COMPETITION COMMITTEE

Barriers to Entry

Series Roundtables on Competition Policy

N° 58

OECD

2005

Unclassified **DAF/COMP(2005)42**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

06-Mar-2006

English/French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP(2005)42
Unclassified

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JT03205063

English/French

FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Barriers to Entry which was held by the Competition Committee in October 2005.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les barrières à l'entrée, qui s'est tenue en octobre 2005 dans le cadre du Comité de la Concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "les tables rondes sur la politique de la concurrence".

OTHER TITLES

SERIES ROUNDTABLES ON COMPETITION POLICY

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EXECUTIVE SUMMARY

by the Secretariat

Considering the discussion at the roundtable, the delegates' submissions and the background paper, several key points emerge:

(1) The concept of barriers to entry is important in many areas of competition law and policy, but the question of exactly what constitutes an entry barrier has never been universally resolved.

Barriers to entry are important because they are relevant in virtually every kind of competition case that does not involve a per se offence. It is necessary to consider entry barriers when assessing dominance, when determining whether unilateral conduct might deter new firms from participating in a market, and when analysing the likely competitive effects of mergers, to name a few examples. Most significantly, entry barriers may retard, dampen, or nullify the market's usual mechanism for checking market power: the attraction and arrival of new competitors. If a merger will substantially increase concentration to the point where a competition agency is concerned about anticompetitive effects, for example, entry barriers matter because competition will not be reduced if new firms would enter easily, quickly and significantly. Consequently, agencies seeking to block a merger will usually need to show that entry barriers make quick, significant entry unlikely. Similarly, establishing the presence of substantial entry barriers is usually necessary to prove that a high market share translates into market power in monopolisation or abuse of dominance cases.

Arguments among economists over how to define barriers to entry began decades ago, however, and they have yet to be settled. In general, the term means an impediment that makes it more difficult for a firm to enter a market. A controversy has persisted, though, about the types of impediments that should qualify as "barriers to entry." Some scholars and practitioners have argued that an obstacle does not count as an entry barrier unless it is something that the incumbent firms did not face when they entered. Others contend that an entry barrier is anything that hinders entry and has the effect of reducing or limiting competition, regardless of its other characteristics. A number of other definitions have been proposed over the years, but so far none of them has emerged as a clear favourite, at least not among economists.

(2) There is no consensus on whether a precise definition of entry barriers is necessary. While most competition enforcement agencies indicated that they do not need a fixed definition of barriers to entry, several others have one and have found it to be valuable.

In recent years, several competition scholars have concluded that the debate about entry barriers should be considered irrelevant to competition policy. What matters in actual cases, they argue, is not whether an impediment satisfies this or that definition of an entry barrier, but rather the more practical questions of whether, when, and to what extent entry is likely to occur. Most, but not all, competition agencies in OECD countries agree with that view. Some, however, have found that having a precise definition of entry barriers is helpful. In New Zealand, for example, lower court decisions would have posed problems for the competition agency if higher courts had not adopted a clear definition of entry barriers.

(3) *A barrier to entry does not have to prevent firms from entering a market forever in order to affect competition and consumer welfare; sometimes merely retarding the arrival of new firms is enough. Therefore, entry conditions are usually analysed from a dynamic, rather than a static, perspective.*

Consumer welfare can obviously suffer if supra-competitive pricing persists indefinitely due to absolute entry barriers. But consumer welfare may also suffer if the barriers delay entry. As Professor Carlton has argued, the interesting question for competition authorities is not whether price will eventually equal the competitive level after entry occurs, but how long it will take for that to happen. There probably is no perfect place to draw a line between significant and insignificant delays, but many competition agencies have chosen two years as the appropriate benchmark in their guidelines.

(4) *Furthermore, entry analysis goes beyond asking whether entry barriers exist and whether entry could conceivably occur. Typically, it also asks whether entry would occur and, if so, whether it is likely to happen quickly enough and be substantial enough to fix the anticompetitive problem that is central to the case.*

Most competition agencies conduct factual and flexible case by case investigations about entry conditions in their matters rather than formulaic or purely abstract inquiries about what constitutes a barrier to entry. Guidelines on entry analysis vary from jurisdiction to jurisdiction, but the central feature of many of them is an examination of whether entry will be likely, timely, and sufficient to remove concerns about possible anticompetitive effects in a given matter. Placing the focus on those issues avoids the risk of incorrectly concluding that the mere possibility, or even the actual occurrence, of any entry is enough to make intervention unnecessary.

(5) *Conditions that constitute entry barriers may be "structural" or "strategic." Structural barriers have more to do with basic industry conditions such as cost and demand than with tactical actions taken by incumbents. Strategic barriers, in contrast, are intentionally created or enhanced by incumbents, possibly for the purpose of deterring entry. While structural barriers are sometimes relatively easy to quantify, strategic barriers are often difficult to measure.*

Structural barriers may exist due to conditions such as economies of scale and network effects. Sometimes it is possible to quantify these kinds of barriers because it is known in advance how much it will cost to build an efficient plant or to purchase necessary inputs. Strategic barriers, on the other hand, may arise from behaviour such as exclusive dealing arrangements. It can be substantially more difficult to measure the difficulties that such behaviour can impose on potential entrants. Furthermore, it is not always easy to determine whether strategic behaviour should be viewed as fostering or restricting competition in the first place. Based on agencies' experience, it seems that some of the behavioural factors that allow firms to have large market shares in differentiated good industries are also factors that are considered to establish the existence of barriers to entry. In other cases, however, factors that point toward the existence of barriers to entry are also exactly the factors that are deemed to foster vigorous competition. Advertising, for example, is often considered to promote competition by increasing the amount of information available to consumers. "Too much" advertising, however, is sometimes deemed to be a barrier to entry when it effectively imposes an obligation on entrants to advertise their products to a similar extent.

(6) *Evidence of past entry, or the lack of it, can be helpful in assessing entry conditions in a market. Such evidence is not usually considered determinative by itself, though.*

Previous instances of entry do not necessarily prove that it was easy, that it was competitively significant, or that it is likely to take place again. Moreover, current potential entrants may not face the same market conditions that previous entrants faced. By the same token, long periods without entry do not necessarily prove that entry barriers are high, or that significant entry is unlikely in the future. Instead, such patterns may indicate that a market is very competitive (or that it is in decline) and that it has therefore been unattractive to potential entrants. Nevertheless, the history of entry in an industry can occasionally provide useful information about the likelihood and nature of entry in the future. If market conditions have not changed appreciably since the historical period being used for comparison, for example, then it may make sense to draw some inferences about what is likely in the future based on that period. While such evidence may be relevant, though, it is usually considered inadequate for making final conclusions.

(7) *Some agencies have pro-actively taken aim at entry barriers that were unnecessarily created by government regulation, issuing reports that study the regulations' effects on competition, identify less restrictive alternatives, and advocate appropriate changes.*

In regulated sectors, licensing procedures, territorial restrictions, safety standards, and other legal requirements may unnecessarily deter or delay entry. In some cases, these regulations seem to be the result of lobbying efforts by incumbents to protect their businesses. In other cases, incumbents find ways to take advantage of existing, complex regulations to thwart entry, such as by using the laws as the basis of litigation against entrants. Competition agencies in Ireland, Mexico, the United Kingdom, and the United States, for example, have published reports that highlight such problems in various markets including banking, contact lenses, federal auctions, and wine.

SYNTHÈSE

par le Secrétariat

De la discussion qui a eu lieu lors de la table ronde, des contributions des délégués et du document de référence, plusieurs points essentiels peuvent être dégagés :

(1) *La notion de barrière à l'entrée est importante dans de nombreux domaines du droit et de la politique de la concurrence, mais la question de savoir ce qu'est exactement une barrière à l'entrée n'a jamais été résolue une fois pour toutes.*

Les barrières à l'entrée sont importantes car il en existe dans pratiquement tous les types d'affaires de concurrence qui ne se matérialisent pas par une infraction au sens strict. Il est indispensable d'en tenir compte lorsqu'on définit des marchés selon des critères géographiques ou en fonction de produits, lorsqu'on cherche à apprécier si une entreprise est en position dominante ou à déterminer si une pratique unilatérale risque de dissuader de nouveaux entrants de pénétrer sur un marché, ou encore lorsqu'on analyse les effets probables sur la concurrence d'une fusion, pour ne citer que ces quelques exemples. Les barrières à l'entrée ont principalement pour effet de retarder, de ralentir, voire de neutraliser le mécanisme classique d'équilibrage des pouvoirs sur un marché, à savoir l'arrivée de nouveaux concurrents. Dans une situation où une fusion a pour effet d'accroître sensiblement la concentration au point que l'autorité de la concurrence se préoccupe des effets anticoncurrentiels qui risquent d'en découler, elles sont importantes puisque, tant que de nouveaux entrants peuvent accéder facilement, rapidement et en nombre au marché, la concurrence ne se trouve pas amoindrie. C'est pour cette raison que les autorités de la concurrence qui cherchent à s'opposer à une fusion doivent généralement démontrer que les barrières à l'entrée rendent improbable l'entrée en scène à bref délai de nouveaux concurrents en nombre. De même, il leur faut en règle générale démontrer qu'il existe des barrières non négligeables à l'entrée pour apporter la preuve que la détention d'une large part de marché équivaut à une position dominante dans une affaire de monopole ou d'abus de position dominante.

Les querelles entre économistes sur la manière de définir les barrières à l'entrée ont commencé il y a des dizaines d'années et ne sont toujours pas près de s'éteindre. De façon générale, le terme de barrière à l'entrée fait référence à tout facteur qui rend plus difficile pour les candidats éventuels l'entrée sur un marché. Le débat se poursuit toutefois depuis longtemps sur les catégories de facteurs qu'il convient de considérer comme des barrières à l'entrée et qui doivent être reconnus comme telles par les autorités de la concurrence et les tribunaux. Certains théoriciens et praticiens partent du principe qu'un obstacle ne peut être qualifié d'obstacle à l'entrée que s'il s'agit d'une difficulté à laquelle les entreprises en place ne se sont pas heurtées lorsqu'elles sont arrivées sur le marché. D'autres affirment que constitue un obstacle à l'entrée tout facteur qui interdit l'accès au marché et a pour effet de restreindre ou limiter la concurrence, indépendamment de ces autres caractéristiques. Un certain nombre d'autres définitions ont été proposées au fil des années, mais jusqu'ici, aucune d'elle ne s'est véritablement imposée, du moins pas aux yeux des économistes.

