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Summary of Discussion of the Roundtable on the Concept of Potential Competition

Annex to the Summary Record of the 135th meeting of the Competition Committee

10 June 2021

This document is the summary of discussion of the Roundtable on the Concept of Potential Competition held by the Competition Committee on 10 June 2021.

More documents related to this discussion can be found at
https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm

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Summary of Discussion of the Roundtable on The Concept of Potential Competition

On 10 June 2021, the competition committee held a discussion on the concept of potential competition chaired by Professor Frédéric Jenny.

The Chair introduced the topic and noted that recently, competition authorities' (lack of) consideration of potential competition has been the source of controversy, especially in the context of merger control. For example, both the French and German Ministries of Economy criticized the European Commission for failing to consider CRRC – a Chinese high-speed train manufacturer, as a potential competitor in the Siemens-Alstom merger case; some controversy also arose in the Dow-DuPont merger case, where the Commission was concerned about harm to innovation of a general nature, without requiring it be related to a specific product market. In the US there has been concern about the agencies' failure to stem a wave of mergers initiated by large tech firms, which appear to target potential competitors; arguably, this failure is a result of the adherence to the Chicago School approach towards potential competition.

The issue of potential competitive constraints is relevant in a wide range of cases (e.g., exclusionary conduct, agreements by potential competitors not to compete, etc.) The discussion usually focuses on concerns about the elimination of potential competition through merger, but also on the extent that potential competition may mitigate anticompetitive effects of mergers.

The Chair introduced the expert speakers who took part in the discussion: **Steven C. Salop**, Professor of Economics and Law, Georgetown University; **Koren W. Wong-Ervin**, Partner, Axinn, Veltrop & Harkrider LLP; and **Niamh Dunne**, Associate Professor of Law, London School of Economics. The Chair noted that the first part of the discussion will focus on the assessment of losses of future competition and the legal and evidentiary tests applicable in horizontal merger cases; the second part will concern the challenges of and practical experience with assessing potential competition in dynamic and innovative markets; the third part will consider whether a reform in evidentiary requirements is required to better assess horizontal mergers in the digital sector; the fourth will centre on the assessment of potential competition as a countervailing factor; and the last part of the discussion will be devoted to non-merger cases, especially anticompetitive agreements. The Chair then asked the experts to highlight one important point they wish to make at the beginning of the discussion.

Steven Salop noted that ultimately, dominant firms are motivated by their desire to reap monopoly profits, and they therefore have the incentive to reduce or eliminate the ability of nascent or potential competitors to compete effectively. To this end dominant players are likely to outbid other firms to ensure they acquire a potential entrant or nascent competitor, strike anticompetitive deals with potential or nascent competitor, or engage in exclusionary conduct to remove potential constraints. Dominant firms stand to lose their monopoly profits, and their incentives therefore outweigh those of potential competitors to fight back, as the latter can only hope for competitive profits. All this suggests increased intervention by competition authorities is required. There is often a lack of case specific evidence, and this supports the argument for a presumption against dominant firms' conduct in this context.

Koren Wong-Ervin noted that given the degree of uncertainty around the evolution of markets, a dynamic, rather than static, analysis of mergers is required, and that competition enforcers should refrain from over-reliance on market shares in narrowly defined markets. Theories of harm should be clearly articulated – the nature of competition and innovation lost, of barriers to entry erected, etc., should be specified. The focus should be on harm to the competitive process or an impairment of competitive conditions in a significant area of commerce that thus harms consumers. The standards in the US are indeed high, but for good reason – any merger requires predicting the future, but the challenge of making prediction in potential competition cases, where there is no history of competition, prices etc., is greater.

Niamh Dunne noted that EU law is more receptive to potential competition. This approach is manifest in the "as efficient competitor" test which applies in abuse of dominance cases both to actual and potential competitors. The definition of potential competition was articulated in the recent Generics and Lundbeck cases: for the purposes of conduct analysis, potential competition exists where an undertaking has real and concrete possibilities of entering the relevant market and competing against incumbents. In other words, the test focuses on identifiable competitors that are outside the market, who may enter and begin to compete. Interestingly, the origins of the current test can be found in a case from the late 1990s, which essentially implies that potential competition is merely one aspect of dynamic analysis. Finally, while the Court clarified that mere speculation does not qualify as a "real and concrete possibility" of entry, there is no requirement that successful entry is certain either. The degree of inherent uncertainty associated with potential competition is thus recognised in the legal standards set by the Court.

