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Summary of Discussion of the roundtable on Conglomerate Effects of Mergers

Annex to the Summary Record of the 133rd Meeting of the Competition Committee held on 10-16 June 2020

10-16 June 2020

This document prepared by the OECD Secretariat is a detailed summary of the discussion of the roundtable on Conglomerate effects of mergers held virtually during the 133rd meeting of the Competition Committee on 10-16 June 2020.

More documents related to this discussion can be found at http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm

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Summary of Discussion of the roundtable on Conglomerate effects of mergers

On 10 June 2020, the Competition Committee held a roundtable on conglomerate effects of mergers chaired by Professor Frédéric Jenny.

The Chair introduced the topic and noted given the absence of horizontal or vertical relationships between the merging parties, conglomerate mergers have not been in the focus in the past. The main theories of harm applied in this context concern market foreclosure, usually linked to tying and bundling. While such theories may have merit, they are often complex, and it is difficult to support them with sufficient evidence.

There is renewed interest in this topic, first, due to concerns about aggregate concentration – concerns that are usually cast in broad social terms, and not necessarily in the pure economic sense; and second, due to the growth of the digital sector, where conglomerate mergers are particularly important. While new terminology is being employed to describe conglomerate theories of harm, it is unclear whether this reflects the development of new theories or whether the discourse remains related to traditional theories of foreclosure.

The Chair introduced the three expert speakers who took part in the discussion and had also submitted video contributions in preparation for the roundtable: Prof. **Marc Bourreau**, Professor of Economics at Telecom Paris, Institut Polytechnique de Paris, who recently co-authored a report about digital conglomerate mergers; **Eliana Garcés**, Director of Economic Policy, Facebook, former deputy chief economist in the European Commission's Directorate General for Internal Market; and **James Langenfeld**, Senior Managing Director, Ankura, former director at the United States Federal Trade Commission Bureau of Economics.

The following is a brief description of the three experts' video interventions, which were made available to delegates before the discussion:

Marc Bourreau focused on the rise of digital conglomerates and the associated competition concerns.

While maintaining strongholds in markets they historically dominate, big tech players' have diversified their business in recent years and now compete in multiple markets. One of their motivations to enter neighbouring markets is to indirectly increase market power; this may be the reason behind the development of "product ecosystems" that increase diversification between tech companies' offerings and soften competition. Another explanation for increased diversification is excess capacity of specific resources such as skill, talent, or consumer data, which tech companies can employ by expanding into neighbouring markets. Expansion may also be a means of creating an internal, more efficient, capital market to fund ventures, where external funding may be more difficult to obtain. Finally, the tech sector is characterised by economies of scale and scope which reduce the costs of expanding into new markets, and by consumer interest in shared product functionality and synergy.

As for competition concerns, diversification may enable product bundling, which, while often beneficial, may limit potential entry to the market, and lead to creation of highly diversified product ecosystems which soften competition with rivals. Another concern relates to conglomerates gaining control over essential inputs which rivals require to effectively develop competing product ecosystems. Finally, while acquisition of promising start-ups may be driven by efficiency gains, it may also limit competition.

Eliana Garcés believes renewed interest in conglomerate effects originates from increasing consumer demand for complex and sophisticated products, which leads firms to acquire and offer new product features. This has led to conglomerate mergers, the emergence of powerful firms, and as a result, a reconsideration of relevant competition policy.

Traditionally, assessment of conglomerate mergers was based on tying and bundling theories of harm, the concern being consumers would be coerced into buying tied products, thus limiting choices and raising prices for consumers uninterested in the bundle. The Chicago School argued monopoly rent may be extracted without resorting to tying, but later literature demonstrated the incentive to tie as a means of foreclosure in cases where the tied market is not fully competitive. The analysis is not straightforward and requires assessment of market power in the relevant markets, barriers to entry, demand complementarities, customer heterogeneity, as well as of efficiencies derived from tying.

More recently, bargaining theory has been applied to conglomerate mergers. This type of assessment focuses on a given merger's effect on bargaining power and the resulting price effects rather than on foreclosure, and requires a very careful and fact intensive analysis. Another recently proposed theory of harm relates to innovation: as incumbents diversify their offerings, new rivals are compelled to offer a diverse set of products and hence face higher barriers to entry, which over time affect innovation. The analysis in this context is complex as well.

