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The concept of potential competition – Summaries of contributions

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This document reproduces summaries of contributions submitted for Item 1 of the 135th OECD Competition Committee meeting on 9-11 June 2021.

More documentation related to this discussion can be found at https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm

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BIAC

The current debate regarding the nature of potential competition, particularly in relation to innovative markets, has gained significant attention. In this submission, certain principles which ought to be considered in the context of "potential competition" are emphasized. These include, amongst others:

- While acknowledging that one cannot remove subjectivity or discretion entirely, it is imperative that competition law rules are developed and enforced in an objective and evidence-based manner. The law must remain clear, certain and capable of being transparently applied. Good competition law principles require a transparent and economically sound structural approach to analyzing the effects of mergers.
- Proposals to assess "market power" in the absence of defining "relevant markets" would represent a serious departure from established and accepted norms of competition analysis and could introduce a risk of conjecture in the assessment of potential competition.
- Significant reforms such as lowering the standard of proof or reversing the burden of proof should only be considered where the economic evidence clearly supports such a significant change in the rights of the parties and where such changes are likely to lead to more predictable and objective outcomes. Otherwise, there is a material risk that decisions will be based on perception, bias, or other factors divorced from sound economic analysis.
- There is clearly a balance to be struck between static market analysis and blanket prohibitions. This balance is best struck using a case-by-case, economically sound, evidence-based, competitive effects approach.
- While it may be politically attractive to suggest that authorities be more confident in taking speculative decisions, the impact on the investment climate should not be ignored. Merger regimes where risks are harder to assess will affect investment decisions. Investment capital will tend to flow to those jurisdictions where business and legal certainty is higher.

In summary, the assessment of potential competition in merger analysis is not novel. While agencies are encouraged to better understand complex and dynamic markets (as many have done or are actively doing), objective and evidence-based decision remains critical to ensuring continued, respected review processes. Before "rules" are changed, clear and compelling justifications are required in order to demonstrate that the current processes and rules are inadequate.

Brazil

This paper briefly introduces CADE's approach to potential competition. We note that the core of the potential competition doctrine is the possibility that a player entering the market or an existing player introducing a new product could constrain the pricing decisions of incumbent firms.

However, Posner stated that there is no way to translate the theoretical insight of how the elimination of a potential competitor could affect the market into an objective standard of illegality, pleading, therefore, that the doctrine be abandoned.

Even so, throughout the past decade, CADE successfully made use of the potential competition doctrine when reviewing some of its most complex cases, a few of which called for remedies while others had to be blocked. Thus, the investigation of CADE's methods and understandings seems justified.

In this paper, we are able to show that CADE's Guide for Horizontal Merger Review provides some general guidelines about how and why to address the issues of potential competition. However, it does not exhaust the topic. Thus, it is necessary to analyze some of CADE's previous cases to better understand its approach to potential competition.

The cases mentioned in the paper indicate that CADE's experience with potential competition points to an understanding that, in order to apply this doctrine, it is important to ensure that some conditions are simultaneously present: (i) the relevant market must have certain characteristics of an oligopoly, including a small number of potential entrants; (ii) a potential entry must have pro-competitive effects; and (iii) there must be clear evidence that a potential entrant could in fact enter the market. Without these conditions, any assessment involving potential competition would end up being mere speculation and would, therefore, be irrelevant to the analysis.

Furthermore, CADE has been proactively investigating possible antitrust violations and monitoring markets to identify and prevent attempts to lessen potential competition.

Finally, we listed some of CADE's publications that somehow deal with the potential competition doctrine and promote the adoption of best practices while disseminating scientific knowledge to competition community in Brazil.

Canada

The submission focuses on the Bureau's experience and approach in analyzing preventions of competition in merger reviews. It discusses the concept of poised entry prevented by a merger and its anchoring in the assessment of barriers to entry into a market. It describes how the jurisprudence guides the Bureau's approach to mergers involving potential competition and how far off into that prevented future entry can be while still raising concerns under the Act.

The Merger Enforcement Guidelines describe a substantial prevention of competition ("SPC") in this way: Competition may be substantially prevented when a merger enables the merged firm, unilaterally or in coordination with other firms, to sustain materially higher prices than would exist in the absence of the merger by hindering the development of anticipated future competition.

The Tribunal outlined the analytical framework for the assessment of an SPC in its Tervita decision. This framework was subsequently affirmed by the Federal Court of Appeals and the Supreme Court of Canada.