The Chair turned to the issue of the assessment of loss of future competition in horizontal cases, and he asked Chile to discuss the Cornershop-Uber merger.

Chile explained that Cornershop is a grocery delivery digital platform, and that Uber's internal documents indicated that it was likely to enter Cornershop's market. Uber is active in similar markets in other countries and had already been operating a grocery delivery interface in Chile as a pilot. However, there was evidence of third parties' intentions to invest in competing services. For example, several supermarket chains were investing in beating Cornershop's delivery times, and platforms similar to UberEats were also investing in improving their logistics and in opening "dark stores" dedicated to online sales. Additionally, whereas supermarkets have their own inventory and can benefit from economies of scale from combined brick-and-mortar and online sales, two-sided platforms act merely as intermediaries. Finally, Chilean supermarkets' loyalty programs are strong and put them at an advantage compared with online platforms. The merger was therefore cleared.

The Chair asked South Africa to its analysis of the Naspers-WeBuyCars case and whether it considered potential entry by other platforms.

South Africa noted that its and Chile's contributions highlight a particular context in which potential competition issues are relevant: entry into many types of online intermediation markets requires local investment or infrastructure; global players are sometimes slow to enter some markets and leave space for local entrepreneurs to mimic their business models, gather a critical mass and reap the benefits of network effects; when global firms eventually arrive, they often acquire the domestic firm.

WeBuyCars is a dominant used car platform that connects private sellers and dealers and allows users to value cars and participate in online auctions. Naspers bought a similar business in Germany and had made a partnership agreement with another firm to enter the South African market, but instead, it tried to acquire WeBuyCars. The parties argued that entry barriers were low and that even car dealerships were entering, but this kind of entry was deemed insufficient. Moreover, Naspers had its own proven tech platform and business model, resources to take on the leading firm, and had successfully entered other markets, and was obviously well positioned to enter the market. The parties' argument that Google and Facebook pose a competitive threat was not supported by evidence. Moreover, the evidence surrounding the merger transaction was telling of how the target firm sought to avoid competition by lowering its prices significantly. Finally, there was a real concern that complementarities between the merging firms would further entrench the incumbent.

The Chair moved the discussion to the second part, which focused on the legal and evidentiary standards for assessing the loss of future competition, and he asked Israel to discuss the Eurocom case.

Israel explained that the actual potential competitor doctrine deals with possible harm to future competition caused by the elimination of a would-be competitor. The Supreme Court of Israel adopted this standard in the Eurocom case, which involved a merger between Bezeq – the incumbent telecommunications operator, and DBS – one of only two multi-channel tv providers at the time. The Israel Competition Authority rejected the merger in 2006 on the grounds that Bezeq was likely to enter the multi-channel tv market. Competition Tribunal overturned the ICA's decision, but the Supreme Court reversed, and the merger was blocked. The Supreme Court set a strict double element test. First, a reasonable likelihood of entry must be established by showing the potential entrant has both the capacity and sufficient incentives to independently enter the market in the near future. Objective evidence is required, while subjective evidence of the alleged potential entrant's intention to enter the market. Second, the advantage of entry over the merger should also be established. In that case, the Supreme Court was convinced that the elimination of Bezeq as a potential competitor justified blocking the merger but ruled that as this doctrine expands the scope of merger control, it should be implemented cautiously. Much has changed since this decision was handed down, and the standards set by the Supreme Court appear to be too rigid to adequately address the challenges posed by digital platforms.

The Chair asked Israel why standards should become more flexible in the context of digital platforms.

Israel replied that the Supreme Court's remark about the need to exercise caution in this context is outdated. Moreover, it is unlikely to meet the burden of proving capacity and sufficient incentives to enter such markets, especially in the context of mergers with start-ups and "killer acquisitions".

The Chair asked Canada to discuss the Tervita case and the evidentiary standards in place.

