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The Concept of Potential Competition – Note by Niamh Dunne

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Potential Competition in EU Law[*]

1. This short note addresses the concept of potential competition as it has been developed in recent jurisprudence of the Court of Justice of the European Union, specifically in relation to Articles 101 and 102 TFEU. Potential competition, for these purposes, refers to the extent to which the business activities of, or the impact of allegedly anticompetitive conduct upon, "an undertaking that is not present in a market" can and should be taken into account when assessing the behaviour of "undertakings that are already present in that market" under the EU competition rules.[2] While the case-law makes a clear distinction from actual competition, this understanding of potential competition emphasises its role as an existing source of competitive constraint on the behaviour of undertakings operating in the relevant market. What the Background Paper for this Roundtable refers to as "actual potential competition"[3] has received less attention in the Article 101/102 jurisprudence, although potential competition is considered over a longer time horizon in the context of the EU Merger Control Regulation.[4] The Court's treatment of potential competition nonetheless provides a useful overview of considerations that may inform the assessment of both perceived *and* actual potential competition in practice.

2. The relevance of potential competition from a competition law perspective stems, very simply, from the dynamic nature of the competition process.[5] In most markets, it is not merely the existing and established players that may impose competitive constraints upon each other, or which can drive welfare-enhancing rivalry. New entrants may bring competing products to the market, thus challenging the market shares of incumbents. Or consumer preferences may shift to quite different products that turn out to be largely substitutable from a demand perspective.[6] Competitive pressure exerted by undertakings not currently within the same relevant market may be important when considering whether coordinated behaviour can be said to have an appreciable negative effect on competition, or whether an undertaking holds significant market power, or whether unilateral conduct is likely to damage the competitive structure of a market. Extending the reach of the competition rules to the protection of potential competition is important precisely because it is the precursor to enhanced actual competition: "if it were permissible to halt or delay future entrants' preparation for market entry…that potential competition could never come

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[2] Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority* EU:C:2020:52, para.36.

[3] Namely, sources of potential competition that are not yet constraining the incumbent's behaviour but are expected to do so: see *Roundtable on the Concept of Potential Competition—Background Note by the Secretariat*, DAF/COMP(2021)3, para.11.

[4] Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L 24/1, 29.1.2004).

[5] A point made by the Commission in its *Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (OJ C 45/7, 24.2.2009), para.16.

[6] An interesting example can be found in Case C-179/16 *Hoffmann-La Roche and Novartis* EU:C:2018:25, where off-label prescribing of a cancer drug to treat macular degeneration brought that medicine into competition with the—far more expensive—leading treatment in the macular degeneration field. This prompted collusive lobbying efforts by the licensees of both medicines to seek to have regulators prohibit such off-label use.

into existence by those operators entering the market."[7] Indeed, as early as the US Supreme Court's decision in *Standard Oil*, the Court construed the anticompetitive conduct at issue, a violation of both §1 and §2 of the Sherman Act, as an effort "to destroy the 'potentiality of competition' which otherwise would have existed".[8]

3. As the Background Paper notes, however, there is an important distinction between potential competition and simple speculation.[9] The fact that it is conceivable that some rival might build a better mousetrap and thereby challenge the market position of incumbents in future is irrelevant to the antitrust assessment of behaviour occurring within that market today, if such a prospect is unlikely to actually materialise in the medium term at least. Where the recent jurisprudence of the Court Justice is particularly useful, therefore, is in terms of articulating a clear standard for potential competition as a *legally* relevant concept, alongside identifying factors that can inform the determination of whether that standard is met on the facts.

4. As a preliminary point, it is worth noting that EU competition law has long recognised the importance of protecting "the structure of the market and, in so doing, competition as such," beyond merely protecting "the interests of [existing] competitors or of consumers".[10] Implicit protection for potential competition might thus be found in the objective focus of Article 102 on behaviour that degrades the structure of a market,[11] and which has the capacity to foreclose efficient competing sources of supply without a need to demonstrate that actual rivals have in fact been excluded.[12] The *AKZO* test for predatory pricing,[13] alongside the more recently developed "as-efficient competitor" (AEC) standard for the assessment of other pricing abuses,[14] both evaluate the acceptability of a dominant firm's conduct by reference to its own costs and revenues.[15] In doing so, Article 102 seeks to identify and avoid situations where unilateral conduct is capable of harming or limiting socially beneficial competition, regardless of whether this already exists in a market or would otherwise have the potential to develop over time. The recognised exception for protection of less efficient competitors in certain circumstances[16] also aligns with a commitment to potential competition: in markets where a dominant undertaking is already present, there are typically substantial barriers to entry, meaning that competition law needs to be particularly sensitive to additional behavioural barriers created by a defendant's conduct.[17]

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[7] Opinion of Advocate General Kokott in Case C-307/18 *Generics (UK) Ltd and Others v Competition and Markets Authority* EU:C:2020:28, para.76.

