

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

The Concept of Potential Competition – Note by Chile

10 June 2021

This document reproduces a written contribution from Chile submitted for Item 2 of the 135th OECD Competition Committee meeting on 9-11 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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JT03476998

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1. Introduction

1. In the assessment of horizontal mergers, the Chilean Competition Authority (*Fiscalía Nacional Económica* or “**FNE**”) considers, within the merger control evaluation, whether anticompetitive concerns may result from a concentration among actual or potential competitors. Also, how potential competition may restore some of the competitive pressure lost due to a merger.

2. In particular, the FNE’s guideline for the assessment of horizontal mergers (“**Guideline**”)¹, considers different scenarios in which potential competition must be considered within the counterfactual. For example, any acquisition of potential entrants or recent entrants that are expected to exercise competitive pressure in the near future or the acquisition of players in related markets for which their positions in those markets confers advantages to enter into the acquirer’s market. In the same vein, the merger assessment will consider whether the transaction impedes or prevents the expansion of a player into new geographic markets or prevents or delays the introduction of new products, among others.

3. The FNE has recently launched an updated version of the horizontal merger guidelines² which specifically addresses the possibility that one of the parties of the merger could enter the market or expand its activities without the merger, therefor increasing competitive constraints.

2. Chilean case law regarding potential competition

4. As explained below, the FNE has assessed a range of merger cases involving potential competition. In the analysis, it has evaluated that such element may impact either (a) the number of actual or potential competitors –because the merger involves their acquisition– or (b) the incentives of players that participate in related markets to enter or expand into neighboring markets.

5. This contribution approaches two relevant cases in the FNE’s case law. The first one, involved a merger between two digital platforms in which the loss of a potential competitor was foreseen as an antitrust concern. In the second one, potential competition was considered as an element that was able to exert competitive pressure after the merger.

¹ <https://www.fne.gob.cl/wp-content/uploads/2012/10/Guia-Fusiones.pdf>

² <https://www.fne.gob.cl/wp-content/uploads/2021/05/Guia-para-el-Analisis-de-Operaciones-de-Concentracion-Horizontales-mayo-VF.pdf>. Subject to public consultation until June, 2021. In this respect, the new guideline establishes that a merger may reduce competition if it involves an incumbent and a potential competitor, that, in the absence of the Transaction, the potential competitor would have entered the market or the recent entrant would have expanded its operations significantly increasing the levels of competitive pressure. In such case, the FNE would evaluate the likelihood of that the potential competitor in becoming an effective competitor and whether the loss of competitive pressure that would result from the Transaction could be sufficiently offset by the repositioning or realignment of other players.

2.1. Loss of a potential competitor

2.1.1. *The acquisition of Cornershop by Uber*

6. In 2020, the FNE assessed the merger between two multi-sided digital platforms that operate different app services. Uber is a company dedicated to the development of multi-sided platforms, providing intermediation services of a range of products and/or services among different users. In Chile, it operated as Uber Rides in the ride-sharing market and as Uber Eats in the food delivery market. Cornershop is a delivery app that operates in the grocery delivery market.

7. One of the affected markets identified by the FNE was the one of digital platforms that offer on-line grocery delivery where Uber was considered as a potential entrant. In this market, Cornershop was the market leader and competed with the on-line delivery services of supermarket chains and other multi-sided platforms.

8. The FNE's assessment followed its Guideline and also international criteria on the assessment of potential competition³ and evaluated whether, in this case, the loss of a potential competitor represented a substantial lessening of competition. Indeed, the analysis considered the probability that the firm would be an effective competitor as well as the number of alternative potential competitors which would be in a position to exert competitive pressure to the parties.

9. After the examination of internal documents, the FNE was able to verify that Uber had serious plans to enter in the grocery delivery market, where the leader was Cornershop. Nonetheless, third parties' internal documents –specifically from the main supermarket chains–, also showed several and imminent plans to expand in the on-line groceries' delivery market with services resembling those provided by Cornershop (i.e. with personalized shoppers and short delivery times).