Canada noted that the Tervita-Complete Environmental case concerned a local market for the disposal of solid hazardous waste in secure landfills. At the time Tervita held a monopoly position in the area, while the target had only obtained a permit to open a secure landfill nearby. The Competition Tribunal articulated the framework for the assessment of a substantial prevention of competition in the context of potential competition and required that entry and expansion be likely and timely, occur on a sufficient scale, and result in a material impact on competition, in a significant part of the relevant market, for a sustained period. This framework anchors the assessment on barriers to entry, and in particular on the lead time for entry. Interestingly, the Tribunal found that the target company would have first tried and failed to establish a waste treatment facility, and only then open a secure landfill. Both the Court of Appeals and the Supreme Court of Canada adopted this non-linear determination of entry. The Supreme Court however provided a couple of important clarifications, one of them being that the emphasis on lead time should not be used to justify predictions about the distant future, which may be speculative.

The Chair pressed Canada to explain at what point predictions become speculative and asked whether the criteria for qualifying sufficient entry imply that alternative entry by third parties, that has the same or even greater impact on the market, need not be considered.

Canada clarified that alternative entries are considered if they fall within the temporal dimension of barriers to entry. The Tervita case was simple as the lack of alternative potential entrants was clear.

The Chair noted that to his understanding, there is a requirement to show that the effects of entry would last for at least two years, and he asked why this particular standard was set.

Canada explained that the two-year requirement is a type of guidepost, that essentially accounts for markets with high barriers to entry.

The Chair asked Israel whether Bezeq eventually entered the market, if not why, and whether Israel would have reconsidered its decision had it know that Bezeq would never enter.

Israel replied that the Supreme Court's decision was handed down in 2009, and when conditions changed in 2014, the merger was approved subject to remedies. Today there are four competitors in the market.

The Chair noted that the UK distinguishes between the loss of future competition and the loss of dynamic innovation. He asked the UK to specify which standards apply for assessing whether unilateral effects can result from potential competition loss and on what evidence it relied in the PayPal-iZettle case.

The United Kingdom's approach is set out in its recently updated merger guidelines. To assess whether a merger involving a potential entrant leads to a loss of future competition, the Competition and Markets Authority (CMA) considers, first, whether either firm would have entered or expanded absent the merger and, second, whether the loss of future competition amounts to a substantial lessening of competition. Regarding the element of entry or expansion, the CMA considers evidence concerning the merging parties' ability and incentives to enter the market, and there is no requirement to produce evidence of subjective intentions. Plans or steps taken towards entry, a history of entry to adjacent markets, and other firms' actions in anticipation of entry, may all be relevant. As for the requirement concerning the loss of future competition, other constraints (e.g., additional potential entrants, the current market structure, predictions of market players' future actions) will be taken into account. In this respect the CMA considers internal documents, especially forecasts and valuation models, and documents detailing the characteristics of the offerings of new entrants and their business models, whether potential entrants are well positioned to enter and any responses to competitive threats on the part of potential entrants.

In the PayPal-iZettle case, the CMA was considering whether PayPal would expand its offline payments in order to compete more closely with iZettle, which was primarily focused on those services, and whether iZettle would expand in online payments. The CMA found PayPal had several credible entry options, and that it would have substantially improved or replaced its products and become a stronger competitor against iZettle. The decision however clarifies that there were limitations to PayPal's growth in the short term, and that iZetlle expansion would have taken place at a slower rate. The CMA relied on internal documents, IPO documentation, party submission and evidence regarding PayPal's incentives. The merger was ultimately cleared despites some evidence that PayPal would have potentially entered the market.

The Chair asked the UK how it assesses these criteria against evidence of alternative potential entry, and what timeframe for entry it considered relevant.

The United Kingdom's assessment of potential entry is the same, regardless of the potential entrant being a merging party or a third party. As for the timeframe, similar to Canada, the default is two years, but this may be adjusted depending on the specifics of the case.

The Chair noted that timeframes differ somewhat from jurisdiction to jurisdiction. He then asked the EU to specify the criteria for blocking a merger with a potential competitor and the evidence it relies upon.

The European Union noted that the concept of potential competition has been part of the Union's legal framework for a very long time and is clearly spelled out in the European Commission's horizontal merger guidelines. The legal test for blocking such a merger is essentially the same as for any other anticompetitive merger – "a significant impediment to effective competition". The guidelines however specify that for this criterion to be fulfilled, the merger must be with a significant or soon to be significant constraint, in the absence of sufficiently significant remaining constraints on market players' behaviour. In practice, barriers to entry, as well as the likelihood and strength of potential entry (both by the relevant merging party and by alternative potential entrants), are assessed.