The SPC framework focuses on new entry prevented by the merger and considers whether that entry would have been (i) timely, (ii) likely and (iii) sufficient in scale and scope to materially impact the level of competition in the market.

This analytical framework has been largely adopted in other contexts under the Act, like the abuse of dominance provisions in sections 78 and 79.

The approach in Canada to the SPC analysis is flexible in how to contemplate the but-for world and the different ways that new entry may play out in the absence of the merger. The steps toward entry and associated timeline for those steps, that are discussed in the submission, should be discernable and grounded in the evidence.

The standard for the SPC (and SLC) test set out in the Act is one of a balance of probabilities; the effects of acquisitions of potential competitors assessed under the merger provisions of the Act will have to be more likely than not to occur.

Chile

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

In its analysis, the FNE has evaluated that potential competition may impact either the number of actual or potential competitors, or the incentives of players that participate in related markets to expand into neighbouring markets.

In that sense, this contribution approaches two relevant cases in the FNE's case law involving potential competition. Firstly, the acquisition of Cornershop Technologies LLC ("**Cornershop**") by Uber Technologies Inc. ("**Uber**"), in which the loss of a potential competitor was foreseen as an antitrust concern. Secondly, the merger between Peugeot S.A. ("**PSA**") and Fiat-Chrysler Automobiles N.V. ("**FCA**"), in which potential competition was considered as an element that was able to exert competitive pressure after the merger.

The acquisition of Cornershop by Uber involved two digital platforms that function different app services in Chile. On the one hand, Uber operates as Uber Rides in the ride-sharing market and as Uber Eats in the food delivery market and, on the other, Cornershop operates in the grocery delivery market. One of the affected markets identified by the FNE was the one of digital platforms that offer on-line grocery delivery where Uber was considered as a potential entrant. Thus, the FNE's assessment had to evaluate whether the loss of a potential competitor represented a substantial lessening of competition. In its analysis, the FNE noted that there were a sufficient number of alternative players which were able to exert competitive constraints to the parties after the transaction. Therefore, the FNE was able to discard the mentioned anticompetitive concern.

Regarding the merger between PSA and FCA, one of the affected markets identified by the FNE was the small light commercial vehicles segment ("**small LCVs**"), where the parties were close competitors and concentrated a relevant market share. The competitive analysis focused then in the ability of some players present in neighbouring markets, but not in small LCVs, to exercise a competitive constraint vis-à-vis the incumbents. The investigation demonstrated that the incentives to enter that market might be affected, hence, the parties offered remedies to address this concern. In particular, PSA's commitment to offer Toyota an annual capacity of small LCVs destined exclusively for Chile with a price discount. This remedy was found to be satisfactory to foster potential competition, as it increases the incentives of Toyota, a potential competitor, to enter the small LCVs market in Chile.

In conclusion, the analysis of potential competition has played a key role within the FNE's merger control assessment, not only as an element that could counter the competitive constraints of the merged entity, but also as a relevant factor in remedies design, safeguarding entry conditions for new players in the affected markets.

Colombia

The document lays out Colombia's Superintendence of Industry and Commerce (henceforth, SIC) approach to the notion of potential competition. The purpose is to contribute to the clarification of the concept and to provide our experience assessing potential competition within the merger control procedures conducted by the SIC. Starting with a background on relevant elements from Colombia's applicable merger control regime, followed by the description of barriers to entry, and an account of the concept of potential competition on the basis of a relevant merger case to illustrate how and in which contexts it has been addressed, this document will provide information as to the ambit of the SIC's work on the matter.

Costa Rica

Costa Rican regulations, either, soft law and hard law, on the Competition Law establish that barriers to entry and the factors which could foreseeably alter these barriers and the supply of other competitors must be assessed, since it is considered highly relevant to analyze both potential and current competition in order to determine the existence of substantial market power in a much more accurate way.

This analysis must be carried out in cases of relative monopolistic practices and mergers; regarding absolute monopolistic practices, the regulations establish that potential competitors can also be subjects of this type of practices.

Barriers to entry have been defined as: "factors that prevent or hinder the entry of new economic agents to a market" and potential competitor has been defined as a "any economic agent that has the possibility of entering the market or competing for it, within a reasonable time, depending on the sector and without incurring high sunk costs."

In the application of the regulations in specific cases, especially in the establishment of some technical regulations, one of COPROCOM's concerns is that these legal instruments do not become barriers to entry or expansion of potential or current competitors, especially in relevant markets that tend to be highly concentrated in the hands of a few companies.

