Organisation for Economic Co-operation and Development

DAF/COMP/WD(2021)21

Unclassified English - Or. English

25 May 2021

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

The Concept of Potential Competition – Note by the EU

10 June 2021

This document reproduces a written contribution from the EU 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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JT03476961

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1. Introduction

1. Entry is a source of competitive constraint on companies: it can upset existing patterns of market conduct, overthrow incumbents, launch new technologies and fresh approaches to product design and marketing. New entry often leads to more competitive prices, better quality, more choice and innovation to the benefit of consumers.

2. Therefore, entry analysis plays an important role in assessing the competitive effects of mergers and agreements as well as exclusionary practices by companies enjoying a position of economic strength. Where entry conditions are easy, incumbent or merging firms may be unable to exercise market power without attracting new entry. Conversely, where a potential entrant imposes an actual or future competitive threat on an incumbent, cooperation or integration between them can harm consumer welfare.

3. The present contribution will focus on the assessment of entry and potential competition by the European Commission in the context of mergers. Prominent debates have surfaced in recent years on issues directly or indirectly related to this topic.[1] In particular, whether EU merger control takes sufficiently into account the increased globalisation of the economy and potential entry of non-European players.

4. In addition, concerns have been raised about acquisitions of smaller potential competitors to discontinue their innovative projects before they grow into a significant competitive threat in the same market where the acquirer is already active (sometimes referred to as "killer acquisitions" but referred to in this paper as "acquisitions of nascent competitors") or with a view to integrating them in their own businesses, thus cementing the acquirer's strong position, giving it a significant competitive advantage over its rivals.

5. The debate about acquisitions of smaller potential competitors revolves around both jurisdictional and substantial dimensions. On the one hand, these transactions might be escaping turnover-based thresholds because of the low or inexistent turnover generated by the target, especially in the digital economy, where services regularly launch with the aim of building up a significant user base and/or commercially valuable data inventories before implementing a business model that could result in significant revenues.

6. On the other hand, competition authorities and stakeholders (such as businesses and the academic community) worldwide have to ask themselves how to carry out the challenging assessment of the competitive consequences of the elimination of possible

[1] The debate on acquisitions of nascent competitors has been shaped by an article by Cunningham, Colleen and Ederer, Florian and Ma, Song, Killer Acquisitions, and other papers contributed to the debate. For example, The UK Report of the Digital Competition Expert Panel, Unlocking Digital Competition, of March 2019 mentioned the figure of 250 transactions by big digital players in the past 5 years. The French Council of Economic Analysis, note 51, Competition and Trade: Which Policies for Europe, of May 2019 mentions 634 acquisitions for a total amount of more than USD 142 billion made by the big digital players between 1991 and 2018. This trend could have been reinforced by the COVID-19 pandemic as there have been reports of increased numbers of acquisitions by large tech companies in 2020 compared to the years 2016-2019: 'Big Tech goes on pandemic M&A spree despite political backlash', Financial Times, 28 May 2020; according to this article, the GAFA(M) companies announced 19 deals between January and May 2020, the fastest pace since 2015; reported (potential) deals include Amazon/Zoox, Facebook/Reliance/Jio and Facebook/Giphy.

future or innovative competitors (in one or more existing markets or in a future one) or their integration in the acquirer's wider business.

7. Against this background, the present note will be structured as follows. It will first set out the legal framework at EU level for the assessment of potential competition (section 2), then discuss the investigative challenges that may arise when applying this legal framework (section 3) and finally present some examples from the European Commission's case practice (section 4).

2. Legal framework to assess potential competition

8. Pursuant to Article 2 of the Merger Regulation, in its appraisal of concentrations, the Commission should take into account (actual and) potential competition from companies located either within or outside the EEA, as well as any entry barriers.

