Organisation for Economic Co-operation and Development

DAF/COMP/WD(2021)18

Unclassified

English - Or. English

18 May 2021

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

The Concept of Potential Competition – Note by Spain

10 June 2021

This document reproduces a written contribution from Spain 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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JT03476619

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Spain

1. This contribution by the Spain's National Commission for Markets and Competition[1] (CNMC) addresses the subject of the roundtable on the "Concept of Potential Competition", to be held in the June 2021 meeting of the Competition Committee.

2. It is structured as follows. The first section deals with the relation between competition enforcement and compliance, assessing the role of compliance programmes and policies. The second section addresses the role of advocacy in promoting a culture of competition and compliance. The third section concludes with the main takeaways.

1. Introduction

3. In Competition Law, the concept of potential competition is of the utmost importance, as it is commonly used in the following scenarios:

Under articles 101 of the Treaty on the Functioning of the European Union ("**TFEU**") and 1 Spanish Competition Act[2] ("**SCA**")	To determine, in horizontal agreements, the application of the mentioned articles, as they are only applied in this context to coordination between companies that are in competition, if not actually, at least, potentially.
	To determine, when there is not a restriction of competition by object, the effects of a specific conduct in the market.
Under articles 102 TFEU and 2 SCA	To determine, among other elements that must be considered (such as market shares, entry barriers, etc.), whether a company has a dominant position in a specific market.
	To determine whether a specific conduct by a dominant undertaking might foreclose a potential competitor from the market (thus, strengthening its already dominant position in such market).
From a merger perspective	In relation to the global discussion on whether the turnover thresholds should be modified in order to capture the so-called killer acquisitions (i.e. the acquisition of potential competitors, which are usually start-ups with a great growing potential but a low turnover during their initial years).
	During the substantive analysis, as it involves the assessment of several elements and, among them, the competition that can be exerted by actual and potential competitors in the market.

4. In addition, the digitisation of the economy or the so-called fourth industrial revolution (that combines automatization, digitisation, connectivity, AI, etc.), has put potential competition at the core of the current discussions in the competition world: mavericks, innovative start-ups, competitive process, new theories of harm to address these challenges, etc.

5. Thus, potential competition is an extremely important concept for Competition Law but, what is potential competition? And more importantly, how is it assessed by competition authorities and the courts?

[1] This contribution has been prepared by the staff of the CNMC and shall not be regarded as the official position of the CNMC unless it refers to CNMC approved documents.

[2] Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

6. One definition of potential competition can be found in the European Commission ("**EC**") Horizontal Guidelines[3]: "*A company is treated as a potential competitor of another company if* […] *in case of a small but permanent increase in relative prices it is likely that the former, within a short period of time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active*"[4].

7. In addition, according to the EC, this assessment has to be based on realistic grounds, not being sufficient the mere theoretical possibility to enter a market[5].

8. In this regard, as explained by the EC, one of the main elements of the concept is timing. The Horizontal Guidelines envisages the idea that it has to take place in a short period of time, and this idea is also repeated in other soft-law instruments from the EC: (i) for a third party to be considered a potential competitor, market entry would need to take place sufficiently fast so that the threat of potential entry is a constraint on the parties' and other market participants' behaviour[6]; and (ii) for entry to be considered a sufficient competitive constraint on the parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential restrictive effects[7].

9. This obviously brings the question on which is the appropriate timeframe to assess potential competition. According to the EC this depends on the facts of the case at hand, its legal and economic context, and, in particular, on whether the company in question is a party to the agreement or a third party[8]. Although this is not very specific, other rules contain more specific references: (i) both the R&D and the Specialisation Block Exemption Regulations consider a period of not more than three years a "short period of time"; while (ii) the Horizontal Mergers Guidelines consider that entry is normally only considered timely if it occurs within two years.

10. Having said that, the decisional practice from the competition authorities and the case law from the Courts also contain useful indications regarding the concept, assessment, and use of potential competition.

11. Following the introductory remarks of this first section, in the following ones, the concept, assessment, and use of potential competition will be further explained, with references to the relevant decisional practice and case-law (in Spain and the EU). In this regard, the second section of this article will cover the analysis of potential competition from an article 101 TFEU and 1 SCA perspective, the third section from an article 102 TFEU and 2 SCA perspective, and the fourth one from a merger perspective. Lastly, section five will contain the main conclusions that can be drawn.

[3] Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance (see here).

[4] See para. 10 and footnote 3.

[5] See para. 10 of the Horizontal Guidelines.

[6] See footnote 3 of the Horizontal Guidelines.

[7] See para.47 and 68 of the Horizontal Merger Guidelines (Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings; see here).

[8] See footnote 3 of the Horizontal Guidelines.

2. Articles 101 TFEU and 1 SCA perspective

2.1. The use of the concept of potential competition

12. As explained above, the concept of potential competition is used under article 101 TFEU and 1 SCA to:

- To determine, in horizontal agreements[9], whether they are applied to a conduct – as both are applied, inter alia, to coordination between companies that are in competition with each other, if not actually, then at least potentially (in both object and effect potential restrictions) [10]; and
- To determine, when there is not a restriction of competition by object, the effects of a specific conduct in the market.

13. In these cases, the case law considers that competition authorities need to consider: (i) impact of the agreement on existing and potential competition; and (ii) the competition situation in the absence of the agreement[11]. Thus, according to the case law, potential competition is considered when analysing the effects of a conduct in the market[12].

14. In this regard, this second set of cases is more related to the use of potential competition in the effect analysis than to the concept of potential competition itself.

15. The case law and decisional practice from the competition authorities further illustrates the concept and use of potential competition under these two scenarios.