The inherent uncertainties necessitate reliance on a strong body of evidence. Basic economic theory is insufficient, and there is a tendency to rely on qualitative evidence, especially internal strategy and pipeline documents. In recent cases the Commission reviewed specific and detailed entry plans and did not rely merely on potential entrants' general capabilities and incentives. The more consistent and robust the evidence base is, the more likely it is that the merger has a potential significant impact on competition. For example, in industries characterised by high barriers to entry, entry is planned and implemented over many years, and it may be possible to assess the impact of a merger over a relatively longer timeframe. Finally, while there is mention of timeframes in the guidelines, the Commission's practice demonstrated that timeframes are set for each industry separately based on its characteristics.

The Chair asked the EU whether it would set similar timeframes for two separate mergers in the same industry.

The European Union replied that it would likely do so if the mergers were assessed at the same time, but that it also depends on the specific characteristics of each case.

The Chair noted that in its contribution, the EU explained that one of the requirements is for the potential entrant to already exert a significant constraining influence before its entry in the market. He noted this appears to differ from standards in other jurisdictions and asked the European Union to explain this requirement and specify how it is assessed.

The European Union clarified that under its guidelines, a potential competitor is either already exerting a significant constrain or is very likely to do so in a short period of time.

The Chair asked the expert speakers for their reaction to the discussion thus far.

Niamh Dunne cautioned that courts may be less receptive to such theories of harm. In the CK Telecoms case, which concerned actual competition, the General Court stressed that predictions based on prospective analysis require evidence of high quality. Evidentiary standards are likely to be much higher if the remote element of potential competition is introduced. The decision is currently under appeal and the standard may change, but it currently raises considerable issues.

Koren Wong-Ervin noted that many jurisdictions rely on internal documents. She argued that agencies should refrain from relying on subjective evidence of firms' intentions to enter (e.g., executives' statements), and focus on objective evidence (e.g., capital requests, strategic documents, etc.).

The Chair asked the EU if it relies on concrete evidence.

The European Union replied that its decisions reflect reliance on concrete evidence, including confidential information. The EU agrees that predictions of future developments must be based on consistent and convincing evidence, and it also agrees that it is important for agencies to look at what really happens within firms in relation to potential competition (e.g., investments in innovation).

Steven Salop noted that while statements can be open to interpretation, they do have probative value and should not be ignored. For example, statements made by Facebook's executives in relation to Instagram are telling, as are the plans to exclude a competitor which were explicitly laid out by the CEO in the McWane case. The discussion revolved around the potential entry into the core market of a dominant firm, but mergers with firms operating in vertically adjacent or vertically integrated markets merit attention as well, since firms operating is such markets could ultimately become potential entrants or partner up with new entrants. For example, regarding the Facebook-Instagram case, photo-sharing can serve as a platform to enter social media. Additionally, had Instagram not been purchased by Facebook, maybe another potential entrant would have (e.g., Google+, Apple). A similar argument can be made in relation to Google's acquisition of Admob and DoubleClick (neither of which were Google's competitors), that deterred entry into the AdTech market.

The Chair moved to the discussion to the assessment of the loss of dynamic competition. He noted that the UK's contribution names sectors where assessing dynamic competition is of particular importance, namely investment and R&D intensive sectors, and asked the UK whether its approach towards dynamic competition assessment is relevant also in sectors where investments are regular, and innovation is more predictable. The Chair asked the UK to discuss the relevant evidentiary standards as well.

The United Kingdom explained that efforts and investments aimed at protecting or expanding profits are an important aspect of competition in some sectors. Dynamic competitive interactions between current and potential competitors are of particular interest in such markets because even if the outcome of innovation is uncertain, the process of competition itself increases the likelihood of new products being made available to consumers. The assessment may cover specific products being developed or broader patterns of dynamic competition (e.g., in the pharmaceutical and digital sectors, firms are known to seek various options rather than bet on a single product's success).