Likewise, in the case of SUTEL, it has remained vigilant in the telecommunications sector regarding the imposition or creation of barriers to entry that limit the access of operators to a market, negatively affecting competition and therefore the benefits that it provides.

Furthermore, in merger analysis, both COPROCOM and SUTEL have always tried to analyze that the proposed operations do not result in a market closure, which inhibits the possibility of expansion of current and potential competitors; also, that access to relevant inputs is guaranteed and that there is a possibility of an acceptable response from current and potential competitors who may enter with new products, services, alternative technologies and with new ideas to provide better options to customers or end consumers. In other words, that a contestability and acceptable potential competition in the market is always guaranteed.

EU

Potential competition is a clearly identified source of competitive constraint and plays an important role in assessing the competitive effects of mergers. The applicable legal framework identifies the main scenarios in which the Commission takes potential competition into account in its competitive assessment of mergers: a merger with an entrant, the effect of a merger on entrants, and the countervailing effects of entry by third parties.

In all instances, the main challenge of potential competition lies in the need to push the forward-looking nature of merger control into greater uncertainty by assessing future entry. To do so, the Commission follows the same approach to the competitive assessment as for actual competition, but may shift its focus away from narrowly defined relevant markets, for instance to 'innovation spaces'. Such an assessment can only rely on an extensive, consistent and convincing body of evidence gathered from both the parties and third parties.

Given the focus on the future, this body of evidence is typically more qualitative than is the case for the assessment of actual competition, and internal documents have particular significance in the review. 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. This contribution provides illustrations of the Commission's case practice with regard to potential competition.

Israel

Israeli law recognizes the applicability of the potential competitor doctrine; It is present in Israeli block exemption regulations, it has been discussed and applied by the Israel Supreme Court, and the Israel Competition Authority itself incorporates the potential competitor doctrine in its guidelines, opinion papers and decisions.

This contribution by the Israel Competition Authority will provide an overview of the presence and uses of the potential competitor doctrine under Israeli law. We will elaborate on case law and the ICA decisions in this regard, demonstrate how the potential competitor doctrine is incorporated in Israeli legislation, as well as address a few points looking forward, *inter alia* in view of challenges raised by the digital economy.

Mexico

This document presents an overview on how the IFT, as competition authority and regulator of the telecommunications and broadcasting sector in Mexico, addresses the analysis of potential competition and barriers to entry, through a special investigation procedure to determine the existence of essential facilities or barriers to competition, established in the competition law. Additionally, it considers various provisions on competition policy in the sectoral law that favor the existence of potential competition. The IFT shares its practical criteria to analyze potential competition and relevant case studies that exemplify how this practical criteria was applied in:

1. *Red Compartida* (wholesale shared network) and AT&T's acquisition of Nextel Mexico;
2. Radio spectrum bidding procedures; and
3. Granting of radio broadcasting concessions for non-commercial use (social, for communities and indigenous groups; and public, for private higher education institutions, civil associations and individuals, with cultural, scientific, educational, or community purposes).

Russian Federation

Digital services are becoming more widespread, while their functioning and further development are based primarily on the collection and processing of data.

From the point of view of competition, particular concern is the growing economic concentration in certain areas, including the processes of differentiation (in terms of participants and/or services provided) of digital platforms and their transformation into digital ecosystems.

In this context, questions about data portability contained in various services and on digital platforms, as well as their interoperability, are becoming more relevant and require special attention from the competition authorities.

Given the lack of industry regulation and the importance of data portability and interoperability issues to ensure competition in the digital economy, the FAS Russia in its practice pays special attention to issues related to access to data and their impact on the market power of business entities.

Currently, the Government of the Russian Federation is considering amendments to the Federal Law of July 26, 2006 No. 135-FZ "On Protection of Competition" (the so-called "fifth antimonopoly package").

The adoption of the amendments will allow the antimonopoly authority to respond in a timely and flexible manner to the challenges of the digital economy, including issues related to data circulation.

South Africa

Global antitrust enforcement in digital markets has resulted in renewed interest in the assessment of potential competition in merger control. The primary focus of this interest is the pattern of acquisitions of start-ups by the global tech giants, and the concern that these giants are entrenching their position by acquiring future competitors to themselves. However, a different potential competition issue is emerging in developing markets such as South Africa, which is that of the potential entrant buying the incumbent instead of the other way around.