Finally, she questioned the assumption that similar concerns are prevalent in the context of online platforms and product ecosystems. In her view, there is no reason to presuppose that platforms' expansion of features or self-preference of their respective products, raises competition concerns. Here too the analysis is very complex, and require a careful examination of the particulars of the case at hand. She stressed that economies of scale and scope are very significant when it comes to product ecosystems, that innovation in this context is often disruptive, and that it is often difficult to discern whether the products are substitutes, complements or serve as inputs for one another. Finally, she questioned the assumption that the conglomerate model is applicable to digital platforms, considering the difficulty of isolating components of the platform, which cannot exist separately outside the platform's ecosystem.

James Langenfeld explained the differences between the United States and the European Union's approaches to conglomerate mergers. The European Union has challenged 9 conglomerate mergers since 1997 (some of these raised other types of competitive concerns) and addressed the issue in the 2008 non-horizontal merger guidelines. It appears the EU is modestly active in this field, probably out of concern over type II errors (i.e. lack of intervention where one is merited). Its challenges to mergers are based on many theoretical economic models, and interest in digital platforms markets is increasing because of their characteristics.

In contrast, there have been no challenges to conglomerate mergers in the United States since 1974, and there was no reference to such mergers in the 1984 non-horizontal merger guidelines, nor in the 2020 draft vertical merger guidelines. The draft guidelines were criticized by the American Bar Association for not explicitly stating that conglomerate effects are not recognized as a theory of merger harm. The final version of the Vertical Merger Guidelines do explicitly discuss how the agencies will treat mergers with potential competitors. This reserved approach can be explained by a concern over type I errors (unmerited intervention), lack of reliable empirical evidence showing harm to competition, and the fact most theories of harm involve exploiting efficiencies from the merger). The rise of digital platforms may not bring changes to this approach, although the staff of the US House of Representatives recently issued a report recommending changes to make a successful challenge to conglomerate mergers easier.

As for potential anticompetitive conglomerate effects related to digital platforms, these platforms have various characteristics, such as economies of scale and scope, network effects, etc., which may help enable a platform to harm competition. This issue has received ample attention recently, for example in the United Kingdom Competition and Market Authority's interim report on its market study of online platforms and digital advertising and the US Department of Justice's recent complaint against Google, which allege Google has substantial market power. The theories of harm proposed in this context are based on economic theory, documents, and limited empirical evidence. Common to all theories are an absence of effective competition in one market withbarriers to entry, and economies of scale or scope and/or network effects in the other market.

While a merger between firms operating in these markets may raise concerns for co-ordinated effects, the focus is on unilateral effects. Unilateral anticompetitive effects could result from the merging parties having advantages over single market competitors, which could lead to the exclusion of rivals in at least one market. Earlier cases discussed these concerns through bundling and envelopment theories. Tying may also lead to exclusion of rivals, but this is often because consumers benefit from lower prices or better products offered by the merging parties, at least initially.

Control over key inputs and components which could impede market entry by rivals can be another concern, but those concerns should be balanced against requiring a firm to provide access to a key component may reduce the incentive of the firm to develop it. Similarly, concerns regarding platforms' pre-emptive acquisitions of firms operating in a potentially related market should be balanced with ensuring start-ups remain motivated by the possibility of being purchased by established firms.

The Chair proposed the discussion focus on three issues: competition authorities' practice in recent years and classical theories of harm; whether or not theories of harm related to the digital sector are different from classical theories; and strategies for competition authorities to overcome challenges related to conglomerate merger assessment. He gave the floor to Chinese Taipei, which has reported an increase in conglomerate mergers in various sectors.

Chinese Taipei reviews conglomerate mergers by applying the same theories of harm as those proposed in the US and EU. In recent years there has been an increase in the number of conglomerate mergers, and that they account for over 10% of notified mergers every year since 2016, excluding 2017. The financial services sector has seen the largest number of conglomerate mergers, motivated by changing consumer payment habits, the complementary nature of financial services and the synergies between them.

