

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

The Concept of Potential Competition – Note by Egypt

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1. Introduction

1. A competitive market must ensure that potential entry is timely, likely and sufficient for new competitors¹, in addition to easy expansion for existing competitors. This will be challenging if barriers to entry exist, as barriers would prevent potential competitors from attempting to enter the relevant market. Defining potential competition and barriers to entry and expansion are crucial since potential competition for incumbent firms in an industry changes market outcomes before or without actual entry. Potential competition is the competitive pressure from potential, as well as, existing competitors within a relevant market. Potential competition is a powerful deterrent to anticompetitive practices by existing firms, even if the industry currently has a highly concentrated structure.² Existing competition on the other hand is the competitive pressure existing on incumbent competitors from new or expanding competitors, enabling the promotion of a healthy competitive market benefitting both consumer and competitors.

2. Potential competition has the advantage of promoting a healthy relevant market, ensuring the existence of mutual pressure among rivals with comparable resources between market players, producing different products on a basis of competitive parity. Each firm has the intention to beat their competition in order to earn the highest profits, gain high efficiency and innovation levels, and increase their market share without harming effective competition.

3. The aim of this paper is to discuss the policy of the Egyptian Competition Authority (“ECA”) regarding the assessment and the role of potential competition. This will be achieved by (1) first assessing the existence of potential competition in a relevant market (2) discuss potential competition in the assessment of anticompetitive practices and (3) mergers and acquisitions.

2. Assessing potential competition in the market

2.1. The concept of potential competition

4. In general, there are three possible ways for new market entry³:
1. Market expansion by established companies by external or internal diversification into a different market,
 2. Product expansion by established companies by external or internal diversification into a different market or
 3. Start-up of a company.
5. An undertaking is considered a potential competitor if it has a concrete ability to enter the market, and does not meet any insurmountable barriers to entry. Possible new

¹ Entry Barriers, Miguel de la Mano Chief Economist Team, European Commission

² Potential competition, *A Dictionary of Economics*, John Black, Nigar Hashimzade, Gareth Myles, OUP Oxford, Jan. 22, 2009

³ OECD Roundtable on barriers to entry, Germany submission, 2005, p. 127

firms in an industry may provide competition for incumbent firms before or without their actual entry.⁴

6. Potential competition exists when a company “would be likely, on realistic grounds, to undertake the necessary additional investments or other necessary switching costs to enter the relevant product and geographic market(s) within a reasonably short period of time in response to a small and permanent increase in relative prices.”⁵ A purely theoretical possibility of entry would not suffice to sustain a finding of potential competition.⁶

7. Even absent a current presence on the market, the realistic possibility of new entry acts as a competitive constraint on existing actors⁷. For potential entry to pose this constraint, it must be quick enough to influence the conduct of incumbent competitors.⁸

8. Potential competition can be eliminated as a result of high entry/expansion legal and behavioural barriers, preventing any new competitors from entering the relevant market, which would result in the dominant firm controlling the market and creating a near-monopoly.

9. This displays how the elimination of potential competition can lead to the creation of a monopolistic market, in which the dominant undertaking controls prices and quantity of relevant products in the market, without fearing the potential competition coming from inside or outside the relevant market, which will be explored in various examples from ECA case law below.

2.2. Barriers to entry facing potential competitors

10. Barriers are all restrictions that hinder entry and have the effect of reducing or limiting competition.⁹ Barriers to entry barriers may prevent potential competitors from entering an existing market, while barriers to expansion prevent existing competitors from expanding in an existing market.

11. Barriers to entry should not necessarily prevent potential competitors from entering the market forever in order to be anticompetitive, but it is sufficient to delay the entry of new firms to have a negative impact on the market.¹⁰

12. Barriers to entry and expansion are mentioned in Article 8 of the Executive Regulations of the Egyptian Competition Law (“ECL”), as one of the criteria taken into consideration to assess dominant position, which states that:

“A person shall have an effective influence on the price of products or volume of supply in the relevant market if he has the ability to determine the price or volume

⁴ Potential Competition, L. G. Thomas III, Goizueta Business School, Atlanta, GA, USA

⁵ Commission Notice — Guidelines on the Application of Article [101TFEU] to Technology Transfer Agreements (2004) OJ C 101/02, § 67.