Outside of the globally dominated search, social media, smartphone operating systems and app stores, there is a vast array of digital markets where there is scope for local entrepreneurs to replicate the business models of tech companies in other markets and establish a first mover advantage. This is particularly where global firms need to make country-specific investments in infrastructure, localisation or even just brand marketing to bring the consumer side on board. Whilst some tech companies such as Uber and Netflix have been quick to roll out globally to pre-empt such entry, this is not always the case or not always successful. In South Africa we have seen the emergence of leading local incumbents in eCommerce, classifieds, fintech, travel & accommodation aggregators and food delivery.

In these circumstances, the potential late entry of established tech companies from mature jurisdictions into developing markets may occur in the face of an entrenched local incumbent. The local incumbent has advantages from being the first mover, including an existing and expanding user base, strong brand recognition, local data and information to calibrate the model, and profitability to fund ongoing consumer acquisition. Established firms from other markets also have advantages, making them strong potential entrants compared to local start ups, including established technology platforms, business models and cash flow/venture capital from existing operations to fund scaled entry at lower unit costs.

The locally dominant platform may be comfortable in facing off local threats, but less so in facing off against a global firm with more resources and its own advantages. For both the global firm and the local dominant firm, the war of attrition based on head-to-head competition may be a far less desirable and uncertain outcome than teaming up through an acquisition. Furthermore, the entry counterfactual also facilitates a deal. This is because the local incumbent is likely to see reduced profitability and growth in the entry counterfactual making shareholders willing to discount current firm value for a deal. This deal discount simultaneously makes an acquisition more attractive to the global giant relative to greenfields entry. Aside from the loss of potential competition, the complementary assets of the global firm may further entrench the local market leader and raise barriers to the entry / expansion of rivals. This is precisely the context which played out in the prohibited acquisition of WeBuyCars by Naspers (Prosus) in the market for guaranteed purchase used car marketplaces discussed in the submission.

The submission goes further to state that in concentrated developing country markets, there is an incentive for larger firms to expand into adjacent markets much like digital market economies of scope. The larger firms also represent stronger potential entrants than smaller entrants given the barriers faced by new entrants and the complementary assets that facilitate scaled entry by larger firms. However, the benefits of such expansion may be lost where the strategy is one of acquisition of a leading firm in the adjacent market rather than organic growth or the acquisition of a smaller market player which is assisted to grow. In

the interests of erring on the side of competition and promoting longer term competitive markets, it may be of interest for competition authorities to look far more sceptically at the acquisition of a leading market player by a large firm in an adjacent market. This may include a longer-term perspective on the prospects of entry that is focused on incentives to do so rather than whether there are immediate plans to do so.

Spain

The concept of potential competition is at the core of Competition Law and it is of the utmost importance for the application of articles 101 TFEU and 1 SCA, 102 TFEU and 2 SCA, and from a merger perspective.

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

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

The assessment of entry has to be based on realistic grounds, not being sufficient the mere theoretical possibility to enter a market.

The case law and decisional practice from the courts and competition authorities provide very useful indications regarding the assessment of potential competition.

This article will examine and analyse that case law and decisional practice, in order to elaborate on the application of potential competition and its elements from a triple perspective: 101 TFEU and 1 SCA, 102 TFEU and 2 SCA, and from a merger perspective.

Turkey

With the rise of the potential competition concept, it has taken its place on the agenda of the Turkish Competition Authority (TCA) like other antitrust authorities around the world. First, in the latest preliminary findings report on its e-marketplace sector inquiry, the TCA presented the potential competition concerns derived from the practices in the e-platforms market.

In the aforementioned inquiry, it is stated that killer acquisitions may completely hinder market entries since entry barriers are already structurally high. It is concluded that the academic studies are yet to claim that the acquisition of nascent undertaking will cause harm in the end. According to the TCA, a more conservative and stricter approach towards these platforms should be adopted since the e-marketplace platforms differ from the traditional markets to a great extent. Lastly, the gatekeeper companies are thought to notify all kinds of merger and acquisition practices no matter what the turnover of the acquired company is.

The most recent development in merger control has been the adoption of the SIEC test 16 years after the EU's recognition. On the other hand, there is no case law in relation to killing zones, killer acquisitions of nascent undertakings yet. So, it is too early to comment on how the TCA's treatment of potential competition will be. However, as stated above, the literature review on innovation competition has been achieved and referred to in the preliminary findings report on its e-marketplace sector inquiry.