The types of evidence relied upon vary from case to case and may include reactions by incumbents to competitive threats or incentives to do so. Internal documents are particularly relevant in this context. The new guidelines clarify that a significant lessening of competition could occur even where a new entrant is unlikely to succeed, especially where a dominant incumbent firm has much to lose from competition. The analysis also accounts for the fact that incumbents' response to dynamic threats is likely to be by investing in innovation, whereas price competition is less likely in this case.

As for the Chair's second question, the evidentiary standard is still being developed, and additional experience will probably help provide additional guidance; regardless, it would be imprudent to be tied down to particular types of evidence, given that fact the dynamic competition could play out in different ways. Regarding the Chair's first question, the UK's approach is obviously relevant to the digital and pharmaceutical sectors, but it may also be applicable in other sectors that share similar characteristics.

The Chair pressed the UK to explain whether its approach is of a general nature, or whether it specifically targets certain sectors.

The United Kingdom replied that nothing in its guidelines prevents it from applying this approach to any sector where dynamic competition precedes horizontal competition. It may be natural to focus first on competition between existing products, but dynamic theories can be nevertheless explored as well.

The Chair asked the EU to explain when and how it assesses the possibility of loss of dynamic competition.

The European Union explained that while such an assessment is more likely to take place in industries like the pharmaceutical industry, the Commission has conducted such assessments in other types of sectors such as power generation, financial services, and pesticides. These cases have led to a formalisation of the assessment framework, which distinguishes between price and product competition on the one hand, and innovation competition on the other hand. The analysis of innovation competition is not focused on specific products, but rather on "innovation spaces" which are essentially aggregations of prospective product markets. Such analysis considers evidence of overlaps between pipelines, capabilities, and efforts. The Commission may resort to more traditional analysis of price and product competition where there is a significant likelihood that pipeline products will eventually turn up in the market. The innovation angle is particularly relevant for assessing capabilities and pipeline overlaps.

Koren Wong-Ervin noted that in dynamic markets the focus may be on slightly different factors, e.g., barriers to entry, the replicability of the target's assets, and the existence of other start-ups or nascent firms in the relevant differentiated product space. Arguably, the requirement that potential entry have significant competitive impact is the reason the potential competition doctrine is underused in the US. The threshold was met in the past in cases concerning simple product or geographic market extensions, but the current standards may be too burdensome for contemporary cases in dynamic markets.

The Chair thanked Koren Wong-Ervin for raising this point which relates to the next topic of discussion regarding the need to reform legal and evidentiary standards. He asked the US to provide an overview of the applicable standards, and to discuss the possibility of applying different standards to the digital sector.

The United States Federal Trade Commission (FTC) believes that nascent and emerging competitors are critical for the development of disruptive and dynamic competition, which is crucial in many markets, and not only in digital ones. In recent years the FTC challenged several transactions that risked delaying or thwarting future competition (Illumina-PacBio, Illumina-Grail (a vertical merger) and Facebook-Instagram and WhatsApp), but guidance on evidentiary standards can only be drawn from previous cases, such as the STERIS-Synergy Health merger, that was challenged in 2015. In that case, the FTC presented the Court with Synergy's public announcement of a plan to enter STERIS's market that it had also shared with its board, letters of intent from customers and as evidence showing it had configured necessary equipment and had contracts to acquire more, had expanded its manpower and had secured a physical location for its plant for this purpose. The District Court was however persuaded by Synergy's executives' testimony that they would not have followed their plans to enter the market and dismissed the case. The FTC believes the STERIS standards are untenable as a matter of law, given the provisions of the Clayton Act and the 2010 merger guidelines which consider firms that have plans to enter in the near future as competitors. These standards are also inadvisable as a matter of policy, as they do not reflect the need to thwart firms' efforts to eliminate the risk of competition through mergers or other conduct.

The **United States Department of Justice (DOJ)** explained that a monopolist's acquisition of a potential competitor may be challenged either under section 7 of the

Clayton Act or section 2 of the Sherman Act. The recent challenge to Visa's proposed acquisition of Plaid is a good example of how both statutes come into play. The DOJ alleged that Visa sought to acquire Plaid in order to protect Visa's monopoly over online debit transactions from competition from Plaid's future products. Bringing such cases is challenging given the evidentiary hurdles, and the need to argue cases before generalist judges who sometimes struggle with complex legal and economic concepts and with the predictive judgements they are required to make in merger cases, especially in potential competition cases. The Sabre-Farelogix case is illustrative of these challenges. In that case the District Court was convinced that the merger would have a negative impact on competition, but it nevertheless denied the DOJ's request to block the merger, ruling that the DOJ had not met its legal burden. The decision was ultimately vacated by a higher court after the parties abandoned the deal following the CMA's objection, but courts are likely to continue to struggle with potential competition cases, especially in the digital space. The DOJ regards such cases to be worthy, as the competition at stake could be quite significant and intends to pursue them despite the obstacles.

