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# Summary of discussion of the roundtable on Theories of Harm for Digital Mergers

**Annex to the Summary Record of the 140th meeting of the Competition Committee**

16 June 2023

This document prepared by the OECD Secretariat is a detailed summary of the roundtable discussion on Theories of Harm for Digital Mergers, held during the 140th OECD Competition Committee meeting on 14-16 June 2023.
It is circulated to delegates for approval under written procedure. Delegates are requested to submit any proposed changes by 15 February 2024.

More documents related to this roundtable can be found at
www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm

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# *Summary of Discussion of the roundtable on Theories of Harm for Digital Mergers*

## 1. Introduction by the Chair

On 16 June 2023, the OECD Competition Committee held a roundtable on theories of harm for digital mergers chaired by Professor Frédéric Jenny.

**The Chair** introduced the topic of discussion, which is linked to other roundtables held within the Competition Committee on innovation and consumer welfare standards. He contextualized the discussion within a broader debate on the acquisition strategies of major tech companies, which have resulted in over eight-hundred mergers in the past decade. Most of these merges escaped scrutiny from competition authorities, as they did not meet the regulatory threshold. And even when scrutinized, these digital mergers were frequently cleared with no commitments. The Chair pointed out to a potential lack of appropriate tools for competition authorities to examine these mergers, which would be the starting point of the discussion. The Chair then proceeded to explain that the discussion would be structured in three parts:

- A presentation of existing theories of harm that are applied across all markets and their potential applicability to digital mergers;
- A discussion on whether the peculiarities of digital mergers demand the development of new theories of harm or the modification of existing ones;
- And a reflection on the challenges that new theories of harm and the legal uncertainty that they might create.

The Chair introduced the three expert speakers who took part in the discussion, either online or in the room:

- **Luís Cabral,** Paganelli-Bull Professor of Economics, New York University Stern School of Business;
- **Annabelle Gawer,** Professor in Digital Economy & Director, Centre of Digital Economy, University of Surrey
- **Viktoria Robertson,** Professor of Competition Law, Vienna University of Economics and Business & University of Graz

## 2. Background paper by the Secretariat

**The Chair** gave the floor to the Secretariat to present the main findings of its background paper.

**The Secretariat** explained that definition of digital mergers that the paper follows, clarifying that it excludes mergers that involve entities which provide traditional goods and services with the support of digital technologies. The paper thus focuses on mergers that raise novel challenges for merger authorities. However, the Secretariat warned that the precise boundaries of this definition of digital mergers would not be significant for later discussions.

The first part of the paper explores current practices of competition authorities, finding that traditional theories of harm (both horizontal and non-horizontal) have already been widely

applied in digital mergers, being adapted to take into account the characteristics of digital markets. In the application of non-horizontal theories, input foreclosure was found to be a recurring theme, often referring to digital inputs such as application programming interfaces (APIs) and operating systems, and for this reason market access and interoperability were identified as a key concern for market authorities. The paper also distinguished data theories of harm as a separate category, since data inputs were found to be a key focus of both horizontal and non-horizontal theories of harm.

A second part of the paper looks into practices that are not being implemented by competition authorities, finding that ecosystem-based theories, innovation-based theories and killer acquisition theories are rarely enforced. The following section in the paper explores the new theories of harms that were being discussed in the literature, finding that ecosystem-based theories are the most prominent. These theories do not necessarily fit conceptually in the horizontal, vertical and conglomerate conceptualization, since they are designed to look at the impact of a merger on a platform's broader portfolio of services and products.

Besides these ecosystem-based approaches, the paper finds that other theories of harm applied in digital markets are not strictly new and tend to focus on non-price aspects of competition (such as innovation and privacy). Furthermore, many of the novel approaches proposed for the assessment of digital mergers call for the analysis of longer time horizons, since these mergers can create short-term efficiencies that then turn into harms due to network effects and the propensity to tip that characterize digital markets. However, not all experts share this vision, and some claim that digital markets are too innovative to make longer-term predictions free of speculation and uncertainty.

