

European Merger Control

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III. Horizontal Effects

*institutional investors with respect to growth (and thus capacity) merely reflect a characteristic inherent in the relevant market, the Commission would still have to establish that the fact that institutional investors hold shares in three of the four leading tour operators amounts to evidence that there is already a tendency to collective dominance.*⁶⁷⁶

The strength of the incentive to coordinate, finally, depends on the developmental stage of the relevant market or markets. Mature markets with stagnating growth or those are experiencing “pullback” are characterized, as a rule, by more stable market positions than markets in strong expansion; this can increase the risk of coordination. The risk of coordination may be even higher if overcapacities are prevalent on the market.⁶⁷⁷

bb) Transparency

Second, for coordinated effects to arise on a market, that market must be sufficiently “transparent” that each member of the oligopoly can discover the market behavior of all the other members accurately and promptly.⁶⁷⁸ The less transparent a market, the stronger the incentives for firms to “cheat” the terms of the coordination and secretly lower their prices to win contracts and build market share.

It must, for example, be readily apparent whenever an oligopolist breaks away from the terms of coordination in an effort to increase its own sales through price reductions, thereby expanding its market share. In the *Airtours* judgment, the GC described this criterion in the following terms:

“[E]ach member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. [...] [I]t is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members’ market conduct is evolving.”

It is thus not sufficient for each of the companies in question to perceive that a common method of proceeding on the market would be profitable for all; it must also be possible to monitor one another’s conduct. Structural features of a market that improve transparency, and thus raise a clearer prospect of coordination, will include:

- the publication of price lists (by market participants or third parties)⁶⁷⁹;
- public terms of dealing (e.g., products or services offered at fixed prices on the open market)⁶⁸⁰;
- simplicity of pricing structures⁶⁸¹;

⁶⁷⁶ Case T-342/99 *Airtours v. Commission* [2002] E.C.R. II-2585, para 91.

⁶⁷⁷ Case IV/M.580 (*ABB/Daimler Benz*), para 90.

⁶⁷⁸ Horizontal Merger Guidelines, *supra* note 30, paras 49–51.

⁶⁷⁹ See, e.g., Case COMP/M.4854 (*TomTom/Tele Atlas*), para 280 (“coordination on prices would be difficult since map database prices are not transparent”).

⁶⁸⁰ See, e.g., Case COMP/M.4963 (*Rexel/Hagemeyer*), para 71 (“most transactions are done through individual price negotiations, resulting in highly dispersed prices and margins”); Case COMP/M.4942 (*Nokia/Navteq*), para 403 (“usually, contracts between map suppliers and their customers are not public and their terms are not known by other firms”).

⁶⁸¹ See, e.g., Case COMP/M.4844 (*Fortis/ABN Amro Assets*), para 197 (“Regarding debit cards, for instance, pricing is relatively difficult to observe – despite certain transparent elements – because debit cards are closely linked to current accounts and other retail banking services that are offered in various packages.”); Case COMP/M.4523 (*Travelport/Worldspan*), para 161 n.96 (quoting one respondent’s view that “the complexity of the pricing structure does not allow market transparency as too many add-ons are necessary to run the business efficiently”).

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- homogeneity of products;
 - contacts between the firms on multiple markets⁶⁸²;
 - the use of (public) tendering procedures⁶⁸³;
 - symmetry of market participants⁶⁸⁴;
 - regular transactions (markets characterised by infrequent high-value transactions are less transparent than those in which transactions are frequent, because frequent transactions provide more opportunities to determine the terms at which competitors are offering their products or services); *and*
 - open transactions (where dealing typically occurs on undisclosed terms participating firms have stronger incentives to “cheat” their competitors and secretly underbid).⁶⁸⁵
- 199 Coordination is easier when the products or services supplied on the relevant market are homogeneous rather than heterogeneous, because homogeneous goods make strategies of differentiation – which might serve to disguise attempted price reductions – by individual oligopoly members more difficult.⁶⁸⁶
- 200 In *Pernod Ricard/V&S*, the Commission found that the price lists published by AC Nielsen were not sufficiently useful to its competitors to introduce significant transparency into a market for wines & spirits:
- “[I]t could be argued that the existence of retail price data such as those made available by AC Nielsen and similar organisations would increase price transparency and thereby facilitate monitoring and coordination. However, such retail data do not entail information on prices upstream in the supplier segment, and neither do they list the margins obtained by retailers. It would therefore require publicly available price lists from suppliers in order to facilitate reliable monitoring. Even if such price lists were available, the market investigation in the present case has indicated that a large number of different discount schemes are applied in this sector, which would make the actual prices achieved by suppliers more difficult to estimate.”⁶⁸⁷*
- 201 In the *Oracle/BEA* case, the Commission found that the relevant (software) markets were not sufficiently transparent for the purposes of assessing the risks of coordination, based in part on a strong industry practice of discounting through bilateral negotiations and on the highly differentiated nature of the products in question.⁶⁸⁸

⁶⁸² See, e.g., Case IV/M.619 (*Gencor/Lonrho*), para 141.