9. The Notice on the definition of the relevant market[2] clarifies that, while potential competition is one of the three main sources of competitive constraints, it does not play a role for the purposes of market definition: the competitive constraints arising from it are "*in general less immediate and in any case require an analysis of additional factors*", in particular with respect to the conditions of entry (paras. 14 and 24 of the Notice). For this reason, the constraints from potential competition are taken into account at the stage of the competitive assessment, once "*the position of the companies involved in the relevant market has already been ascertained, and when such position gives rise to concerns from a competition point of view*" (para. 24 of the Notice).

10. The Commission's framework for the assessment of potential competition is set out in the Commission's Horizontal ("HMG")[3] and Non-Horizontal Merger Guidelines ("NHMG").[4] This framework addresses three scenarios separately: (i) mergers with an entrant either in the same market (horizontal), in a market upstream or downstream (vertical) or in a closely related market (conglomerate), (ii) effects of mergers between existing suppliers (both horizontal and non-horizontal) on entrants, and (iii) countervailing effects of entry by third parties (in both horizontal and non-horizontal mergers).

11. First, according to the HMG and NHMG, a merger with a potential competitor can have anti-competitive effects similar to mergers between undertakings already active in the same or related relevant markets.[5] A merger with a potential entrant can generate horizontal (coordinated or non-coordinated) effects if the potential competitor significantly constrains the behaviour of the firms active in the market. This is the case if the potential competitor can easily enter without incurring significant costs. Anticompetitive effects may also occur where the merging party is very likely to incur the necessary sunk costs to enter the market in a relatively short period of time, after which it would constrain the behaviour of firms currently active in the market.[6] As to what constitutes an appropriate "relatively short period of time", time periods considered may depend on the particular circumstances.

[2] Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997.

[3] Horizontal Merger Guidelines, OJ C 31, 5.2.2004.

[4] Non-Horizontal Merger Guidelines, OJ C 265, 18.10.2008.

[5] Horizontal Merger Guidelines, paragraph 58; Non-Horizontal Merger Guidelines, paragraph 7.

[6] Horizontal Merger Guidelines, p. 5, paragraph 59.

12. In both scenarios, for the merger to have significant anti-competitive effects, two basic conditions must be fulfilled. In the first place, the potential competitor must already exert a significant constraining influence, or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission reach such a conclusion. In the second place, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger.[7]

13. Second, mergers could also have a negative effect on entry by third parties, raising barriers to entry or expansion for competitors. For instance, according to the HMG, some proposed mergers would leave the merged firm in a position where it would have the ability and incentive to make the expansion of smaller firms and potential competitors more difficult. The merged entity may have such a degree of control, or influence over, the supply of inputs or distribution possibilities or over patents or other types of intellectual property that expansion or entry by rival forms may be more costly.[8] Furthermore, according to the NHMG, a vertical merger may foreclose potential competition on the downstream market when the merged entity would be likely not to supply potential downstream entrants, or only on less favourable terms than absent the merger. This could be in particular the case if input foreclosure would entail for such potential competitors the need to enter at both the downstream and the upstream level in order to compete effectively on either market.[9] Similar considerations apply to customer foreclosure concerns and the possibility that competition on the upstream market is impeded by raising barriers to entry to potential competitors.[10] Also, with respect to conglomerate mergers, the NHMG clarify that foreclosure practices may deter entry by potential competitors, for example by reducing sales prospects for potential rivals or by forcing rivals to entry more than one market at the same time.[11]

14. Third, entry by a third party may constrain the market power of merging parties. The HMG and NHMG[12] indicate that such entry must be:

- timely, meaning that entry taking place within two years would normally be sufficiently swift to be considered.[13] However, what constitutes an appropriate time period depends on the characteristics and dynamics of the market at stake, as well as on the specific capabilities of potential entrants.[14] Thus, the Commission's analytical framework is flexible to cater for the specificities of the relevant markets in each given case.
- likely, meaning for instance that entry would need to be profitable post-merger, also in light of barriers to entry and the reaction of incumbents; and

[7] Horizontal Merger Guidelines, paragraph 60.

[8] Horizontal Merger Guidelines, paragraph 36.