[8] *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), 74.

[9] Background paper, fn.2 above, para.28.

[10] Case C-501/06 P *GlaxoSmithKline* EU:C:2009:610, para.63.

[11] *Generics*, paras.147-48.

[12] Case C-413/14 P *Intel* EU:C:2017:632, paras.138-40.

[13] Case C-62/86 *AKZO* EU:C:1991:286, paras.70-72.

[14] See *Enforcement Priorities*, fn.4 above, paras.23-27, and Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* EU:C:2011:83, paras.31-33.

[15] *TeliaSonera*, paras.41-44; and Case C-209/10 *Post Danmark I* EU:C:2012:172, para.28.

[16] *Enforcement Priorities*, fn.4 above, para.24.

[17] The *Enforcement Priorities*, fn.4 above, para.24, lists network and learning effects; in Case C-23/14 *Post Danmark II* EU:C:2015:651, para.60, the Court identified high barriers potentially

5. The more recent and directly focused case-law on potential competition has arisen primarily in the context of Article 101, and more specifically, involves reverse payment settlements (also known as "pay-to-delay" agreements) in the pharmaceutical sector. In two Court of Justice decisions—the first a preliminary ruling in *Generics* in January 2020, the second confirming the Commission's infringement decision in *Lundbeck* in March 2021[18]—plus two thoughtful Opinions both written by Advocate General Kokott,[19] the Court expounded on potential competition as it relates to the assessment of anticompetitive coordination. In *Generics*, it also touched upon its application to unilateral conduct. Reverse payment settlements typically occur when a proprietary medicine is coming off patent.[20] This period is heavily regulated under EU law to facilitate speedy authorisation and thus easier entry of generic competitors.[21] Reverse payment settlements involve the transfer of value from an originator to a prospective generic rival, in consideration for the latter delaying or abandoning its proposed entry. Such settlements often arise in the context of patent litigation, where the originator claims that the generic product infringes its existing intellectual property (IP) rights,[22] and/or the prospective entrant challenges the validity of any outstanding rights. The antitrust treatment of such agreements raises contentious questions about the interaction between IP and competition law.[23] Of more central relevance for our purposes, however, is the extent to which such cases turn upon the significance of potential competition: since the originator and proposed generic entrant do not currently compete within the same relevant market, to what extent does an agreement to settle litigation on terms that effectively preclude entry in future restrict competition as such?

6. It is well-established that the prohibition in Article 101 extends to anticompetitive coordination that may "influence the conduct on the market of an actual *or potential* competitor".[24] In *Generics*, the Court of Justice thus acknowledged as a threshold requirement for the application of Article 101 to horizontal cooperation agreements that, "the coordination involves undertakings who are in competition with each other, if not in

justifying protection of a less efficient competitor where the dominant firm was publicly-owned and retained a statutory monopoly in certain market segments.

[18] Case C-591/16 P *Lundbeck* EU:C:2021:243, upholding the judgment in Case T-472/13 *Lundbeck* EU:T:2016:449, and the decision in Case AT/39226—*Lundbeck*, Decision of 19 June 2013.

[19] Opinion in *Generics*, and Opinion of Advocate General Kokott in Case C-591/16 P *Lundbeck* EU:C:2020:428.

[20] The topic was the subject of a June 2014 OECD Roundtable on *Generic pharmaceuticals and competition*, see https://www.oecd.org/daf/competition/generic-pharmaceuticals-competition.htm (last accessed 9 May 2021).

[21] Further information on the truncated process for authorising generic entry can be found on the website of the European Medicines Agency, "Generic and hybrid medicines," see https://www.ema.europa.eu/en/human-regulatory/marketing-authorisation/generic-hybrid-medicines (last accessed 9 May 2021).