The United States Department of Justice believes that merger analysis, including rules concerning burdens of proof, should reflect the realities of the market. In the US, the Government proves its prima facie case once it proves a merger occurs in a highly concentrated market and market shares exceed a certain threshold. Similarly, there is room to consider shifting the burden of proof in cases involving dominant firms in industries characterised by longer development pipelines. Allowing firms to gobble up nascent competitors with impunity is an untenable policy.

The Chair then asked Steve Salop to discuss his proposals for reforming legal standards.

Steven Salop reiterated his position that enforcement should be enhanced. He believes a strong presumption that dominant firms' acquisitions are anticompetitive is mandated, in particular in digital sectors. Optimal decision making combines prior information and case-specific evidence; relative weights are placed on each type of information depending on their reliability; in such cases, reliable case-specific evidence is often lacking, and one must therefore rely on presumptions. The suggestion is not to establish *per se* prohibitions but rather to lay a heavy burden on dominant firms. This proposition is justified by the fact that in this context, under-deterrence is a greater concern than over-deterrence, first, because dominant firms have powerful incentives to eliminate nascent or potential competition, while would-be competitors' incentives to fight back are significantly lower. Second, markets will not self-correct if dominant firms are allowed to acquire, destroy, or neutralise potential competition. Third, dominant firms have better information than competition authorities, and are better at identifying future threats (Google's acquisition of DoubleClick and Admob and Facebook's acquisition of Instagram are a case in point). Finally, dominant firms outbid alternative purchasers in order to preserve their monopoly power, whereas other firms are merely attempting to compete. Regarding over-deterrence, the argument for permitting acquisitions by dominant firms usually revolves around efficiency benefits. However, such benefits can usually be achieved by the dominant firms on its own or through less restrictive means. Moreover, efficiencies are not necessarily lost if the transaction is abandoned. Finally, the argument that prohibiting such transaction would reduce incentives to establish start-ups is unconvincing given that start-ups may be purchased by alternative purchasers.

The Chair gave the floor to Koren Wong-Ervin.

Koren Wong-Ervin clarified that she does not believe that agencies should refrain from intervening unless they are absolutely confident and have a full-blown effects-based analysis. However, defendants deserve their day in court, and the burden should be on the government or plaintiff. One of Steven Salop's main premises is that monopoly profits typically exceed duopoly profits, but he also acknowledges that this does not always hold. In differentiated markets, where entrants can create new brands and products, duopoly profits may be greater. This analysis may be relevant to high-tech markets, and if so, the proposed presumptions be applicable therein. A second premise is that efficiencies can be achieved through less restrictive means, or that alternative purchasers could acquire the target firm, but it is not clear how likely this is to occur. For example, there are numerous examples of tech giants' failed attempts to expand. Moreover, there is a rich literature concerning the problems associated with transactions, and it is likely not to be as efficient as vertical integration or merger.

Steven Salop clarified that he also believes that there should be a full-blown competitive analysis, but that the burden should still be on the dominant firm and not the government.

The Chair noted that BIAC opposes lowering evidentiary thresholds or reversing the burden of proof given the lack of economic evidence to justify such reforms, and he asked BIAC whether it was convinced by Steven Salop's arguments.

BIAC welcomes this discussion as well as the particular focus on digital markets but cautions against wholesale changes to the merger review methodology unless they are justified by cogent evidence. Objective standards are crucial to ensuring robust and continuous investment. Mergers cannot be accurately and consistently reviewed if the relevant markets are not understood. Rather than advocating for reversing the burden of proof or for the proposed presumptions, it would be more appropriate for authorities who have suffered defeats in courts to reflect on their investigatory and analytical capacities. It is important to ensure rules are proportionate, do not disincentivise pro-competitive conduct or innovation, and limit the discretion granted to competition authorities. Legal certainty is ensured only if nascent competition is considered probable and provable, and the proposition to reverse the burden of proof fundamentally changes the position of the parties and their rights. The fact that mergers involving dominant firms are often pro-competitive is often overlooked, and the fact that OECD member states refrain from adopting blanket prohibitions is telling. The proposals under discussion appear to be driven by the current political climate, but this may lead to the flow of capital and start-ups to jurisdictions where business and legal certainty is higher.