2.2. Cases (EU and Spain)

2.2.1. Application of article 101 TFEU and 1 SCA:

- Lundbeck case[13]: In June 2013, the European Commission ("**EC**") fined Lundbeck (an originator drug manufacturer), Merck, Alpharma, Arrow, and Ranbaxy (four generic manufacturers) with € 93,8 million and € 52,2 million, respectively, for delaying market entry of generic medicines competing with Lundbeck's citalopram (an infringement of article 101 TFEU by object). According to the EC, Lundbeck paid generic manufacturers to delay the launch of their version of the drug once its

[9] Article 101 TFEU and 1 SCA are also applied to vertical agreements, which are agreements between companies that operate in different levels of the production chain (i.e. are not direct actual or potential competitors).

[10] See, for example, C-591/16 – *Lundbeck*, para. 53: "[…] *with respect to horizontal cooperation agreements* […] *coordination involves undertakings who are in competition with each other, if not in reality, then at least potentially*", and also C-307/18 – *Generics*, para. 32. In addition, the EU Courts have acknowledged the possibility for other non-competing undertakings (either actual or potential) to be liable of an infringement if they are involved in the conduct in question - see, for example, C-194/14 P AC-Treuhand, para. 35 "*Article 81(1) EC refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the common market, irrespective of the market on which the parties operate* […]".

[11] See, for example, T-328/03 - *O2 (Germany)*, para. 71.

[12] See also soft law from EC; e.g. paras. 10 and 47 of the Horizontal Guidelines.

[13] AT.39226 – *Lundbeck*.

main patent had expired. The General Court ("**GC**") (2016) [14] and the European Court of Justice ("**ECJ**") (2021)[15] upheld the EC's decision.

- Lundbeck contested before the GC and the ECJ that generic manufacturers were not actual or potential competitors of Lundbeck at the time the agreements at issue were concluded, so article 101 TFEU was not applicable.
- However, both the GC and the ECJ rejected this argument and upheld the EC's finding that the generics manufacturers were potential competitors of Lundbeck.
- The GC (2016) gave very useful indications regarding the concept of potential competition in its judgement (with reference to relevant case-law):

Paragraph	Relevant content regarding the concept of potential competition
99	Need to analyse not only existing competition but also potential competition, in order to establish whether […] there are real concrete possibilities: (i) for the undertakings concerned to compete among themselves; or (ii) for a new competitor to enter the relevant market and compete with established undertakings.
100	In order to determine whether an undertaking is a potential competitor in a market, the Commission [or national competition authorities] is [are] required to determine whether, if the agreement in question had not been concluded, there would have been real concrete possibilities for it to enter that market and to compete with established undertakings.
100	An undertaking cannot be described as a potential competitor if its entry into a market is not an economically viable strategy.
101	While intention to enter may be of relevance, the essential factor is whether the potential competitor has the ability to enter that market.
102	No need to demonstrate that the potential competitor intends to enter that market in the near future, the mere fact of its existence may give rise to competitive pressure (i.e. the likelihood of entrance if the market becomes more attractive).
103	Conclusion of agreements or establishment of information exchange mechanisms with undertakings not present on the market provides a strong indication that the market in question is not impenetrable[16].
104	The purely theoretical possibility of market entry is not sufficient; need to demonstrate that market entry could have taken place sufficiently quickly for the threat of a potential entry to influence the conduct of the participants in the market, on the basis of costs which would have been economically viable.

- Then, applying this theorical framework to the facts of the case, the ECJ considered (as the EC and GC did) that the generic manufacturers were potential competitors of Lundbeck as:

Paragraph/s	Application of the theory to the case at hand
124 GC and 62, 78, and 86 ECJ	They had a firm intention and an inherent ability to enter the market (i.e. made considerable investments to enter the market).
180 and 78 ECJ	They took steps to obtain the necessary authorisations.
216 GC	They had stock of the drug.
220 GC and 78 ECJ	They concluded supply agreements with suppliers.
363 GC	They did marketing efforts.
124 and 125 GC and 62 ECJ	There were no insurmountable barriers to entry (Lundbeck's patent had expired and there were other processes available to produce citalopram that were non-infringing[17].
181 GC and 78 ECJ	The conclusion of the contested agreements was a strong indication of potential competition.

[14] Case T-472/13 - Lundbeck v Commission.

[15] Case C-591/16 P - Lundbeck v Commission.

- Generics case[18]: in January 2020, in a preliminary ruling regarding, among others, the concept of potential competition in relation to article 101 TFEU, the ECJ reached similar conclusions as those of the GC in Lundbeck that were subsequently also upheld by the ECJ: generics manufacturers were potential competitors of the originator manufacturer[19].
- *AT.39.839 — Telefónica/Portugal Telecom*: in 2013, the EC – alerted by the Spanish Competition Authority ("**CNMC**")[20] - fined Telefónica and PT with €66.8 and €12.29 million, respectively, for including in a SPA (related to the acquisition of sole control by Telefónica over ViVo, a JV operating in Brazil jointly controlled by this company and PT) a non-compete obligation by which both companies refrained to compete with one another in the Iberian market (an infringement of article 101 TFEU by object). The GC (2016) and the ECJ (that dismissed the appealed) upheld the EC's decision.
  - Telefónica and PT contested before the GC, among others, that the EC did not demonstrate that they were potential competitors and that the clause was therefore capable of restricting competition.
  - However, the GC, as the EC did, pointed out several factors taken into account to conclude that the parties were potential competitors:

Paragraph/s	Relevant content regarding the concept of potential competition
170 and 180	Entering into a non-compete agreement constituted recognition by the parties that they were at least potential competitors (if not, there would have been no need to conclude any non-compete agreement at all).
171	The clause was broad in scope (applicable to all services).
172 and 181	Those services had been liberalised and that should be the departure point.
178 and 180	The existence of the non-compete clause made sense only if there was competition to be restricted.
183	There were no insurmountable barriers that prevented the parties from entering their respective neighbouring markets.
185 and 186	What matters is the ability to enter that market (and both companies had it), not the intention (e.g. entering would not have corresponded to the parties' strategic priorities or would not have been economically advantageous or attractive).