[9] Non-Horizontal Merger Guidelines, paragraph 49.

[10] Non-Horizontal Merger Guidelines, paragraph 75.

[11] Non-Horizontal Merger Guidelines, paragraph 112.

[12] Non-Horizontal Merger Guidelines, paragraph 76, footnote 5.

[13] Horizontal Merger Guidelines, paragraph 74.

[14] Horizontal Merger Guidelines paragraph 74.

- of sufficient scope and magnitude to deter or defeat any potential anticompetitive effects of the merger.[15]

3. Legal framework to assess innovation effects

15. To assess the effects of a merger on the parties' innovation efforts, the Commission has applied both potential competition and innovation competition theories of harm.[16] In that context, potential competition is used to assess the effects of a merger on product and price competition between actual and forthcoming products or between forthcoming products of the parties. This assessment is made using the same relevant markets as defined to assess the effects of the merger on actual competition, and is applied to pipeline products with a significant likelihood of reaching the market, albeit sometimes only several years in the future.

16. By contrast, the assessment of a merger's effects on innovation competition considers in particular the merged entity's incentives to discontinue, delay or reorient existing pipeline projects (as well as the broader incentives to innovate in the future). In this setting, the immediate loss in innovation also ultimately results in a loss in product competition in the future. This assessment relies on the identification – for instance by looking at research targets and pipeline projects – of 'innovation spaces' upstream of relevant product markets, in which the relevant players are identified and their respective strength is assessed. The pipeline projects considered in innovation competition are those for which market launch is less certain and further away in time, and the parties' overlaps in these innovation spaces may differ from their overlaps in (current and future) product markets.

17. In some cases where barriers to entry are high, the competitive assessment may touch upon each of actual product and price competition, potential competition, and innovation competition, with each assessment relying on somewhat different elements and evidence.

4. Investigative challenges when assessing potential competition and innovation competition

18. Both the HMG and NHMG make the main challenge for the assessment of potential competition explicit already in their first paragraphs. Indeed, merger assessment is by its very nature forward looking and requires to compare the competitive conditions that would result from the merger with the conditions that would have prevailed without the merger, the so called "counterfactual". In most cases, where the markets at stake are relatively stable, the observed *status quo* constitutes the relevant comparison for evaluating the effects of a merger.[17]

19. However, assessing potential competition by predicting how the market will evolve with or without the merger is, by its nature, subject to greater uncertainty. In such cases, according to its guidelines, the Commission may take into account future changes to the

[15] Horizontal Merger Guidelines, paragraphs 68-75.

[16] See for instance the Commission decision of 27 March 2017 in Case M.7932 – *Dow/DuPont* and the Commission decision of 21 March 2018 in Case M.8084 – *Bayer/Monsanto*, notably recitals 48 and following.

[17] Horizontal Merger Guidelines, paragraph 9; Non-Horizontal Merger Guidelines, paragraph 20.

market that can reasonably be predicted.[18] In that context, even closer attention must be paid to the strength of the evidence used.

20. Another challenge in assessing potential competition relates to the application of the concept to both the parties and their (potential) competitors – a proper counterfactual assessment requires that the pipeline products of the parties and their competitors be treated in a consistent manner. Indeed, it is important to apply the concept of potential competition consistently across firms for the competitive assessment to be meaningful. To do so, the Commission effectively uses the tools at its disposal to make sure that it has all the information necessary from both the parties and third parties. In particular, the Commission will ask for internal pipeline documents from both the parties and their competitors to assess the competitive landscape.

4.1. Ways to assess potential competition and innovation competition

21. The Commission may assess potential competition and innovation competition in different ways depending on the underlying facts. In each case, the objective is to identify more remote but still sufficiently significant competitive constraints in the context of the merger. In practice, this can be done by assessing the strength of out of market constraints by focussing on barriers to entry and entry plans, but also by not precisely defining the relevant market or by using broader competitive 'spaces'.