Finally, in the context of unilateral conduct, competition authorities should be careful that their interventions are not aimed at protecting inefficient competitors, as this will adversely affect consumers.

The Chair let the US and Steven Salop to react to BIAC's intervention.

The United States Federal Trade Commission asserted that it is not accurate or fair to argue that those advocating a shifting of the burden of proof or a change in standards believe that rigorous economic and legal analysis should be abandoned. Standards should remain objective albeit the burden being too high.

Steven Salop noted that BIAC did not attempt to rebut the economic concepts and evidence he provided, and that he was disturbed by BIAC's endorsement of jurisdictions' "race to the bottom" in terms of antitrust enforcement in order to attract investment.

The United States Department of Justice believes that merger analysis, including rules concerning burdens of proof, should reflect the realities of the market. In the US, the Government proves its *prima facie* case once it proves a merger occurs in a highly concentrated market and market shares exceed a certain threshold. Similarly, there is room to consider shifting the burden of proof in cases involving dominant firms in industries characterised by longer development pipelines. Allowing firms to gobble up nascent competitors with impunity is an untenable policy.

The Chair gave the floor to Koren Wong-Ervin and to BIAC.

Koren Wong-Erwin agrees that presumptions could be used when effects-based analysis is conducted. While theory is important, there is no empirical evidence of there being a systemic problem. A full-blown analysis within a rule of reason and error cost framework is required. Without taking a position regarding Facebook and Google's mergers, consummated mergers provide evidence of subsequent developments in the markets. The exponential output growth, lower prices and thriving innovation observed are not consistent with assertions of anticompetitive effects.

BIAC stressed that it was not advocating for a race to the bottom but is seeking to ensure standards remain objective, sound, and rational.

The Chair noted that discussion of this issue should continue in the future, given the correlation between concentration and innovation in digital markets. He then moved the discussion to the next part concerning the consideration of potential entry as a countervailing factor. He asked the UK to discuss the relevant assessment framework, and to explain why there are hardly any decisions to clear otherwise anticompetitive mergers in light of their likely contribution to dynamic competition.

The United Kingdom considers whether potential entry is timely, likely, and sufficient to prevent a significant lessening of competition. The timeliness criterion focuses on the time the entrant's impact on the market is likely to be felt. Typically, the timeframe is set to within two years of the occurrence of a significant lessening of competition, but this may vary depending on the circumstances. As for likelihood, firms' ability, and incentives to enter, given entry barriers and potential gains from successful entry, are considered. Particular focus is given to firms that are reluctant to enter at pre-merger price levels, but which may enter if prices rise, as these appear to exert the same constraints as the merging parties do pre-merger. As fur sufficiency, entry should effectively exert a competitive constraint, and the analysis therefore focuses on the likelihood that new products and new capacities will be introduced.

As for the Chair's question, mergers are rarely cleared on the basis of countervailing potential competition, but there is no reason for that not to occur, as the CMA applies the same standards for the assessment of entry to any potential entrant, be it a merging party or a third party. In the Visa-Plaid case, the CMA considered the likelihood of other firms' expansion, but this fell into the competitive assessment and was not necessarily considered separately as a countervailing factor.

The Chair asked Mexico to discuss the AT&T-Nextel Mexico merger.

Mexico explained that the merger was cleared by the IFT after concerns over foreclosure of competitors' access to the upstream mobile spectrum market were alleviated, since the two remaining mobile service operators had very large subscriber bases. Additionally, new bids for additional spectrum were planned for the short or medium term. Finally, the future deployment of the "Red Compartida" project – a wholesale shared network of telecommunications, that was likely to facilitate entry and expansion by incumbents, was taken under consideration. **The Chair** then turned to the EU and asked whether contribution to dynamic competition can be considered as a possible efficiency of mergers, and if such an approach could have changed the decision regarding the Alstom-Siemens merger.