- The case of consortiums: the use of consortiums (independent companies that bid jointly in a tender) is related to the concept of potential competition.
  - In this sense, the creation of a consortium[21] is never a *per se* infringement and requires a case by case analysis:

[18] C-307/18 - Generics (UK) and Others.

[19] See, in particular, paras. 43-46 - preparatory steps to enter the market and barriers to entry -, and 55 – conclusion of the agreements as a strong indication of potential competition-.

[20] Comisión Nacional de los Mercados y la Competencia.

[21] The following explanation affects only to the creation of the consortium. Please note that there could be other potential agreements between the parties (non-compete clauses, etc.) that would require an independent analysis.

- If the companies are not actual or potential competitors (i.e. they would not be able to bid individually), there is no application nor infringement of articles 101 TFEU and/or 1 SCA[22]; while
- If the companies are actual or potential competitors (i.e. they would be able to submit a bid individually), articles 101 TFEU and/or 1 SCA are applicable and, *prima facie*, there is a restriction[23] (which, in its turn, can be justified under articles 101.3 TFEU and/or 1.3 SCA) [24].

- Spanish cases:
  - *S/0519/14 - Infraestructuras Ferroviarias*: in 2016, the CNMC fined 4 companies and 9 directors with €5.64 million for, among others, using a consortium to share public tenders among themselves. In this case, the CNMC considered that the companies were actual and potential competitors as they[25]: (i) were big and established companies with a high turnover (in comparison with the tender prices); (ii) had individual capacity to operate individually; (iii) fulfilled the technical, economic and know-how requirements; (iv) had individual capacity to manufacture the tender items; and (v) the authority also considered the lack of complexity in the execution of the works for the companies in question. This case has been upheld by the High Court (2017) and the Supreme Court (2019)[26].
  - *S/0545/15 - Hormigones de Asturias*: in 2017, the CNMC fined 13 companies with €6.12 million for, among others, using a consortium to share public tenders among themselves. In this case, the CNMC considered that the companies were actual and potential competitors and the companies did not provide a technical justification for tendering together, although they were specifically asked to[27]. The case has been appealed before the High Court.
  - *S/0010/19 - ITV COMERCIALES EN CARRETERA*: in 2019, the CNMC closed an investigation against several companies that created a consortium to participate in several tenders of the public traffic regulator (DGT). In this case, the CNMC considered that the companies were not actual or potential competitors as they did not have the individual actual or potential capacity to participate in the tender, among others, for the following reasons[28]: (i) the tender covered the whole Spanish territory, when the companies had a local presence; (ii) covering the whole territory individually could lead to

[22] See para. 237 of the Horizontal Guidelines: "[…] *consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually. As the parties to the consortia arrangement are therefore not potential competitors for implementing the project, there is no restriction of competition within the meaning of Article 101(1)*".

[23] Provided that the content of the agreement, its objectives and the economic and legal context do not prove otherwise.

[24] This was the legal test applied, among others, in S/0545/15 - *Hormigones de Asturias* – pages 45-48. See also para. 237 of the Horizontal Guidelines.

[25] See pages 48-49.

[26] Judgements can be accessed here.

[27] See page 48.

[28] See pages 14-18

high costs (that were saved through the consortium); (iii) there were some elements (*unidades móviles*) requested by the tender and only one of the companies owned such assets, which it usually rented to the others; (iv) the authority did not find evidences of collusion during the dawn-raids; and (v) there were alternative and plausible explanations to an infringement.

2.2.2. Effect analysis

- *S/DC/0607/17 – TABACOS*: in April 2019, the CNMC imposed a total fine of almost €58 million after considering that three out of the four main tobacco manufacturers in Spain (Philip Morris Spain, Altadis, and JT International Iberia)[29] and Logista (a quasi-monopolist tobacco distributor) exchanged commercially sensitive information regarding sales of cigarettes to tobacconists (sell-in data), which produced anticompetitive effects in the market since 2008 until February 2017 (an infringement of both articles 101 TFEU and 1 SCA by effects). The case is currently under appeal before the High Court.
  - The companies alleged that the conducts in question did not have effects in the market.
  - However, the CNMC rejected these arguments, among others, because it considered that the alleged behaviours restricted actual and potential competition in both the market for the manufacturing and for the distribution of tobacco in Spain:
    - Manufacturing market: regarding the existence of high entry barriers and potential competition, the CNMC considered that[30] (i) there were high entry barriers mainly motivated by the legal ban on advertising and promotion of tobacco; (ii) this led to a situation where new entrants could not promote their products in a mature market (decreasing sales trend) where there was high loyalty to current brands; (iii) all this prevented the entrance of new competitors and, thus, the risks of competition for the four main companies (in fact, in the last 10 years at the time of the decision, no new operators had successfully entered the market); and
    - Distribution market: despite the fact that there were other tobacco distributors, Logista distributed 99% of the cigarettes in Spain. The CNMC considered that the alleged conduct not only homogenised even more the competition conditions in the market, but also facilitated collusive behaviours[31]. In addition, the conduct increased barriers to entry in the distribution market.

[29] British American Tobaaco España S.A. conduct was considered time-barred since the company publicly distanced itself from the exchanges in 2012 and the investigation was initiated in 2017 (being the limitation period 4 years for very serious infringements in Spain, such as the one in question).

[30] See page 61.

[31] See page 63.

3. Articles 102 TFUE and 2 SCA perspective

3.1. The use of the concept of potential competition

16. As explained above, the concept of potential competition is used under article 102 TFEU and 2 SCA to:

- Determine the existence of a dominant position (to this end, competition authorities usually take into account several factors such as the market position of the dominant undertaking and its competitors; countervailing buyer power; and/or expansion and entry, among others)[32]; and
- In exclusionary abuses, as one of the elements to determine where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking[33].