22. Most prominently, the Commission guidelines clarify that the Commission may, in particular, take account of the likely entry or exit of firms.[19] In so doing, the Commission will notably determine the barriers to entry and/or exit in the relevant market. Such barriers may be legal (for instance regulation or certification) or technical (for instance economies of scale or scope), but may also be directly related to demand (for instance reputation or the need for a good track-record) or to the strategic behaviour of incumbents (for instance a known commitment to use large capacity to defeat entry).[20] In addition to barriers to entry, the Commission considers in particular specific entry/exit plans by all relevant market players, looking for instance at profitability or fit with each supplier's business model. Combined, these will point to the likelihood and sufficiency of entry.[21]

23. The Commission may also decide, where appropriate, not to take a firm view as to the relevant scope of the market and to leave the "market definition open", so to assess the effects of the merger in all potential future scenarios.

24. In the same vein, when innovation is an important parameter of competition and the theory of harm pursued by the Commission in a case concerns a reduction in innovation, a relevant product market may not yet exist, as innovation will create new markets, or may potentially concern different product markets. In such context, the Commission has focused its analysis on "innovation spaces", that is groups of products for which innovation competition takes place (e.g. *Dow/DuPont* and *Bayer/Monsanto*). This was based on the observation that in the analysed sector, R&D players did not innovate for all the product markets composing a sector at the same time. They also did not innovate randomly without targeting specific spaces within that sector. To the contrary, when setting up their

[18] Horizontal Merger Guidelines, paragraph 9; Non-Horizontal Merger Guidelines, paragraph 20.

[19] Horizontal Merger Guidelines, paragraph 9; Non-Horizontal Merger Guidelines, paragraph 20.

[20] Horizontal Merger Guidelines, paragraphs 36 and 71.

[21] Horizontal Merger Guidelines, paragraphs 68-75.

innovation capabilities and conducting their research, R&D players have specific research targets and this identified the relevant scope of the Commission's competitive assessment.

25. Ultimately, the assessment of potential competition largely follows the assessment of actual competition in terms of elements considered. It does, however, have to adapt to inherently greater uncertainty, which makes a detailed quantitative assessment impossible. Accordingly, the assessment of potential competition follows more of a qualitative approach than a quantitative one.

26. As mentioned above, this shift holds true even more when considering innovation competition. The difference is that when the investigated theory of harm concerns the reduction of innovation or innovation efforts (such as R&D), the focus moves from the assessment of existing or future product overlaps to the assessment of pipeline overlaps (in sectors characterised by well-defined research and testing phases such as the pharmaceutical sector), or capability overlaps. This has indeed been at the heart of the investigation in many cases ranging from pesticides (e.g. *Dow/DuPont* and *Bayer/Monsanto*) and pharmaceuticals (e.g. *Novartis/GlaxoSmithKline's oncology business*[22] and *J&J/Actelion*[23]) to financial markets (e.g. *Deutsche Börse/NYSE Euronext*[24]) to industrial products (e.g. *General Electric/Alstom (Thermal Power - Renewable Power & Grid Business)*[25]).

4.2. Sources of evidence

27. There are specificities as regards the evidence used by the Commission in potential competition and innovation competition assessments. While static tools, such as market shares or measures of substitutability between the parties' current products may carry informative value for future overlaps in situations where both parties are established players in an industry,[26] this needs to be thoroughly investigated on a case by case basis.[27] When one of the parties is not yet present in the market, such measures are uninformative.

28. In this context, the evidence used by the Commission in its case practice varies depending on the industry at stake. For example, in *Novartis/GlaxoSmithKline's oncology business* and *J&J/Actelion* (both phase I decisions where the Commission investigated innovation theories of harm in relation to drugs for treatment of skin cancer, ovarian cancer and several other cancer types, and for insomnia, respectively), the Commission performed

[22] Commission decision of 28 January 2015 in Case M.7275 – *Novartis/GlaxoSmithKline's oncology business*.

[23] Commission decision of 9 June 2017 in Case M.8401 – *J&J/Actelion*.