Lastly, the paper addresses future challenges for merger authorities, concluding that new theories of harm for digital markets will bring some of level of uncertainty and challenging legal tests. However, the paper stills finds utility in the authorities' attempts to better capture the unique features of digital markets in terms of mergers, including: (i) the fact that the digital economy is centred around a small number of large ecosystems with broad services and products portfolios; (ii) the absence of a clear relationship between digital products and services, as it is not always obvious whether they are complementary, substitutes or vertically linked; (iii) the fact that digital mergers typically take place in multi-sided markets and their impact is felt more intensely in the business side; and (iv) non-price aspects of competition being at the forefront of these mergers, ahead of price effects. The Secretariat concluded its presentation by proposing future area of research: the interplay between digital theories of harm, legal standards and standards of proof.

## 3. Traditional theories of harm

**The Chair** thanked the Secretariat for its background paper, and asked Professor Robertson to present her recently published review of digital and technology merger cases from across the European Union and the United Kingdom.

**Professor Robertson** agreed with the Chair that there needs to be analysis of why despite the large number of digital mergers in recent years only two have been challenged. She then presented three potential answers: (i) that these digital mergers have not led to anti-competitive harms (which her research does not validate); (ii) that authorities lack the jurisdiction to scrutinize them, as they review mergers based on notification thresholds which are not met by digital mergers (although many countries like Austria, Germany and Spain have introduced innovative thresholds); and (iii) that authorities are missing the appropriate theories of harm. Professor Robertson clarified that her intervention would

focus on this third hypothesis, the absence of appropriate theories of harm, by analysing the application of traditional theories to digital mergers.

She then presented the scope of her digital mergers research, which covers sixty-nine mergers that took place between 2015 and 2021 across the European Union and the United Kingdom. Out of these merger cases, 44% were exclusively based on horizontal theories of harm, and only 3% were based on conglomerate theories of harm. The Professor then proceeded to present a series of case studies in order to explain the adaptation of these traditional theories of harm to the particularities of digital markets. The first of these studies concerned the eBay/Adevinta merger, which was reviewed in parallel by Austrian, German and UK authorities. The merger was cleared unconditionally in Germany, while Austria and the United Kingdom imposed certain structural and behavioural commitments (including the sale of specific lines of business), due to different market realities across the three geographies. Within this range of digital merger cases, authorities found that many of their competition concerns that emerged from horizontal theories of harm were actually mitigated by factors relating to the functioning of digital markets. Overall, these cases prove that horizontal theories of harm remain the focus of authorities' review of digital mergers, through their adaption to the characteristics of digital markets.

The second case study referred to the Meta/Giphy merger, in which vertical input foreclosure was one of the main competitive concerns assessed by Austria and the United Kingdom, although with different outcomes. While the United Kingdom's authority requested a divesture, Austria cleared the merger with access commitments imposed on Meta. Professor Robertson then discussed the competition concerns that data access raises in digital markets, mostly in cases of vertical integration but also in horizontal and conglomerate digital mergers. The fact that data is such a versatile input grants it value across both related and unrelated markets, creating competition concerns when competitors are no longer to access specific datasets that are essential for their business.

Regarding conglomerate theories of harm, the Professor explained that very few digital merger cases have explored them in depth. Although post-merger bundling has been explored as a possible conglomerate effect, it has not been considered as a credible threat to competition. One of the few cases to consider conglomerate theories of harm has been the Greek Delivery Hero case, which involved a leading online food delivery platform that intended to acquire undertakings that operated in related (but non-identical) business segments. The Hellenic Competition Authority thus explored conglomerate effects, finding that the platform's acquisition strategy would combine the online food delivery services with the various online intermediation services of the target undertakings. To tackle bundling concerns, commitments were imposed, and the Professor highlighted that these kinds of conglomerate effects assessments are being increasing deployed in digital merger review.

She then concluded that traditional theories of harm remain the focal point of substantive assessments in digital merger reviews, and that they are adaptable to the features of digital markets. However, there is a limit to the application of these traditional theories, after which ecosystem theories of harm need to be incorporated into merger review. Lastly, digital merger review needs to be better aligned with abuse of dominance assessments to fully capture potential anti-competitive effects.

**The Chair** thanked Professor Robertson for her presentation and invited Romania to share its review of the Glovo/Food Panda merger, which was notified in 2021 and involved two competing food delivery platforms in a multisided market.