⁶⁸³ See, e.g., Case IV/M.580 (*ABB/Daimler Benz*), para 89.

⁶⁸⁴ See, e.g., Case COMP/M.4963 (*Rexel/Hagemeyer*), para 73 (“Moreover, the Dutch market would remain quite asymmetric after the merger.”); Case COMP/M.4823 (*Yara/Praxair/JV*), para 44 (“Moreover the parties have always very asymmetric market shares. As a consequence, the creation of the JV is unlikely to lead to anticompetitive coordination between Yara and Praxair on those national markets.”).

⁶⁸⁵ See, e.g., Case COMP/M.4979 (*Acer/Packard Bell*), para 40 (bilateral and confidential transactions provided only limited transparency).

⁶⁸⁶ See, e.g., Case IV/M.619 (*Gencor/Lonrho*), para 141.

⁶⁸⁷ Case COMP/M.5114 (*Pernod Ricard/V&S*), para 108.

⁶⁸⁸ Case COMP/M.5080 (*Oracle/BEA*), para 33 (“[I]n view of the specific characteristics of software markets, the merger would not be conducive to coordinated effects either. Should the new entity and IBM behave in such a way, numerous competitors as listed above (SAP, Sun, Microsoft and open source providers) would have the means to exert a competitive constraint. In addition, middleware solutions are differentiated products, and their pricing is nontransparent, also because of the number of vendors and their practice to apply discounts on public prices which are agreed typically on bilateral negotiations. As a consequence, price comparison between similar products is difficult. Therefore, the proposed transaction is unlikely to give rise to any coordinated effects, in particular between IBM and the merged entity.”).

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cc) Deterrence

Third, in order for coordination to be successful, “there must be an incentive not to depart from the common policy on the market.”⁶⁸⁹ The “threat of future retaliation [...] keeps the coordination sustainable.”⁶⁹⁰ The General Court has explained that, for the purposes of coordinated effects in EC competition law:

*“The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. ... [F]or a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative[.]”*⁶⁹¹

The undertakings acting in coordination with one another must appreciate that any competitive advance in an attempt to increase one’s own market share (e.g., through a price reduction) would immediately trigger sanctions from the other group members, such that the company in question would draw no advantage of any kind from its initiative. The credibility of the threat depends on a sufficient certainty that some deterrent mechanism will be used.⁶⁹²

Any market mechanism which can be used to “punish” other market participants for deviating from the terms of coordination is a potential deterrent mechanism. Such a mechanism could involve the severance of trade relationships (particularly crucial supply links) or aggressive “targeting” of the deviator’s market share. Conversely, it could be as simple as a return to competition.

For retaliation to be effective, the speed with which deterrent mechanisms can be implemented is crucial. It is important to note that a high degree of market transparency can facilitate an effective deterrent reaction by the companies coordinating with one another. A substantial delay in the detection of the competitors’ actions resulting from a lack of transparency will lead to retaliation measures being delayed.⁶⁹³

If effective and timely sanctions are not possible through the process of regular competition, the specific features of the market, or of the relationship between the relevant firms, may suggest other mechanisms to “discipline” the members of a coordinating group, including, for example, the termination of joint ventures or supply relationships. These sanctions need not take effect on the same market as that on which the coordination takes place.⁶⁹⁴

⁶⁸⁹ Case T-342/99 *Airtours v. Commission* [2002] E.C.R. II-2585, para 62.

⁶⁹⁰ Horizontal Merger Guidelines, *supra* note 30, para 52.

⁶⁹¹ Case T-342/99 *Airtours v. Commission* [2002] E.C.R. II-2585, para 62 (emphasis added).

⁶⁹² Horizontal Merger Guidelines, *supra* note 30, para 52. The credibility of the retaliation is not necessarily affected in the event of short-term economic losses incurred as a result of a price war or significant output increases as long as the losses incurred are smaller than the long-term benefit resulting from the artificially high prices charged as a result of the successful coordination. Horizontal Merger Guidelines, *supra* note 30, para 54.