17. The case law and decisional practice from the competition authorities further illustrates the concept and use of potential competition under these two scenarios.

3.2. Cases (EU and Spain)

3.2.1. Definition of a dominant position

- *Google Shopping*[34] and *Google Android*[35] cases[36]: in 2017 and 2018, the EC fined Google with €2.42 billion for abusing its dominant position as search engine by giving illegal advantage to its own comparison-shopping service and with €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine, respectively. The cases are under appeal before the GC.
  - The EC held that another important factor (in addition to, for example, market shares) when assessing dominance is the existence of barriers to entry or expansion, preventing either potential competitors from having access to the market or actual ones from expanding their activities on the market[37].
    - In these cases, the EC listed some of the barriers that could have prevented potential competitors from having access to the market (although most of them were more related to actual competitors): (i) capital investments that competitors would have to match; (ii) network externalities that would entail additional costs for attracting new customers; (iii) economies of

[32] See paras. 12 and 16-17 of the EC Guidance priorities on 102 ("*Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance)*" – see here-).

[33] See para. 19 of the EC Guidance priorities on 102.

[34] CASE AT.39740 - Google Search (Shopping).

[35] CASE AT.40099 - Google Android.

[36] Similar conclusions have been reached in the Google, case AT.40411 – *Google Search (AdSense)*, which final decision was published recently (see here, paras. 226 and 227).

[37] See AT.39740 - Google Search (Shopping), paras. 269-270; and AT.40099 - Google Android, para. 438.

scale; (iv) the actual costs of entry incurred in penetrating the market; and (v) switching costs[38].

- All of these factors would be considered in order to determine whether a potential competitor would be able to enter the market and contest the market power of the alleged dominant undertaking. In this regard, the more likely that entrance is (and its likelihood of success), the more constrained the alleged dominant undertaking would be.

- *Case 486/00 - McLane/Tabacalera*: in 2002, the extinct *Tribunal de Defensa de la Competencia* ("**TDC**", now CNMC) fined Tabacalera, the former monopoly for the manufacture and distribution of tobacco in Spain, with €3 million for refusal to supply its brands to a competitor (McLANE) in the market for the distribution of tobacco in Spain. The case was upheld by the High Court (2003) and the Supreme Court (2009)[39].
  - The TDC, when determining that Tabacalera held a dominant position, analysed among others the existence of competitors and barriers to entry in the market. Concretely[40]:
    - The TDC took into account the total foreclosure of the market for new entrants, firstly, for the legal monopoly and, subsequently, for the maintenance of the monopoly in the tobacco retail sales (only possible through tobacconists and other authorised sale points) and the lack of parallel imports due to technical and economic barriers (such as tax regulations, labelling, etc.).
    - The TDC considered the difficulties and costs that a new entrant had to overcome to enter the market: pre-existing legal monopoly; need of authorisation for operating in the market, and the refusal to access distribution channels.
    - All these elements led the TDC to conclude that Tabacalera held such market power that it had allowed it to impede the entrance of third parties in the market (concluding eventually that the company was dominant in both the market for manufacture and distribution of tobacco in Spain).

3.2.2. Exclusionary abuses

- *Case 486/00 - McLane/Tabacalera* (explained above): the TDC considered that Tabacalera abused its dominant position in both the market for manufacture and distribution of tobacco in Spain by refusing to supply the tobacco brands it manufactured to a new entrant in the distribution market (McLANE).
  - The TDC obliged Tabacalera, as an interim measure, to supply its products to McLANE[41];

[38] See AT.39740 - Google Search (Shopping), paras. 269-270; and AT.40099 - Google Android, para. 438.

[39] Judgements available in the CNMC's website.

[40] Expte. 486/00 - *McLane/Tabacalera*, page 23, para. 19.

[41] Page 2.

- When the conduct in question took place Tabacalera was the only manufacturer of tobacco in Spain, with almost a 100% market share in the market for distribution of tobacco in Spain[42];
- The TDC considered that, with its refusal to supply an essential input to compete in the market for the distribution of tobacco, Tabacalera prevented the entrance of McLANE in the market, which was a new entrant into a market in which there were almost no operators active, depriving the different manufacturers and retailers in the upstream and downstream markets from the benefits that a new entrant in the distribution market could have had[43];
- Interestingly, before refusing to supply its products, Tabacalera (i) also opposed to the grant of a license to McLANE in the administrative procedure; and (ii) then, tried to purchase 50% of the shares of McLANE and, after not achieving its objective, a 25% (transaction that also failed);
- This is an example of the common abuses that take place when markets started to be liberalised, with traditional incumbents reacting against new entrants in the market.

- *Case R 718/07 - PUERTOS DE ANDALUCIA*: in 2008, the extinct *Comisión Nacional de Competencia* ("**CNC**", now CNMC) closed an investigation (as the investigating body did in the appealed decision) against the company that managed the ports in Andalusia for an alleged abuse of dominant position consisting in applying predatory prices that would have prevented actual and potential private competitors from expanding or entering the market, as they would not have been able to apply profitable prices. However, among other reasons, the authority considered that expansion and entry was possible as several (i) actual private operators applied for new opening licences to expand its current activities; and (ii) new private operators had entered the market in the last years. The High (2010) and Supreme Court (2014) upheld the decision[44].
- *Case S/DC/0604/17 - MEDIAPRO FÚTBOL*: in 2018, the CNMC accepted the commitments offered by a company (Mediapro) for a potential abuse in the market for the wholesale commercialisation of pay-TV channels in Spain (which include football content) against an internet operator (Obwan) that had recently entered the market, offering pay-TV content through internet (the so-called internet or OTT segment).
  - Obwan, a new provider of internet content (over the top – OTT) in Spain specialised in sports content, filed a complaint against Mediapro for an alleged abuse of dominant position, as such company would be refusing to provide exclusive content in FRAND terms in Spain.
  - Mediapro was present (i) in the wholesale market for the commercialisation of pay-TV channels (in which it could be dominant, as it has the exclusive right to commercialise certain football content); (ii) in the traditional pay-TV segment; and (iii) in the OTT segment (such as Obwan).
  - Apparently, Mediapro would have abused its alleged dominant position in the wholesale commercialisation market by preventing the entrance of pure internet

[42] Page 7.