[22] Often a process patent after the active ingredient patent has expired, as was the case in both *Generics* and *Lundbeck*.

[23] Advocate General Kokott opened her Opinion in *Lundbeck*, para.1, by noting, "A certain degree of tension is often inevitable between competition and intellectual property rights…"

[24] Case C-40/73 *Suiker Unie* EU:C:1975:174, para.174 (emphasis added); see also Joined Cases T-374/94 etc. *European Night Services* EU:T:1998:198, para.137; and Case T-461/07 *Visa Europe and Visa International Service* EU:T:2011:181, para.68.

reality, then at least potentially."[25] The basic test for whether such potential competition exists is whether an undertaking not already present in the relevant market has "real and concrete possibilities…to enter that market and compete with the undertakings established in that market.".[26] The Court pitched this criterion of "real and concrete possibilities" somewhere above the standard of a mere hypothetical chance, but considerably below that of a guaranteed certainty of entry:

> *Such a criterion means that there can be no finding of a potential competitive relationship as an inference merely from the purely hypothetical possibility of such entry or even from the mere wish or desire of the manufacturer of generic medicines to enter the market. Conversely, there is no requirement that it must be demonstrated with certainty that that manufacturer will in fact enter the market concerned and, a fortiori, that it will be capable, thereafter, of retaining its place there.*[27]

7. Accordingly, simply *speculation* is insufficient; but demonstrating something akin to *actual* competition is not required.

8. The complication, of course, is how and where to draw the line between these poles. In line with its more general embrace of a context-specific, effects-attuned approach to competition assessment,[28] the Court of Justice in *Generics* grounded the determination of whether potential competition exists in an assessment of "the structure of the market and the economic and legal context in which it operates."[29] In the context of the preliminary ruling procedure, the Court in *Generics* was not empowered to rule definitively on the existence or otherwise of potential competition in the domestic action, though it confirmed the Commission's findings in this respect in *Lundbeck*. The two cases taken together nonetheless provide us with a useful checklist of factors that may inform the case-by-case determination of whether potential competition can be said to exist.

9. First, potential competition requires it to be demonstrated that the prospective rival has an "**inherent ability**"[30] to enter the relevant market. This has been described as "the essential factor on which categorisation as a potential competitor must be based,"[31] although the recent jurisprudence does not expressly endorse this claimed priority. An undertaking's ability to enter hinges on two considerations: whether the potential entrant

[25] *Generics*, para.32; also *Lundbeck*, para.53.

[26] *Generics*, para.37; endorsed in *Lundbeck*, para.55. This legal test has its origins in Case C-234/89 *Stergios Delimitis v Henninger Bräu* EU:C:1991:91, para.21, where the Court spoke of "real concrete possibilities" of new entry as the standard to assess whether a series of exclusive dealing contracts might have the effect of foreclosing competition to an appreciable extent contrary to Article 101(1).

[27] *Generics*, para.38

[28] As reflected, *inter alia*, in the judgments in *Intel*, para.139, and Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank* EU:C:2020:265, para.51.

[29] *Generics*, para.39.

[30] *Generics*, para.54; followed in *Lundbeck*, para.56.

[31] Opinion in *Generics*, para.59, following the approach *inter alia* in Case T-370/09 *GDF Suez* EU:T:2012:333, para.84.

would face "insurmountable" barriers to entry,[32] and what preparatory steps if any it has already taken in planning for its anticipated entry.[33]

10. The issue of barriers to entry is dealt with extensively in the literature,[34] and an incredibly broad range are recognised within the EU competition jurisprudence. What is pivotal here is that any relevant barrier is insurmountable in the sense of presenting an intractable obstacle to the new entry anticipated by the potential entrant: even if the stars otherwise align in terms of the would-be rival's own preparations for entry, it is simply impossible on the facts. This is a demanding threshold. In both *Generics* and *Lundbeck*, the fact that patent infringement litigation stood in the path of lawful entry—claims in respect of which, it was acknowledged, the patent-holder might ultimately prevail—was not considered to pose insurmountable barriers to entry in a sector where such litigation was commonplace and wholly consistent with "competition on the merits". In *Toshiba*, defendant undertakings located in Asia had no experience of or established markets for the sale of power transformer equipment to clients located in the EU/EEA. But this was similarly no bar to their characterisation as potential competitors of European producers participating in the same market-sharing cartel, on the basis that a mere absence of existing sales practice was hardly an insurmountable obstacle to entry.[35]