(2) *Il n'y a pas consensus sur la question de savoir s'il est nécessaire de disposer d'une définition précise de la notion de barrière à l'entrée. Si la plupart des organismes chargés de faire respecter le droit de la concurrence ont fait savoir qu'ils n'avaient pas besoin d'une définition arrêtée de ce concept, plusieurs autres en appliquent une et estiment qu'elle a son intérêt.*

Ces dernières années, plusieurs théoriciens de la concurrence sont arrivés à la conclusion que le débat sur les barrières à l'entrée n'avait rien à voir avec la politique de la concurrence. Ce qui compte pour eux dans une situation réelle, ce n'est pas de savoir si un obstacle correspond ou non à une définition donnée de la notion de barrière à l'entrée, mais plutôt de déterminer concrètement si, quand et dans quelle mesure il risque de se présenter. La majorité, si ce n'est la totalité, des autorités de la concurrence des pays de l'OCDE sont de cet avis. Certaines d'entre elles se sont toutefois aperçues qu'il est utile de pouvoir s'appuyer sur une définition précise. En Nouvelle-Zélande par exemple, les décisions rendues en première instance auraient posé des problèmes à l'autorité de la concurrence si les instances supérieures n'avaient pas adopté une définition claire de ce que désigne le terme « barrière à l'entrée ».

(3) *Il n'est pas nécessaire qu'une barrière à l'entrée empêche définitivement de nouveaux arrivants d'entrer sur un marché pour qu'elle ait des effets sur la concurrence et le bien-être des consommateurs ; il suffit parfois qu'elle retarde simplement leur entrée en scène. C'est pourquoi les conditions à l'entrée sont généralement analysées dans une perspective dynamique et non statique.*

Le bien-être des consommateurs peut évidemment pâtir du maintien, pendant une durée indéfinie, de prix non soumis à la concurrence, imputable à l'existence de barrières à l'entrée, mais il peut également faire les frais de l'existence d'obstacles à l'entrée qui retardent l'arrivée de nouveaux concurrents. Selon le Professeur Carlton, la question pertinente pour les autorités de la concurrence n'est pas de savoir si le prix atteindra au bout du compte le niveau auquel il doit s'établir en situation de concurrence une fois que de nouveaux concurrents seront entrés sur le marché, mais plutôt de savoir combien de temps cela prendra. Il est probablement impossible de déterminer à partir de quel moment ce délai doit être considéré comme significatif, mais dans beaucoup de pays, les autorités de la concurrence l'ont fixé à deux ans dans leurs directives.

(4) *En outre, l'analyse ne doit pas avoir uniquement pour objet de déterminer s'il existe des barrières à l'entrée et si l'arrivée de nouveaux concurrents est raisonnablement envisageable. Elle doit en principe également viser à apprécier si de nouveaux concurrents vont réussir à entrer sur le marché et, dans le cas d'une réponse positive, s'ils vont pouvoir entrer en scène assez rapidement et en nombre suffisant pour résoudre le problème de l'atteinte portée à la concurrence qui est central dans ce type de situation.*

Dans la plupart des pays, les autorités de la concurrence procèdent, pour appréhender les conditions d'entrée sur un marché, à des enquêtes au cas par cas, qui se déroulent selon des modalités souples et sont fondées sur l'observation des faits, plutôt que sur des spéculations théoriques ou purement abstraites relatives à ce qui constitue une barrière à l'entrée. Les principes qui doivent régir l'analyse des conditions d'entrée sur un marché varient selon les pays, mais ont pour beaucoup un dénominateur commun : ils préconisent d'examiner si l'entrée de nouveaux concurrents est probable et si elle surviendra en temps opportun et dans des proportions suffisantes pour apaiser la crainte d'éventuels effets anti-concurrentiels dans une situation donnée. Le fait de mettre l'accent sur cet aspect élimine le risque de conclure à tort que la simple possibilité qu'un nouveau concurrent entre sur le marché, voire l'arrivée effective d'un nouveau concurrent, suffit pour rendre superflue une intervention des autorités. En revanche, lorsqu'on procède à des analyses au cas par cas, la marge d'appréciation laissée aux analystes rend leurs conclusions hautement imprévisibles. C'est pourquoi, comme cela arrive fréquemment sur les questions de concurrence, il semble qu'il faille opérer un arbitrage entre la justesse et la prévisibilité des décisions.

(5) Les conditions instituant des barrières à l'entrée peuvent être de nature "structurelle" ou "stratégique." Les barrières structurelles sont davantage liées aux conditions d'ensemble qui prévalent dans le secteur d'activité concerné, notamment aux coûts ou à la demande, qu'à des actions tactiques menées par les entreprises en place. Les barrières stratégiques en revanche sont mises en place, ou tout au moins relevées intentionnellement par les entreprises en place, le cas échéant aux fins de dissuader d'éventuels candidats de chercher à pénétrer sur le marché. Si les barrières structurelles sont quelquefois relativement faciles à quantifier, les barrières stratégiques se révèlent en revanche souvent difficiles à évaluer.

Il peut exister des barrières structurelles liées à des facteurs tels que les économies d'échelle et les effets de réseau. Il est parfois possible de les chiffrer lorsqu'on sait à l'avance combien coûte la construction d'une usine performante ou l'acquisition des intrants requis. Les barrières stratégiques en revanche résultent dans certains cas de pratiques prenant notamment la forme de prix-limites et d'accords d'exclusivité. Il peut se révéler nettement plus difficile de mesurer les obstacles que ce type de comportement peut imposer aux entrants potentiels. En outre, il n'est pas toujours facile de déterminer si l'on doit considérer qu'un comportement stratégique a d'abord pour effet de stimuler ou de restreindre la concurrence. L'expérience acquise par les autorités compétentes semble montrer que certains éléments des comportements qui permettent aux entreprises de s'adjuger de généreuses parts de marché dans des secteurs de production de biens différenciés sont aussi considérés comme des facteurs attestant l'existence de barrières à l'entrée. Il arrive aussi cependant que les facteurs qui témoignent de la présence de barrières à l'entrée soient aussi précisément des facteurs censés favoriser une vive concurrence.

(6) Le fait que dans le passé, de nouveaux arrivants aient réussi à entrer sur le marché, ou a contrario, qu'aucun n'y soit parvenu, peut être une indication utile pour apprécier les conditions d'entrée sur un marché. Ce genre d'observation n'est toutefois généralement pas jugée déterminante en soi.

Le fait qu'une entreprise ait réussi dans le passé à pénétrer sur un marché ne prouve pas obligatoirement que cela a été facile, que cette arrivée a été significative sur le plan de la concurrence, ni qu'il est probable que le phénomène se reproduise à nouveau. Par ailleurs, il se peut que les candidats à l'entrée ne soient pas soumis aux mêmes conditions que leurs prédécesseurs. A l'inverse, une longue période sans arrivée nouvelle sur un marché n'est pas nécessairement synonyme de barrières élevées à l'entrée, pas plus qu'elle ne signifie que toute arrivée nouvelle est improbable dans le futur. Ces constats peuvent en revanche être le signe qu'un marché est très ouvert (ou en déclin), et de ce fait, peu attrayant pour les candidats éventuels à l'entrée. Néanmoins, l'examen dans une perspective historique de la situation d'un secteur d'activité peut parfois apporter un éclairage utile sur la probabilité que de nouveaux arrivants entrent en scène dans le futur, ainsi que sur la nature de ces entrants. Si les conditions sur le marché n'ont pas sensiblement changé depuis la période de référence par rapport à laquelle on établit des comparaisons, il peut être légitime d'en tirer des conclusions pour l'avenir. Bien que pertinentes dans certains cas, les analyses rétrospectives sont pourtant généralement jugées inadéquates pour tirer des conclusions définitives.

(7) *Certains organismes se sont attaqués en priorité aux barrières à l'entrée imposées sans nécessité par la réglementation et ont pour ce faire publié des rapports qui étudient les effets de la réglementation sur la concurrence, répertorient des solutions de substitution moins restrictives et prônent des réformes.*

Dans les secteurs réglementés, les procédures d'agrément, les restrictions territoriales, les normes de sécurité et autres obligations légales risquent de compromettre ou de retarder indûment l'entrée de nouveaux concurrents sur le marché. Dans certains cas, les réglementations semblent être l'aboutissement de pressions exercées sur les institutions par les entreprises en place en vue de se protéger. Dans d'autres, les entreprises en place trouvent des moyens de mettre à profit les réglementations complexes en vigueur pour faire barrage aux candidats à l'entrée, notamment en s'appuyant sur les textes en vigueur pour leur intenter des procès. En Irlande, au Mexique, au Royaume-Uni et aux États-unis par exemple, les autorités de la concurrence ont publié des rapports qui mettent en évidence l'existence de ce genre de difficultés sur divers marchés dont ceux des services bancaires, des lentilles de contact, des ventes aux enchères et du vin.

BACKGROUND NOTE

1. Introduction

Although the debate over how to define barriers to entry began decades ago, it has yet to be won. In general, the term means an impediment that makes it difficult for a firm to enter a market. A controversy has persisted, however, with respect to the types of impediments that should qualify as "barriers to entry" and thus be acknowledged by competition authorities and courts. Some scholars have argued, for example, that an obstacle does not count as an entry barrier unless it is something that the incumbent firms did not face when they entered. Others contend that an entry barrier is anything that hinders entry and has the effect of reducing or limiting competition, regardless of its other characteristics. A number of other definitions have been proposed over the years, but so far none of them has emerged as a clear favourite. Because the debate over these definitions remains unsettled by both scholars and courts, yet they continue to be relied upon as analytical tools, the possibility of confusion – and therefore of sub-optimal competition policy – has lingered for many years.

More recently, other commentators have concluded that the debate about entry barriers, although it may be intellectually interesting, should be considered irrelevant to competition policy. What really matters in actual cases, they argue, is not whether an impediment satisfies this or that definition of an entry barrier, but rather the more practical questions of whether, when, and to what extent entry is likely to occur.