10. In addition, the FNE considered the impact of the Covid-19 crisis into the analysis, assessing whether the contingency could affect both the transaction and the affected markets. In this context, the sudden positive demand shocks for online services generated by lockdowns acted as a sort of “natural experiment”, which were used to evaluate whether the competitive conditions of these markets at such time favoured the expansion of actual competitors and/or the potential entry by new firms.

11. In that regard, it was observed that, in response to the increase in consumer demand for online delivery services, different delivery platforms in the market reacted by speeding-up their investment plans. This new information supported the conclusions reached by the FNE about the merger effects, which anticipated the existence of competing platforms that could exert sufficient competitive pressure to the parties. In other terms, while Covid-19 crisis did not change nor determine the results of the merger investigation, it did help to confirm some of its results.

12. In summary, the FNE was able to discard the anticompetitive effects related to the elimination of a potential competitor as a result of the transaction, considering the existence of a sufficient number of alternative players which were able to exert competitive constraints to the parties after the transaction.

³ European Commission, Guidelines on the assessment of horizontal merger under the Council Regulation on the control of concentrations between undertakings (2004), paragraph 58-60.

Office of Fair Trading (now CMA), Merger Assessment Guidelines (2010), paragraph 5.4.13 - 5.4.18.

2.1.2. Merger between Peugeot and Fiat-Chrysler

13. In this case, the FNE analysed how entry of potential competitors could reduce the unilateral effects (price increase) in the multijurisdictional merger between two car manufacturers, Fiat Chrysler⁴ and Peugeot⁵.

14. In Fiat/Peugeot the FNE carried out a thorough investigation which included econometric analysis and evidence recollection (from interviews with other market players, assessment of internal documents and industry data, including a consumers and market players' questionnaires). In this case, the FNE concluded that the parties: (a) were close competitors in the light commercial vehicle segment (LCVs) and; (b) concentrated a relevant share of the market. In light of the above the competitive assessment of the transaction required the FNE to perform an in-depth Phase 2 investigation, with a particular focus on the small LCV segment.

15. The competition analysis showed that there were few similar alternatives to the small LCV models commercialized by the parties. In fact, the investigation showed that these few other players had limited ability to exercise competitive pressure and counteract the incentives of the parties to increase prices.

16. A relevant fact to the investigation is that Chile does not have a car manufacturing industry and all vehicles commercialised in the country are imported. In particular, small LCVs are imported mainly from Europe and, to a lesser extent, from Asia. Therefore, the analysis was focused in potential competition and in the ability of some other players, present in neighbouring markets but not in small LCVs, to exercise a competitive constraint vis-à-vis the incumbents. Entry or expansion of players was considered to be probable – potential competitors were already present in other vehicle segments and there were no significant legal barriers–; timely –the required authorizations could be obtained in a short period of time– and sufficient –due to the similarities of the products commercialized by these players abroad–.

17. In this regard, the FNE identified several alternative manufactures that commercialized similar products to the parties' small LCVs outside Chile, but were not present in the local market. In fact, some of these brands were actually present in other vehicle segments. As such, they had already obtained brand recognition and an extensive distribution and service networks, that implied lower sunk costs that could facilitate their entry or expansion into the small LCV segment⁶.

18. Moreover, the investigation showed that one of the most important barriers to entry was the limited size of the Chilean market⁷. Furthermore, around half of the sales corresponded to fleets sold to companies that offer operational lease services. In this

⁴ Fiat Chrysler is an Italian-American automotive business group mainly engaged in the manufacture and marketing of components and vehicles worldwide, under the brands Abarth, Alfa Romeo, Chrysler, RAM, Dodge, Fiat, Jeep, Lancia and Maserati. In Chile, the group's products are represented by an independent importer.

⁵ Peugeot is a French business group mainly engaged in the manufacture and marketing of components and vehicles worldwide, under the Peugeot, Opel, Citroën, Vauxhall and DS brands. In relation to Peugeot and Opel brands, the group import directly the products to Chile and organized its distribution network formed mainly by independent dealers. The brand Citroën and DS, are represented by an independent importer, which has its own dealer network.

