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English - Or. English

14 March 2022

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

Executive Summary 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 executive summary prepared by the OECD Secretariat contains the key findings from the discussion held during the meeting of the OECD 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>

Please contact Mr Antonio CAPOBIANCO if you have questions about this document.
Email: Antonio.CAPOBIANCO@oecd.org

JT03491213

Executive Summary of the Roundtable on The Concept of Potential Competition

By the Secretariat¹

The OECD Competition Committee held a Roundtable on the concept of potential competition on 11 June 2021. Based on the background paper prepared by the Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

1. The concept of potential competition is relevant in a wide range of cases, while it has received renewed interest in the context of antitrust enforcement in dynamic and innovative markets.

Given the important role that entry into new markets can play in ensuring competitive markets and encouraging innovation, issues related to potential competition are relevant in a wide range of cases such as exclusionary practices, anticompetitive agreements and mergers. These issues usually focus on concerns about the elimination of potential competition by way of agreements, concerted practices or mergers between potential competitors or exclusion of potential competitors by dominant firms. In some instances, potential competition could also serve as a countervailing or mitigating factor to what might otherwise be a finding of significant lessening of competition.

While no industry or sector is immune to issues related to potential competition, the concept of potential competition has received renewed interest in recent years in the context of antitrust enforcement in dynamic and innovative markets such as digital and pharmaceutical sectors. The elimination of competition is particularly important in these markets where typically the process of entering markets takes place over a long period of time and involves significant costs or risks, or the key aspects of the competitive offering are set during the investment phase rather than flexed on an ongoing basis.

2. Competition agencies are striving to use all available analytical tools to assess and protect potential competition. However, assessment of potential competition, which is inherently subject to significant uncertainty, remains a challenging exercise.

Greater uncertainty associated with the concept of potential competition implies higher evidentiary standards which competition agencies are required to satisfy. Courts have held that potential competition exists where an undertaking has real and concrete possibilities of entering the relevant market and competing against incumbents. Accordingly, competition agencies face challenges to demonstrate potential competition that goes beyond unfound speculation regarding possible future events.

Competition agencies are striving to meet such high evidentiary standards using all available analytical tools such as the assessment of the barriers to entry (e.g. customer preferences, technical capabilities or regulatory constraints) and the ability and intention of firms to enter the relevant market. The Secretariat's background paper sought to provide an overview of such analytical tools and suggested several newer tools that have been

¹ This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the session, the delegates' written submissions, the panellists' presentations and the Secretariat's background paper.

increasingly used in some jurisdictions (e.g. valuation analysis, forward-looking customer surveys or analysis of adjacency in geographic or product scope).

In terms of the body of evidence supporting their analysis, competition agencies are increasingly relying on qualitative evidence such as internal documents or statement from firms' representatives due to the inherently uncertain nature of potential competition which makes a quantitative assessment less relevant. For example, evidence related to market shares or measures of substitutability between the parties' current products could prove to be less informative when one of the parties is not yet present in the relevant market. Some however observed that competition agencies should refrain from relying on evidence on firms' subjective intentions to enter the relevant market.

Despite such efforts from competition agencies, the assessment of potential competition remains a challenging exercise due to its inherently uncertain nature. Competition agencies recognise that there has been some degree of under-enforcement against the cases eliminating potential competition. Some agencies have indeed challenged the mergers with a potential competitor that they had approved in the past or recognised that there was a degree of optimism bias on the prospects of potential competition in the past.

3. There are ongoing debates about the need to lower or reverse the evidentiary burdens imposed on competition agencies in cases involving potential competition. However, there seems no consensus as to whether the current evidentiary burdens are insufficient and should thus be revised.

The above-mentioned considerations lead to the discussion on the need to lower or reverse the evidentiary burdens imposed on competition agencies allowing them to better handle cases involving potential competition. Several authors, competition agencies and legislators have indeed proposed to reverse the burden of proof or lower the evidentiary bar in cases involving acquisitions of potential rivals in the digital sector. They argue that such legislative intervention is necessary because, among other things, dominant firms have strong incentives to eliminate nascent or potential competition by acquiring it or engaging in exclusionary conduct to exclude it and such incentives outweigh those of potential competitors to fight back.

However, there seems no consensus as to whether the current evidentiary burdens are insufficient and should thus be revised. Others have indeed expressed strong concerns about such legislative intervention and claimed that the burden of proof should be on the competition agencies and satisfied solely on the basis of a consistent and compelling body of evidence.