Chinese Taipei dealt with ecosystem issues in the Line Bank case, where concerns the Line App ecosystem would enable the joint venture to engage in anticompetitive practices were raised.

The Chair gave the floor to Brazil, which has moved on from focusing solely on portfolio effects to analysing new theories of harm and conducting quantitative studies.

Brazil noted that while traditionally, conglomerate mergers do not raise significant concerns, there is growing concern about anticompetitive effects in the digital, agricultural and educational sectors. In general, the Administrative Council for Economic Defense (CADE) applies the theory of reciprocal dealing in this context, and where appropriate, has imposed behavioural remedies to discourage tying and bundling. However, other rationales and theories have been applied as well.

Brazil briefly discussed the Bayer-Monsanto case – a product extension case which raised concerns related to the merging parties' increased portfolio power. In that case, CADE was concerned that the merged entity would be able to create strictly compatible products, that tying and bundling was therefore very likely, and that rivals would not be able to offer comparable portfolios and thus be excluded. CADE also dealt with a market extension case of a merger between educational institutions spread across many areas in Brazil.

Assessment of conglomerate mergers is challenging, especially in vertically integrated sectors and sectors linked to the digital economy. CADE has expanded its analysis beyond assessment of portfolio effects, and now integrates new theories and increasingly supports its assessment with quantitative studies related to efficiency, market rivalry, bargaining power, etc.

The Chair noted that while in the past the US agencies stayed clear of conglomerate mergers, today they may be inclined to address some of the issues they raise and asked the US delegates to elaborate on that.

The United States Federal Trade Commission reiterated it no longer challenges conglomerate mergers under theories which fail to recognize merger efficiencies. Today, a conglomerate merger would be considered under both vertical and horizontal theories of harm. With respect to vertical theories, the focus is on mergers involving complementary products that are used in the production of a third product. In this setting, concerns of raising rivals' costs or foreclosure may become relevant. However, this type of merger likely generates significant efficiencies which must be balanced against any potential harm to competition. Also, if a certain conduct which raises concerns can be easily remedied post-merger, said conduct will be investigated if and when it is manifested post-merger. As for horizontal theories of harm, these relate to innovation and competition over the development of new products and services in areas where the merging parties' current offerings do not overlap. For example, in the Teva-Allergan case, both parties were engaged in research, development, manufacture and sales of a wide range of generic drugs and the FTC investigated whether the merger would reduce incentives to develop new ones.

The US Department of Justice agreed with the FTC's description of current policy and added that it is of the opinion that the existing framework provides an appropriate and relevant set of principles for analysing conglomerate mergers in all industries, including the digital sector. New economic theories can be incorporated, as long as they are supported by empirical evidence.

Regarding suggestions competition authorities consider behavioural remedies to alleviate concerns resulting from conglomerate mergers, the DOJ has a strong preference of structural remedies considering that behavioural remedies are considered temporary solutions to long-term structural issues, which too often result in non-compliance and a need for ongoing oversight and intervention. If a structural remedy cannot be prescribed, the merger would be blocked.

Finally, the DOJ noted the progress toward convergence in this area since the last roundtable on this issue in 2001, and stressed the importance of ensuring consistent outcomes and avoiding mergers being prohibited in one jurisdiction on grounds that other jurisdictions reject because they risk sacrificing important efficiencies.

The Chair then turned to the European Union, which has been more active in intervening in conglomerate mergers, in particular where concerns of foreclosure arise.

The European Union noted that overall, intervention in conglomerate mergers is not particularly common. The European Commission's horizontal and non-horizontal merger guidelines specify the legal and analytical framework for assessing conglomerate mergers and determining whether they result in significant impediment to effective competition. In this context, the Commission usually focuses on non-coordinated effects, in particular, foreclosure. Similar to the assessment of vertical foreclosure concerns, the Commission investigates whether the merged entity has an ability and incentives to foreclose competitors, and the foreclosure's effects. Typically, the commission assesses the ability to offer a bundle of products or to technically or contractually tie them together, in order to prevent use of one product with another product offered by a third party. The ability to foreclose is assessed by investigating, notably the degree of market power that the merged entity holds in one of the markets concerned. As for the incentive, the Commission assesses the profitability of foreclosure by weighing both potential gains and costs of pursuing the strategy. Finally, the Commission assesses effects on single market competitors and on potential entry.