⁶⁹³ Horizontal Merger Guidelines, *supra* note 30, para 53. Effective sanction mechanisms will in general be easily identified in cases in which the oligopoly members could reduce prices or raise output without a significant time delay. If, on the other hand, price changes or output levels could only be implemented with a significant time delay (e.g., because it is the custom in the sector to issue annual price lists), or if production could not be increased on short notice (e.g., because purchases are agreed on a long-term basis) or if the market is characterized by irregular large-volume orders, then effective sanctions may not be possible through the process of regular competition.

⁶⁹⁴ Horizontal Merger Guidelines, *supra* note 30, para 55; Case T-102/96 *Gencor v. Commission* [1999] E.C.R. II-753, para 281; Case IV/M.1313 (*Danish Crown/Vestjyske Slagterier*), para 177.

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- 207 In *Norddeutsche Affinerie*, for example, the Commission found that the proposed concentration would leave the market vulnerable to deterrent mechanisms that could reinforce a position of collective dominance:

“The fact that the new entity will have more spare capacity and a market share almost three times as high as A-TEC is likely to give the new entity a higher ability to retaliate than A-TEC. At the same time, the minority shareholding might provide A-TEC with the possibility to take advantage of its shareholding and enabling it to retaliate, by either using information it would not have as a simple competitor or by opposing the new entity’s business policy as a major shareholder. In view of this, it cannot be excluded that the A-TEC and the new entity might consider each other as able to react to deviations of a potential agreement.”⁶⁹⁵

- 208 Homogeneity can increase the effectiveness of punishment mechanisms since, for example, a small reduction in price may suffice to win back market share from a competitor who has defaulted from the terms of coordination. Conversely, when products or services are differentiated, it may be more difficult to discipline a competitor in response to an innovation or price-cut that threatens the coordination.⁶⁹⁶

dd) Outsider reactions

- 209 Finally, if customers, competitors, suppliers or other third parties would be in a position to jeopardise any attempt at coordination, coordinated effects will be less likely to develop.⁶⁹⁷ In the words of the General Court, “the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy”.⁶⁹⁸
- 210 Of particular relevance to this analysis is the so-called “maverick” effect: if one of the market participants has significantly different incentives to those of its competitors, such that it is unlikely to join any attempt at coordination on the relevant market, the presence of the maverick may suffice to preclude the development of coordinated anti-competitive effects.⁶⁹⁹ Conversely, if the merger has the effect of removing a maverick, the case may attract additional scrutiny.⁷⁰⁰

⁶⁹⁵ Case COMP/M.4781 (*Norddeutsche Affinerie/Cumerio*), para 188.

⁶⁹⁶ Case IV/M.580 (*ABB/Daimler Benz*), para 91.

⁶⁹⁷ See, e.g., Case COMP/M.4979 (*Acer/Packard Bell*), para 40 (“customers or competitors could jeopardize any coordination attempt”); Case COMP/M.4751 (*STM/Intel/JV*), para 46 (“competitors (and in particular Samsung) appear to be able to constrain Newco and Spansion should they undertake such market behaviour”).

⁶⁹⁸ Case T-342/99 *Airtours v. Commission* [2002] E.C.R. II-2585, para 62. The most obvious example of a strategy to disrupt or defeat coordination is a simple capacity increase or price reduction by competitors that are not participating in the coordination. See, e.g., Case COMP/M.4781 (*Norddeutsche Affinerie/Cumerio*), para 191 (“If the new entity and A-TEC try to reduce capacity for copper shapes, other actors would easily be able to react by increasing production or shifting capacity to the merchant market.”). The probable reactions of software competitors – ranging from Microsoft to open source software providers – were relevant to the Commission’s analysis in the *Oracle/BEA* case, in which the Commission found that, should attempted coordination occur, “numerous competitors [...] would have the means to exert a competitive constraint.” Case COMP/M.5080 (*Oracle/BEA*), para 33.

⁶⁹⁹ In *Rexel/Hagemeyer*, the Commission used the term “maverick” to refer to “a particularly aggressive player”, concluding that Hagemeyer could not be considered such a firm as it was not consistently the lowest pricing firm. In any event, however, in that case the Commission found that “differences in the respective profiles of the wholesalers in the Netherlands result in different incentives [among the market participants in general], thereby rendering coordinated effects between wholesalers unlikely to be sustainable”. Case COMP/M.4963 (*Rexel/Hagemeyer*), para 73.