The European Union believes that in principle it is possible, but that the legal framework for assessing efficiencies in the EU is quite specific in that the burden is on the parties and the threshold is high. In practice, therefore, it would be unlikely for this to occur given the challenges of bringing convincing evidence in this respect. As for the Alstom-Siemens merger, the commission considered many alternatives, but found that sufficient entry was unlikely, even beyond the default two-year framework.

The Chair then asked Colombia to discuss the Protabaco-Coltabaco merger.

Colombia explained that the merging parties argued that British America Tobacco (BAT), which, like the merging parties, had a significant market share in the hydro cigarettes market, should be considered a potential competitor in the low-medium segment of the market for cigarettes. This argument was however rejected, as the mere presence in the high-end segment did not imply that BAT was a potential competitor in the low-medium segment. Moreover, BAT faced significant barriers to entry, e.g., significant investments in facilities, branding and advertising, legal and regulatory barriers (in particular, those concerning advertising), declining demand and idle capacity. The merger was cleared subject to remedies, but the parties ultimately abandoned the transaction.

The Chair moved to the last part of the discussion concerning agreements that eliminate potential competition and asked Niamh Dunne to discuss the relevant EU jurisprudence and evidentiary thresholds.

Niamh Dunne noted that this issue came to the fore recently in the Generics and Lundbeck cases, both of which dealt with violations of article 101 (anticompetitive agreements) and 102 (abuse of dominance). A real and concrete possibility of entering the relevant market and compete against incumbents is the test for determining whether an undertaken is considered a potential competitor. In both cases the Court required a showing that undertakings have an inherent ability to enter the market and a firm intention to do so. The inherent ability element, which appears to be crucial, is comprised of two sub-elements: the first is a general requirement that barriers to entry are not insurmountable; and the second is of a more personal nature and relates to evidence that the specific undertaking has the ability to enter. As for the second element, the undertaking's intention to enter within a reasonable timeframe must be demonstrable. The timeframe is likely to be the one anticipated under the horizontal merger guidelines.

The Chair asked Turkey to share its experience with agreements limiting potential competition.

Turkey noted that the Turkish Competition Authority (TCA) was concerned about the assignment of responsibilities under the exclusive distribution agreement between Allergan and Abdi Ibrahim and suspected that it was motivated by ulterior motives. The deal was ultimately cleared subject to the removal of the non-compete clause. More recently, Sanofi's agreement with Abdi Ibrahim was approved subject to the condition that Abdi Ibrahim refrain from withdrawing its application to distribute an insulin product which competes with Sanofi's similar products.

The Chair asked Turkey whether it relies on internal documents when considering whether ulterior motives are behind non-compete clauses.

Turkey replied that it does rely on such documents.

The Chair asked the expert speakers to share their final thoughts before concluding the discussion.

Steven Salop believes anticompetitive agreements are a serious problem. Apple's agreement that Google be the default search engine is a good example, since Apple is clearly a potential rival of Google in search. Pay-for-delay agreements are therefore not the only type of agreement that can harm potential competition. He also noted that pay-for-delay agreement can occur wherever there are patents, and not only in the pharma sector.

It is unlikely that courts would conclude patents are invalid because monopolies are likely to settle the cases and share their profits with plaintiffs.

Koren Wong-Erwin noted that cases are being brought and won, and that firms abandon transactions due to challenges. It is therefore wise to proceed with the existing framework while carefully studying the proposals for reforms. The proposals regarding presumptions of illegality are very controversial and are unlikely to survive unless the Filibuster rule is revoked.

Niamh Dunne believes that the challenges of welding abstract economic ideas with administrable legal standards was manifest in the discussion. Hopefully, more acceptable and administrable standards will be developed to deal with the inherent uncertainties of potential competition.

The Chair believes that the discussion made it clear that the articulation of the potential competition doctrine does not simplify its application to mergers in some of the hi-tech sectors, and that there is room to consider change of criteria and possible reform. He added that competition authorities appear to recognise that they need to be more sophisticated and precise when it comes to the assessment of potential competition, and that dynamic competition is as important as static competition, if not more, and that there is a need to integrate both aspects. The Chair thanked the Secretariat, the expert speakers, and the participants, and concluded the discussion.