In the past five years, the commission intervened in six cases involving conglomerate theories of harm, while others were cleared. For example, in the Microsoft-Linkedin case, the Commission was concerned about tying and interoperability restrictions which would enable Microsoft to leverage its market power in operating systems and productivity software, in the market for professional social networking services, where Linkedin is present. The case was resolved by the parties undertaking a commitment, amongst others, to maintain Windows' software current level of interoperability with other social networks. The Commission also considered issues related to data and privacy protection in that case. The Essilor-Luxottica merger was cleared after an extensive investigation alleviated concerns tying and bundling of complementary optical products would lead to market foreclosure.

The Chair turned to Eliana Garcés, and noted she seemed to be sceptical about competition authorities' ability to find anticompetitive conglomerate mergers.

Eliana Garcés explained her main point related to the difficulty of reviewing such mergers, but that one should never completely exclude the possibility of challenging a conglomerate merger. She reiterated the complexity of the analysis, which involves, developing complicated theories and supporting them with ample evidence regarding product characteristics, consumer preferences, market players' positions in the market etc.

In such complex cases there is a real danger the case is developed just in order to validate a theory, which may be unmerited. Heavy reliance on empirical facts and validation is therefore required in such cases. Additional attention should also be given to analysis of efficiencies, especially as products and technology become more complex, and to dynamic effects, the analysis of which should be informed by industry knowledge.

She cautioned against using innovation-based theories of harm, considering little is understood about the process of innovation, about the motivation for innovation in different companies, and about what is considered successful innovation.

Finally, she believes there is room to explore conglomerate mergers' effects on bargaining power, which could inform the debate regarding fairness.

The Chair responded that competition authorities need to address many complex issues and that overcoming complexity is one of the reasons for holding the roundtable, and asked James Langenfeld to comment.

James Langenfeld agrees with Eliana Garcés point about complexity. He also complimented the US FTC and DOJ for clarifying their position regarding conglomerate mergers considering the ambiguity in the guidelines, for tying conglomerate effects back to horizontal and vertical theories, and for highlighting the importance of efficiencies in the analysis.

Recognising efficiencies is actually a starting point for challenging conglomerate mergers on the basis of foreclosure theories of harm, since a competitive advantage is a perquisite for tying, bundling etc. In light of this, it is difficult to show an anticompetitive effect.

The Chair noted that while allowing conglomerate mergers in the digital sector increasew incentives to innovate, at the same time such mergers may also raise barriers to entry, and asked James Langenfeld how to strike the balance between the efficiency gain and foreclosure effect.

James Langenfeld responded the basic premise is that the merger will lead to a big efficiency gain that leads to a competitive advantage. To challenge a merger, one must first show the efficiencies and then show the resulting likelihood of foreclosure – which it is a complicated endeavour. However, it may be possible to change perspectives and adopt a different market definition, and for example, evaluate whether there is loss of competition in a cluster market which includes the parties' products.

The Chair moved the discussion to focus on conglomerate effects in the digital sector and questioned whether conglomerate mergers in the sector need to be addressed from a different perspective. He noted the importance of discussion the issue in light of the sector's growth and the fact there seem to conglomerate mergers in this sector. He turned to Japan, which recently amended its merger guidelines and addressed the role of data and artificial intelligence in merger control.

Japan has recently issued several market surveys and studies regarding big-data, e-commerce and digital platforms, and has amended its merger guidelines, which now address how the Japan Fair Trade Commission (JFTC) reviews conglomerate mergers, with a special reference to features of the digital economy. In particular, regarding concerns of foreclosure, the guidelines consider direct and indirect network effects in multi-sided markets, and their effect on market concentration; the guidelines also stress the importance of analysing data accumulated by the acquired company.

The JFTC addressed concerns of foreclosure in the recent case of M3-Nihon Ultmarc, a merger between a digital platform operator, which provides physicians with information about drugs and marketing support for pharmaceutical companies, and a databased operator, which provides pharmaceutical companies and medical information platforms with medical personnel data. Both parties served pharmaceutical companies. Considering the pharmaceutical companies' dependency on the merging parties' database, the JFTC was concerned about foreclosure in the market for medical information platform services. The merger was finally cleared subject to behavioural remedies.