⁷⁰⁰ Horizontal Merger Guidelines, *supra* note 30, para 42.

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In *Linde/BOC*, for example, the Commission was concerned that the removal of 211 Linde as an aggressive maverick increased the risk of tacit collusion in the relevant helium wholesale market thereby raising serious doubts as to the compatibility of the merger with the common market:

*“The removal of Linde as a maverick and the combination of Linde’s and BOC’s sources after to the merger would therefore be likely to result in coordinated effects by eliminating Linde as a maverick being ready to enter aggressively and to increase total supply by its newly available quantities.”*⁷⁰¹

A “maverick” of this kind, Garmin, was also present on the market in *Nokia/ 212 Navteq*:

*“Garmin would likely be in a position to destabilise such coordination between NAVTEQ and Tele Atlas in sales of maps for mobile handsets, via its long term contract with NAVTEQ that guarantees its supply of digital maps. Garmin has already announced its intention to launch a smartphone embedding navigation functionalities, and has also announced that its navigation solutions will be made available on Samsung handsets in Europe.”*⁷⁰²

However, “outsiders” need not operate at the same market level as the firms 213 attempting to coordinate behaviour, or even be present on the relevant market: potential competitors and smaller-scale undertakings may also be able to supply sufficient pressure to prevent coordinated dealing.⁷⁰³

The prospect of market entry from upstream or downstream trading partners in 214 response to the imposition of oligopoly pricing may discourage coordination.⁷⁰⁴ Competitive pressure from distinct but neighbouring markets may also preclude, or help to preclude, the development of coordinated effects.⁷⁰⁵

Where customers can directly influence the behaviour of the coordinating firms – 215 for example, by tempting firms to “break ranks” with the other coordinating firms – this will tend to disrupt an attempt to establish terms of coordinated dealing, making it relatively difficult to reach a common understanding on the terms of coordination.⁷⁰⁶

More generally, when analysing the collective independence of the oligopolists 216 towards competitors, customers and consumers, the general principles discussed above in the context of non-coordinated effects may also be relevant in assessing their ability, as a group, to influence competitive conditions on the relevant market or markets.⁷⁰⁷

⁷⁰¹ Case COMP/M.4141 (*Linde/BOC*), para 192.

⁷⁰² Case COMP/M.4942 (*Nokia/Navteq*), para 406.

⁷⁰³ For example, in *Pernod Ricard*, strong local producers and potential market entrants together presented a significant threat to any attempted coordination between large international suppliers of wine and spirits. Case COMP/M.5114 (*Pernod Ricard/V&S*), para 110.

⁷⁰⁴ See, e.g., Case COMP/M.4781 (*Norddeutsche Affinerie/Cumerio*), para 191 (“[I]n addition, a reduction of capacity or a price increase would raise the incentive for users of copper shapes to enter copper shapes production. As discussed, copper shapes producers which are not yet active on the merchant market, as well as customers who could integrate upstream into the production of copper shapes would exert an additional competitive constraint.”).

⁷⁰⁵ See, e.g., Case COMP/M.4842 (*Danone/Numico*), para 83 (“Given the competitive pressure stemming from regular drinks, and the inherent difficulty to come to a common understanding on the terms of a tacit coordination on a consumer good market (range and quality of products, and introduction of new products differ across companies), coordinated effects as a result of the merger do not seem likely despite symmetry of market shares after the proposed concentration.”).

⁷⁰⁶ See, e.g., Case COMP/M.4854 (*TomTom/Tele Atlas*), para 280 (“[C]ustomers could react to any coordination by enticing deviation with long term contracts”).

⁷⁰⁷ See *supra* Section C.III.2. (Non-Coordinated Effects). Of particular significance – just as in the analysis of non-coordinated effects – is the market share “gap” between the potentially dominant