Regardless of whether there is a consensus on a precise definition, or even whether the definition ultimately matters, it is undeniable that the concept of barriers to entry plays an important role in a wide variety of competition matters because it is vital to the analysis of market power. Entry barriers can retard, diminish, or entirely prevent the market's usual mechanism for checking market power: the attraction and arrival of new competitors. Indeed, some argue that the mere possibility that a new supplier would be encouraged to enter the market can be a strong constraint on the behaviour of incumbent firms, even when they have very high market shares.

If a merger will substantially increase concentration to the point where a competition agency is concerned about anticompetitive effects, for example, entry barriers matter because competition will not be reduced if firms can enter easily, quickly and significantly. Consequently, agencies seeking to block a merger will usually need to show that entry barriers make quick, significant entry unlikely. Similarly, establishing the presence of substantial entry barriers is usually necessary to prove that a high market share translates into market power in monopolisation or abuse of dominance cases.[1] Furthermore, entry barriers play an indirect role in determining market concentration, since potential competitors are usually treated as though they are actual competitors if entry barriers are low enough to enable them to enter quickly.

It is therefore imperative that competition agencies have a strong grasp of why barriers to entry are important to competition policy, how they affect competition under various circumstances, and how they

[1] In contrast, an analysis of entry barriers is usually unnecessary in cases involving per se offences such as price fixing and other cartel behaviour.

may be properly assessed in individual cases. This Note explores some of the academic literature on barriers to entry as well as the methods that various competition agencies are using to analyse them.

Part 2 reviews a number of definitions of the term "entry barrier" that have been proposed over the last 50 years, and then it explores the question of whether these definitions should matter to competition agencies and courts. Part 3 discusses some of the conditions that frequently affect the ease of entry, including sunk costs and various structural and strategic factors. Part 4 addresses several points that are relevant to assessing the significance of entry barriers and describes the entry analyses set out in several competition agencies' guidelines. Finally, Part 5 presents an illustration of how pro-active advocacy by competition agencies can help to eliminate regulatory entry barriers.

The main points of this paper are:

- Although the lengthy effort to define barriers to entry has contributed to a better theoretical understanding of entry deterrence and prevention, the lack of consensus has also caused uncertainty about how entry should be analysed in real cases. Ultimately, the practical concern of agencies and courts should not be how to define entry barriers, but how to evaluate the extent to which market conditions will delay or prevent entry from curing the anti-competitive effects at issue in individual cases.

- Barriers to entry should be understood to include not only factors that absolutely prevent entry, but those that retard it, as well. Consumer welfare obviously suffers if supra-competitive pricing persists indefinitely due to absolute entry barriers. But consumer welfare may also suffer if the barriers delay entry. There probably is no uniformly perfect place to draw a line between significant and insignificant delays, but many competition agencies have chosen two years as the appropriate benchmark in merger cases.

- Good entry analysis must go beyond asking only whether entry barriers exist and whether entry could occur. It must also ask whether entry *would* occur, and most importantly, whether it is likely to be substantial enough to fix whatever feared anticompetitive problem is central to the case. This will require a factual and flexible case by case inquiry rather than formulaic or purely abstract thought about what constitutes a barrier to entry. Otherwise, agencies and courts will run the risk of incorrectly concluding that the mere possibility, or even the actual occurrence, of any entry is enough to make intervention unnecessary.

- Entry analysis can be an extremely important part of competition investigations and cases, but it does not always determine their outcomes. Specifically, it should not be inferred that a merger will substantially lessen competition or that an allegedly anticompetitive practice will do the same, simply because barriers to entry happen to be relatively high. It is possible that, despite a low likelihood of new entry, post-merger or post-conduct competition will be vigorous among the firms that are already in the market. Entry analysis, therefore, should not be conducted until after an assessment of the level of competition that would likely exist without entry.[2] If that level is deemed adequate, then there is no need to examine entry conditions.

- Many different types of conditions may constitute barriers to entry. Some are "structural," having more to do with basic industry conditions such as cost and demand than with tactical

2 "Entry analysis" here refers only to the analysis of committed entry. The possibility of hit and run entry is usually taken into account when market participants are identified for the purpose of determining market concentration. This detail is discussed in Part 4.

actions taken by incumbents to keep entrants out. These include factors such as economies of scale and network effects. Other barriers are "strategic," having been intentionally created or enhanced by the incumbent, possibly for the purpose of deterring entry. Strategic barriers could include factors such as limit pricing and exclusive dealing arrangements.

- Barriers to entry should not be considered in isolation from one another. Because they can interact with and magnify each other's effects, what might seem like a fairly innocuous circumstance when regarded individually may be more problematic when the presence of other barriers is taken into account.

- Although evidence of past entry (or the lack of it) can be helpful in assessing the significance of entry barriers in a market, such evidence should not be considered determinative by itself. Previous episodes of entry do not automatically prove that it was easy, that it was competitively significant, or that it is likely to take place again. Beyond that, current potential entrants may not face the same market conditions that previous entrants faced. Similarly, long periods without entry do not necessarily prove that significant entry is unlikely in the future. Such evidence should certainly be considered relevant, but inadequate for drawing final conclusions.

- Another type of evidence that is helpful, but not automatically determinative, involves incumbents' profit levels. While data showing that incumbents earned persistently high profits is generally consistent with high entry barriers, by no means does it prove that high entry barriers exist, nor is it necessary for making that proof. By the same token, data showing that incumbents consistently failed to earn high profits is generally consistent with low entry barriers, but it does not prove that barriers are low, and in any case, other types of evidence may be sufficient to establish that fact.

- There is a great deal of common ground among the entry analyses prescribed in guidelines issued by competition agencies in various OECD member countries. For example, to be recognised as something that can defeat or deter the potential exercise of market power, entry is often required to be timely, likely, and sufficient under the guidelines of many agencies. Furthermore, two years is typically chosen as the longest acceptable delay before effective entry can occur if it is to be considered timely. Although some guidelines approach entry analysis in a slightly more quantitative way than others do, it is generally recognised that a wide variety of facts and circumstances need to be taken into account when assessing the ease of entry.

2. What is a barrier to entry?

2.1 Entry

Before reviewing the various definitions of entry barriers that have been proposed over the years, it is useful to begin by defining entry. Very simply, entry means the appearance of a new producer of goods or services in a market. There are two general types of entry. The first type, usually called "hit and run" or "uncommitted" entry, is possible when a firm can quickly enter and exit a market without having to pay appreciable sunk costs. Sunk costs are costs that a firm cannot recover, even if it withdraws from a market. For example, sunk costs might include advertising expenses, license fees, or research and development costs. Sunk costs and their implications for entry analysis are discussed in greater detail in Part 3.A.

A hit and run entrant enters because it perceives an opportunity to make profits, even if only for a short time, knowing that it can exit the market costlessly (or almost costlessly) if that opportunity disappears. Such an opportunity might arise, for instance, when a merger results in a price increase. Theoretically, as long as hit and run entrants have sufficient capacity and are not cost-disadvantaged, they should be able to drive market prices back down to the pre-merger level. Actual occurrences of hit and run entry, however, appear to be uncommon.

Supply-side substitutability falls into the same general category as hit and run entry. If firms in other markets can easily and quickly divert their resources to the relevant market (and back out again, if necessary), this will tend to push prices downward, as well.

The more common type of entry is typically referred to as "committed" entry. Committed entry involves appreciable sunk costs and will only be attempted by firms that believe they will eventually be able to recover those costs and make a profit. Like hit and run entry, committed entry can defeat or deter anti-competitive prices increases. In order to do so, however, committed entrants must be able to affect prices quickly and significantly. Determining whether that is the case is often difficult, and therefore the analysis of committed entry tends to be more complicated than the analysis of hit and run entry.

2.2 Definitions of Barriers to Entry Proposed in the Economics Literature

Many definitions of entry barriers have been proposed by economists over the years. The best known ones are listed below in chronological order.[3]

1. *Bain*. The debate over how to define entry barriers began nearly 50 years ago when Joe Bain published his book *Barriers to New Competition*. In what was to become a classic of industrial organisation literature, Bain presented the conclusions of the first thorough study of entry barriers. In doing so, he defined an entry barrier as anything that permits incumbents to earn above-normal profits without attracting entry. More specifically, he contended that an entry barrier is an advantage of incumbents over potential entrants that can be measured by the extent to which incumbents can persistently hold their prices above competitive levels without attracting new firms to the market.[4] "Persistently," to Bain, meant the long run, or a period long enough that all existing capital investments are replaced.[5]

   It is noteworthy that Bain's definition encompasses phenomena such as economies of scale and product differentiation, which appeared to be positively correlated with high profits. This characteristic of his definition created a great deal of controversy because it struck some commentators as being too broad. Furthermore, if one's intuitive interpretation of "barrier to entry" is that the term has a negative (anti-competitive) connotation, then Bain's definition may seem even more overbroad.[6] After all, a firm might be able to sustain supra-competitive

3 The list is primarily based on R. Preston McAfee, Hugo Mialon & Michael Williams, "What Is a Barrier to Entry?" 94 American Economic Review, Papers and Proceedings 461 (2004).

4 Joe Bain, *Barriers to New Competition* 3 (1956).

5 *Id*. at 6-7, 10-11, 17.

6 The term "barrier to entry" should not automatically carry a negative connotation. First, entry barriers, or the hope of creating them, provide greater incentives to create new products and services. Intellectual property rights, for example, are an effective incentive to innovate precisely because they help to deter and prevent entry. *See* OECD (2004), Intellectual Property Rights, DAF/COMP(2004)24. Second, some entry barriers achieve important societal goals outside the scope of competition policy. Safety

prices simply because it has a better product than anyone else, or because it is more efficient. In fact, Bain expressly identified absolute cost advantages as a barrier to entry.

At the same time, Bain's definition is too narrow because it identifies no barriers to entry in markets where incumbents earn no supra-competitive profits even though further entry is impossible. For example, there may be insufficient demand for even a solidly protected monopolist to cover its cost. It seems illogical to say that such a market has no entry barriers when we know that it does, yet that is Bain's result. This is the problem with using profits as a proxy for entry barriers.