⁶ The Lundbeck case and the concept of potential competition, On-Topic I Concurrences N°2-2017 I Sandra Marco Colino, pp. 24-50

⁷ The Lundbeck case and the concept of potential competition, On-Topic I Concurrences N°2-2017 I Why protect potential competition? Niamh Dunne

⁸ Case T-472/13 H. Lundbeck A/S and Lundbeck Ltd v. European Commission EU:T:2016:449, par. 104

⁹ OECD - Organisation For Economic Co-operation And Development – Competition and Barriers to Entry - Policy Brief 2017

¹⁰ OECD Policy Roundtable on Barriers to Entry, 2005.

of supply of such products individually in the market without his competitors having the capacity to limit it, taking into account the following factors in particular:

The ability of the person and his/her competitors to obtain the raw materials necessary for production or to access the distribution channels.

The extent to which legal or actual restrictions affect the ability of a person's existing competitor to expand into the market in question or the ability of another person to enter that market.”

13. As mentioned in ECL and its Executive Regulations, barriers to entry may take several forms such as statutory barriers, structural barriers and strategic barriers.

14. First, statutory barriers are barriers set up in the form of laws, regulations and administrative decisions and practices.¹¹ They can take for instance the form of bureaucratic procedures to obtain government authorization to operate in a specific sector.

15. Second, structural barriers to entry usually arise from demand-related industry characteristics or resources that are imperative to the successful operation of an undertaking in a relevant market. They are related to industry conditions and the structure of the market, such as economies of scale, network effects, brand loyalty and sunk costs, and they are not generally created for the purpose of limiting entry or expansion.¹²

16. Third, strategic barriers are intentionally created by incumbent firms for the purpose of foreclosing competition by deterring new entrants or expansion of existing companies.¹³

17. Furthermore, the history of entry and exit of market players in a particular market provides useful information on the likelihood of entry occurring in a timely manner and on a sufficient scale.

18. ECA conducted a market study on steel rebar used in the construction industry to stand on the allegedly exponential price increase thereof. The study covered the period from January 2002 through December 2006.¹⁴

19. ECA established that the main reason behind the lack of competition in this key sector resides in the absence of sufficient integrated plants to compete effectively with the dominant firm and to be cost effective, hence to reduce the industry marginal cost. The study showed there was only one integrated plant (besides the dominant firm) with a market share of 0.5%; this was due to various reasons (financial, managerial and structural problems). As such, ECA conducted advocacy efforts with the Ministry of Trade and Industry to re- open licenses for new integrated plants which had been blocked for several years. Accordingly, the Ministry made a bid and awarded four new licenses in 2008.

20. In a similar vein, ECA recommended to the Ministry to ease the entry of imported steel rebar especially that the Egyptian specs seem to be tighter than other countries. Hence, the Ministry took several measures to facilitate the importation of rebar, including reducing customs tariff to zero, changing the specs, shortening the administrative procedures from 30 days to 1 day. Consequently, the amount of imports climbed in one year (2009) from 1% to 23%, prices went down from 8000 EGP per ton to less than 3100 EGP a ton and the then dominant firm decreased by 10%.

¹¹ OECD Policy Roundtable on Barriers to Entry, 2005 p. 128.

¹² OECD Policy Roundtable on Barriers to Entry, 2005 p. 129-130.

¹³ Concurrences Glossary of Competition Terms, “Barriers to Entry”.

¹⁴ Steel, study requested by Minister of Trade and Industry 16/7/2006, concluded on 27/1/2009.

21. As demonstrated, barriers to entry are considered as the main obstacle facing potential competitors, preventing them from entering a certain market, which result in anti-competitive effects in this market from the absence of potential competition or from the abuse of an undertaking taking advantage or creating barriers to entry.

3. Potential competition in the assessment of anticompetitive practices

22. Insubstantial potential competition in a market may lead to violations of ECL that may take the form of:

- An existing competitor abusing its dominant position,
- Several competitors forming anti-competitive agreements, whether being in a horizontal relation or in a vertical one.