⁶ In order to check if those manufacturers had any plan to enter the market, the FNE interviewed them but was not able to obtain concrete conclusions as to the probability of entry in the small LCVs market in the near future.

⁷ Annual sales of small LCV fluctuated between 14,000 and 18,000 units.

segment most of the products offered were associated to the brands of PSA Group due to their high resale value –the primary determinant for the lease companies’ final choice of which vehicle is the most suitable to purchase– and good quality after-sale service. Thus, the FNE concluded that the incentives to enter the market might be affected.

19. As a result, the FNE concluded that the transaction could significantly lessen competition in the market for small LCVs and antitrust concerns were raised to the merging parties.

20. In order to address such concerns, the parties thereafter offered certain commitments consisting in (i) the obligation to maintain the import and wholesale distribution of RAM and Citroën brand products to independent third parties, for three years; (ii) the obligation to maintain the wholesale distribution of Peugeot and Opel brands on PSA's Chilean subsidiary, for three years; and (iii) considering that PSA and Toyota were engaged into a cooperation or joint venture agreement for the development, manufacture and supply of small LCVs in the EMP2 (K9) platform, PSA unilaterally committed to offer Toyota an annual capacity of small LCVs destined exclusively for Chile⁸. The annual capacity offered by the commitment can be requested by Toyota at its sole discretion during the term of the cooperation agreement. Additionally, the remedy offered by PSA includes a discount on the transfer prices of the vehicles and on the prices of parts and spare parts associated with such products.

21. This last commitment offered interesting commercial conditions, thus increasing the incentives of Toyota, a potential competitor, to enter the small LCVs market in Chile. Furthermore, the FNE also considered that Toyota would become an effective competitor in case they decide to import small LCVs to Chile⁹.

22. The FNE market-tested this remedy with interested third parties, so as to check whether they fully addressed the antitrust concerns derived from the merger. The results showed that this remedy, designed to foster potential competition, was likely to promote the entry of a close competitor in the Chilean market.

23. Among others, the elements that were considered for those purposes were that Toyota had a wide service and distribution network, high brand recognition and cost advantages in terms of import logistics¹⁰. Further, the FNE observed a limited opportunity cost for Toyota¹¹ and the discount on the wholesale price of the Toyota small LCVs makes more likely that a price increase in the LCVs of the parties could make Toyota more competitive and thus lead to its entry into the market.

⁸ This remedy offered to the FNE is similar to the one agreed with the European Commission under the same transaction. The annual capacity offered for Chile is over and above the capacity considered by the European remedy and can be requested by Toyota at its sole discretion during the term of the cooperation agreement.

⁹ Indeed, Toyota’s small LCV model shares many of the primary characteristics that the consumer survey highlighted as relevant in their purchasing decision, such as type of fuel, brand recognition and loading capacity. In sum, the remedy may place Toyota as the brand that offers the closer substitute to the PSA models and could effectively exercise competitive pressure to the parties by constraining the incentives of the parties to increase prices.

¹⁰ Due to its leading position in pick-up trucks and passenger cars.

¹¹ The additional capacity provided by the remedy is exclusively appointed to the Chilean market. As such, even if there are markets that are more profitable than Chile, they could not take advantage by the capacity determined in the commitment.

24. The FNE accepted the proposed commitments which were made legally binding and cleared the merger. The transaction was closed on January 16. Even though it is too early to determine the effectiveness of the commitments, the analysed remedy intended to strengthen the position of a potential competitor and create a credible threat of entry that would minimise the incentives to raise prices, as identified by the FNE.

3. Conclusion

25. Within its merger control assessment, it is becoming increasingly relevant for the FNE to consider the elimination of a potential competitor and the competitive constraints that new entrants could exert to the merged entity. In particular in the digital arena, the analysis of potential competition is key in assessing the possible changes of dynamic markets as the Uber/Cornershop case showed. In the same vein, in transactions raising antitrust concerns, a relevant factor in remedies design is to focus in safeguarding entry conditions, so as potential competition could eventually become an actual constraint in the market.