Carlton asserts that the weakness of Bain's entry analysis is not his definition, but his failure to present a consistent theory showing that the factors that count as entry barriers lead to supra-competitive prices. Bain's analysis, Carlton states, is based on a belief that barriers determine the number of firms in a market, which determines the market's competitiveness and thus its participants' rates of return. In other words, Bain believed in a structure-conduct-performance paradigm. That view has been shown to be too simple, though. The number of firms in a market is determined by their ability to earn profits, which depends on many factors, not just structural ones as Bain believed.[7] Nevertheless, mathematically reinforced versions of Bain's definition continue to command the respect of some industrial organisation scholars.[8]

2. *Stigler*. Twelve years after Bain's book appeared, George Stigler introduced a very different view. Rather than defining barriers to entry in terms of their effect, he argued that they are costs that must be borne by entrants but are not borne by incumbents.[9] (Most commentators believe that, in addition to costs that are not currently borne by incumbents, Stigler meant to include – or at least should have included – those costs that were not borne by incumbents in the past, either.) Notably, under Stigler's definition, scale economies cannot be entry barriers, provided that entrants have equal access to technology, because incumbents presumably encountered the same economies. Capital costs are not Stiglerian barriers, either, unless the incumbent never had to pay them. In addition, if advertising is correlated with high profits, Bain would consider it an entry barrier whereas Stigler would not, as long as advertising is available to everyone on the same terms. Stigler's definition is therefore narrower than Bain's.

Nevertheless, Schmalensee has shown that under certain conditions, Stigler's definition is still too broad.[10] On the other hand, Demsetz showed in a classic article that both the Bain and Stigler definitions are too narrow. Demsetz hypothesized a taxi market in which each taxi was required by the government to obtain one of a limited number of licenses (in the form of medallions). The medallions must be purchased from the government at market-determined prices. The medallion requirement is a barrier to entry as long as the number of medallions

regulations, for example, may make it more difficult to enter the nuclear waste hauling business, but few would disagree that a certain amount of regulation in this instance is necessary.

7 Dennis Carlton, "Why Barriers to Entry Are Barriers to Understanding," 94 American Economic Review, Papers and Proceedings 466, 467 (2004).

8 *See, e.g.*, Jean Tirole, The Theory of Industrial Organization 305-06 (1988); F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance 360 (3d ed. 1990).

9 George Stigler, *The Organization of Industry* 67 (1968).

10 Schmalensee assumes that variable costs are zero. *See* Richard Schmalensee, "Sunk Costs and Antitrust Barriers to Entry," 94 American Economic Review, Papers and Proceedings 471, 473 (2004).

available is less than the number of taxis that would be in business if there were no such requirement. In this situation, both incumbents and entrants face exactly the same cost of entry, so Stigler's definition fails to recognize the barrier. At the same time, because the market process will dissipate profit, Bain's definition also fails to recognize the barrier.[11] Consequently, neither definition can reliably help to answer the important questions of whether entry is likely, and if so, how long it will take.

An additional way in which Stigler's definition could be too narrow is that it does not seem to recognize that it in some circumstances it is more difficult for entrants to break into a market than it was for an incumbent that was the first firm to enter. More precisely, when a market is already occupied by an incumbent, potential entrants might face an entrenched brand or brands, as well as demand that is insufficient to permit efficient operation. The first firm in a market, on the other hand, had no rival brands opposing it and could at least temporarily enjoy having an untapped market demand curve all to itself. It is not clear from his definition whether Stigler would try to account for these difficulties by assuming them away, (i.e., assuming that incumbents faced the same hurdles in developing their brands and the same economies of scale that entrants do), which seems unrealistic, or if he would acknowledge that the first firm in a market really can have advantages that would qualify as entry barriers.

Finally, although it became generally accepted in the 1980s and 1990s that sunk costs can be a source of entry barriers, Stigler's definition excludes them. Both incumbents and entrants may need to pay sunk costs before entering a market, and they therefore do not meet the requirements of a Stiglerian barrier. Sunk costs nevertheless can create a decisional asymmetry that is capable of deterring entry because incumbents have already paid them and entrants have not. This asymmetry will be explored further in Part 3.A.

3. *Ferguson*. Ferguson defined an entry barrier as something that makes entry unprofitable while allowing incumbents to price above marginal cost and persistently earn monopoly profits.[12] Though different from Bain's definition because it specifies that an entry barrier will make entry unprofitable, and that it requires incumbents to earn monopoly profits, Ferguson's definition is still open to the same criticisms of over- and under-breadth that Bain's is. In other words, it could still be considered too broad because it may include desirable factors such as superior quality and efficiency, and it could be considered too narrow because it does not include factors that clearly make entry impossible yet do not permit monopoly profits.

4. *Fisher*. Fisher defined an entry barrier as anything that prevents entry when entry would be socially beneficial.[13] Although it attempts to introduce a normative element to the discourse on entry barriers, this definition does not give any guidance for identifying socially harmful impediments.[14] Furthermore, as McAfee, Mialon and Williams point out, social welfare does not always overlap perfectly with consumer welfare, which is what competition agencies usually strive to protect. Suppose, for example, that a firm decides not to enter an industry

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11 Harold Demsetz, "Barriers to Entry," 72 American Economic Review 47, 48 (1982).

12 James Ferguson, Advertising and Competition: Theory, Measurement, Fact 10 (1974).

13 Franklin Fisher, "Diagnosing Monopoly," 19 Quarterly Review of Economics and Business 23 (1979).

14 As Dennis Carlton has stated, "If the point of defining entry barriers is to identify some (exogenous) conditions that imply social harm, one should not define 'barriers' as conditions that cause social harm, unless one can identify the conditions *ex ante*[.] Otherwise such a definition serves little purpose." Dennis Carlton, "Why Barriers to Entry Are Barriers to Understanding," 94 American Economic Review, Papers and Proceedings 466 (2004).

because it does not expect to be able to recover the large capital costs that it would face. To Fisher, this outcome is just what society would want (since society would take the optimal allocation of resources into account). Fisher thus agrees with Stigler's view that high capital costs are not entry barriers. From a consumer perspective, though, the addition of another firm could boost competition and consumer welfare – possibly by enough to compensate for the firm's profit loss.[15]

5. *Von Weizsacker*. Von Weizsacker defined an entry barrier as a cost that must be borne by an entrant but is not borne by incumbents and that implies a distortion in society's resource allocation.[16] This is similar to Stigler's definition but is even narrower because the difference in cost must also reduce social welfare to count as an entry barrier. Von Weizsacker's point was that, in a Cournot industry, there may be more firms than the socially optimal number.[17] This leads to the result that entry barriers may actually serve a good purpose. If that reasoning and result seems counterintuitive, it may be because real-world examples of Cournot industries are rare. In any case, because it focuses on social welfare, von Weizsacker's definition is open to the same criticisms that Fisher's is.[18]

6. *Carlton and Perloff.* Carlton and Perloff defined an entry barrier as anything that prevents a firm from instantly creating a new firm in a market. Realizing that this is not a practical definition because it would virtually always signal the presence of entry barriers, they refined it by specifying that a long-run barrier to entry is a cost that entrants must bear but incumbents do not, or did not, have to bear.[19] In solving the one problem, though, the authors created another because the long run is too long for effective competition policy where entry barriers are concerned. If enforcement agencies acknowledged only long run entry barriers, they might allow mergers that cause anticompetitive effects in the short and medium term but, due to the absence of long run barriers, would not cause such effects in the long run. This policy would ignore factors such as sunk costs, which by definition do not exist in the long run. It therefore appears to be too permissive.

   As the U.S. Federal Trade Commission wrote in one merger decision:

   > *Unless there is a barrier to entry . . ., market power cannot be exercised indefinitely. Sooner or later, new firms will enter the market and drive prices back down to competitive levels. From the standpoint of the public, however, it makes a great deal of difference whether this occurs sooner or later. There may be little practical difference between an absolute barrier to entry and conditions of entry that delay restoration of competitive prices for decades.*

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15 R. Preston McAfee, Hugo Mialon, & Michael Williams, "What Is a Barrier to Entry?," 94 American Economic Review, Papers and Proceedings 461, 463 (2004), available at http://userwww.service.emory.edu/~hmialon/B2E.pdf.

16 Carl von Weizsacker, "A Welfare Analysis of Barriers to Entry," 11 Bell Journal of Economics 399 (1980).

17 A Cournot industry is one in which firms use output as a strategic choice variable rather than the price of the good or service. The good or service is homogeneous and produced at a constant cost.

18 Schmalensee criticizes Fisher and von Weizsacker for this reason. Richard Schmalensee, "Sunk Costs and Antitrust Barriers to Entry," 94 American Economic Review, Papers and Proceedings 471, 472 (2004).

19 Dennis Carlton & Jeffrey Perloff, Modern Industrial Organization 110 (1994).

Therefore, we will also consider a second type of barrier to entry, which might more accurately be called an impediment to entry. An impediment to entry is any condition that necessarily delays entry into a market for a significant period of time and thus allows market power to be exercised in the interim.[20]

Although the term "impediment to entry" does not seem to have been widely adopted as a term of art, the underlying point is clear.

Moreover, Carlton himself recognised the danger of focusing too hard on the long run when he later wrote, "as a practical matter, the long run may be of no interest whatsoever. It may take so long to get there that the persistence of supra-competitive profits until then turns out to be the fact of practical importance, not that these excess profits are eliminated in some far-off future year."[21] As for how long is too long to tolerate the impedance of entry without acknowledging its effect on consumers, that is a subjective question. Clues to how various competition enforcement agencies view that issue can be found in their guidelines, however, and a sampling of them will be discussed in Part 4.B.

7. *McAfee, Mialon and Williams*. Finally, McAfee, Mialon and Williams tried to clear up some of the confusion over entry barriers by devising two categories for them. First, they defined an economic entry barrier as a cost that must be incurred by new entrants and that incumbents do not or have not had to incur. This is simply the Stigler definition repackaged to make the verb tenses clearer. Second, they defined an antitrust entry barrier as "a cost that delays entry and thereby reduces social welfare relative to immediate but equally costly entry."[22] Their definition was immediately recast by Schmalensee, however, as "conditions that constrain the ability of new entrants . . . to contribute to the achievement of antitrust policy goals," which he asserts relate to consumer surplus, not social overall economic welfare.[23]

McAfee, et al., and Schmalensee add a highly important dynamic element to their definitions of antitrust entry barriers. Their proposals appear to be the first ones that acknowledge the significance of factors that delay entry rather than permanently prevent it. As Schmalensee notes, however, "economists unfortunately seem to have produced very little potentially relevant theory and essentially no systematic empirical analysis of factors that slow entry."[24] Regardless of whether this new terminology helps to settle the definitional debate or merely adds more categories to the taxonomy of entry barriers, it does not really offer much assistance to policymakers beyond highlighting the need to consider the pace of entry.