23. These two forms of violations will be presented in details in this section.

3.1. Abuse of dominant position

24. Barriers to entry, created in a certain market, make it more costly for potential rivals to enter the market. They often lead to the exclusion of potential competitors from the market, which reduces the competitiveness in the market and decreases the consumers' welfare in result of the lack of competition in the market. Moreover, the opposite is true, when a dominant undertaking abuses its dominant position in a market; this creates barriers to entry for new competitors.

25. This was present in the Carpet Market case¹⁵, where a firm had a dominant position in the market for machine-made carpets in Egypt from 2008 to 2011, and was abusing this position by forcing distributors to deal exclusively in its products and don't distribute any of its competitors' products.

26. ECA's investigation into the dominant firm's practices revealed a number of barriers to market entry in the form of difficulties in establishing a new carpet-manufacturing factory in terms of high investment costs. The dominant firm's executives themselves stated that to establish a factory able to compete, it must have at least 20 carpet manufacturing machines with each costing 1 million euros. It should be noted that in order to create an effective factory that can compete with the dominant firm, it must have about 100 carpet fabric machines, which was an estimated cost of 850 million Egyptian Pounds at the time. In addition to that, it was difficult to obtain sophisticated and efficient carpet manufacturing machines, as they are available only in Van de Weile's machines, where the dominant firm has recognized that Van de Weile's machines are the greatest in the world.

27. In addition to the fact that these machines are manufactured on demand, it is practically difficult to obtain them in one year. At least 5 to 10 years will be required just to obtain them, as the purchase of carpet manufacturing machines is an essential factor in determining the ability of competitors to limit the impact of the dominant firm on the market in question.

28. On another note, in 2016 ECA started investigating the practices of the Confederation of African Football (CAF) concerning an unfair exclusive licensing of all marketing and media rights of the main regional football championships in Africa to Lagardere (a firm operating in content publishing, production, broadcasting, and

¹⁵ Carpet Market case, ECA, 2011

distribution, including that of football events worldwide). ECA concluded that CAF is in a dominant position, as it was the sole owner of all media and marketing rights of all African football tournaments. Hence, it had the power to license these rights to any other undertaking in a fair and competitive matter.

29. ECA's investigation revealed that CAF awarded Lagardere exclusivity over the above-mentioned rights for a total of twenty years by renewing a previous contract. ECA established that the absence of tendering procedures automatically eliminated any potential competitors from entering or remaining in the market. Moreover, the renewal mechanism embodied within the old CAF-Lagardere agreement, covering the period between 2007 until 2016, constituted by itself a barrier to entry that would automatically exclude actual or potential competition. Finally, ECA established that CAF sold all its rights related to major sports events in one single package despite the absence of any link between different tournaments and selling all media rights for the live broadcasting of these tournaments via all broadcasting outlets to one single entity, despite the absence of any natural or commercial links between the different media outlets.

30. ECA ordered firstly, the immediate termination of the CAF/Lagardere agreement within the Egyptian market and the suspension of its effects within the Egyptian territories. Secondly, an obligation on CAF to follow free open, fair and transparent tendering procedures for the award of broadcasting rights within the Egyptian market. Thirdly, an obligation on the CAF to assess the offers made by different bidders according to objective pre-set criteria. Fourthly, an obligation on the CAF to offer its broadcasting rights in several smaller (reasonable and meaningful) packages on a market-by-market base, particularly separating the sale of live TV broadcasting rights from Internet live streaming and other internet rights. In addition to 'no single buyer obligation' on packages involving valuable live rights.

31. These cases illustrate how barriers to entry could be exploited by a dominant undertaking to abuse its dominant position in a market, and how these barriers can eliminate any type of potential competition in the market.

3.2. Anticompetitive Agreements

3.2.1. Horizontal agreements

32. Horizontal agreements are agreements concluded between firms competing at the same market level. Article 6 of the ECL states that:

“Contracts or agreements between competing entities are prohibited if they may or likely to lead to:

Increase, decrease, or fix prices of products

Market allocation or portioning on the basis of geographical areas, distribution centers, customer nature, product quality, market share, seasons or time periods.