[43] Page 7.

[44] Judgements available in the CNMC's website.

operators in the OTT segment, in which it was also active (for example, by offering different conditions to those offered to traditional operators[45])[46].

- The CNMC considered that Mediapro could be[47]: (i) trying to preserve for itself the OTT segment of the Pay-TV market, which had a very high growing potential; and (ii) preventing the entrance and development of a new technology in Spain with a great potential in the future for increasing competition in the market.
- Mediapro committed to grant access to its content to OTT operators (such as Obwan) in FRAND terms (as it did with traditional operators), which was considered enough to address the competition concerns identified.

- There are also several examples of potential exclusionary abuses against new entrants (potential competitors) in the energy markets. See, for example:
  - COMP/37.966: in 2007, the gas company Distrigaz offered commitments to resolve the concerns raised by the EC that the company was foreclosing the downstream gas markets in Belgium via long-term supply contracts concluded with a large number of customers. Thus, only a small share of the total market was open to competition, preventing competitors from entering the market;
  - COMP/39.402: in 2009, RWE offered commitments in response to the Commission's concerns that (i) it may have refused access to its gas transmission network, pursuing a strategy aimed at systematically keeping the transport capacity for itself and foreclosing third parties; and (ii) it may have incurred in a margin squeeze to prevent even competitors as efficient as RWE from competing effectively on the downstream gas supply markets, or limiting competitors' or potential entrants' ability to remain in or enter the market; and
  - COMP/39.386: in 2010, the EDF offered commitments in response to the Commission's concerns that EDF's contracts with large electricity consumers may hinder the entry and expansion of EDF's competitors on the French market.
  - *Case 645/08 - CENTRICA/HIDROCANTÁBRICO*: in 2009, the CNC (now CNMC) fined HIDROCANTÁBRICO DISTRIBUCIÓN with €0,83 million for abusing its dominant position in the market for the distribution of energy, following a complaint lodged by Centrica (an energy commercialisation company)[48]. The CNC considered that HIDROCANTÁBRICO DISTRIBUCIÓN (a vertically integrated company) abused its dominant position by refusing to grant access to the SIPS (a database operated by it and necessary to provide commercialisation services) to competing commercialisation companies, such as Centrica. It is of interest in this case that HIDROCANTÁBRICO DISTRIBUCIÓN tried to justify its refusal to grant access to the SIPS database based on the General Data Protection Regulation ("**GDPR**") in force at that time. However, the authority ruled out this justification, among other reasons, because the company did grant access to this

[45] In fact, these traditional operators could also provide that content through internet (as the OTT operators), although only a minority of them did so.

[46] Pages 27 to 30.

[47] Page 21.

[48] In fact, Centrica lodged 5 complaints before the CNC against the 5 energy distributors active in Spain at that time. All cases had the same result as this one.

database to its downstream arm (a commercialisation company) and because the GDPR itself established as an infringement the refusal to grant access to the SIPS by the distributors.

4. Merger perspective

4.1. The use of the concept of potential competition

18. As explained above, the concept of potential competition is used from a merger perspective in the following cases:

- Regarding the merger thresholds: the acquisitions of potential competitors (usually start-ups that are disruptive entrants) by well-established companies in the market (especially in the pharma and digital economy) that do not meet the (most commonly used) turnover merger thresholds and, thus, are not notified despite their (usually) high impact in the markets – sometimes referred as killer acquisitions-, has led to a global discussion around the need to modify these turnover thresholds in order to capture this sort of transactions; and
- Regarding the substantive analysis: the substantive analysis of a merger involves the analysis of several elements and, among them, is the competition that can be exerted by actual and potential competitors in the market. In addition, potential competition has also an impact in the market structure, analysis of entry and expansion barriers, competitive dynamics, innovation, etc., that are also considered when analysing a merger.

19. The following sub-section further illustrates the concept and use of potential competition from a merger perspective.

4.2. Cases (EU and Spain)

4.2.1. Merger thresholds

20. One of the most discussed topics in recent years in the field of merger control is the assessment of acquisitions by strong incumbents of nascent, innovative start-ups[49] (potential competitors in the future).

21. This sort of acquisitions, which are very common in the pharma and digital sectors, are sometimes referred as "killer acquisitions" when they are aimed at avoiding future potential competition from the start-up company by:

- "Killing" the target's research projects or its operations (future product or services launches) before it grows into a significant competitive threat (the so-called "pure killer acquisitions", as they usually imply the shutting down of the target or its innovation projects[50]); or
- Integrating the target and its research projects and/or operations into the incumbent's growing ecosystems (the so-called "reverse killer acquisitions", as in

[49] See "*Start-ups, killer acquisitions and merger control – Note by the European Union*", June 2020, paras. 1-8.

[50] As stated by the EC, the killing of innovative projects is not limited to the acquisition of start-ups but may also arise in acquisitions of established companies. See "Start-ups, killer acquisitions and merger control – Note by the European Union", June 2020, para. 4.

most cases the target continues operating in the market but under the incumbent's control[51]) [52].