2.3 Do Definitions Really Matter?

One source of disagreement and confusion over entry barriers may be that the foundation for some of them comes from the structure-conduct-performance literature, which has been shown to have a

20 *Echlin Manufacturing Co.*, 105 F.T.C. 410, 486 (1985).

21 Dennis Carlton, "Why Barriers to Entry Are Barriers to Understanding," 94 American Economic Review, Papers and Proceedings 466, 468 (2004).

22 R. Preston McAfee, Hugo Mialon, & Michael Williams, "What Is a Barrier to Entry?," 94 American Economic Review, Papers and Proceedings 461, 463 (2004), available at http://userwww.service.emory.edu/~hmialon/B2E.pdf.

23 Richard Schmalensee, "Sunk Costs and Antitrust Barriers to Entry," 94 American Economic Review, Papers and Proceedings 471 (2004).

24 *Id.* at 473.

number of theoretical defects. Another source of disagreement and confusion may be that when people try to define entry barriers, they do not always clarify whether they are aiming to identify anything that can obstruct entry or just to identify those obstacles that warrant some kind of public policy-based intervention. It may seem axiomatic that the latter meaning is the relevant one for competition policy. But in fact the former meaning is usually the relevant one.

The reason is that in real-world competition cases, the subject of entry barriers most often comes up not because the barriers themselves are allegedly detrimental, but because the competitive harm that some other event or conduct may cause could be cured by entry unless there are barriers that will prevent or deter it. In a merger case, for instance, the court's typical concern with entry barriers is whether they are high enough to prevent or discourage new firms from entering the market if the merger results in a significant price increase. The concern is usually not whether the court should issue an order that will remove an entry barrier, though. This point becomes even clearer if one imagines a market in which one of the most important barriers is a law that protects public health by imposing certain safety requirements on sellers. A court is unlikely to invalidate that law in a competition case, but the court should take that law into account when determining how difficult entry will be.[25]

Of course, in some cases, something that could be described as an entry barrier is on trial. This might happen, for example, in an exclusive dealing case. In such situations, the court is being asked to determine whether the "barrier" warrants judicial intervention. Even in those cases, though, there is often (or should be) a more general inquiry about entry barriers that goes beyond the one at the root of the litigation. This broader inquiry takes place when the court attempts to determine whether, even if the alleged barrier exists, any harmful effect it might have on competition is nevertheless likely to be cancelled or substantially mitigated by entry. Suppose that a court determines in a predatory pricing case that the defendant is indeed pricing below cost. The below-cost prices could be considered an entry barrier. The court, however, might also consider whether any other barriers would prevent entrants from defeating an attempt by the predator to recoup its losses. In other words, the court might explore whether, say, the need to invest in formidable sunk costs would deter entry even if the predator were to raise its price to a supra-competitive level. The sunk costs are not "unlawful," but they are definitely relevant. Thus, it is not useful to limit one's conception of entry barriers to behaviour or market traits that, by themselves, justify intervention.

Because of the duelling definitions described in Part 2.B. above, however, the term "barriers to entry" has become so controversial that it is now difficult to use it in a widely acceptable manner. In recent years, some commentators have deemphasised this problem, arguing that the debate over the meaning of "barriers to entry" is not essential for competition policy. In a 2004 article, for example, Carlton advised that: "Rather than focusing on whether an 'entry barrier' exists according to some definition, analysts should explain how the industry will behave over the next several years."[26] Posner is in agreement, having noted in 2002 that the important practical issue is not whether something is or is not a Stiglerian barrier, but whether it will delay new entry.[27] Werden also intentionally left the definitional dispute behind in a 2001 article by using the less-controversial term "conditions of entry."[28]

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25 However, sometimes competition is harmed by legal barriers to entry that cannot be justified even on grounds outside of competition policy. Such laws are very attractive targets for the advocacy initiatives of competition agencies. See Part 5 for an example of effective advocacy along these lines.

26 Dennis Carlton, "Why Barriers to Entry Are Barriers to Understanding," 94 American Economic Review, Papers and Proceedings 469 (2004).

27 Richard Posner, Antitrust Law 74 (2d ed. 2002).

28 *See* Gregory Werden, "Network Effects and Conditions of Entry: Lessons from the Microsoft Case," 69 Antitrust Law Journal 87 (2001). Some of Werden's earlier work also suggests that strict adherence to

These authors concluded that abstract, theoretical pondering on the definition of barriers to entry is unlikely to be very helpful in investigations and policy decisions. Instead, the more useful inquiry is whether and when entry is likely to defeat the anti-competitive effects that an agency or court is concerned about, given the facts and circumstances of each matter. This pragmatic approach is suggested here, as well. Therefore, although the words "barrier" and "barrier to entry" appear throughout this Note, no particular definition is endorsed. Instead, these terms are intended simply to denote something that is relevant to entry analysis because it tends to delay or prevent entry.

3. Conditions that may influence entry

A very large variety of conditions and behaviours can affect the ease of entry. This part of the Note contains descriptions of many of the factors that are commonly relevant in entry analysis. The purpose is not to create a comprehensive checklist, but to provide enough examples to illustrate the kinds of considerations that agencies and courts take into account when they evaluate entry. The conditions are divided into two basic types – structural and strategic. Some arguably spill over from one category to the other, and none of them should be viewed in isolation because they can interact with and magnify each other. However, there is one type of condition that permeates the whole discussion, so it is listed first and separately.

3.1 Sunk Costs

Sunk costs are investments that are fully committed to the market once they are made. They cannot be recovered, even if the firm that invested in them goes out of business. Along with regulatory barriers, sunk costs are now viewed by many commentators as one of the two main sources of entry barriers because they are involved in so many other factors that can impede entry.[29] Several empirical studies have shown that sunk costs have substantial effects on how industries evolve.[30]

Sunk costs are often confused with fixed costs, but the two are not necessarily the same. Fixed costs do not vary with the level of output, but some of them may be recovered by ceasing production and selling or redeploying the related assets. Selling and redeploying are not options with sunk cost assets, though. For example, suppose a university in a small city decides to fund an astronomy program, and that it adds an observatory dome with a powerful telescope to one of its buildings. The costs of the dome and the telescope are fixed; they do not vary with the number of times the dome and telescope are used. Suppose further that the city experiences explosive growth and the resulting increase in lighting ruins the night skies for local astronomers, preventing further productive use of the telescope in the dome. The university can move the telescope to a satellite campus 30 kilometres away and put it to good use there. The telescope is therefore a fixed but non-sunk cost. However, suppose that it would cost more to disassemble and move the dome than it would to build another dome at the satellite

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certain definitions of entry barriers could lead to incorrect policy choices. *See* Gregory J. Werden & Luke M. Froeb, "The Entry-Inducing Effects of Horizontal Mergers," 46 Journal of Industrial Economics 525 (1998) (showing that, under certain conditions, sunk costs can deter entry even in a market that contains no Stiglerian barriers).

29 Thomas Ross, "Sunk Costs and the Entry Decision," 4 Journal of Industry, Competition and Trade, Bank Papers, 79, 80 (2004).

30 *E.g.*, A. Gschwandtner & V. Lambson, "The Effects of Sunk Costs on Entry and Exit: Evidence from 36 Countries," 77 Economic Letters 109 (2002) (the number of firms tends to be less variable over time in high sunk cost industries); Timothy Bresnahan & Peter Reiss, "Measuring the Importance of Sunk Costs," 34 Annales d'Économie et de Statistique 181 (1994) (minimum price that triggers entry is uniformly higher than maximum price that triggers exit).

campus. In that case, unless the college can find some other productive use for the original dome, its cost cannot be recovered, so that cost is both fixed and sunk.

Generally, sunk costs can affect entry in two ways. One way has to do with incumbents' sunk costs. When incumbents have already made irreversible investments that contribute toward the manufacturing, distribution or sale of their products, they will not necessarily take the cost of those investments into account when pricing in response to entry. The reason for this is simple: the money is already gone and no course of action will ever bring it back.

Because there is no way to recover any of the money spent on sunk costs, a firm that has already absorbed them could rationally ignore its sunk costs when making pricing decisions. That means that an entrant facing an incumbent who has invested in substantial fixed costs is facing a rival that might respond to entry by cutting its prices below the point where it is covering any part of its sunk costs. In other words, the post-entry price competition from incumbents who have substantial sunk costs may be particularly fierce. "Fierce" in this case means that such incumbents may be able to deter not only those entrants that would be less efficient, but also those that would be equally efficient and even some that would be *more* efficient.

To see that last point, bear in mind that while the incumbent has already invested in the sunk costs necessary to enter a market, potential entrants have not. Although potential entrants could pay for the sunk costs, enter, and then promptly price at a level that is insufficient to recoup them (just like the incumbent is doing), that would appear to be an irrational strategy because the potential entrant still has a choice not to lose the money it would spend on sunk costs. All it needs to do is to stay out of the market. The incumbent, having already made the investment, has no such choice. At least hypothetically, then, the incumbent can price at the level of its average non-sunk costs in order to deter entry.[31] Therefore, unless an entrant would be so much more efficient than the incumbent that it could price at or below the latter's average non-sunk cost and still be profitable (taking its own sunk costs into account), it is unlikely to enter.[32] Stated another way, the ability to remain profitable while pricing at or below the incumbent's average total cost simply may not be good enough.

The second general way in which sunk costs can affect entry involves a more direct influence that sunk costs can have on potential entrants. To begin with, sunk costs reduce the likelihood of hit and run entry by imposing exit costs on potential entrants. The higher sunk costs are relative to the profit

31 For a more mathematically rigorous discussion of these concepts, see Stephen Martin, "Sunk Cost and Entry," 20 Review of Industrial Organization 291 (2002) (showing that sunk costs may make entry unprofitable because of their effect on the post-entry unit costs of incumbents).