Coordinating with regard to proceeding or refraining from participating in tenders, auctions, negotiations and other calls for procurement.

Restricting the manufacturing, production, distribution or marketing operations of products, including restricting the type or size of the product, or limiting its availability”

33. Article 6 ECL has the aim to prevent anticompetitive agreements which may arise between competing persons. Thus, the concept of competing persons must be first defined

and whether it only covers actual competitors in a relevant market or extends to potential competitors/entrants in the market.

34. In this context, Article 11(2) of the Executive Regulations of ECL defines competitors as persons currently operating in the same relevant market or have the potential to enter the relevant market in the future.

35. This was confirmed and applied in the ECA's investigation of the healthcare sector, initiated in 2018. In this case, ECA established that hospitals and radiology center members of the Board of Directors of the Chamber of Health Care Providers have agreed to raise and fix contractual prices for medical services which is considered an infringement to Article 6 (1) ECL.¹⁶

36. In this case, ECA confirmed that the concept of competing persons includes persons who operate in the same relevant market or may operate in the same market in the future or, in other words, are potential competitors. A person who is not currently an existing market player but can undertake the additional investment necessary to enter the market or to shift from the market in which they operate to the market in question, in a relatively short period. Thus, hospital members of the Board of Directors of the Chamber, which currently does not have a psychiatric or ophthalmology departments, are considered as competitors to specialized hospitals.

37. Horizontal agreements, whether hardcore or non-hardcore cartels, are one of the most serious competition offences which may harm potential competition in the market. Each economic entity has to take its decisions individually, without influence by other entities, in line with the principles of free market economics, which assume that competition between different entities must be based solely on supply and demand mechanisms without influence from other competitors in the market.

38. In addition, anticompetitive horizontal agreements may have an effect of foreclosing the market and, consequently, hindering potential competition. In fact, ECA had initiated a case concerning horizontal agreements that have had a negative impact on the potential competition in the market, and could be considered as a barrier to entry hindering potential competition.

39. ECA established that Delivery Hero exercised its veto right concerning Glovo's launch of Series D investment round. Delivery Hero was able to block the investment round and condition its approval upon Glovo's exit from several geographical markets, including Egypt. Thus, the exercise of the veto right led to a Market Allocation Agreement that violates Article 6 of ECL as this agreement will result in the exit of Glovo from the Egyptian market and therefore, the remaining main market players will be Otlob and Carriage, which are two subsidiaries under Delivery Hero.

40. Glovo's exit from the Egyptian market would harm the on-demand delivery of grocery goods or related marketplace, and the online on-demand prepared food ordering and delivery service market. As the online on-demand prepared food ordering and delivery market would be deprived from an innovative and efficient supplier of online food services that has incentivized other competitors to join the race of innovation. Following the exit of Glovo, market concentration in the online on-demand food ordering and delivery market would increase tremendously. Moreover, potential entrants would be unable to present an effective challenge to Otlob and Carriage due to their strong position in the market and the high barriers that Otlob and Carriage may impose. Otlob and Carriage were in possession of a huge customers database that new market players lack, Delivery Hero had the ability

¹⁶ ECA's assessment of hospitals and radiology centre members of the Board of Directors of the Chamber of Health Care Providers, 3 September 2019.

to use its deep pockets to protect Otlob and Carriage from the threats of competition by forcing the exit of current competitors or preventing entry of potential competitors whether through acquiring their competitors, as previously experienced over the past nine years. Delivery Hero had acquired twenty companies worldwide, by predatory pricing that might be exercised on three different sides of the market: consumers, drivers, and restaurants.