11. Conversely, in *E.ON/GDF Suez*, also involving a market-sharing cartel, the existence of national monopolies that prohibited free competition within each defendant's home market—a legal monopoly in France, *de facto* monopoly in Germany—was considered to have the effect of negating any potential competition between them.[36] Even in the absence of the outwardly blatant non-compete agreement, competition within domestic gas markets was practically impossible: meaning that the ostensible cartel merely confirmed rather than constituted the restriction of competition. Once the respective markets opened to competition, however, the defendants could be classified as potential competitors, so that the choice to continue with the market-sharing arrangement became a "by object" violation of Article 101.[37] On the other hand, the fact that the newly-liberalised German gas regime contained no express provision for granting third-party access, although presenting a barrier to entry, did not "imply that access is totally impossible".[38] As such potential competition could exist even in its absence.[39]

12. The question of preparatory steps is more personal, related to the specific efforts that have been taken by a potential rival in furtherance of its anticipated entry into the relevant market. In her Opinion in *Lundbeck*, Advocate General Kokott identified three categories of potential steps that might be taken, encompassing efforts "in administrative, judicial and commercial terms".[40] Administrative efforts refer, in effect, to any regulatory requirements that must be completed before a product can lawfully be brought to market.

[32] *Generics*, para.45.

[33] *Generics*, paras.43-44.

[34] Including, with specific reference to potential competition, the Background Paper to this Roundtable, fn.2 above.

[35] Case C-373/14 P *Toshiba Corporation* EU:C:2016:26, para.32.

[36] *GDF Suez*, paras.86-106.

[37] Ibid, paras.163-79.

[38] Ibid, para.109.

[39] Ibid, paras.108-11.

[40] Opinion in *Lundbeck*, para.78.

In the context of generic medicines in the EU, there is a requirement of market authorisation to sell chemically identical versions of a licensed proprietary product. Other administrative efforts might include securing approval as a service-provider by a public or industry body or ensuring that a product complies with required industry standards or qualifies for a quality mark. Judicial efforts, in the specific context of the pharmaceutical sector, refer primarily to patent litigation: whether to challenge outstanding process patents, or to defend an action intended to obstruct at-risk entry. Litigation of this sort is "part of normal competition in sectors where exclusive rights to technologies exist,"[41] and thus can provide evidence of a potential entrant's seriousness of purpose. In other sectors, however, it would perhaps be the exception rather than the norm. Finally, commercial efforts encompass any practical steps taken by the potential entrant to prepare to bring its product to market. This could include a vast range of activities, from finding premises, to employing staff, manufacturing or acquiring stock, setting up a distribution network or planning an advertising campaign.

13. An absence of substantial barriers to entry indicates that entry is possible in principle; evidence of actual preparatory steps taken by an identified prospective rival confirms that entry is feasible in practice. The emphasis in recent case-law on individual efforts towards entry, and not merely the abstract question of the possibility of entry by any suitably situated would-be challenger, suggests that the concept of "potential competition" as currently envisaged in EU law is primarily a question of *existing* competitive constraints. Thus, potential competition in this sense is something "exerted"[42] by defined undertakings, rather than existing as a mere background possibility with a market. In this regard, the concept may be narrower than that utilised in the merger control context, where the definition of a potential competitor encompasses both prospective rivals that "already exert a significant constraining influence" on the other merging party *and* where there is "a significant likelihood that it would grow into an effective competitive force".[43]

14. Second, potential competition in the sense recognised in the *Generics* and *Lundbeck* rulings is premised upon the existence of a "**firm intention**"[44] on the part of the identified potential rival to enter the relevant market. Intention to enter was not afforded much attention in earlier case-law, which focused primarily on the question whether entry was practically possible.[45] In *Generics*, however, the Court placed demonstrable intention to enter on a par with ability to do so, again suggesting that the *legally pertinent* concept of potential competition revolves around discernible competitive constraints. Such intention is evidenced, most obviously, by preparatory steps along the lines of those discussed immediately above.[46] One can reasonably assume that an undertaking that has devoted significant time and resources to exploring and developing the possibility of market entry has a genuine interest in doing so—even if, as discussed further below, the likelihood of following through successfully cannot be established unconditionally. Conversely, an absence of such efforts suggests that even a declared ambition to enter remains a "mere

[41] Opinion in *Lundbeck*, para.127.