32 Readers interested in the finer economic details of entry will notice that this description makes implicit assumptions. It is possible that sunk costs would *not* deter entry if, for example, products are not homogeneous and marginal costs are not constant and identical among firms. Those conditions are assumed to apply here, though, in order to allow general points about sunk costs to be expressed in a way that is relatively easy to understand. Another complication is that certain advanced research in game theoretic economics suggests other reasons why entrants might still rationally enter a market in which an incumbent is threatening to disregard its sunk costs in pricing decisions. This could be the case when, assuming that a "brave" entrant enters anyway, it turns out that the incumbent's optimal strategy would be to accommodate the entry rather than to continue fighting it by refusing to cover sunk costs. In this case, the incumbent is said to have a "commitment" problem because it cannot convincingly threaten to commit itself to a strategy of failing to price high enough to cover its sunk costs. In fact, the body of game theoretic work on strategic behaviour in response to entry is very substantial, and it supports a wide range of possible outcomes. For a brief explanation of some of this work, see Richard Gilbert, "Mobility Barriers and the Value of Incumbency" in 1 Handbook of Industrial Organization 509-510 (Richard Schmalensee & Robert Willig, eds. 1989).

opportunity available, the less attractive a temporary foray into a market will be. However, hit and run entry appears to be rare as a general rule anyway, even when there are no substantial sunk costs.

Sunk costs also raise the risk associated with committed entry. There will virtually always be at least some chance that entry will be unsuccessful, and that probability is sometimes large. The entrant may underestimate its operating costs, for example, and discover after entering that it cannot compete with more efficient rivals. Alternatively, in a rapidly changing market, the entrant's technology may be surpassed just as it enters the market, making the entrant's product obsolete before it has a chance to generate profits. The economy may go into a recession, or any one of a large number of other things may go wrong. Sunk costs may be thought of as the amount that the entrant puts at risk by entering. If entry turns out to be a failure, the sunk costs are the amount that will be unrecoverable in the aftermath. Therefore, the higher sunk costs are relative to the expected profit opportunity, the less appealing entry is.

It can be seen that uncertainty plays an important role here. Uncertainty about future market conditions interacts with the level of sunk costs to influence the perceived risk of entry. In general, the higher the sunk costs are, and the more uncertainty there is about conditions that will affect the success of entry, the less likely it is that a firm will enter. On the other hand, uncertainty will not be much of a deterrent if there are no sunk costs. The reason is simply that under these circumstances, even if a firm fails, it can still recover all of its costs.

Many different types of investments may constitute sunk costs. Here are a few examples:

- Losses that firms virtually always experience during their start-up phase, such as losses due to promotional pricing that is necessary to induce customers to try a new product, or losses from operating at inefficiently low initial output levels.
- Certain investments in human capital, such as recruiting and training costs.
- Investments in highly specialised equipment or buildings that have limited resale value.
- Expenditures on advertising and promotions.
- Spending on research and development that does not yield results with alternative uses.
- Money spent on complying with government regulations.

3.2 Structural Conditions

Structural barriers to entry arise from basic industry conditions such as cost, demand, and technology. In general, the factors under this heading are either largely out of incumbents' direct control, or are by-products of their efforts to compete in general, rather than specific strategies carried out for the purpose of deterring entry.

1. *Absolute cost advantages.* Absolute cost advantages exist when an incumbent's cost curve is below an entrant's at every level of output. As long as the incumbent prices below the entrant's expected cost, the incumbent can earn supra-competitive profits but entry will be unprofitable. A permanent cost advantage could arise, for example, from a requirement that new entrants buy certain environmental protection equipment that incumbents are not required to buy. Similarly, an incumbent might derive an absolute advantage from having exclusive access to superior production technology or resources. It is important to keep in mind, though, that while the incumbent may presently have superior technology, this may not

always be the case. A key question is whether the market is driven by innovation and thus whether the incumbent's technology can eventually be surpassed, or at least replicated. If so, then the next question is how long it is likely to take for that to happen.

2. *Economies of scale*. When economies of scale are present, average costs decrease as units of output increase over a certain range of production. Within that range, even if incumbents and entrants have the same cost curves, the incumbent may be able to operate at higher output levels where costs are lower than they are at a potential entrant's expected level of output, given likely differences in demand. If that is the case, then as long as it holds its prices even slightly below the entrant's expected cost, the incumbent can earn supra-competitive profits while ensuring that entry will be unprofitable. Furthermore, even if the incumbent is pricing at a level high enough to allow an entrant to earn a profit when new entry occurs, the level of post-entry competition may increase as a result of the entry, driving prices below the point where new entrants can survive.

Box 1. Contestable Markets

Entry probably has its strongest hypothetical effect on competition and market performance in the theory of contestable markets.* In perfectly contestable markets, entry and exit are costless and immediate, and incumbent firms cannot react to entry right away. Such markets always perform in a competitive manner, even if there is only one firm in the market. The reason is that if prices rise above the competitive level, the resulting opportunity to earn supra-competitive profit instantaneously attracts new entrants until the price returns to the competitive level.

The conditions necessary for perfect contestability are, however, very stringent and they probably exist only rarely. Because pricing can usually be changed on very short notice, for example, it is doubtful that entrants will often believe they can enter and undercut the incumbent without any possibility of a quick price response.

Nevertheless, as Bishop and Walker point out, the concept of contestable markets "has now entered the legal vocabulary and is used in a looser fashion than that proposed in the economic literature. Broadly speaking, the legal use of the term contestable applies to those markets in which potential competition is said to exert a significant competitive constraint on the behaviour of the incumbent firms, *i.e.*, where entry is relatively easy and does not require large sunk costs. Although economists may grumble at what they consider to be the misuse of terms, the key point has been well taken by the legal profession: The more difficult it is to enter a market, the less the weight that should be placed on potential entry as a constraining factor on competitive behaviour in that market."†

* William Baumol, John Panzar & Robert Willig, Contestable Markets and the Theory of Industry Structure (1982).

† Simon Bishop & Mike Walker, The Economics of EC Competition Law 61 (2d ed. 2002).

An important and interesting point about economies of scale is that they cannot prevent or deter entry in the absence of sunk costs. This is one of the implications of the theory of contestable markets. (See Box 1.) An industry that does not require any investment in sunk costs is ideal for hit and run entry, especially if it is also possible to enter and exit very quickly. Whenever a potential entrant spotted an opportunity to earn above-normal profits, it could enter, ramp production up to the optimal production level, sell as much output as possible until prices dropped to competitive levels, and then costlessly exit the market. In reality, there are few (if any) markets that can be entered without any investment in sunk costs.

On the other hand, if substantial sunk costs do exist, then they usually bring about economies of scale. This is because sunk costs are, for at least some period of time, large fixed costs, and large fixed costs are often a source of scale economies.

The more powerful scale economies are, the more likely it is that entrants would have to enter on a large scale to have any chance of being competitive, and the less attractive entry will generally be. The reason is that potential entrants are more likely to conclude that they will be unable to gain enough market share to survive, or that high pre-entry prices in the market would quickly be reduced by the incumbent when it reacted to the entrant's substantial new presence in the market. Each scenario tends to delay entry in proportion to the level of sunk costs that are required to enter.

3. *Economies of scope*. When economies of scope are present, cost savings are realised because of efficiencies associated with producing, distributing, or selling several types of products instead of just one. Therefore, even if a potential entrant would be just as efficient at distributing tennis racquets, for instance, as an incumbent would be, the incumbent may have lower average costs due to savings it realises by distributing tennis balls, as well.[33] If that is the case, then as long as it holds its prices just below the entrant's expected cost, the incumbent can earn supra-competitive profits while ensuring that entry will be unprofitable.

   Most of the entry considerations that apply to economies of scale also apply to economies of scope, including the point that these economies cannot prevent or deter entry in the absence of sunk costs. Similarly, the more powerful economies of scope are, the more likely it is that entrants would have to enter two or more product markets to have any chance of being competitive. That, in turn, may entail greater sunk costs and thus greater risk for potential entrants.

4. *High capital costs*. This word "high" really has two components: the absolute magnitude of the total costs necessary to enter a market, and the relative cost of borrowing money to fund the entry. Both components are among the entry conditions that have contributed most to the liveliness of the debate over defining entry barriers. Some scholars contend that high capital costs cannot be considered barriers because well-functioning capital markets will fund any firm with a reasonable entry plan at a fair interest rate, regardless of the amount of capital needed.[34] Furthermore, many firms are capable of paying very substantial capital costs without any outside financing, and will do so when they believe entry to be worthwhile.

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33 It is possible that some single-product entrants will be so efficient at what they do, or produce such a superior product, that they can overcome economies of scope. For example, consider inpatient hospital services versus a small cardiac specialist firm. Hospitals clearly benefit from the economies of scope associated with offering a broad menu of health care services. However, a niche player specialising in just one of those services, like cardiac care, might be efficient enough or skilled enough at that one service to be profitable even though it does not benefit from the same economies of scope that a hospital enjoys.

34 *See, e.g.*, George Stigler, The Organization of Industry 113-122 (1968); Robert Bork, The Antitrust Paradox 196-96 (1978); Richard Posner, "The Chicago School of Antitrust Analysis," 127 University of Pennsylvania Law Review 925, 929 (1979).

Others maintain that lenders do not view all borrowers as equals, which creates disparities in the financing costs that various firms face. Wealthier, more experienced companies will usually be able to obtain cheaper financing than new, unknown start-ups, even if one adjusts for risk.[35] In any case, these scholars argue, capital markets do not always function perfectly.

Finally, some economists are content to follow Schmalensee's pragmatic approach. He argues that if business people think the cost of capital is a barrier to entry, then that perception is likely to affect their entry decisions and become a de facto barrier, regardless of economists' opinions about their rationality.[36]

Rather than getting caught up in an argument about whether high capital costs do or do not meet a set of requirements that satisfy someone's conception of an entry barrier, it is probably more useful to think about how the costs affect a potential entrant's decision. First, it seems straightforward that the higher the capital costs that are required to enter a market, and the greater the proportion of them that will be sunk, the riskier a potential entrant will consider entry to be because the entrant will stand to lose more money if the endeavour fails. All else being equal, the more risk there is, the less likely it is that entry will occur. Second, the impact that high capital costs are likely to have on a potential entrant's assessment of risk depends very much on that entrant's situation. A brand new entrepreneur with no other businesses and no experience is more likely to be daunted by high capital costs than a sprawling conglomerate that has been operating in many other markets for decades. In other words, what seems intolerably risky to one entrant might not seem that way to another.