**Romania** explained the great interest of the case, partly due to concerns of market sharing agreements that were raised during the document review. The delegate explained that the

proposed merger entailed the acquisition by Glovo of sole control over Food Panda in order to increase quality and efficiency of the food delivery services. Both platforms focused on facilitating transactions between two sides: restaurants and customers. In this context, the Romanian Competition Council (RCC) identified two relevant markets: (i) the online delivery of general goods, due to the undertakings' dependency on third-party supermarkets, which did not give rise to any competitive concern; and (ii) the market for online food delivery platforms, in which the RCC identified competitive concerns arising from various factors (the overlap of the undertakings' activities and their cumulative market shares, which could lead to the imposition of exclusivity clauses on partner restaurants and thus restrict multi-homing by users). Multi-homing was identified as a key driving force of competition in digital markets, by which both consumer and business users can switch platforms without additional costs. Glovo's resulting market dominance and the potential imposition of exclusivity clauses had the potential to restrain multi-homing. For this reason, the RCC only cleared the merger after Glovo's commitment to not impose such clauses. Lastly, the delegate explained that traditional tools were deployed for the analysis of potential competitive harms, and no new theory of harm had to be developed.

**The Chair** called Japan to present a horizontal case that related to code-based payment services and explored indirect network effects.

**Japan** explained that the merger review concluded in clearance with remedies and covered various features of digital markets: a two-sided market, indirect network effects and data as an important input. Furthermore, the nature of the remedies was unprecedented since the relevant markets were nascent and rapidly growing. The two-sided market related to the provision of code-based payment services, which provides consumers and member stores with payment options through the scanning of QR and barcodes by smartphones. These two sides (member stores and end-users) led the Japanese authority to define two relevant markets: one involving general consumers as users of the code-based payment services and second one with the member stores as users. The theories of harm assessment considered potential indirect network effects by which the merging undertakings would first gain market power in the consumer side, and consequently in the business side. Furthermore, they took into account potential exclusivity deals agreed with member stores, that would restrain competition in both relevant markets. And third, the assessment considered market powers gains through increased data collection. Ultimately, the adopted remedies stated that the undertakings would periodically report and discuss competitive concerns with the authority for a period of three years after the merger. This remedy was designed in light of the novelty of the market and its rapid expansion.

**The Chair** invited Chinese Taipei to expand on its merger guidelines which require consideration of potential competitive harms in conglomerate mergers, and which were applied to a merger between Google and Communication Global Certification (CGC). The Chair also inquired about the relevance of these conglomerate effects theories for the identification of killer acquisitions.

**Chinese Taipei** explained that it does not apply a specific analytical framework tailored to digital mergers. Instead, cases including potential "killer acquisitions" are reviewed under the conglomerate merger framework, particularly focusing on the theory of potential competition. Several factors are assessed to determine the existence of potential competition between merging parties, considering factors like regulatory changes, technological advancements, and evidence of the merging party's plans to enter other markets. Chinese Taipei then discussed two cases to illustrate their approach. First, the Google and CGC merger, in which Google intended to acquire CGC, a wholly owned subsidiary of HTC that provided certification and testing services for mobile devices. Chinese Taipei characterized this as a conglomerate merger but found that the two

companies did not have a potential competition relationship. Due to low entry barriers, a lack of incentives for Google to enter the market, and Google's absence of intent to enter other markets, the merger was cleared without any remedies.

In the second case, Chinese Taipei presented the creation of an online-only bank called LINE bank through a joint venture of seven companies, including LINE group. The merger authority feared the potential misuse of LINE's extensive data to hinder competition and for this reason it reviewed various data-related factors, such as substitutability, duplicability, data processing capabilities, and competitive advantages. After a detailed analysis, it was found that the data controlled by LINE was widely available in the market, and therefore the joint venture did not pose competition concerns. In conclusion, Chinese Taipei acknowledged the unique challenges posed by digital mergers, where firms can predict future competitors with greater precision. The delegate highlighted the importance of finding long-term solutions while suggesting that the potential competition theory within the traditional conglomerate merger framework could offer short-term solutions.

**The Chair** called on the USA to present its contribution and close the first part of the roundtable discussion on traditional theories of harm.