[42] According the Court in *Lundbeck*, para.85.

[43] European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (OJ C 31/5, 05/02/2004), para.60.

[44] *Generics*, para.54; followed in *Lundbeck*, para.56.

[45] See, e.g., *GDF Suez*, para.84.

[46] *Generics*, para.43-44.

hypothesis,"[47] thus falling below the standard of "real and concrete possibilities" required by the case-law.[48]

15. Unlike ability, intention to enter cannot however be construed as an *essential* component of the potential competition concept. This is clear from *Toshiba*, where the Asia-based defendants' claims that they had no interest even in attempting entry into markets in Europe provided no defence to the Commission's holding that the market-sharing cartel restricted potential competition.[49] Yet a focus on intention to enter makes sense at least to the extent that potential competition is understood to denote something more than a mere absence of barriers to entry into the market concerned. Notably, the Horizontal Merger Guidelines similarly list the existence of any "[e]vidence that a potential competitor has plans to enter a market in a significant way" as the most immediately relevant consideration when determining whether a merger involving a possible future rival should be classified as a horizontal merger as such.[50]

16. Third, the anticipated **timeframe** of new entry must be "within such a period as would impose competitive pressure"[51] on existing players in the relevant market. Just how short or long a period this might be is unspecified, although in her *Generics* Opinion, Advocate General Kokott argued that entry must "occur with sufficient speed to form a competitive constraint on market participants."[52] She clarified, however, that "that does not mean that entry must be capable of taking place immediately; it is sufficient if it can take place within a reasonable period."[53] The Court in *Lundbeck*, moreover, held that competitive pressure may be exerted by potential new entrants before lawful entry is possible, where prospective rivals are gearing up for entry in anticipation of market opening.[54]

17. The implication is that this must, ultimately, be a fact-specific determination. We can nonetheless try to understand the meaning of a "reasonable" time period by reference to guidance provided by the European Commission in other areas. In the context of its Horizontal Merger Guidelines, the Commission suggested that the likelihood of new entry into a post-merger marketplace could be considered a "sufficient competitive constraint"[55] only if it occurred within a "timely" fashion, defined as "normally…within two year".[56] Conversely, in the rather different context of its Market Definition Notice, the Commission specified that supply-side substitutability could be considered to exert a sufficient "disciplinary effect on the competitive behaviour of…companies" only where suppliers could "switch production to the relevant products and market them *in the short term* without incurring significant additional costs or risks in response to small and permanent changes

[47] *Visa Europe*, para.167.

[48] See fn.25 above.

[49] Case COMP/39.129—*Power Transformers*, Decision of 7 October 2009, paras.165-68.

[50] *Horizontal Merger Guidelines*, fn.42 above, para.60.

[51] *Generics*, para.43.

[52] Opinion in *Generics*, para.90.

[53] Ibid.

[54] *Lundbeck*, para.85.

[55] *Horizontal Merger Guidelines*, fn.42 above, para.68.

[56] Ibid, para.74.

in relative prices."[57] In *Generics*, Advocate General Kokott acknowledged that questions of potential competition and supply-side substitutability thus overlap in part. Yet they differ insofar as the latter requires, in essence, a possibility of *immediate* new entry by the prospective competitor, whereas potential competition can exist and function as a relevant competitive constraint even if it fails to materialise in the short term.[58]

18. Fourth, the "**perception**"[59] of current players in the market as to whether a competitive relationship exists with the potential entrant can be taken into account as a validating factor.[60] Specifically, the question is the *perceived risk* posed by the prospective new entrant to the commercial interests of the established operators.[61] The rationale for taking account of such an inherently subjective criterion in the context of the otherwise objective assessment under Article 101 is the extent to which even perception of risk can impact upon incumbents' competitive strategies.[62] Accordingly, perception of risk is assessed at the time the allegedly anticompetitive behaviour occurred.[63] Importantly, however, the Court stresses that subjective perception is a supporting rather than a "decisive" consideration, functioning only to *confirm* the existence of potential competition provided that this finding is supported by other factors as outlined above.[64]