5. *Reputational effects*. This factor denotes the effect on entry that an incumbent's strong reputation for reliability or quality may have. It is intended to be distinct from brand loyalty induced by advertising, which is addressed in Part 3.C.4. below. It is certainly true, though, that a firm's reputation for quality can be enhanced by advertising as well as by its products' actual quality and reliability.

   Whenever acquiring information about products is not costless (which is most of the time), consumers will often find it useful to rely on a firm's reputation and experience as a guide to their purchasing decisions. It stands to reason that they will tend to favour firms with an established reputation for quality and reliability. To overcome this effect and persuade customers to try their products, new firms will often have to make investments in promotional pricing to compensate customers for the risk they perceive in trying the new product. The higher the perceived risk, the greater the discount will have to be. In some markets, the perceived risk may be so high that customers will be virtually unwilling to try a new product at any price until several other major customers try it first, making profitable entry extremely difficult. A new software company, for example, might wish to sell a product that keeps mainframe computers running without interruption, reports software "bugs" as they occur and fixes them automatically. If nearly every major customer in the market has been using the incumbent's product for the past ten years with great satisfaction, however, and the shutdown of mainframe systems even for a few hours would be viewed as catastrophic, then unknown entrants will most likely have a very difficult time gaining customers.

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35 *See* Mark Reinganum & Janet Smith, "Investor Preference for Large Firms: New Evidence of Economies of Size," 32 Journal of Industrial Economics 213 (1983); Joseph Stiglitz & Andrew Weiss, "Credit Rating in Markets with Imperfect Information," 71 American Economic Review 912 (1983).

36 Richard Schmalensee, "Horizontal Merger Policy: Problems and Changes," 1 Economic Perspectives 41 (1987).

Reputations may also influence the relative cost of capital, as lenders will tend to view loans to established, well-known firms as less risky than loans to new firms that lack a proven record of success. Therefore, entrants will have to take the costs of reputational differences between themselves and incumbents into account when evaluating the likely profitability of entry.

Nevertheless, some courts have been sceptical toward the idea of recognising reputational effects as entry barriers. In *Advo, Inc. v. Philadelphia Newspapers, Inc.*, for example, an appellate court stated:

> *New entrants and customers in virtually any market emphasize the importance of a reputation for delivering a quality good or service. . . . [Plaintiff's] argument, without some limiting principle . . . implies that there are barriers to entry, significant in an antitrust sense, in all markets. We find this proposition implausible[.]*[37]

Another appellate decision states: "We fail to see how the existence of good will achieved through effective service is an impediment to, rather than the natural result of, competition."[38]

This raises an important general point. It is not objectionable to say that good will earned through good service is a natural result of competition. But the idea that the same good will can be an impediment to further competition should not be objectionable, either, because it is certainly possible. Returning to the example above involving mainframe computer software, it is easy to see that an entrant's likelihood of success would be much greater if there were no reputable incumbent already in the market. See Box 2.

Box 2. Entry Barriers and Unlawful Conduct

One reason courts have been reluctant to acknowledge the possibility that reputations can deter entry may be that the term "barrier to entry" has a negative connotation. Courts therefore may have gotten the impression that when they are asked to find that entry barriers exist, this is equivalent to being asked to find that the incumbent has done something unlawful. Yet that is not at all the case. Courts must be careful not to confuse plaintiff's attempts to prove the presence of entry barriers with attempts to prove unlawful, anticompetitive conduct.

Something that deters entry is not necessarily unlawful. It may even be the result of good competition, yet it can still inhibit new entry. In other words, it is clear enough that it ought not to be unlawful for firms to operate in industries with high entry barriers. Plaintiffs should able to rely upon any entry barriers that are present, however, to help prove other elements in competition cases, such as that an incumbent is dominant, or that it will become dominant if its proposed merger is allowed, without having to prove that the barrier itself is unlawful.

Of course, it is possible that the alleged anticompetitive conduct in a case could actually be the creation or heightening of an entry barrier. In that case, however, the legal outcome should not depend on whether the conduct has resulted in something that can be called an entry barrier, but on whether the conduct fits into a clear definition of "competition on the merits." See OECD (2005), Competition on the Merits, DAF/COMP(2005)32, which addresses efforts to add precision to the term "competition on the merits."

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37 51 F.3d 1191, 1201-02 (3d Cir. 1995).

38 *United States v. Syufy Enterprises*, 903 F.2d 659, 669 (9th Cir. 1990).

6. *Network effects*. Direct network effects arise when the benefit a consumer receives from a product increases not only with the amount of it that he or she consumes, but with the number of other people who are consuming it, too. Indirect network effects arise when increases in the size of a network stimulate the production of complementary goods or services. Substantial network effects tend to cause the largest networks to grow larger while causing smaller ones to shrink. In fact, if network effects are strong enough, a market may naturally gravitate, or "tip," toward having only one network. Although potential entrants may exist, the dominant firm's position is solidified to some extent because the network effects have created a kind of moat around its position. To get past that moat, an entrant would need to offer a competitive product that is so much more attractive than the incumbent's that customers would be willing to give up the benefits of belonging to the dominant network.[39] The stronger the network effects are, the greater are those benefits and thus the more difficult it will be for an entrant to succeed.

   As Werden states, "[n]etwork effects are among the determinants of the conditions of entry in many industries, and they can create a truly formidable entry obstacle, sufficient to permit prices to persist above competitive level[s] for a substantial period of time without attracting entry."[40] He also cautions, though, that "assessing conditions of entry in the presence of network effects is likely to be a complex and highly fact-intensive process."[41]

7. *Legal/regulatory barriers*. Including regulatory barriers in the structural conditions section rather than in the strategic behaviour section may seem overly optimistic to some readers. It is certainly true that many companies have successfully manipulated regulatory regimes for the purpose of deterring entry. Unless the regulation itself is being challenged, however, *why* regulation exists is not as important as *that* it exists.

   Moreover, although proponents of Chicago School economics tend to view regulatory or legal restrictions imposed by governments as the most substantial entry barriers, it cannot be denied that many such restrictions serve other important policy goals. Safety and environmental regulations can raise entry barriers in obvious ways, but they may be necessary to ensure that child car seats work properly, for example, or that toxic chemicals do not enter a community's water supply. Furthermore, some legal "barriers" may even do more good than harm to competition and consumer welfare. A patent may prevent rivals from entering a market by imitating the incumbent's product, but the product might not exist at all were it not for the protection that patents afford. What is more, some patents lead to the availability of new products that would have been impossible or impractical to create without the patented technologies.[42]

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39 For an interesting and useful illustration of how network effects affected the outcome in a famous monopolisation case, see Gregory J. Werden, "Network Effects and Conditions of Entry: Lessons from the Microsoft Case," 69 Antitrust Law Journal 87 (2001).

40 *Id*. at 108.

41 *Id*. at 88.

42 For a more detailed discussion of the interaction between intellectual property rights and competition policy, see OECD (2004), Intellectual Property Rights, DAF/COMP(2004)24; *see also* Burton Ong, "Building Brick Barricades and other Barrier to Entry: Abusing a Dominant Position by Refusing to Licence Intellectual Property Rights," [2005] European Community Law Review 215.

On the other hand, some government-imposed restrictions such as tariffs and import quotas have the express purpose of raising entry barriers and limiting competition. Still others may purport to serve some socially meritorious goal, but either fail to do so or do so in a way that unnecessarily deters entry. An example of that type of barrier is discussed in Part 5.

Regardless of the overall social value of a government regulation or legal barrier, when agencies evaluate the prospects for entry in a given market, they will need to take such restrictions into account because they may make it substantially more difficult, expensive, or time-consuming for new firms to enter a market.

8. *Barriers to exit*. The more expensive it is to get out of a market, the riskier it will be to enter it in the first place. Just as entering a market is usually not costless, exiting is rarely free, either. A firm may have to make severance payments to employees, for example, or it may face costs associated with the early termination of contracts with customers or suppliers. In addition, any sunk costs the firm may have absorbed that have not yet been covered or fully depreciated could be thought of as exit costs, as well. These types of costs make exiting a market less appealing, and if they are high enough, they could make exit virtually impossible. They can therefore be considered "barriers to exit." The likelihood and degree of barriers to exit, however, will also be considered by a rational potential entrant when it makes its decision about whether to enter a market.

   Moreover, the presence of exit barriers may also affect the behaviour of incumbents. When they cannot leave a market without incurring considerable losses, any threat that they will respond to entry aggressively becomes more credible. Exit barriers may therefore have a doubly negative role as entry barriers, as well. Not only do they make entry riskier because of the costs an entrant would face if it decided to leave the market, but they may make entry riskier by giving incumbents a greater incentive to fight entry rather than yield to it.

9. *First mover advantages*. Some markets endow the first entrant with long-lasting or permanent advantages that enable it to earn supra-competitive profits without attracting entry. The first mover may develop a strong brand loyalty, for instance, by virtue of being known as the oldest firm in the business. Alternatively, the industry may have a long and substantial learning curve on which no entrant can catch up to the first firm. That firm may amplify this effect by keeping its price below its profit maximising price in order to stimulate demand, thereby hastening its progress along the learning curve. Another possibility is that the market has network effects and the first mover is able to tip it before any other firms enter.

10. *Vertical integration*. By operating in two stages of the chain of production, an incumbent may be making it more difficult for entry to occur by giving itself certain advantages that can be duplicated only by other firms that are similarly integrated. If accomplishing such integration would add substantially to the time required to enter the market, or to the necessary sunk costs that would be put at risk, entry may be delayed. The key questions are how substantial the benefits of integration are, whether integration is actually essential to achieving them, and if so, whether the integration can be replicated and with how much time and difficulty.