**The United States** outlined two ways in which its antitrust laws recognize potential competition: actual potential competition and perceived potential competition. The first looks at whether an acquisition eliminates a firm that is reasonably probable to enter the relevant market through means other than an acquisition. It hinges on the available feasible means for entering the market and whether there is a substantial likelihood that entry will deconcentrate the market or produce other procompetitive benefits. Meanwhile, the perceived potential competition theory considers whether an acquisition eliminates a firm on the fringe of the relevant market and whose presence benefits competition in that market. The delegate then presented the FTC's challenge to the Meta/Within merger to illustrate the application of the actual potential competition theory. This case involved Meta's acquisition of Within, which offered Supernatural, a VR dedicated fitness app. In litigation, the FTC argued that objective evidence of Meta's size, resources, capabilities, and motivation showed it was reasonably probable that Meta would enter the VR dedicated fitness app market, where it would have competed against Within. Moreover, the FTC presented evidence demonstrating that Meta intended to enter the market. This case is significant for several reasons: (i) it reaffirms that actual potential competition and perceived potential competition are valid antitrust theories; (ii) it recognizes that markets can be defined using *Brown Shoe*'s "practical indicia," such as industry recognition of the market and the product's particular uses and characteristics, and without the use of any particular quantitative methodology; and (iii) it rejects the view that new entry will necessarily deconcentrate a market unless there also is evidence of shifting market shares.

**The Chair** asked Professor Robertson for comments on the cases presented by the delegations.

**Professor Robertson** argued that many of the cases presented prove that traditional theories of harm can be applied to digital mergers. However, cases like that of Meta/Within demonstrate the existence of standard of proof challenges, which might difficult the implementation of traditional theories of harm.

## 4. Adequacy of traditional theories of harm. Are new theories needed?

**The Chair** opened the second part of the discussion, which aimed at exploring whether merger review authorities could keep applying traditional theories of harm or whether they

should develop new theories. He invited Professor Gawer to reflect on this question, focusing on the ecosystem-based theories that are gaining ground in digital merger review.

**Professor Gawer** stressed that her intervention would expose the fundamental ways in which ecosystems operate and explain particularities of competition and innovation in digital markets. Her first point was on the creation of value by platforms within digital ecosystems, which is not only determined by new types of markets, but also by new types of firms. These new digital firms seek value creation through complementarities, and large-scale data collection and processing facilitate the exploitation of the complementarities. Furthermore, the Professor explained that her research distinguishes between two types of platforms: (i) transaction platforms, which are online marketplaces which facilitate identification and transaction among parties that would otherwise have difficulties for operating together; and (ii) innovation platforms, which create value by facilitating or stimulating the development of complementary innovation, notably through economies of scope. These two types of platforms follow different value-creation strategies: transactional and innovation-led. GAFAM platforms actually combine these two forms of value creation in a conglomerate manner.

Professor Gawer then discussed innovation, making an important distinction between innovation in substitutes and innovation in complements. These two are very different in their impact on markets and the consolidation of market power. In this regard, platforms have incentives to stimulate complementary innovation by third parties in their ecosystems, but they also have strong incentives to prevent substitute innovation to preserve their market power. Once a market has tipped, this incentive to prevent substitute innovation can become problematic, and mergers can play an important role in the prevention of this type of innovation. Furthermore, platforms compete through the subsidization of at least one side of the market in which they operate and the leveraging of user data, through a feedback loop by which consumers of a digital service generate data. This data then becomes both an input and an output. Through these means, platforms compete with both traditional firms and even platforms within their own ecosystems, as seen in the acquisition of both Instagram and Whatsapp by Meta.

Regarding ecosystem theories of harm, the Professor highlighted the new ways in which digital platforms compete, innovate and create value. The paradox of these platforms is that they present a distributed pattern of value creation, in which different members of the ecosystem generate data and then contribute to collective value creation, but due to digital business models, that value is then captured in a centralized way. This leads to an intense polarity between the center of value capture and the center of value creation. Platforms who survive the first stages of competition become central governors of the ecosystems in which value is created, thus becoming potential bottlenecks. The Professor then introduced the question of how mergers could be assessed in terms of harms in ecosystems. In this regard, mergers need to be framed as strategic moves towards the expansion of a firm's scope and need to be analyzed in light of its business model. Digital firms' strategies frequently incentivize complementary innovation through subsidies, but they also try to eradicate the threat of substitution and acquire complements that are likely to evolve into substitutes. These platform strategies are not constant and evolve throughout time, and mergers need to be understood in the context of these strategies, beyond a sole focus on mergers as simply an expansion of scope. Beyond this expansion, digital merges also frequently lead to changes in the interfaces and the sides of the market. Professor Gawer explained that the interface refers to the two-way exchange of data between the platform and each of the sides of the market: the more open the interface is, the more it will allow for third-party innovation, and firms will have to balance this stimulation of external innovation with control over the future of their platform. Ultimately, digital mergers need to be assessed against these fluctuations in the interface and the sides of the market.