41. ECA has reached the conclusion that Delivery Hero and Glovo have entered into two cartel agreements that contravened Article 6 of ECL and ordered both parties to promptly cease and desist the anti-competitive agreements which resulted in the exit of Glovo from the Egyptian market and restore the initial situation prior to the agreements; Glovo should not proceed with any liquidation proceeding and shall resume its operations in Egypt and that Glovo shall announce and resume their operations in Egypt through the same means used in announcing their exit from the Egyptian market.¹⁷

3.2.2. Vertical agreements

42. Vertical agreements are agreements concluded between firms competing on two different levels of market. Article 7 of the ECL states that “*Agreements or contracts between a Person and any of his supplier or clients are prohibited, should they intend to restrict competition.*”

43. Anticompetitive vertical agreements aim to reduce market access to actual or potential competitors, thereby increasing their costs or otherwise impairing their ability to compete. This motive is commonly referred to as foreclosure, exclusionary behavior, and raising rivals’ costs, which in turn lead to hinder potential competition¹⁸.

44. In 2008, ECA received a complaint against Ghazal studio who has taken control of all the photography and video shooting inside the luxury hotel halls in Alexandria. ECA established that contracts concluded between Ghazal studio and five-star Hotels in Alexandria had a clause that impairs the entry of other photographers in these hotels. This clause relates to an amount to be paid by the client if they wish to hire a different studio than the studio contracted to the hotel or auditorium, which constitutes a constraint to competition for the remaining photography studios in the market. Moreover, the negative effects of these agreements on competition have already been achieved with a studio already out of business after working at the Sheraton Park Hotel, one of the five-star hotels in Alexandria, and others unable to enter the market and engage in this activity.

45. ECA reached the conclusion that agreements concluded between Ghazal studio and five-star Hotels in Alexandria constitutes a violation to Article 7 of the ECL and ordered the immediate termination of the mentioned violations.

4. Potential competition in the assessment of merger and acquisitions

46. Article 19 of the ECL imposes an obligation for any undertaking with the turnover of at least 100 million Egyptian pounds to notify ECA upon their acquisition of assets, proprietary or usufructuary rights, shares, establishment of unions, mergers, amalgamations, appropriations, or joint management of two or more persons.

¹⁷ ECA’s assessment of anti-competitive agreements between Glovoapp23, S.L. and Delivery Hero SE, June 2019

¹⁸vincent Verouden, Vertical Agreements: Motivation and Impact, 2008. retrieved from: https://ec.europa.eu/dgs/competition/economist/vertical_agreements.pdf

47. In this context, ECA may find it necessary to intervene, under Articles 6, 7, and/or 8 of ECL, in cases where mergers or acquisitions may lead to irreversible harm to competition, mainly through the creation of a non-contestable dominant position¹⁹.

48. Potential competition is relevant in assessing any potential merger, which might substantially lessen competition where, absent the merger, entry or expansion by either or both merging firms may have resulted in new or increased competition between them.

49. Existing firms and potential competitors can interact in an ongoing dynamic competitive process, and a merger could lead to a loss of dynamic competition. Firms that are exerting effort or investment that may eventually lead to their entry or expansion will do so based on the opportunity to increase their sales and earn higher profits. Incumbent firms that are exerting efforts to improve their own competitive offering may do so to mitigate the risk of losing future profits to potential entrants. In this sense, potential entrants can be thought of as dynamic competitors, even before they effectively enter and commence supplying customers. A merger may reduce the incentives of dynamic competitors to continue with efforts to enter or expand, or the incentive of incumbent firms to mitigate the threat of future rival entry or expansion. The impact of such a reduction in efforts would affect customers in the present, rather than solely from a future point in time when entry or expansion may occur.

50. This was evident in the case of Uber/Careem, where ECA found that the transaction may have anti-competitive effects on the entry of potential competitors as Uber has previously taken measures where entrants may foresee difficulty of entering and remaining in the market. Entry was also unlikely if there is existing brand loyalty or if the post-transaction entity has superior technology. Moreover, even if potential competitors succeed in entering the market and raising capital, “some experience advantages cannot be replicated through accelerated spending programs by late entrants”²⁰. Customers may remain loyal to Uber and Careem brands, especially given current plans to maintain both brands separately. The post-transaction entity will have an advantage on the market, as the acquirer is the first-mover incumbent, which can constitute a barrier to entry for potential entrants, as it may minimize their ability to access funds.²¹

51. Also, ride-hailing platforms may also target drivers who do not own cars by offering them facilitations to purchase new cars. Drivers who obtain such facilitations are more likely UberX full-time drivers and are hence frequent users of the platform. This creates an attractive target for ride-hailing platforms. They form a significant portion of Uber drivers, which do not own the vehicles they operate. Hence, if a new entrant cannot offer drivers that do not own cars similar advantages, it is unlikely that they will consider joining the platform.