The Chair then turned to Mexico, where the Federal Telecommunications Institute (IFT), which regulates competition in the telecommunications and broadcasting sectors, expects an increase in conglomerate mergers, and has recast the analysis of conglomerate mergers in the digital sector, given digital firms' particular business models.

Mexico noted that while the IFT has never challenged a merger on the grounds of conglomerate effects, it has identified various elements and characteristics in the telecommunications and broadcasting sectors which support the prediction that additional conglomerate mergers are forthcoming. The IFT's analysis focuses on the links between products and services in order to determine whether they reside in neighbouring markets, on the merging parties' positions in the relevant and neighbouring markets, and on their ability to engage in anticompetitive conduct.

Products and services in the telecommunication and broadcasting sectors often share inputs and users, and clients, and can be regarded as belonging to neighbouring markets.

This is true in particular for over-the-top services, which usually share common consumers with a disposition to consume a bundle of services, different inputs, technologies and the intensive use of data. OTT services are therefore often bundled together to form product ecosystems. Furthermore, these markets are often characterised by "winner takes all" or "winner takes most" dynamics, strong network effects, and economies of scale. In light of this, conglomerate mergers of OTT services are prone to exhibit anticompetitive conglomerate effects, as the merging parties might engage in tying and bundling or take control of essential inputs and foreclose markets. Another concern is such mergers may reduce the incentive to innovate, where the merger is a substitute for the purchasing company's own innovation.

Competition authorities should focus on anticompetitive effects of bundling which may raise entry barriers for innovators that increase differentiation whilst softening competition, as well as on envelopment strategies that take advantage of economies of scale on the supply side and network effects on the demand side. Careful case-by-case assessment is required considering that conglomerate mergers may result in efficiencies.

The Chair then asked Chile to discuss the recent Uber-Cornershop case.

Chile explained the case concerned a conglomerate merger between Uber, a ridesharing and food delivery platform, and Cornershop, a Chilean grocery delivery platform, which raised three concerns: first, concerns regarding the ability to leverage market power in one market to restrict competition in another one; second, concerns that the merged entity would accumulate cross-market data and thus erect barriers to entry; and third, concerns regarding envelopment of platforms following a theory proposed in a paper by Padilla & Condorelli.

To assess the merging parties' ability to foreclose the market the National Competition Authority (FNE) assessed the degree of market power held by the merging parties. FNE conducted a survey in order to find out whether consumers were multihoming or using only one platform to acquire services. FNE carried out a cost-benefit analysis in order to assess incentives. The degree of product complementarity is an important determinant of cost, considering the cost of bundling complementary products is relatively lower. The results of the survey concerning consumers' tendency towards multihoming, were also relevant in this context, since a high degree of multihoming would raise the cost of implementing bundling strategies. As for the analysis of effects, FNE studied whether the different markets share a common pool of consumers, the sizes of the different markets, and the prospect of rivals offering competing bundles.

FNE found that while Uber's position in the ridesharing market would allow it leverage its power and adopt a bundling strategy which would benefit Cornershop in the market for grocery deliveries, there was evidence that this strategy would not allow Uber to capture competitors' customers. In addition, FNE found rival companies could react by offering similar bundles.

The Chair noted it appears that Chile analysed its case with traditional instruments, however, that a great deal of information on consumer preferences was required. Accordingly, it may be that analysis of these cases, while being more complex, does not require any specialised tools. He then asked South Africa to elaborate on the Naspers-WeBuyCars merger case.

South Africa recently prohibited a merger between WeBuyCars, a company focused on purchasing cars from individuals and offloading them to dealers for further resale; and Naspers, an internet giant that operates two entities of particular interest in this case: AutoTrader, the largest specialized automotive online advertising portal; and OLX, a generalised classifieds portal, which has the largest listing of individuals seeking to sell cars. None of the merged entity's rivals would have been able to offer a similar range of complementary products, and the Competition Commission of South Africa believed the market would tip towards the merged entity.