19. *Lundbeck* suggests that any contemporaneous documentary evidence may be relevant to establish the parties' subjective perception of the competition dynamics in the market concerned.[65] Yet the strongest available evidence on the facts of both *Generics*[66] and *Lundbeck*,[67] and indeed in the earlier case of *Toshiba*,[68] was the very existence of the allegedly restrictive agreements. A potential criticism here is the circular nature of this approach: the fact of concluding the agreement serves to confirm the presence of potential competition, which in turn justifies the classification of the arrangement itself as *anti*competitive in character. Yet as a matter of common sense, it is hard to deny the instinctive and pragmatic appeal of this argument. While competition law should avoid the dangers of "there's no smoke without fire"-style reasoning, it is undeniable that the fact of concluding an agreement intended precisely to keep a claimed would-be competitor out of the market tends to suggest that that undertaking is viewed as at least a potential competitive threat by the counterparty.

20. The complication in the pharmaceutical cases is the background context of patent litigation, and the acknowledged entitlement of rights-holders to settle on mutually advantageous terms should they choose to do so. The recent case-law addresses this

[57] *Commission Notice on the definition of relevant market for the purposes of Community competition law* (OJ C 372/5, 9.12.1997), para.20 (emphasis added).

[58] Opinion in *Generics*, para.234.

[59] *Generics*, para.42, endorsing the approach of AG Kokott in her Opinion in *Generics*, para.60.

[60] *Generics*, para.54; Lundbeck, para.76.

[61] *Generics*, para.57, and Opinion in *Lundbeck*, para.79.

[62] *Generics*, para.57.

[63] Opinion in *Lundbeck*, para.86.

[64] *Lundbeck*, para.74.

[65] Opinion in *Lundbeck*, para.86.

[66] *Generics*, para.55.

[67] *Lundbeck*, para.78.

[68] *Toshiba*, para.33.

problem by scrutinising any transfer of value by the patent-holder to its claimed potential competitor, to determine whether there is an "explanation other than the commercial interest of the parties to that agreement not to engage in competition on the merits."[69] Accordingly, the mere fact of entering into a reverse payment settlement is not evidence in itself of a restriction of potential competition; but unduly generous terms can raise a legitimate suspicion that the rights-holder is paying off its anticipated future rival.

21. Finally, the case-law highlights the fact of continuing **uncertainty about entry** as the key distinction between actual and potential competition. The defendants in *Generics* and *Lundbeck* each argued that, because underlying patent litigation had not reached a final determination on the merits and might instead conclude that prospective generic competitors could not enter the relevant markets legally, this should function as a bar to any finding of potential competition. In both cases the suggestion was rejected, however, with the Court holding that the continuing existence of some uncertainty as to how competition might play out in the relevant markets in future did not negate the prospective generic entrants' status as potential competitors.[70]

22. This linked, in part, to the nature of competition in pharmaceutical markets, where patent litigation and at-risk entry are common features. Yet the more universally relevant justification was a recognition of the distinction between actual and potential competition.[71] Requiring the same certainty to establish potential competition—an inherently prospective, contingent concept—as to establish actual competition would absorb the former into the latter concept: making any demonstration of potential competition dependent upon showing that it definitely would materialise, and perhaps even that it already had done so. This would place an unduly heavy evidentiary burden on enforcers in many instances; in situations like *Generics* and *Lundbeck*, where the suspect behaviour was designed precisely to prevent potential competition from materialising, it might even prove impossible in practice. As contemporary competition enforcement moves away from a paralysing preoccupation with Type I errors, the greater flexibility implicit in the potential competition concept may provide a useful avenue along which to develop a more forward-looking dynamic approach to assessment.

23. Relatedly, the Court in *Lundbeck* clarified that the question whether an undertaking was a potential competitor was judged by reference to the circumstances and state of knowledge that existed at the time when the alleged anticompetitive conduct occurred.[72] Any *subsequent* events that might make it less likely that putative potential competition would crystalise into actual competition in future—in *Lundbeck*, these were patent rulings in the originator's favour—were irrelevant, insofar as such developments were "not capable of having influenced [the defendants'] conduct on the market and, therefore, of shedding light on the existence of a competitive relationship between the undertakings concerned at the time".[73] The issue, accordingly, is whether the defendants are motivated to act in a manner calculated to restrict foreseeable future competition, even if it is not entirely certain that such efforts are needed to secure the benefits of a quiet life. In this regard, the approach to potential competition under Article 101 again aligns with the evolving legal standard for abuse of dominance under Article 102. This, as noted, turns on the capability of unilateral

[69] *Generics*, para.90; followed in *Lundbeck*, para.114-15.

