and Markets Authority also uses qualitative approaches to analyse the loss of non-price competition in mergers. For instance, in the Ladbroke/Coral merger enquiry the Authority assessed the impact of the opening of new local betting offices on the parties’ refurbishment of their existing betting offices. Other measures of non-price competition they have used include opening hours and average waiting times for service. Some evidence is also indicative of both price and non-price competition, namely market shares, diversion ratios and variable margins. Diversion ratios, are calculated either through survey responses or alternative methods, can in combination with margins be used to calculate a measure of the post-merger incentive to reduce quality.

The **Chair** then turned to Canada, which has a duty to quantify competition harms from a merger. He asked the delegate from Canada to provide some examples of methods to quantify non-price effects.

**Canada** explained that as a result of a Supreme Court decision, the Competition Bureau has a burden to quantify all quantifiable effects, including non-price effects. When such effects cannot be quantified, qualitative effects are considered as a second step. The delegate noted that there are still open questions about how far the Bureau must go to quantify non-price effects in situations where it may be impractical, for example because it would be costly, time-consuming or burdensome to assemble the requisite data from the parties or third parties.

**Chile** was then invited to elaborate on the two cases concerning banking and cinemas described in its written contribution, and in particular how it managed to obtain data for analysing and evaluating non-price effects. The delegate noted that Chile’s internal guidelines mention the possibility of considering non-price variables in merger analysis. In two cases of 2012 and 2015, quantitative analysis was key in reaching a decision. The 2015 case concerned a joint venture for the administration of ATM cash points proposed by three of the largest banks in the country. The relevant market was self-regulated and clients in Chile faced no direct cash-withdrawal costs at any ATM. Therefore, because banks compete for transactions, competition was not based on price but on the number of locations, a variable that directly affects the quality of service for clients. The authority’s hypothesis was that increasing concentration in the market would decrease incentives to maintain or expand the ATM network. This was subjected to empirical analysis on the basis of extensive transaction-level data from the companies. The econometric analysis estimated that the effect of the joint venture would be an increase in the probability that an ATM

would be uninstalled by more than 10% in the relevant geographical locations. Thus, the authority did not approve the joint venture.

The **Chair** asked Korea to then describe its approach to non-price competition in an airline merger, which involved the use of a quality index from the airline regulator.

The Korea Fair Trade Commission (KFTC) stated that the joint venture between Korean Airlines and Delta Airlines was the first case in which the authority conducted a comprehensive qualitative analysis of quality of service. The KFTC balanced the potential price increase that would result from the elimination of competitors against the consumer benefit resulting from the increased quality of services. The price increase was estimated using data regarding air fares and number of passengers, however the quantification of quality was a more controversial issue. The KFTC used a Quality Service Index (QSI) method employed by airline regulators, which involved gathering data from the parties on variables such as the number of stopovers on a given route and waiting times for stopovers. The case team examined several different calibrations of the index in terms of the weight of variables, and consulted competitors as well as outside economists. The KFTC concluded that the efficiencies effect would likely exceed any price increase effects, but indicated that regulators should put in place some behavioural conditions as well as a review of the venture after three years.

**France** then described the Fnac/Darty merger in the electronic product retail sector, which involved significant analyses of non-price competition. The French authority used a survey with a sample of 20 000 consumers who had purchased from one of the parties, which provided granular information regarding shopping decisions on an individual product basis. The survey showed that a majority of consumers would have diverted their purchase to another supplier in the event of specific scenarios of quality degradation, such as the lack of customer service availability or long cashier wait times. These findings enabled the authority to identify geographic areas where the merger would result in a degradation of quality, and ask the parties for remedies to avert such outcomes.

## 5. Challenges of remedies for non-price effects

The Chair then turned to the final topic of the discussion, the design of remedies that could address concerns related to non-price effects. He invited Italy and Belgium to share their experiences.

**Italy** noted that quality in the sense of decreased variety of products was an issue in the context of two mergers in the publishing sector. As these mergers affected all levels of the production and distribution chain, different remedies were considered to address the different levels: one remedy eliminated certain clauses in the authors' contracts that would foreclose other publishers, another remedy ensured that the contracts' terms and conditions were maintained for independent publishers, and other remedies addressed the space and visibility of third party products in bookstores. Italy then emphasized that it is often difficult to assess such qualitative aspects. The Authority also took into account efficiencies from these mergers, although the delegate noted that obtaining sufficient information and data from the parties about efficiencies can be a particular challenge.

**Belgium** described a merger in the market for what were termed "quality newspapers," in which the authority determined that concerns about media diversity were associated with consumer choice and were therefore competition concerns. The authority imposed remedies in this case, requiring separate editorial boards to be maintained and indicating

specific functions that should continue to exist for each title during a specified period (with the provision that a person could not perform the same function for multiple titles). Following this case, another merger arose in the market for “People magazines,” which had fewer broad concerns associated with the protection of democracy. The merger could have still raised concerns about consumer choice, however, and some remedies were imposed that were less extensive than those associated with the newspaper merger.

To conclude the discussion, the Chair gave the floor to Orla Lynskey.

**Orla Lynskey** opened by discussing the concern that there may be what Professor Joseph Farrell termed a “dysfunctional equilibrium” with respect to consumer decision-making involving data protection. As a result, consumers may be resigned to having a lack of data protection, not due to a lack of rationality, but in fact because giving up could be a rational response to a lack of control and information. This would create a vicious cycle, resulting in poorer data protection quality.

However, Professor Lynskey did note some developments following the entry into force in Europe of the GDPR; specifically companies are taking data protection more seriously and may in fact be starting to explicitly compete with each other in this area. She noted some examples in which consumers are being presented with more meaningful choices that put a price on data collection. Limits to data collection and secondary data markets as a result of data protection legislation could serve to increase the value of data, meaning that data as a competitive asset could be an increasingly important part of the competition assessment in mergers.

She then concluded by introducing the idea that data protection could be considered in the merger context not as a competition factor, but as part of a contemporaneous parallel assessment, similar to what occurs in some jurisdiction with media plurality concerns. Since data protection concerns extend beyond questions of privacy, to broader questions of economic power and societal impact, such an assessment may be increasingly necessary.

## 6. Concluding Remarks

At this point, the Chair concluded the discussion by summarising some key themes of the discussion. First, further attention may need to be paid to some non-price effects of mergers. Second, the theoretical framework for many non-price dimensions of competition may not support any automatic presumptions, so an effects-based analysis is needed. Third, there are numerous examples of authorities using both qualitative and quantitative evidence to conduct a precise analysis of non-price effects. Fourth, there are some particular complexities to designing remedies to concerns about non-price competition, but there are examples of authorities successfully doing so. Fifth, data protection could constitute a dimension of quality in some markets, and is therefore something authorities should consider when appropriate. The Chair closed by thanking the panellists and delegates for their contributions.