22. Thus, scenario (i) above is more concerned with horizontal effects resulting from the elimination of a potential or innovative competitor due to a "killing" strategy in order to avoid future competition; and (ii) above is more concerned with vertical and conglomerate effects derived from the expansion of the incumbent's activities into neighbouring markets[53].

23. The main problem with this sort of transactions is that nascent companies (potential competitors) do not generate significant sales during their first years in the market (for example, digital companies are more focussed in achieving a large base of users and data, and pharma companies in conducting researches) so, in most cases, they generate a low turnover that does not exceed the turnover thresholds (the most common ones in all jurisdictions) and escapes merger control scrutiny[54].

24. To solve this problem, some countries have introduced new thresholds based in the value of the transaction (such as Germany and Austria[55]). In its turn, regarding the EU merger control review that was initiated in 2016[56], the EC considered initially to review the merger thresholds, for example, by introducing a new value-based threshold. However, this change has been eventually ruled out as the EC has announced[57] that it would use instead the referral system foreseen in article 22 of the EUMR, which allows any Member state to ask the EC, under certain conditions[58], to review a transaction even if the EU and/or national threshold are not met[59].

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[51] In these cases, it is the buyer's innovative efforts in the target's market which have been eliminated. Thus, it is the innovation of the buyer – as opposed to the target's in pure killer acquisitions – that is killed.

[52] See "Start-ups, killer acquisitions and merger control – Note by the European Union", June 2020, paras. 1-8.

[53] See "Start-ups, killer acquisitions and merger control – Note by the European Union", June 2020, paras. 1-8.

[54] See "Start-ups, killer acquisitions and merger control – Note by the European Union", June 2020, para. 7.

[55] See "Joint guidance on new transaction value threshold in German and Austrian merger control".

[56] See "Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control" and "*Start-ups, killer acquisitions and merger control – Note by the European Union*", June 2020, paras. 13-18. The results of the mentioned EU merger control revision process can be accessed here (the Staff Working Document was published on 26 March 2021).

[57] See Vestager's speech "The future of EU Merger Control" at the International Bar Association 24th Annual Competition Conference, September 11, 2020.

[58] The transaction must "*affects trade between Member States **and** threatens to significantly affect competition within the territory of the Member State or States making the request*".

[59] Guidance on the referral mechanism has already been published by the EC (26 March 2021). See "*Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*", March 2021. In fact, on 24 April 2021, the EC accepted the requests submitted under article 22.1 EUMR by Belgium, France, Greece, Iceland, the Netherlands, and Norway to assess the proposed acquisition of GRAIL by Illumina, a transaction that does not meet either the European nor any of the national thresholds of the aforementioned jurisdictions.

25. In fact, there are several examples, some involving start-up companies and potential competitors, of mergers that have been reviewed by the EC, despite EU thresholds not being met, thanks to the referral mechanism (both articles 4.5 and 22 EUMR): Microsoft/GitHub (2018), Apple/Shazam (2018), Amadeus/Navitaire (2016), Lenovo/Motorola Mobility (2014), Facebook/WhatsApp (2014), Cisco/Tandberg (2010), Google/DoubleClick (2008), TomTom/TeleAtlas (2007) and Nokia/Navtek (2007)[60].

26. In Spain, in addition to the turnover threshold, there is a market share threshold that has enabled the CNMC to[61]: (i) review potentially problematic mergers that would have escaped scrutiny otherwise; and (ii) refer these mergers to the EC when they are broader than national in scope. In fact, thanks to this threshold, the CNMC has been able to refer to the EC the aforementioned cases Facebook/WhatsApp (under article 4.5 EUMR) and Apple/Shazam (under article 22 EUMR)[62]. Thus, in principle, this threshold already enables the CNMC to capture potentially anticompetitive deals such as the ones described in this section[63].

27. Therefore, the current merger control rules in Spain are a sound instrument to analyse and monitor the acquisition of potential competitors, even in cases related to killer acquisitions, such as the ones taking place in the digital and pharma sectors.

4.2.2. Substantive analysis

- C 59/00 – MOVILPAGO: in 2000, the extinct TDC (now CNMC) cleared, subject to commitments, the creation of a full-function joint venture, named Movilpago Holding ("**Movilpago**"), between BBVA (a bank) and Telefónica (a telecom company), that would develop and commercialise an e-payment system for mobile phones in Spain.
    - The TDC considered that: (i) the relevant market was the emerging e-payment market[64]; and (ii) Movilpago competed with the traditional card segment and, in the future, with other e-payment systems that could potentially be developed in the short term by other operators (potential competitors).
    - In addition, although there were no technological or administrative barriers, the market was characterised by the existence of other barriers that could prevent or make more difficult the entrance of potential competitors[65]: (i) the traditional presence of banks in the creation and promotion of new payment systems and BBVA's financial capacity (that had a 22% market share by assets); (ii) Telefónica's financial capacity and national strong presence (it was the dominant operator in fixed communications and had a 56% market share in the mobile segment); (iii) the high advertising investments needed (Telefónica was the first advertiser in Spain by volume at that time); and (iv) the inexistence of

[60] See "*Start-ups, killer acquisitions and merger control – Note by the European Union*", June 2020, para. 12.

[61] See "*Start-ups, killer acquisitions and merger control – Note by Spain*", page 3.

[62] See "*Start-ups, killer acquisitions and merger control – Note by Spain*", page 3.

[63] See intervention of the Chief of the CNMC at the "*Georgetown Law's 14th Annual Global Antitrust Enforcement Symposium*", for example here (GCR news).

[64] Pages 19-22.

[65] Pages 35-38.

international standards over the technology needed to operate the system (Telefónica developed its own technology and protocols).