[70] *Generics*, paras.51 & 100; *Lundbeck*, para.63.

[71] *Lundbeck*, para.63.

[72] *Lundbeck*, para.68.

[73] *Lundbeck*, para.69. See also the useful discussion of the Advocate General of this point in her Opinion in *Lundbeck*, paras.82-92.

practices to foreclose efficient competition[74]—which may be quite different from the question whether those practices do so in fact.[75]

24. Lastly, it is worth considering the likely and conceivable breadth of the potential competition concept as it develops going forward. *Generics*, *Lundbeck* and indeed *Toshiba* beforehand all involved agreements which had the putative potential competitor as an identified counterparty. In the three cases, moreover, the undertakings concerned were clearly capable of operating in the product markets concerned, even if they did not yet compete within the specific relevant market at the time the suspect agreements were concluded. As such these entities were obvious candidates for potential competitor status; instead, the disagreement in the cases was whether the claimed potential competition could and would crystalise into actual competition in the absence of the agreements at issue. In *Generics*, the Court confirmed that this logic extends to abusive unilateral conduct by dominant undertakings, where efforts to exclude potential competitors involve "practices that fall outside the scope of competition on the merits,"[76] including pay-to-delay agreements with would-be new entrants.[77]

25. A less clear-cut question is the extent to which harm to potential competition is cognisable under Articles 101 and 102 in circumstances where the potential competitor is not directly involved in these "non-normal" methods of competition. As noted, the legal test established in *Generics* and endorsed in *Lundbeck* is premised upon showing that the potential competitor "has in fact a firm intention and an inherent ability to entry the market".[78] This suggests that not only must any claimed potential competitor be identifiable, but also it must be possible to probe their attributes and motivation. Yet the test articulated in *Generics* was pitched to the specific context of reverse payment settlements in the pharmaceutical sector, which is precisely the context in which it was adopted and applied in *Lundbeck*. It remains perfectly possible that a rather looser test might be applied in circumstances where, for instance, the defendants collude to exclude potential competition from third parties, or where wholly unilateral dominant conduct has a negative impact on potential competitors. Indeed, as suggested above, the latter is arguably already accommodated within the AEC test.

26. It is noteworthy, therefore, that the "real and concrete possibilities" standard is an off-shoot of the more generally-applicable "by effects" assessment standard for Article 101(1) developed in *Delimitis*.[79] This provides a valuable reminder that, ultimately, the protection of potential competition is merely an aspect of EU competition law's broader

[74] See fn.11 above.

[75] A criticism levelled at the Grand Chamber judgment in *Intel* (albeit by a former counsel for the defendant!) is that the legal test was framed entirely in terms of *likely* anticompetitive effects, in circumstances where the claimed breach was terminated more than four years before the infringement decision, and more than a decade before the case reached the higher EU court: see James Venit, "The judgment of the European Court of Justice in Intel v Commission: a procedural answer to a substantive question?" 13 *European Competition Journal* 172 (2017), 195-96. The explanation, perhaps, is that a defendant should not be absolved of liability for inherently risky behaviour from a consumer welfare perspective even if their anticompetitive efforts failed to reach fruition.

[76] *Generics*, para.152.

[77] *Generics*, paras.156-57.

[78] *Generics*, para.58; followed in *Lundbeck*, para.56.

[79] See fn.25 above.

task of ensuring "the maintenance of effective competition within the internal market".[80] Drawing artificial distinctions between actual and potential competition may thus be counterproductive longer term. What is key, instead, is to develop a flexible approach to potential competition, which exceeds the realm of mere hypothesis yet does not demand the absolute certitude of showing existing competition within the same relevant market. Ultimately, this requires a case-by-case determination, albeit one inevitably shaped by the jurisprudence discussed above.

[80] Opinion in *Generics*, para.246.