[24] Commission decision 1 February 2012 in Case M.6166 – *Deutsche Börse/NYSE Euronext*.

[25] Commission decision of 8 September 2015 in Case M.7278 – *General Electric/Alstom (Thermal Power - Renewable Power & Grid Business*.

[26] In a concentrated industry in which both merging parties are established players, the existence of product overlaps or pipeline overlaps also suggest the existence of overlaps in R&D capabilities, i.e. the capabilities to develop the next generation of pipelines.

[27] See Horizontal Merger Guidelines, paragraph 15: "*the Commission interprets market shares in the light of likely market conditions, for instance, if the market is highly dynamic in character and if the market structure is unstable due to innovation or growth*". Also, the Union Courts found that, in a dynamic context "*large market shares may turn out to be ephemeral*" and "*are not necessarily indicative of market power and, therefore, of lasting damage to competition*", Judgment of 11 December 2013 in Case T-79/12 Cisco Systems and Messagenet v Commission, ECLI:EU:T:2013:635, paragraph 69.

a structural analysis of the competitive landscape for the pipeline, where responses to the market investigation indicated that only one additional product to those of the parties was being developed for launch in the EEA. In *J&J/Actelion* the Commission also analysed in detail the corporate documents of an R&D joint venture (which would have been demerged into a separate company) to assess the post-merger ability of the merged entity to influence R&D activities.

29. In *Dow/DuPont* and *Bayer/Monsanto*, the Commission completed a similar review of pipelines with an assessment of the merging parties' and their competitors' innovation capabilities based on a number of past and forward-looking indicators, such as the parties' specialisation and assets, targets in terms of R&D efforts (input) and new products (output), track record of bringing new products to the market, and strength of their patent portfolios including high-quality patents.

30. In airline mergers, the assessment of potential competition – including in considering remaining competitive constraints on the merged entity post-transaction – typically relies on the identification of key barriers to entry, the profitability of each route and specific entry and exit plans for all suppliers. Such plans are often supported by internal documents (notably for the merging parties), but may also emerge from the general market investigation by way of requests for information. Past examples of entry and exit are also of particular relevance, as real-world evidence of the likelihood of entry and exit. In fact, the slot remedies that the Commission has accepted in a number of cases are specifically designed to sufficiently facilitate entry to increase the competitive constraint on the merged entity post-transaction and thereby dispel competition concerns.[28]

31. In *General Electric/Alstom (Thermal Power - Renewable Power & Grid Business)*, where the Commission found that the merger would eliminate an important independent innovator from the market for 50 Hertz heavy duty gas turbines, it measured undertakings' innovation capabilities in terms of R&D costs and investments and headcount.

32. In all of these cases, internal documents – in particular strategic forward-looking documents from the merging parties but also from their competitors, such as pipeline updates – constitute essential pieces of evidence. Indeed, they constitute a contemporary business record providing insights on the competitive dynamics, the parties' activities and the transaction rationale. Internal documents are also a very informative tool for the investigation of counterfactuals. It is in this context that the European Commission has been working to refine its investigative methods and practices related to the use of internal documents, in particular with regard to uniform approaches to requests for internal documents, as well as the use of IT tools and search strategies.

4.3. Acquisitions of nascent competitors

33. As acquisitions of nascent competitors, particularly in the digital sector, are often made by large incumbents, such transactions may create or strengthen the dominant position of the acquirer. If the target exerts (potential) competition in the incumbent's market, this may occur by eliminating one of the few remaining competitive constraints. If the target operates in different (but possibly adjacent) markets, this may occur in particular

[28] See for instance Commission decision of 26 January 2011 in Case M.5830 – *Olympic/Aegean Airlines*, Commission decision of 30 March 2012 in Case M.6447 – *IAG/bmi*, Commission decision of 27 February 2013 in Case M.6663 – *Ryanair/Aer Lingus III*, Commission decision of 14 November 2014 in Case M.7333 – *Alitalia/Etihad*, Commission decision of 21 December 2017 in Case M.8633 – *Lufthansa/Certain Air Berlin Assets* and Commission decision of 5 July 2019 in Case M.9287 – *Connect Airways/Flybe*.