One of the theories of harm developed concerned self-preference. In this context, the Commission found that AutoTrader would have been able to preference listings by WeBuyCars and position them in manner which would direct consumers, who are often seeking to both buy and sell cars at the same time, to WeBuyCars platform; WeBuyCars could also benefit from preferential access to users of OLX who could be directed to sell their car through WeBuyCars instead of selling them to individuals through OLX, as well as from access to OLX user data, which would have been made available to WeBuyCars according to Naspers privacy policy; finally, WeBuyCars would benefit from access to AutoTrader's data, which could provide WeBuyCars a significant advantage in pricing. The Commission relied on evidence showing Naspers' successful implementation of such strategies in other jurisdictions, and its intentions to implement them post-merger.

The decision to prohibit the merger was upheld by the Competition Tribunal.

The Chair noted that it is difficult to ascertain whether the tipping effect is a result of self-preferencing or of superior efficiency. He then asked Romania to discuss the details of the Edenred-Benefit merger.

Romania noted the merger involved Edenred, which offers different benefits to workers such as meals, wellbeing products, leisure activities and social services, which acquired Benefit, a digital platform serving employers and employees on one side, and providers of benefits on the other. The main concern was that the merged entity would be able to block entry into the market for employee benefits, by restricting access to Benefit's digital platform. However, the Competition Council found that restricting benefit providers' access to the platform would prevent Benefit from taking advantage of network effects, and that a foreclosure strategy would not be beneficial in the long run considering Benefit's market share and employers' ability to directly contract with benefit providers.

The Chair then asked Marc Bourreau to comment on the current practice and offer his advice regarding the assessment of conglomerate mergers in the digital sector.

Marc Bourreau stressed the importance of considering the specifics of digital economy business models. It is particularly important to consider digital platforms' business models and network effects, because strategies traditionally considered ineffective could actually be profitable in the presence of network effects, and therefore must be reassessed with fresh eyes. Taking account of synergies is also important: some of the digital conglomerates are an aggregation of a number of platforms that allows the conglomerate to benefit from synergies on the supply side, economies of scale and scope in the development of new products and services or ecosystems, which in turn allow consumers to benefit from synergies.

The specifics of the digital economy should inform theories of harm developed in cases pertaining to the digital economy. Bundling, for example, can take the form of envelopment strategies, where, in the presence of economies of scope and network effects, a firm could leverage its customer base in one market to attack another one. In addition, the negative impact bundling can have on innovation could be considered more important in the digital economy.

The role of data is important as well: data clearly motivates conglomerate mergers, but could also raise competitive concerns when it is essential for entry and cannot be replicated.

Finally, theories of harm related to innovation are also important. The purchase of start-ups by the big tech firms may indeed be beneficial, however, there is a threat these mergers are designed to restrict competition. It is therefore important to assess such mergers' effects on innovation, in particular by investigating the prospects of the target firm becoming a competitor of the acquiring company.

The Chair asked whether the existence of incentives to innovate emerging from the possibility of a start-up being purchased by a big tech company should be considered as an efficiency which merits permitting such mergers, despite the possibility of their creating barriers to entry in the long run, and asked Marc Bourreau to share his view.

Marc Bourreau agreed there are both procompetitive and anticompetitive effects, and added that post-merger, the acquiring company may have less incentives to innovate than those the acquired firm had before the merger, and that the ability to acquire small firms may reduce large firms' incentives to innovate in the first place.

The Chair questioned whether, considering the different, sometimes conflicting, effects on innovation, economics can inform policy, and asked whether there is any empirical economic analysis which could shed light on the dominant and prevalent effects.

Marc Bourreau replied it is possible to distinguish between two types of innovation: the first is designed to increase firms' margins, and thus charge higher prices. In this context concentration would lead to lower output and reduce incentives to innovate; the second type of innovation is aimed at expanding sales without significantly increasing prices. In this context, concentration increases the incentive to innovate because the firm can enjoy more comfortable margins as the volume of sales increases. This distinction can inform competition authorities' policy and decisions regarding the effect of concentration on innovation.

The Chair gave the floor to James Langenfeld and then to Eliana Garcés.