**Spain** shared that it has already assessed twenty-four digital mergers, partly due to its new thresholds. Five of these reviews focused on the issue of innovation and explored the existence of potential killer acquisitions, and all of them concluded in clearance. The delegate started his intervention with the Just Eat/Canary merger which involved an online food delivery, the competition authority (CNMC) evaluated whether the merger could constitute a "killer acquisition" by analyzing the potential of the target company, Canary, to exert significant competition pressure. The CNMC determined that Canary had low turnover, limited R&D investment, and was not an innovative or aggressive competitor. In the Turnitin/Ouriginal merger, the CNMC similarly concluded that there was no threat to innovation due to low R&D investment by the target and the innovative capacity of other market players. In Norton/Avast, the authority determined that the target was less innovative than the buyer, and competitive pressures, including the rise of cyber threats, ensured competitive outcomes in terms of prices and innovation. In the Wedding Planner/Zankyou Ventures, the authority considered that innovation was not a significant driver of market power. Finally, in Karnov/TR Spain/WK Spain (2022), the CNMC found that innovation played a crucial role in certain market segments, such as legal software. The analysis considered competitive pressure from other innovative competitors, competitive pressure from three solutions, and internal documents indicating efficiency and maintenance of an innovative network.

**The Chair** asked Hungary to elaborate on its use of data-based theories of harm in its digital merger review practice.

**Hungary** shared insights from a specific case, Netrisk/Biztosítás.hu, which involved online insurance intermediation platforms. The delegate explained that this case examined the following aspects related to data and potential theories of harm: (i) whether the data that the merged entity would have access to was unique and would provide a competitive advantage, finding that the data consumers needed to provide for insurance services was not unique and was voluntarily submitted to both the merging parties and other insurance providers; (ii) whether the data would provide a digital advantage, finding that it would not as the information collected was not commercially valuable beyond the immediate insurance context; (iii) whether the resulting entity would be able to provide targeted services and advertising, although it was found that targeted advertising was not particularly relevant in the insurance market; (iv) whether the merged entity could abuse its market power by creating ecosystems or requiring insurers and other insurance mediation platforms to use its services exclusively, finding that it was unlikely, as insurers usually required insurance mediators to connect to their services; and (v) whether conglomerate theories of harm were applicable, but as both the acquirer and the target were insurance mediators, there were no adjacent markets where the combined market share could be abused. Overall, in the Netrisk/Biztosítás.hu case, Hungary did not find evidence to support data-related theories of harm or concerns related to digital innovation.

**The Chair** asked Brazil to present its review of the Microsoft/Activision merger, which considered two ecosystem-based theories of harm.

**Brazil** acknowledged that platforms might be holding forms of market power that are not fully captured by the traditional notion of market dominance. This new power relates to platforms' capacity to set the architecture of entire ecosystems and make them less open. The assessment of the Activision Blizzard/Microsoft illustrated some of these concerns, and the review was based on two ecosystem-based theories of harm. First, incentives to close the ecosystem were assessed, exploring whether the merger would lead Microsoft to close its digital gaming ecosystem for games published by rivals, particularly focusing on Activision Blizzard games. They examined the possibility of exclusivity for these games on the Xbox ecosystem, which was compensated by the provision of efficient alternatives

by rival gaming consoles and alternative distribution channels such as rival digital stores. And second, the restraint of potential competition via subscription services was also considered for the digital games markets, but ultimately disregarded as there were other strong rivals and entry barriers were low. Ultimately, as illustrated in this case, the Brazilian authority is open to exploring digital mergers through ecosystem-based theories of harm, although a challenge remains: the authority will have to assess not only the risk of total foreclosure in adjacent markets, but also risk of partial foreclosure in the form of privileged treatment of first party service within the ecosystem.

**The Chair** stressed that both competition within ecosystems and across ecosystems need to be analysed. He then invited India to present the PayU/Bildesk merger, focusing on the fine tuning of theories of harm and the application of ecosystem-based theories.