due to raising barriers to entry/expansion for competitors (for example, related to network effects, data or technology) or otherwise allowing the merged entity to hinder competitors' expansion[29] or to reduce their ability or incentive to compete.[30]

34. Despite the important probative value of internal documents, the challenge of proving the likelihood of anticompetitive effects in dynamic markets remains. This is in particular the case as regards digital markets, where innovation processes are less structured and innovation is more disruptive. This consideration has prompted a reflection as to whether new tools would be needed for the assessment of specific types of digital mergers.

35. In this respect, in April 2019, three Special Advisors appointed by the Commissioner for Competition Vestager released a report on "Competition policy for the digital era".[31] While finding that the current test set out in the Merger Regulation remains a sound basis for assessing mergers in the digital economy, the Special Advisors proposed to revisit certain theories of harm to assess acquisitions of small start-ups by dominant platforms and/or ecosystems, in particular where such acquisitions can eliminate a potential competitive threat and further lock users within their ecosystem. In such cases, the Special Advisors argued that the notifying parties should bear the burden of showing that the adverse effects on competition are offset by merger-specific efficiencies.

36. The discussions on this topic are still ongoing, with further reflection needed to understand whether the current tools are flexible enough to overcome the challenge of providing evidence of anticompetitive effects in digital markets.

5. Focus on case practice

37. The following sections provide illustrations of the different ways in which potential competition comes into play in the competitive assessment of mergers: where a merger eliminates a potential competitor (section a), also in the specific context of innovation concerns (section b); where a merger raises barriers to entry (section c); and where potential competition may alleviate competition concerns (section d).

5.1. Merger with a potential competitor

38. As explained above, a scenario in which the Commission takes into account potential competition in its competitive assessment is the case of a merger with a potential competitor.[32]

39. The Commission for instance investigated this theory of harm in *Wabtec/Faiveley* in relation to complete break systems for rail.[33] In this case, the investigation initially established that Wabtec was poised to launch a product, thereby challenging the only two existing suppliers Faiveley and Knorr-Bremse. This entry would have occurred within four to six years, which was considered a 'relatively short period of time' in view of the characteristics of the industry, notably the long development lead times and lifecycles for new products. However, the in-depth investigation revealed that barriers to entry for the

[29] See, for example, paragraph 36 of the Horizontal Merger Guidelines.

[30] See, for example, paragraph 15 of the Non-Horizontal Merger Guidelines.

[31] Available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

[32] Horizontal Merger Guidelines, paragraphs 58-60.

[33] Commission decision of 4 October 2016 in Case M.7801 – *Wabtec/Faiveley Transport*.

EEA market were in fact likely too high for Wabtec to effectively enter, in particular in view of the technical features of its future product (making it unsuitable for the EEA) and Faiveley's own 'game-changing' pipeline product. It also became apparent that some competitive pressure was likely to be maintained after the merger through customers' ability to integrate elements from subsystem manufacturers. These elements combined made it unlikely that Wabtec would constitute a significant constraint on existing suppliers (notably Faiveley), and the Commission dropped this theory of harm.

40. The Commission had also investigated this theory of harm in *Google/DoubleClick*.[34] In that case, both parties could be considered potential competitors from two different perspectives. Firstly, DoubleClick was in the early stages of developing an intermediation platform, the DoubleClick Ad Exchange, which would have competed with Google AdSense. Secondly, Google was in the early stages of developing ad serving tools for advertisers and publishers, which would have competed with DoubleClick's ad serving technology. While DoubleClick's intermediation platform might well have become an additional effective competitor of AdSense in the future, the Commission found that competition would not be impeded as a result of the concentration because the merged entity would continue to face strong competitive pressure from a number of other competing ad net-works and ad exchanges. Similarly, the Commission could not exclude the possibility that Google would have successfully developed ad serving tools in the future, but it would have become one of many suppliers competing with DoubleClick, so competition in ad serving would not be negatively affected by the disappearance of Google as a future supplier of such tools.