52. Furthermore, for drivers who do not own vehicles and want to join the Car-leasing program, they must meet the “Partner Drivers Application Referral Criteria”. One aspect of the criteria is for the driver to be eligible, is to complete a required number of trips with Uber. The number of trips is excessive that drivers who work de facto exclusively with Uber can only meet it. This exclusivity creates a barrier to entry for potential entrants

¹⁹ OECD, Merger control in dynamic markets – contribution from Egypt. retrieved from: [https://one.oecd.org/document/DAF/COMP/GF/WD\(2019\)22/en/pdf?_ga=2.191458799.41852381.1621449619-122853464.1621449616](https://one.oecd.org/document/DAF/COMP/GF/WD(2019)22/en/pdf?_ga=2.191458799.41852381.1621449619-122853464.1621449616)

²⁰ Kathryn Rudie Harrigan, Strategic Flexibility and Competition Advantage, Oxford Research Encyclopedia of Business and Management, 2017, p. 16.

²¹ European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004/C 31/03, 5 February 2004, §71.

seeking to recruit drivers who do not own vehicles. Without having similar advantageous exclusive deals to offer, potential entrants will find it difficult to operate on the market and compete effectively.

53. Additionally, data can amount as a barrier to entry when a competitor has exclusive control over certain types of data necessary for competition on the market. In the ride-hailing market, data may act as an entry barrier to new entrants if they are unable to replicate or access as more users are induced to use the ride-hailing platform. The amount of time and money required for new entrants to be able to accumulate an adequate amount of data, given the significance of the barriers mentioned throughout this section, in particular those related to investment costs and access to capital, may deter potential competition.

54. Finally, ECA's assessment of actual regional players and potential regional and international players has shown that there is little chance they would enter the market of app-hailed passenger vehicles, absent adequate commitments regarding the barriers to entry above. Therefore, ECA found that the ride-hailing market currently presents a number of significant barriers to entry and expansion. Potential entrants may face barriers due to the lack of short-term profitability on the market; the requirements and costs of building and managing a network; the difficulty of accessing funds and of attracting drivers and vehicles; the difficulty of overcoming brand loyalty; and the importance of access to data.

55. The Parties presented ECA with a number of commitments, specifically to address merger-specific barriers to entry. In particular, Uber shall grant access to mapping data and access to user data for new entrants. This is in order to facilitate riders to port their data to alternative ridesharing suppliers. Uber shall continue to grant riders access to their data and that Uber shall use commercially reasonable best efforts to expand the scope of data that riders can download and port to a competitor within one year of the Completion Date. Moreover, Uber shall grant access to trip data by one-time access to a Ridesharing Services Provider upon the latter's request to the following data dating from the 12 months preceding such a request for the purpose of training algorithms for matching riders and drivers. Finally, the maintenance of multiple brands to ensure that riders are not confused into thinking that Uber and Careem are independent after the Completion Date, by amending Careem's branding in Egypt to make it clear that Uber and Careem are Affiliated Undertakings.

56. Given the impact mergers and acquisitions can have on any given market which was clear in the Uber/ Careem case, the Egyptian Government in November 2020 approved the Prime Minister's draft law introducing an ex ante merger control regime in the Egyptian Competition Law.

5. Conclusion

57. ECA's policy on potential competition and the importance of ensuring its existence in any relevant market, was established in reference to the existence of barriers to entry in the relevant market as well as the violations to the ECL and how they impact or are impacted by potential competition or its lack of existence. In particular, anticompetitive agreements and abuse of dominant position could directly influence potential competition in a relevant market. Mergers and acquisitions need to be assessed in light of potential competition in that market and how this market will be influenced post-transaction.

58. This resulted in the concept of potential competition being a vital point in properly assessing any violation of the ECL. Assessing potential competition is an essential cornerstone of ensuring a healthy competitive market and that is what ECA is keen to ensure in its enforcement policy.