James Langenfeld believes it is important to determine whether one is more concerned over allowing a anticompetitive merger and the establishment of a dominant firm, or about challenging an efficient merger and deterring efficient killer acquisitions. It is hard to determine, for example, whether Facebook purchase of Whatsapp really reduce competition or whether the purchase added a dimension that consumers value. There are many theories of harm in the literature, but very little, if any, empirical evidence. This is the reason Chile's example should be followed: at least some key theoretical hypotheses need to be tested by using surveys, for example. These considerations should inform decisions on whether to challenge such mergers.

Eliana Garcés clarified she is not of the view that competition authorities should fully avoid conglomerate mergers. She agrees with James Langenfeld that challenging conglomerate mergers requires empirical validation of many underlying assumptions.

She believes something fundamental is absent from the current discussions and reports on this issue: a clear understanding of what is being produced in the digital economy and of how it is being produced. It appears that in this discussion, terms such as “network effects”, “economies of scale and scope”, and “data” are used in a negative context, however, these are fundamental factors which drive the creation of value in this sector. In this moment of transition, a negative approach to these terms, which seems to be based on traditional analysis of mechanical markets, could impair the creation of value derived from extreme connectivity, from being able to transform data into actionable information, and from creating new sources of engagement and new forms of transactions and communication.

In particular, applying envelopment and other foreclosure theories to platforms requires an understanding of platforms’ characteristics. For example, products on platforms are not well defined, the value chain is not well specified, there is no input-output relationship, etc. Also, users of the platform are not only consuming value, but are also generating value; much of platforms’ innovation is based on user generated.

This system of value creation is not well understood, and it is conceptually wrong to apply traditional models in this context and try to engineer market dynamics on this basis. There is, however, room to explore whether more value should be produced. Returning to the fundamentals of the production function and demand would be a helpful exercise.

The Chair noted that traditional analysis is applied to markets for products or services. However, in this context, is appears it may be incorrect to relate to markets as the base unit and he wondered whether traditional models could still be applied to broader base units such as a set of products or services or an ecosystem.

He then moved on to the last part of the discussion: practical challenges competition authorities face in this context and strategies to overcome them. He noted BIAC’s position suggests competition authorities engage in *ex-post* enforcement against tying and bundling practices, rather than intervene in conglomerate merger, and asked BIAC if it would not be better to deal with the issue by prohibiting mergers, considering the challenges associated with handling such enforcement cases. He also asked BIAC why it believes conglomerate merger review imposes a heavier burden on parties, compared with the burden imposed in horizontal or vertical merger review.

BIAC explained that conglomerate mergers impose a heavy burden on parties because competition authorities are required to predict how the market will develop in the future. Such a prospective analysis is fact intensive, especially considering blocking a merger on the grounds of predicted future developments requires meeting an elevated burden of proof. Competition authorities should base their decisions on sound and established principles and should have the required expertise to conduct complex legal and economic analysis. In addition, concerns of post-merger conduct and harm cannot be based on speculation, and must be based on evidence showing the parties’ ability and intention to violate competition laws. Contrary to competition authorities’ perceptions, requests for information can be very burdensome, complicated and costly for respondents. It is therefore important to limit the scope of requests and to focus them of products that are clearly complementary.

Regarding the first question, analysis of efficiency should not be relegated and added-on at the end of the analysis, since many mergers may have a significant pro-competitive effect.

The Chair remarked there seems to be a paradox: on one hand, BIAC admits the novelty of digital technologies and firms; on the other, it requires competition authorities to employ validated theories. One could argue against doing anything in such cases until the theory is tested, but one way to test the theory is through competition authorities’ interventions.

He then asked Spain whether there are ways to lessen the burden on parties required to provide information is conglomerate merger cases.

Spain noted it does not have specific guidelines for assessing conglomerate mergers, but that its assessment is established is informed by experience with assessment of horizontal and non-horizontal mergers.

Obtaining background information at the outset of the investigation about the merger transaction, the parties' business activities, structure of the markets, and complementarity or substitutability between products and services is crucial, and can help limit the burden imposed on parties the parties and other stakeholders such as competitors, clients, etc. Holding meetings with stakeholders can also help focus the investigations and limit requests for information to cover the key aspects of the investigation.