41. In *Johnson & Johnson/Tachosil*,[35] the Commission's preliminary investigation indicated that, in the absence of the transaction, Johnson & Johnson would have had strong incentives to enter the EEA/UK markets for dual haemostatic patches, and it was unlikely that timely and credible entry from other players besides Johnson & Johnson would take place. The Commission therefore came to the preliminary view that the proposed transaction was liable to significantly reduce competition and innovation in the market for dual haemostatic patches through the elimination of the best placed potential entrant, which would have led to higher prices, less choice and reduced incentives to innovate. The Commission never completed its investigation since the parties abandoned the transaction due to the Commission's preliminary concerns.

42. These cases illustrate the fact that the theory of harm of a merger with a potential competitor is one which, sometimes put forward by third parties, the Commission investigates thoroughly to provide a robust assessment of the significance of the competitive constraint being eliminated.

5.2. Dealing with innovation: potential competition and innovation competition

43. In recent years, cases where a potential competition theory of harm was sustained often dealt with the effects of a merger on innovation efforts, as was for instance the case in *General Electric/Alstom (Thermal Power - Renewable Power & Grid Business)* and recent pharmaceutical cases (for instance, *J&J/Actelion*).

44. In the recent pesticide cases *Dow/DuPont* and *Bayer/Monsanto*, the Commission raised concerns on the basis of the elimination of potential competition in view of the high

[34] Commission decision of 11 March 2008 in Case M.4731 – *Google/DoubleClick*.

[35] See the press release of 25 March 2020 on the opening of an in-depth investigation in Case M.9547 – *Johnson & Johnson/Tachosil*.

likelihood that, absent the merger, future products from one of the parties would have been launched (though in some cases only six to eight or even ten years in the future). But the Commission also dismissed concerns on a number of markets in view of competition from other players, which would have sufficiently constrained the merged entity post-transaction. It also investigated whether the transaction would eliminate innovation competition, both in terms of specific lines of research and in terms of broader R&D capabilities (R&D spend and targets, track record in innovation, etc.) and focus.

5.3. Mergers raising barriers to entry

45. In the present context of digitisation and application of machine learning and other data technologies in several industries, the Commission has more and more often assessed whether the combination of datasets under the ownership of one player may have a foreclosing effect for the merging parties' competitors. The investigative hypothesis is that, post-transaction, competitors could be denied access to data which would have allowed them to innovate and improve their products and services.

46. The Commission has investigated this theory of harm, for example, in *Microsoft/LinkedIn*, in relation to the use of LinkedIn data for advanced functionalities based on machine learning in CRM software solutions,[36] and in *Apple/Shazam*, in relation to the use of Shazam data to power music recognition functionalities in digital music streaming services.[37] In both cases the data was not already used for the mentioned purpose and thus the Commission had the challenge to assess future potential market developments.[38]

47. More recently, in the *Google/Fitbit* case,[39] the Commission investigated whether the acquisition of Fitbit's database (as well as its data collection capabilities) would raise barriers to entry or expansion for competitors. It concluded that, by increasing the already vast amount of data that Google could use for the personalisation of ads, it would be more difficult for rivals to match Google's services in the markets for online search advertising, online display advertising, and the entire "ad tech" ecosystem. The transaction would therefore raise barriers to entry and expansion for Google's competitors for these services to the detriment of advertisers, who would ultimately face higher prices and have less choice. To address this concern, Google committed not to use the health and wellness data collected from wrist-worn wearable devices and other Fitbit devices of users in the EEA for its Google Ads services, including search advertising, display advertising, and advertising intermediation products. The relevant Fitbit data will be technically separated and stored in a "data silo", which will be separate from any other Google data that is used for advertising. Finally, EEA users will be given the choice to accept or refuse the use of health and wellness data by other Google services (such as Google Search, Google Maps, Google Assistant, and YouTube).