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4. Loss of Potential Competition

a) General Principles

- 217 The Commission treats concentrations with a potential competitor also as horizontal mergers, as they “can have similar anticompetitive effects to mergers between undertakings already active on the same relevant market”.⁷⁰⁸ *Potential competition* is the competitive pressure exerted on an undertaking’s behaviour by a second firm which is *not* active in the same market, but which could or might enter that market.⁷⁰⁹ Such entry would be particularly likely if, for example, the first firm were to raise prices to supra-competitive levels.
- 218 It will be observed that potential competition and supply-side substitutability differ from one another only in terms of degree. The ability of an undertaking *not* currently active in a particular product or geographic market to begin competing on that market – and in particular the competitive constraint exerted by such an undertaking on firms which *are* currently active in the relevant market – is at issue in both cases.
- 219 However, as noted above, supply-side substitutability (which affects market definition) is an appropriate analytical device *only* where such entry could take place with very low costs, delays and risks. Where this test is not met and the firm in question is not included in the relevant market and the calculation of market shares, potential competition (which affects the assessment of market power on a defined market) is the appropriate device to reflect the competitive pressure emanating from that firm.
- 220 Potential competition is relevant to an analysis of the competitive effects of a merger in two principal ways. *First*, where the merging parties are in potential competition with one another before the merger, the concentration will eliminate this competition, raising the prospect of possible non-coordinated or coordinated anti-competitive effects. This is an anti-competitive effect and, thus, discussed in this section.
- 221 *Second*, when sufficient potential competition (*i.e.*, sufficient likelihood of new market entry) will prevail *after* the concentration, such as to discipline the behaviour of the combined firm, this may have the effect of reducing or eliminating any concerns or risks to competition that might otherwise result from the merger. This is a countervailing consideration which may weigh *against* a finding of harm to competition, and it is discussed below.⁷¹⁰
- 222 Loss of potential competition in relevant UK markets was a concern of the Commission – and the subject of detailed discussion – in *Air Liquide/BOC*. The Commission explained the threat to competition:

“Irrespective of whether the competitor concerned has previously been willing to launch effective competition, the proposed concentration would permanently remove the possibility of such competition taking place. The proposed concentration would thus permanently eliminate potential competition and thereby strengthen BOC’s existing dominant position in the markets concerned. The likely result would be that the combined entity (*Air Liquide/BOC*) would be able to perpetually dominate the markets for cylinder and bulk gases in the United Kingdom and Ireland.”⁷¹¹

group of companies and the next largest competitors. Case T-102/96 *Gencor v. Commission* [1999] E.C.R. II-753, para 208.

⁷⁰⁸ Horizontal Merger Guidelines, *supra* note 30, para 58.

⁷⁰⁹ Horizontal Merger Guidelines, *supra* note 30, paras 58–60, 68–75.

⁷¹⁰ See *infra* Section C.VII.2. (New Market Entry).

⁷¹¹ Case COMP/M.1630 (*Air Liquide/BOC*), para 222. See also Case COMP/M.5096 (*RCA/MAV Cargo*), paras 59 *et seq.*

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Where a market is “protected” by *barriers to entry* (any factor that makes market entry more difficult, less profitable or otherwise less likely), the level of competitive pressure exerted by potential entrants is limited or diminished.⁷¹² The “higher” (*i. e.*, the more burdensome) the barriers to entry are, the less potential competition exists between the current market participants and potential future entrants. 223

b) Legal Standard

Potential competition is considered to be, like actual competition, a form of “effective” competition. Thus, in the Commission’s view, where a concentration leads to a reduction in potential competition – either alone or in conjunction with a reduction in actual competition – it may result in a significant impediment to effective competition within the meaning of the Merger Regulation. Such concentrations may also lead to coordinated effects.⁷¹³ 224

The prospect of non-coordinated effects will arise wherever the concentration will, by reducing or eliminating potential competition, enable the merged entity to impose anti-competitive trading conditions. The Commission has established a two-step test to determine whether a concentration with a potential competitor is likely to lead to a significant impediment to effective competition:⁷¹⁴ 225

- *first*, the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force; and,
- *second*, there must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger.⁷¹⁵

For example, in *Omya/J.M. Huber*, following an in-depth Phase II investigation, the Commission noted in relation to the application of these two criteria to the target company in that transaction: 226

*“As explained below, the market investigations confirmed, first of all, that Huber is a potential competitor on the market for calcium carbonates used for paper coating applications that, in the absence of the proposed transaction, would be very likely to grow into an effective competitive force. Secondly, the investigation confirmed that there is not a sufficient number of actual or potential competitors on that market to maintain sufficient competitive pressure on Omya’s behaviour after the proposed transaction.”*⁷¹⁶

It is important to remember that potential competitive pressure will often be exerted in *both* directions where there is a possibility that either company will enter a market where the other is active.⁷¹⁷ 227

⁷¹² See, *e.g.*, Case COMP/36.539 (*BiB/Open*), para 169 (“However, both BSKyB and BT have very important positions in the United Kingdom in markets neighbouring and closely related to that in which the BiB joint venture will be active. Their positions in these markets are safeguarded, at least in the medium term, by the existence of barriers to entry.”).