Another field in which potential competition concerns are mostly discussed is par-for-delay agreements that pharma giants impose on generics production companies. Although there is no case law on a license settlement agreement that became subject to the authority scrutiny, it would not be true there is not any Board decision to which pay-for-delay agreements are referred. There are all exemption cases in which non-compete clauses are questioned to understand whether the parties of the agreement try to conceal a delay of a drug release.

United Kingdom

Potential competition means the constraint undertakings currently outside a market are able to exert through the prospect that they will enter that market. At the moment undertakings enter they become actual competitors. Until then potential competition merits equal protection in law to actual competition. If this were not the case, undertakings would be able to deny consumers the benefits of actual competition by preventing it from materialising.

Potential competition is therefore not hypothetical: it has real-world implications. Undertakings already on the market, or considering entering, can be expected to take into account the prospect of other undertakings entering, and to adapt their behaviour accordingly.

This paper sets out the approach of the UK Competition and Markets Authority (CMA) when considering potential competition issues with reference to the CMA's mergers and antitrust guidance and experience.

The paper is structured as follows:

- Section 2 explains the CMA's approach to assessing mergers where the elimination of potential or dynamic competition may give rise to horizontal unilateral effects and its approach to assessing barriers to entry in mergers, with reference to the CMA's published Merger Assessment Guidelines (MAGs) which were recently revised in March 2021. This is considered under the following headings:
    a. Definition of potential competition
    b. Ways in which a merger can lessen competition
        I. Loss of future competition
        II. Loss of Dynamic competition
    c. Considerations of entry and expansion as a countervailing factor in mergers.
- Section 3 considers the treatment and assessment of potential competition issues in UK antitrust cases. After reflecting on the legal test for potential competition (3a), it explains the CMA's experience by reference to several case studies (3b) under the following headings:
    a. Agreements and concerted practices between potential competitors
    b. Exclusion of potential competitors.

United States

In the United States (U.S.), the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (together, the Agencies) recognize that firms can face competitive pressure not only from existing competitors, but also from potential competitors. More broadly, incumbent firms often have expectations about competition in the future, and these expectations can affect their competitive strategies in the present. For example, when an industry features innovative firms or firms that make significant expenditures on research and development, the Agencies' concern about conduct directed at potential competitors is acute because the current state of the industry may not be an accurate representation of future competition in the industry. This concern is heightened further in industries characterized by high barriers to entry.

The antitrust laws enforced by the Agencies are flexible enough to cover mergers and conduct that target not just current competition and existing competitors, but also future competition and potential competitors.

Entry into new markets, either by existing firms or startups, can increase competition in the short-term and spur innovation in a relevant market, both of which benefit consumers. Competition enforcers must be attuned to ways in which an incumbent firm, anticipating such entry, can take steps to prevent or delay such entry, to the detriment of consumers.

Given the important role that entry can play in ensuring competitive markets and encouraging innovation, issues related to potential and nascent competition are relevant to all components of antitrust enforcement in the U.S. An agreement involving a potential or nascent competitor can violate Section 1 of the Sherman Act, which prohibits contracts, combinations or conspiracies in restraint of trade; a monopolist can unlawfully exclude (or attempt or conspire to exclude) a potential or nascent competitor in violation of Section 2 of the Sherman Act, which prohibits monopolization; the acquisition of a potential or nascent competitor can violate Section 7 of the Clayton Act, which prohibits mergers and acquisitions the effect of which "may be substantially to lessen competition or tend to create a monopoly," and can violate either Section 1 or Section 2 of the Sherman Act; and conduct directed at a potential or nascent competitor can violate Section 5 of the FTC Act, which prohibits "[u]nfair methods of competition."

An incumbent firm, acting unilaterally or conspiring with another firm, can engage in anticompetitive conduct (including acquisitions) directed at a potential competitor or at a small rival that threatens its market position. In either scenario, the incumbent may, by engaging in conduct that is not competition on the merits, limit the future competitive significance of the emerging or potential competitor. Conduct that targets an innovative or disruptive firm that threatens the status quo in a market of established incumbents is particularly concerning.

As in other areas of antitrust analysis, except in cases involving conduct that is unlawful *per se*, the Agencies will consider whether conduct or a merger involving a potential competitor has countervailing procompetitive benefits that are specific to the conduct or merger at issue and are verifiable.