[36] Commission decision of 6 December 2016 in Case M.8124 – *Microsoft/LinkedIn*.

[37] Commission decision of 6 September 2018 in Case M.8788 – *Apple/Shazam*.

[38] In *Apple/Shazam*, the Commission has sought to overcome this difficulty by elaborating a benchmark methodology to assess the importance of data as input in technology markets, by considering the velocity or speed at which a database is updated, the volume or size of the dataset, the variety of the type of data composing a dataset, and the value of the relevant data.

[39] Commission decision of 17 December 2020 in Case M.9660 – *Google/Fitbit*.

5.4. Entry or expansion by (potential) competitors as a countervailing factor

48. In addition to the restriction or elimination of potential competition as a competition concern, the Commission also conversely considers in its competitive assessment whether potential competition may dispel any competition concerns.

49. In *Siemens/Alstom*,[40] the Commission investigated whether entry by non-European suppliers (in particular Asian suppliers) could impose a sufficient competitive constraint to dispel any competition concerns in very high-speed rolling stock and in signalling systems. The Commission found, on the basis of a consistent and compelling body of evidence (in particular requests for information to the parties as well as their customers and competitors; and internal documents from the parties), that barriers to entry (investment and technical capabilities, requirement for a track record) were very high, particularly so in the EEA (in light of the need for an EEA-specific track record and for regulatory authorisation; informal localisation requirements; and privileged relations with national operators). On that basis, it concluded that sufficient entry was unlikely in the foreseeable future, and potential competition would thus be an insufficient competitive constraint on the merged entity.[41] In terms of timeframe, the Commission did not disregard potential entry by Asian competitors of Siemens and Alstom in the EEA markets for high and very high-speed rolling stock only because it would occur outside the illustrative 2-year period set by the HMG. Instead, it relied on the fact that there was no concrete evidence supporting the likelihood and sufficiency of such entry, even in the 10 year time horizon put forward by the parties. In addition, the Commission considered that the 10 year time horizon was not an appropriate point of reference because it would go beyond all foreseeable future tenders in the EEA and worldwide.[42]

50. Similarly, in *Tata Steel/ThyssenKrupp/JV*, the Commission assessed in depth whether imports from non-European suppliers would sufficiently constrain the merged entity post-transaction to dispel any competition concerns, as claimed by the parties. To conclude that this would not be the case, the Commission relied on existing supply patterns, high barriers to entry (customer preferences, technical capabilities, regulatory constraints such as trade defence measures) as well as the fact that the EEA market was not a key focus for the technically capable Asian suppliers.[43]

6. Conclusions / Future outlook

51. Potential competition is a well-established dimension in the assessment of a merger's impact on competition in the Commission's case practice. It comes into play in at least three different ways: for the effect on competition of a merger with a potential competitor, for the effects of mergers on potential entrants, and for countervailing effects on mergers due to potential entrants. It also plays a central role in assessing the effects of mergers on innovation efforts.

52. Though well-established, the assessment of potential competition by its very nature carries the challenge of determining in a sufficiently reliable way more remote and uncertain effects on competition than those from existing competition. The Commission's

[40] Commission decision of 6 February 2019 in Case M.8677 – Siemens/Alstom.

[41] See in particular recitals 494-495.

[42] See recitals 492 and following.

[43] Commission decision of 11 June 2019 in Case M.8713 – *Tata Steel/ThyssenKrupp/JV*.

case practice shows that it is well-equipped to make this assessment, relying on its investigative tools to gather a detailed but broad body of evidence to support its conclusions.

53. Nevertheless, because of current global trends – notably digitisation – as well as the ever-running creation of new products and markets and the importance of protecting dynamic competition, the Commission continuously assesses and seeks to improve its analytical framework and investigative tools with the objective of accurately capturing evolving competitive dynamics.