⁷¹³ See *supra* Section C.III.3. (Coordinated Effects).

⁷¹⁴ See, *e.g.*, Case COMP/M.5096 (*RCA/MAV Cargo*), para 60.

⁷¹⁵ Horizontal Merger Guidelines, *supra* note 30, para 60; Case COMP/M.5188 (*Mars/Wrigley*), para 25.

⁷¹⁶ Case COMP/M.3796 (*Omya/J.M. Huber*), para 339.

⁷¹⁷ See, *e.g.*, Case COMP/M.4439 (*Ryanair/Aer Lingus*), para 501 (Noting that, in an assessment of potential competition, “it is relevant to consider [...] the closeness of competition between Ryanair and Aer Lingus and the extent to which they constrain each other”). See also Case COMP/M.5096 (*RCA/MAV Cargo*), paras 59 *et seq.*

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aa) Significant constraining influence

- 228 In order to determine whether a potential competitor exerts a “significant constraining influence”, it will be relevant to consider at least the following: the closeness of competition between the firms and the extent to which the potential competitor constrains the behaviour of the other firm; the ability of the potential competitor to enter the relevant market; *and* historical evidence of market entry.⁷¹⁸
- 229 In this context, the Commission will review in detail the documents submitted by the notifying parties under Section 5.4 of the Form CO (*i. e.*, all of the documents prepared for or by the board of the notifying parties in preparation of the concentration) and other evidence in order to find out whether the potential competitor actually already has plans to enter the relevant market in a significant way.⁷¹⁹
- 230 A significant constraining influence may even be exerted by potential competitors who, before the merger, do not have significant existing activities in the relevant industry. In *ENI/EDP/GDP*, for example, GDP (the major supplier of gas in Portugal) was found to have “strong incentives” to enter the wholesale electricity market, and that having done so it “was likely to grow into an effective competitive force” due in part to its existing strong position in Portugal.⁷²⁰
- 231 In *Omya/J.M. Huber*, the Commission analyzed in detail whether the target company “was likely to grow into an effective competitive force” thereby considering the following criteria:

*“When assessing the likelihood that Huber would grow into an effective competitive force, the Commission considered, in particular, the evidence concerning Huber’s plans to enter the relevant market. The Commission assessed, in particular, the extent to which (1) Huber’s PCC Additives technology would be ready for commercialisation, (2) Huber believed in the commercial viability of its proposition on a larger scale, and (3) Huber could make sufficient production capacity available to enter the market. The Commission’s analysis also considered Huber’s sunk costs in entering the market for calcium coating carbonates.”*⁷²¹

bb) No other potential entries

- 232 In order to determine whether other potential competitors will be unable to provide “sufficient competitive pressure”, it is important to assess the likelihood that other competitors could enter the market in question.⁷²² Where, for example, one of the merging parties represents the closest potential competitor of the other –

⁷¹⁸ See Case COMP/M.5083 (*Groupama/OTP Guarancia*), para 22 (“In addition, there are no significant barriers to entry. Recent entrants to the Hungarian market for non-life insurance include: AIM General Insurance, Genertel Insurance and MKB General Insurance. In view of the foregoing, the proposed transaction does not significantly impede effective competition in the common market or in a substantial part of it.”); Case COMP/M.4439 (*Ryanair/Aer Lingus*), para 501.

⁷¹⁹ See Case COMP/M.5096 (*RCA/MAV Cargo*), paras 67, 70 (“RCA’s strategic documents show its [confidential description of plans for Central and Southeastern Europe]. The fact that RCA is currently entering the Slovenian market (which is much smaller) shows that the claimed difficulties of entering Hungary appear not to be insurmountable. [...] The above shows that RCA would have entered the Hungarian block train segment with significant likelihood absent the proposed transaction. This view is also supported by the Hungarian NCA and by the respondents to the market investigation. A majority of the responding customers and freight forwarders have replied that – absent the merger – they consider it likely or very likely that RCA would enter the Hungarian rail freight market.”).

⁷²⁰ Case COMP/M.3440 (*ENI/EDP/GDP*), para 344.

⁷²¹ Case COMP/M.3796 (*Omya/J.M. Huber*), para 375.

⁷²² See Case COMP/M.4439 (*Ryanair/Aer Lingus*), para 501.