The aim is to focus only on the likely tying and bundling strategies and on efficiencies, and to gather the relevant information on market shares, the parties' bargaining power, incentives to bundle, alternatives to the bundle, the possibility to replicate the merging parties' portfolio, entry barriers and prospective entry etc.

Internal documents related to the transaction can shed light on the motives for the transaction. In cases involving purchase of minority shares it is important to understand which rights are associated with these shares and whether they allow access to information which could influence the strategy of a different undertaking controlled by the purchaser. Request for these kinds of information are fairly concise and can prove very useful.

Finally, stakeholders should consider drafting a non-confidential draft of the information they provide, in order to safeguard sensitive information.

The Chair noted that from Spain's contribution it appears that while there cases are inherintley complex, case management can alleviate the burden on stakeholders. He then turned to Turkey, which imposed a structural remedy in the Essilor-Luxottica case.

Turkey briefly discussed its investigation of the Luxottica-Essilor merger, which concerned various markets for eyewear and related products. While in some market, Luxottica and Essilor's activities overlapped, in others, the parties were positioned in different levels of the value chain. The Turkish Competition Authority found the merged entity's portfolio contained powerful brands and was sufficient to cover opticians' needs, and was hence concerned about market foreclosure and the strengthening of Luxottica's already dominant position in the wholesale of branded sunglasses.

The parties undertook to divest a subsidiary of Essilor in order to eliminate horizontal overlaps and alleviate other concerns, which were also addressed by imposing behavioural remedies restricting the merged entity's ability to tie the sale of different products and to engage in exclusive dealing for a period of three years.

The Chair gave the floor to TUAC, whose contribution calls on competition authorities to be more active in this context, and take employer power into account in the analysis.

TUAC noted that the expansion of market power through conglomerate mergers is particularly striking in the digital sector, with the rise of a handful of digital giants. Beyond the negative economic and social effects, expanded market power raises serious public policy concerns, considering the digital giants' lobbying capacity.

The negative effects of excessive corporate power is also manifested in digital platform employees' precarious working conditions, low wages and loss of social protection. These concerns are expanding into secondary markets, which are not digital in nature.

To properly assess conglomerate mergers, the consumer welfare standard and market definition methodology need to be adjusted. Economic power should be assessed by looking at the size of the entity, and not only by looking at separate product lines. In today's world, production is fragmented, by capital ownership is increasingly concentrated. The fairness agenda should indeed be further explored.

The Chair agreed there is a need to adapt to new realities, though not necessarily to go as far as TUAC suggests. He then asked the experts for their final comments.

Eliana Garcés stressed the importance of empirical evidence to validate theories. The more complicated the theories become, the more important it is to substantiate them. She returned to her previous comment regarding digital conglomerates and cautioned against automatically classifying certain market structures as a problem that needs to be addressed; rather, policy should tackle issues such maximising value and consumer welfare and take account of the realities of how value is produced in this sector.

James Langenfeld noted that the new US Vertical Merger Guidelines refer to the issue of “related products”, and he believes this may partially address some of the issues related to market definition that were discussed earlier. He also noted that conglomerate merger investigations are inherently more costly, because they may involve investigating all of the parties products, whereas horizontal mergers investigations focus on overlaps. Conglomerate merger investigations are therefore not only deep into specific products, but also widely across many products.

Marc Bourreau noted that while the discussion focused on competition concerns, there are considerable benefits from conglomerate mergers in the digital economy. The challenge for competition authorities is to balance these efficiencies with traditional concerns, which are magnified in the digital sector in the presence of network effects and economies of scale, and with new concerns, such as concerns of intermediation barriers raised by digital platforms.

The current debate about so called “significant platforms”, “bottlenecks or “gate keepers” may be relevant to overcoming the challenges of defining markets and measuring market power in the digital economy and play a part in conglomerate merger analysis.

The Chair concluded by observing that the discussion was a productive start to clarifying the theories and challenges of assessing conglomerate mergers. He noted that the approach to conglomerate mergers will in a significant way depend on an authority’s approach to the risk of false positives and false negatives. This reflects the broader societal context of an authority, since the theory is not clear that one type of error is more damaging than the other.