**India** introduced its merger notification regime, which is based on a two-step system accounting for assets and turnover thresholds. Many mergers involving promising startups have escaped review because the thresholds were not met. Furthermore, authorities have had to face an inadequacy of traditional assessment and remedy frameworks and develop new theories of harm. Some cases have led to presumptions of self-preferencing, net neutrality data-based market power and triggering of complementary effects. The delegate then discussed a series of digital merger cases. In the last of these cases, PayU/Bildesk, the authority discerned a potential loss of competitive constraints in the overlapping market segments of the two parties, as well as an increase in barriers to entry and expansion. Ultimately, due to the large number of actors present in the market, the authority cleared the merger. As a concluding remark, the9elegatee shared that India is currently considering an ex-ante regulation to identify systematically important digital intermediaries and impose reporting requirements on them.

**The Chair** then asked Chinese Taipei to again intervene and discuss privacy concerns as a source for theories of harm, focusing on a case in which its merger review considered a decline in privacy protection.

**Chinese Taipei** explained that, within its merger review practice, it has not yet assessed competition solely on privacy concerns. Privacy protection is tasked to a different authority, although an interagency taskforce has been set up together with the competition authority (CTFTC). CTFTC's approach has focused on considering privacy protection as a form of quality competition, as it becomes as a factor for competing companies to offer and attract customers. Digital merger review will thus examine if privacy protection is reduced or disincentivized post-merger. The delegate justified this conservative approach to privacy as quality competition on two reasons: (i) consumer protection is a reflexive interest of competition law, and therefore if privacy is to be protected, it should be done through the protection of market competition; and (ii) the need to protect privacy is always subjective and preferences are widely dispersed.

**The Chair** asked the BIAC delegation to close the second part of the discussion and elaborate on its scepticism on efforts to develop new theories of harm.

The **BIAC** delegation agreed that despite the potential of digital mergers to bring enormous benefits and efficiencies, they can also raise issues of harm. However, the delegate also stressed the importance of having merger review systems that are based on well-established economic principles and guarantee predictability, legal certainty, and procedural fairness in merger review. Regarding the need to develop new theories, BIAC argued that existing theories of harm do not stand in the way of a thorough and detailed analysis of digital ecosystems. The delegate also urged for caution on two aspects when amending traditional theories. First, when altering the fundamentals of merger control policy (e.g., by reversing burdens of proof or introduced fixed presumptions). And the second aspect relates to the

grounds that are applicable for the assertion of jurisdiction in relation to digital mergers. In this regard, the delegate argued that there should be no assertion of jurisdiction unless there is an immaterial nexus to the reviewing jurisdiction, and extraterritorial jurisdiction should only be asserted when the effects of the conduct within the reviewing jurisdiction are substantial, unforeseeable, and consistent with international law. BIAC closed its intervention by expressing its concerns on a recent case reviewed by the European Commission, in which the authority asserted its extraterritorial jurisdiction.

## 5. Challenges of new theories of harm and legal uncertainty

T**he Chair** asked Professor Gawer to reflect on the cases that had been present. He also asked her to reflect on the difficulties that competition authorities face when considering the interfaces and sides of platforms in merger review, as these are reliant on a business model that is likely to evolve throughout time and are hard to predict.

**Professor Gawer** referred to the Microsoft case presented by Brazil, which explored the business scope of the resulting entity and the closing of the interface. She also agreed with the Chair that the future of impact of mergers is very hard to assess due to the fluidity of platforms' business models. This difficulty demands a rethinking of the methodology that is employed to review mergers, and the Professor advocated for interventions that are followed by periodical check-ups to ensure that the requirements and commitments agreed at the time of the merger remain valid. She stressed that the uncertainty that characterizes digital markets should not prevent authorities from intervening.

**The Chair** then asked Professor Cabral to reflect on the issue of adapting evidentiary standards to make merger control a more useful instrument in digital markets.

**Professor Cabral** clarified his status an economist by background, with little legal knowledge. He showed his support for the adaptation of existing theories of harm, but also called for an incremental change in the way merger control is addressed in digital markets. The Professor stressed that the operators in these markets are different to traditional businesses, for two main reasons: the uncertainty under which their business models operate and their innovation (notably innovation for buyout strategies). Furthermore, these operators are part of an ecosystem in which innovation for buyout is an integral part of business models, and the impact of merger policy on these ecosystems should thus be considered. Within these ecosystems, hundreds of mergers have gone unchallenged in previous years, and Professor Cabral called for a new review framework that considers dynamics, probability assessments, potential competition and innovation.