- Under these conditions, the main competition concern was to ensure potential competition by the only two other telecom operators in Spain at that time (Airtel and Amena, with a 32% and 12% market shares in the mobile segment respectively)[66].
- As the TDC considered very unlikely that these two operators developed its own e-payment system, due mainly to the potential of the two Movilpago's parent companies, Airtel and Amena would have no other option than to adhere to Movilpago's system[67].
- Thus, to ensure future potential competition, the TDC considered necessary that Movilpago implemented the following commitments: (i) establishment of FRAND access conditions (to ensure a level playing field to all financial and telecoms operators); and (ii) ensuring that Movilpago did not enter into exclusives or ties/bundles with merchants and users (to ensure the openness of the e-payment system)[68].

- C/0612/14 - TELEFÓNICA/DTS: in 2015, the CNMC cleared subject to commitments the acquisition of sole control over DISTRIBUIDORA DE TELEVISÓN DIGITAL, S.A. ("**DTS**"), the main pay-TV operator in Spain at that time, by Telefónica. The decision analysed, among others, the existence of entry and expansion barriers and the potential competition that could be exerted by OTT operators in the future (such as Netflix, which at the time of the notification and clearance was still not active in Spain – it entered the market at the end of 2015).
  - The concentration affected several markets, one of them being the pay-TV market in Spain.
  - The CNMC considered the existence of high entry and expansion barriers in this market:
    - Bundling of services and switching costs[69]: (i) telecoms operators, almost in all cases, commercialised their services in a bundle (pay-TV, mobile, and ADSL/fibre); and (ii) installation of pay-TV required the installation of modems, antennas, etc. that, when compensated total or partially by the operator, entailed a minimum contract period (with early-termination penalties);
    - Economies of scale and scope[70]: necessary to capitalize the investments in the acquisition of content and in the costs associated with the rolling out and management of the pay-TV platform (marketing, CRMs, etc.); and

[66] Pages 38-42.

[67] Pages 38-42.

[68] Pages 44-45.

[69] Paras. 422 to 443 (see, specifically, paras. 425-426, 438, and 440).

[70] Paras. 444 to 452 (see, specifically, para. 444).

- Specific barriers for OTTs[71]: such as access to content and ensuring that emissions can reach consumers with a minimum quality standard and HD.

  - These barriers made the consolidation of a new operator in the market very unlikely in the mid-term[72]:

    - The contestable demand was not 100% (i.e. only clients not tied with pay-TV services or those tied who have ended their minimum periods)[73]; and

    - Although new OTT operators (such as Netflix) were about to enter the market, they were not considered, at the time of the decision, a sufficient competitive constraint for the merging parties[74] (among other reasons, because the merging parties could make their entry more difficult by limiting access to audio-visual content and to a large customer base through the use of bundles and ties)[75].

  - However, the CNMC considered that streaming platforms and internet pay-TV content providers were the future of the pay-TV[76] (in fact, after Netflix, other operators such as Disney+, HBO, Prime Video, etc. have successfully entered the market, which is growing fast in Spain, confirming the trend considered during the analysis of the merger[77]).

- C/1144/20 - CAIXABANK / BANKIA[78] (final decision pending publication while resolving confidentiality issues): in 2021, the CNMC cleared, subject to commitments, the merger of Bankia within Caixabank (two of the main banks in Spain).

  - The CNMC analysed whether the Big Techs that are providing payment services could exert competitive pressure over the merging parties. After analysing their presence in the market and future perspectives, it was considered that they were potential competitors in the future, but that they do not exert actual pressure over the merging parties, except for payment services where some of them (such as Apple o Amazon) are competing actively.

- M.8677 - SIEMENS/ALSTOM: this constitutes the last landmark case in Europe regarding potential competition analysis in a merger, due to the discussion generated around it. On 6 February 2019, the EC blocked the acquisition of Alstom by Siemens, which intended to merge two of the largest rolling stock and railway and metro signalling systems suppliers in Europe[79].

[71] Paras. 453 to 484 (see, specifically, para. 453).

[72] Paras. 485-513.

[73] Paras. 440 and 501.

[74] Paras. 505 and 506.

[75] Para. 511.

[76] Para. 505.

[77] According to the last report on the consumer patterns published by the CNMC, such content providers were present in half of consumers' homes in Spain, with an interannual growth of 33% (compared with the same period of the previous year).

[78] See Official Press Release in English here.

[79] See Official Press Release here.

- The EC blocked the merger based on several conclusions: (i) it would significantly impede effective competition in two main areas (signalling systems and very high-speed trains); and the competitive pressure from remaining competitors would not have been sufficient to ensure effective competition; and (ii) its finding that the entry of Chinese suppliers (such as CRRC, the state-owned Chinese rolling stock manufacturer) in the EEA was unlikely in a foreseeable future[80].
- The parties argued that: (i) Chinese train manufacturers, such as CRRC and Hyundai Rotem, should be considered potential competitors (among other reasons, because there are surmountable barriers to entry); and (ii) that the potential entry of Asian suppliers should be assessed over a 5 to 10 years period given the dynamics of the market[81].
- However, the EC concluded:
  - That it was highly unlikely that new entry from China would represent a competitive constraint on the merging parties in a foreseeable future due to, among others, the following facts: (i) Chinese suppliers are not present in the EEA; (ii) they have not even tried to participate in any tender as of the date of the decision; (iii) it will take a very long time before they can become credible suppliers for European infrastructure managers[82]; and (iv) Alstom already argued almost a decade ago, in the case M.5754 - *Alstom/Areva*, that Chinese entrants should be expected in the EEA, however no material entry has taken place since then[83]; and
  - Regarding the parties' allegations to extend the analysis over a longer period (10 years), the EC considered that it would entail going beyond all foreseeable future tenders in the EEA and the rest of the world, and that it would be a point in time where the prospects of entry are extremely uncertain[84].
- In fact, regarding the time period to analyse potential competition, the EC stated that it depends on the characteristics and dynamics of the market, although entry is normally only considered timely if it occurs within two years[85]. In any case, there has been instances in which this period has been three years[86]. In addition, potential competition exerted by one merging party over the other (as opposed to the already discussed exerted by third parties over the merging ones) is assessed in longer timeframes, around five to ten years[87].

[80] See Official Press Release here.

[81] See paras. 485-488 of the decision.

[82] See Official Press Release here.

[83] See para. 492 of the decision.

[84] See para. 495.

[85] See para. 489 of the decision.

[86] See case *COMP/M.3687 - JOHNSON&JOHNSON / GUIDANT*, paras. 224-228.

[87] All these cases are pharma related and where innovation is an important feature, see for example: (i) M.7326 - MEDTRONIC/ COVIDIEN, the EC analysed potential competition from the pipeline products of one of the parties over those of the other merging party, considering a 5 years period

- The EC's decision led to a fierce debate on whether the EU merger control should take into account industrial policy considerations "*in order to enable European companies to successfully compete on the world stage*", as stated in the Franco-German Manifesto[88] that was published only two weeks after the decision was published (on 19 February 2019).
- The aforementioned Manifesto proposed, among others[89]: (i) adapting regulation no 139/2004 and current merger guidelines to enable a more dynamic and long-term approach to current and future potential competition at global level; and (ii) introduce a sort of European Council's veto right, which could override EC's decisions in well-defined cases and subject to strict conditions.
- Despite the above, it seems that changes such as the aforementioned are not foreseen in the short-term, as stated by Commissioner Vestager[90].
- In any case, regarding the future of EU merger control, the EC has just published (26 March 2021): (i) a communication on Article 22 referrals[91]; (ii) a roadmap on procedural aspects of EU merger control, with an inception impact assessment and consultation open for comments until 18 June 18 2021; and (iii) an Staff Working Paper with the results of the evaluation of procedural and jurisdictional aspects initiated in 2016 (which contains the analytical support for the other two documents)[92]. In addition, the market definition notice[93] is also under a revision process[94].

5. Conclusions

28. As it can be seen from the above and as explained at the beginning, the concept of potential competition is at the core of Competition Law and it is of the utmost importance for the application of articles 101 TFEU and 1 SCA, 102 TFEU and 2 SCA, and from a merger perspective.

29. In addition, Competition Law is considered to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources[95].

(see paras. 179-182; and (ii) M.7275 GLAXOSMITHKLINE / NOVARTIS, the EC took into account a period of 10 years to measure the Parties' innovation strength (see para. 2586).

[88] See "*A Franco-German Manifesto for a European industrial policy fit for the 21st Century*".

[89] See page 3 of the Manifesto.

[90] See Vestager's speech "The future of EU Merger Control" at the International Bar Association 24th Annual Competition Conference, September 11, 2020, in which she stated "*We don't think that the merger regulation as such needs to change*".

[91] See "*Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*".

[92] See "*COMMISSION STAFF WORKING DOCUMENT EVALUATION of procedural and jurisdictional aspects of EU merger control*".

[93] "*Commission Notice on the definition of relevant market for the purposes of Community competition law*".

[94] Consultation period ended in October 2020 (the process can be accessed here).

[95] See former European Commissioner for competition policy Neelie Kroes' speech on 15 September 2005 here.

To this end, existing competition is clearly very important, as it is also potential competition. In this regard, incumbents may face potential competitive constrains from rivals who, over time, may introduce new products and/or services in the market and, thus, who cannot be disregarded.

30. Regarding the concept itself, one undertaking can be considered as a potential competitor of another undertaking when, if there is a price increase of the products in question, the former would undertake the necessary steps and investments to enter the relevant market of the latter in a short period of time.

31. Although the timeframe for considering entry depends on (among others) the facts of the case at hand, its legal and economic context, entry is usually considered timely if it takes place within a 2-3 years period.

32. The assessment of entry has to be based on realistic grounds, not being sufficient the mere theoretical possibility to enter a market. In addition, the case law[96] provides the following indications regarding the assessment of potential competition:

Elements that elaborate the concept of potential competition
Whether there are real concrete possibilities: (i) for the undertakings concerned to compete among themselves; or (ii) for a new competitor to enter the relevant market and compete with established undertakings.
Whether, if the agreement in question had not been concluded, there would have been real concrete possibilities for it to enter that market and to compete with established undertakings.
Whether entry into a market is an economically viable strategy.
Whether the potential competitor has the ability to enter that market (intention may also be of relevance).
There is no need to demonstrate that the potential competitor intends to enter that market in the near future, the mere fact of its existence may give rise to competitive pressure.
The conclusion of agreements or establishment of information exchange mechanisms with undertakings not present on the market provides a strong indication that the market in question is not impenetrable.
The purely theoretical possibility of market entry is not sufficient; need to demonstrate that market entry could have taken place sufficiently quickly for the threat of a potential entry to influence the conduct of the participants in the market, on the basis of costs which would have been economically viable.

33. Taking these elements into account, the courts and competition authorities have applied the concept of potential competition to a wide range of matters, from consortiums to mergers, continuing to elaborate on the concept itself and its assessment.

34. In addition, the concept of potential competition is also being widely discussed currently, due to its importance when analysing digital markets, driven mainly by the innovation of incumbents and new operators in the market. Furthermore, it is also an important concept to take into account in relation to the liberalisation of regulated markets (such as energy, telecoms, train, postal, etc.), as during this process the CNMC (that has a dual role as regulator and competition authority) must ensure that regulation facilitates entry and competition in the concerned market, while closely monitoring the behaviour of the incumbent companies against potential competitors.

35. The case law and decisional practice from the competition authorities elaborate on the concept, its assessment, and use to specific facts and cases, enabling a better understating on the impact of potential competition in antitrust analysis.

[96] See, for example, Lundbeck and Generics, explained above.