The Professor stressed that this conceptual framework does not constitute a theory of harm, but simply a new way to think of big tech acquisitions. Under this framework, he explained that merger review often faces the trade-off between blocking a value increasing merger and avoiding a killer acquisition, depending on whether the target is considered a complementor or a substitute (and therefore, a potential competitor). The Professor then presented a calibration analytical model to estimate the percentages of digital mergers that should be cleared and blocked, concluding that the optimal merger policy should be based on balance of harms which explores the probabilities of various outcomes and multiplies them by the harms and benefits, choosing for a threshold when the harms outweigh the benefits.

**The Chair** asked the Professor to expand on his definition of optimality.

**Professor Cabral** clarified that optimality refers to consumer welfare, and that the conceptual framework is also adaptable to other forms of welfare, including innovation.

**The Chair** commented that a challenge that remains ahead, at least in Europe, is the uncertainty regarding the evidentiary standard in merger control. This uncertainty is expected to be tackled soon in a pending appeal to the Court of Justice. It is yet unclear whether the judgement will opt for a balance of harm or a balance of probability. The Chair then invited Brazil to present the challenges it has faced when developing theories of harm which factors privacy as the quality framework.

**Brazil** explained that addressing privacy as the quality framework might be the most orthodox approach to integrate privacy concerns and merger review. This approach has been discussed in high profile cases across jurisdictions, and it relies on a theory of harm in which mergers might negatively affect consumers in two ways: (i) reducing competition for the provision of digital services through privacy-friendly technologies; and (ii) raising platforms' incentives to collect more consumer data without compensating in the form of a better service. Furthermore, the delegate identified three obstacles for the application this quality framework to merger review: (i) in certain markets firms might not differentiate their products in terms of privacy quality and even if they do so, customers might find it difficult to assess privacy quality in an objective way; (ii) turning privacy into quality creates a dilemma, as quality is a multi-dimensional parameter and privacy will have to be balanced against other quality improvements for the digital services; and (iii) there are legitimate disagreements on how competition agencies should deal with the risks of data protection violations. Ultimately, considering privacy as a quality framework brings both challenges and benefits.

**The Chair** asked the European Commission to present on another set of challenges, relating to the application of ecosystem theories of harm against past consideration of conglomerate issues, since traditionally conglomerate effects have been considered neutral.

**The European Commission** acknowledged that ecosystems assessments are gaining prominence in its merger review practice. The delegate argued that the existing merger regulations and their standard of proof are sufficiently flexible to assess mergers in digital markets. The European Commission also explained that ecosystem related effects can lead to horizontal dominant concerns: the ecosystem is enlarged through the acquisition which creates or strengthens a dominant position in a core market and thus further locks in customers. The assessment of ecosystems could also be guided by conglomerate theories of harm, which the delegate argued are similar to traditional leveraging theories (although more complex, as there might not be a direct link between the platform's core market and the acquired activities). The European Commission then presented three cases relating to these leveraging strategies and explained that courts set a very high legal standard in the application of conglomerate theories irrespective of the sector. For this reason, merger review needs to produce very convincing evidence of cause and effect when establishing a conglomerate theory of harm. But this task does not fundamentally impede the finding of conglomerate concerns. The delegate concluded by predicting an affluency of future cases in which mergers might complement, extend or reinforce an existing ecosystem.

**The Chair** gave the floor to Mexico to present its contribution.

**Mexico** explained that some of the theories of harm that have been applied in its merger review included the assessment of ecosystems. Large ecosystems are thought to incite the exit of some competitors or create barriers to entry, therefore reducing competition in the long run. One important challenge for the competition authority is to meet the burden of the proof, since these markets are marked by uncertainty and dynamism. It is thus difficult to predict the behaviour of incumbents, and internal documents and evidence often does not support the theory of harm. Furthermore, the authority faces a series of challenges when enforcing new theories of harm: (i) proving the existence of market power in related markets; (ii) it must find a high degree of complementarity; and (iii) there may be other

economic agents within different ecosystems that could expand into the analysed market; and (iv) markets are disruptive.

**The Chair** asked Austria whether it had encountered judicial challenging of its merger review on grounds of uncertainty.

**Austria** agreed that the particularities of digital markets demand a specification of traditional theories of harm together with the development of new ones. Information contained in internal documents can serve to formulate these new theories of harm: it can provide illustrate the plans and considerations of a merger, and also hint to its counterfactual. These documents could also signal that the acquirer's main motivation is accessing the target's data, and thus build a data-based theory of harm. The delegate claimed that an effects-based approach could be more useful against the challenges of digital markets. This approach would rely on tests of proof which are better adapted to digital markets than static approaches to market structure (on which the traditional dominance test relies).

**The Chair** inquired the United Kingdom on the inclusion of the challenge of uncertainty in its recently revised merger guidelines.

**The United Kingdom** explained that its merger review guidelines were reviewed in 2021 to adapt its merger policy to the new developments of digital markets. The guidelines compile a set of tools that allow for the flexible assessment of digital markets and are based on two reports commissioned by the competition authority and the government. These reports acknowledged that review of digital mergers will always carry some degree of uncertainty, but this should not be a barrier to finding competition concerns. Furthermore, the delegate explained that the UK Competition Appeal Court mandates a case-by-case review of mergers, subject to the same evidentiary standard irrespective of the theory of harm that is being applied. This standard is the balance of probabilities test, which explores whether a merger is more likely than not to result in a substantial lessening of competition. The delegate stressed that the UK does not apply a balance of harms test, despite the recommendations of the commissioned reports. For this reason, there is no elevated burden of proof for particular theories of harm. The higher degree of uncertainty that characterizes digital mergers is due to the challenging determination of the counterfactual, the nature of future and dynamic competition and the finding of the effects of non-horizontal mergers. The delegate explained how all of these challenges can be surmounted, and despite uncertainty, a forward-looking approach that carefully considers available evidence will allow the authority to find competition concerns.

**The Chair** asked Korea to present its contributions and conclude the third part of the discussion.

**Korea** shared that its review of its digital merger policy was not yet complete. However, the delegate presented a case in which the country's competition authority (the KFTC) reviewed a digital merger in the online food delivery market. The assessment followed a multi-sided market approach for the definition of relevant markets, considering factors such as network effects, non-price factors and leveraging concerns. The authority accounted for the positive cross-side network effects between consumers and restaurants and scrutinized the potential deterioration of data quality. The merger was ultimately cleared after the imposition of both structural and behavioural remedies, which among others, prohibited the parties from increasing fees for restaurants and reducing their discounts to consumers.

## 6. Concluding remarks

**The Chair** shared his concluded remarks. He summarised the speakers' different approaches to the challenges and opportunities that new theories of harm present for digital merger review. He stressed that ecosystems imply new forms of competition, which are very different to competition between firms. He also highlighted Professor Robertson's idea that there are three layers to be considered: competition between traditional firms, between participants of the ecosystem and between different ecosystems. The Chair expressed his belief that traditional tools could still be applied, but that they were insufficient to assess digital mergers. This insufficiency is particularly strong for conglomerate assessments, for which authorities have not yet developed strong theories of harm. He also stressed the interference of competition in digital markets with privacy concerns, and the need to distinguish between scope, sides and interface in digital markets. He then presented the potential solution of imposing remedies that need to be periodically reviewed and expressed his optimism for the finding of solutions to the challenging review of digital mergers. Lastly, the Chair asked speakers to share their concluding remarks.

**Professor Robertson** replied to BIAC's intervention arguing that despite traditional theories of harm being applicable to digital mergers, the anti-competitive effects of these are still better capture by new theories. She warned against the risk of inaction.

**Professor Cabral** stressed the cost of not implementing a balance of harms test as opposed to a balance of probabilities. He called for reforms that assign harms to small probabilities of future competitors.

**Professor Gawer** made reference to an inflection turning point in which authorities must balance the dangers of inaction and creating too much legal uncertainty. She pointed to a great amount of lobbying and polarisation in the digital merger debate, and stressed the importance of debates between academia, international institutions and authorities.

**The Chair** concluded by sharing the importance of adopting the guidelines of strategic management literature, in order to learn about the functioning of ecosystems and their changing business models. He then thanked all speakers and delegations for their participation.