3.3 Strategic Behaviour by Incumbents

As the list above shows, the height of entry barriers depends on a wide variety of factors, including technological and historical conditions that translate into cost advantages, such as ownership of critical intellectual property or natural resources. The actions and reactions of incumbents also matter, though.

This category includes entry conditions that were intentionally created or enhanced by the incumbent – sometimes, but not always, for the purpose of deterring entry.[43] Sometimes these strategies are used to pre-empt entry, and sometimes they are used to retaliate against entry that has already occurred. Alternatively, incumbents may only threaten to implement them. Threats, however, are effective deterrents only if they are credible. That is to say, a mere threat to engage in behaviour that would make entry unprofitable will deter entry only if entrants believe that the incumbent will carry out its threat if entry actually occurs. Several of these strategies have been discussed in detail in previous OECD Competition Committee roundtables:

1. *Predatory pricing*. An incumbent that is willing and able to price below some measure of its own costs for an extended period of time, or that can credibly threaten to do so, may be able to deter entry under some circumstances. It is possible that an incumbent's reputation alone may be sufficient to deter entry, particularly when the incumbent has used predatory pricing to eliminate rivals or to deter entry in the past. When companies succeed in acquiring or maintaining dominance by building entry barriers with anticompetitive strategies such as predatory pricing, the entry barrier itself may be considered unlawful.[44]

2. *Limit pricing*. When incumbents adopt limit pricing strategies, they are not pricing below cost, but they are also purposefully failing to maximise short-run profit. The price is set at a somewhat profitable level that corresponds to a level of output that leaves just a bit too little residual demand for entry to be profitable (*i.e.*, the entrant would not be able to recover its average total cost at the prevailing price). By sacrificing some of its profit, the incumbent aims to keep entrants out of the market and thereby earn supra-competitive (though not monopoly-level) profit persistently. Ordinarily, limit pricing strategies work only in the presence of economies of scale or scope because something must prevent entrants from operating efficiently at the available level of demand.[45]

   The classic model of limit pricing just described assumes that the incumbent firm can persuade potential entrants that its level of output will remain the same regardless of whether new entry occurs. That is a critical assumption. Potential entrants may actually believe that the incumbent's profit-maximising strategy in the event of entry would be to accommodate that entry by reducing its own output, rather than fighting the entry by maintaining its output. This might happen, for example, if potential entrants believe they can easily and quickly reach a point of output at which their cost equals or even falls below that of the incumbent (*e.g.*, scale economies are insubstantial, or entrants have superior technology). In this case,

43 Surveys have shown that strategic entry-deterring behaviour is not uncommon. *See, e.g.*, Robert Smiley, "Empirical Evidence on Strategic Entry Deterrence," 6 International Journal of Industrial Organisation 167 (1988).

44 Predatory pricing was the central subject of discussion in a recent OECD Competition Committee roundtable. *See* OECD (2005), Predatory Foreclosure, DAF/COMP(2005)14.

45 The literature on limit pricing and other forms of entry deterrence is extensive and complex. For a rigorous introduction, see Jean Tirole, The Theory of Industrial Organization, 367-375 (1989); *see also* Richard Gilbert, "Mobility Barriers and the Value of Incumbency" in 1 Handbook of Industrial Organization Ch. 8 (Richard Schmalensee & Robert Willig, eds. 1989).

the incumbent's pre-entry price and quantity could simply be ignored by potential entrants because they will have no effect on the post-entry equilibrium price. In fact, the incumbent may as well set its price at the monopoly level in the pre-entry period and enjoy the profits as long as possible because it would never be able to deter entry with a limit pricing strategy anyway. Practically speaking, however, incumbents and potential entrants may rarely know what each other's cost functions are.

3. *Intentional over-investment in capacity and sunk costs*. One way that an incumbent might get around the credibility problem in limit pricing is to invest in excess capacity. Spence argued that an incumbent firm could, under some conditions, lower its post-entry marginal cost (and thus its credible post-entry price) by investing in extra capacity.[46] That, in turn, would cause a decline in potential entrants' expected profitability that might be sufficient to deter them. In this situation, the incumbent's pre-entry price is not a reliable indicator of its post-entry price, so the incumbent is better positioned to sustain a pre-entry monopoly price.

   Taking the earlier discussion of sunk costs as a starting point, we can now incorporate Dixit's idea that the effectiveness of expanding capacity as an entry deterrent is greater when all or much of the associated capital investment is sunk.[47] By intentionally overbuilding capacity to raise the level of sunk costs, an incumbent might enhance its ability to charge prices so low and leave so little residual demand that no entrant could hope to make any profit. In other words, this strategy allows the incumbent to commit to producing a level of output that would not be rationally sustainable if the expenditures were reversible. In this manner, the incumbent turns a liability into a strategic asset. This might seem like a self-destructive strategy, but it is possible that the incumbent will be more profitable with this strategy than it would have been had it not invested in the extra capacity and there was successful entry. That is especially likely to be true, for example, in a scenario involving a more efficient potential entrant.

4. *Fidelity rebates and bundled rebates*. Dominant incumbents are sometimes able to construct entry barriers by granting discounts to customers who demonstrate their loyalty by buying certain amounts or percentages of their requirements from the incumbent. Similarly, dominant incumbents who have multiple product lines sometimes succeed in preventing or deterring entry by conditioning rebates on the purchase of items from several or all of those product lines. By no means do fidelity rebates and bundled rebates always constitute entry barriers, though.[48]

5. *Product differentiation and advertising*. Bain considered product differentiation to be the single most important factor contributing to the ability of firms to earn supra-competitive profit.[49] Products that are differentiated are not viewed as perfect substitutes by consumers. Differentiation may arise as a result of advertising, real quality differences, reputational differences, or some other factor that is important to consumers. Although firms might not

46 A. Michael Spence, "Entry, Capacity, Investment and Oligopolistic Pricing," 8 Bell Journal of Economics 534 (1977).

47 *See* Avinash Dixit, "The Role of Investment in Entry Deterrence," 90 Economic Journal 95 (1980).

48 Fidelity and bundled rebates have also been featured in recent OECD roundtables. *See* OECD(2002), Loyalty and Fidelity Discounts and Rebates, DAFFE/COMP(2002)21; *see also* OECD (2005), Competition on the Merits, DAF/COMP(2005)32.

49 Joe Bain, Barriers to New Competition 123 (1956).

invest in differentiating their products for the specific purpose of raising entry barriers,[50] they do have control over the amount they spend, so this seems to be more of a strategic factor than a structural one.

Product differentiation may result in the development of brand loyalty. When they are loyal to certain brands, customers are less likely to be willing to try a new brand. To overcome that problem, entrants may have to invest in promotional pricing or in their own advertising campaigns (or both) to induce customers to buy their products.

The extent to which a perceived need to invest in product differentiation will delay or prevent firms from entering depends largely on the degree to which those investments are sunk. This is essentially the same point as the one made earlier about economies of scale. At least in theory, scale economies and advertising expenditures should inhibit entry only if they involve sunk costs. For example, if a potential start-up firm determines that it must spend one million euros on advertising to have a reasonable chance of succeeding in a market, it will probably view that expense as unrecoverable. That will raise its assessment of the risk associated with entering. If an existing conglomerate is eyeing the same market, however, and it plans to use the same brand name that it uses in other markets, that firm may view some of the advertising expense as recoverable because it would increase the value of its brand in other markets, even if the firm ultimately fails in the new market.

There is also an interesting interaction effect between economies of scale and advertising in terms of their effect on entry. Although an entrant may have to spend at least as much as an incumbent on advertising to induce customers loyal to the incumbent's product to try a new brand, those costs are spread across a greater – perhaps much greater – range of output for the incumbent. The per-unit cost of advertising will therefore be higher for entrants unless and until they grow significantly, which makes it harder for them to be competitive.

There is a school of thought that views advertising as primarily barrier-reducing rather than barrier-enhancing.[51] Those who support this position emphasise that by informing customers of the availability of new products, their characteristics and their prices, advertising lowers the cost of searching for alternatives and therefore diminishes brand loyalty and customer inertia. In essence, they argue, advertising increases the cross-price elasticity of demand and raises the frequency of brand switching. Those points assume that both incumbents and entrants are investing in advertising. However, even if the incumbent is the only firm that advertises, entrants can still benefit from the incumbent's advertising expenditures if they result in a better-informed customer base and/or greater market demand. It is therefore unclear who has the harder task, the first firm or the subsequent entrants.

Thus there may be an inherent tension between advertising's tendency to create and erode brand loyalty, and to raise and lower the risk of entry. Seeking to determine which of these two opposing forces was stronger, Kessides constructed a model and applied it to a data set that included U.S. manufacturing industries that experienced net entry during a six-year period. His findings suggest that although advertising does create a sunk cost entry barrier, it

50 They may instead be investing in product differentiation because it maximises their profits, regardless of any effect on entry. *See* R. Dorfman & P. Steiner, "Optimal Advertising and Optimal Quality," 44 American Economic Review 826 (1954) (introducing theorem that describes how firms can choose an optimal level of advertising to maximise profit).

51 *See* Ioannis Kessides, "Advertising, Sunk Costs, and Barriers to Entry," 68 Review of Economics and Statistics 84, 84 & n.5 (1986) (citing several older studies supporting this perspective).

also reduces the risk of entry as perceived by the entrant, and the latter effect dominates the former one. That led Kessides to conclude that the overall impact of advertising on entry is positive in most industries.[52]

6. *Tying*. Tying may make entry more difficult in some situations. Suppose an incumbent is dominant in the market for product A and it decides to condition the sale of A on the purchase of its product B (or suppose it offers substantial discounts for buying A and B together instead of individually). A firm contemplating entry in market B may have to enter market A and tie the two products together, as well, if it is to have any chance of success. However, entering the market for A may not be easy, especially since the incumbent is already dominant in that market. If it has unique access to certain vital intellectual property rights, say, or if A is a mission-critical product and the incumbent has a sterling reputation for reliability, the entrant may not be able to enter at all.[53]

7. *Excusive dealing arrangements*. The more demand that an incumbent firm has the exclusive right to supply, the less likely a new entrant will be to attempt entry. An extreme case would be an incumbent that has lengthy requirements contracts – agreements to supply 100 percent of a buyer's needs – with every customer in the market.[54] If relatively few of the incumbent's contracts come up for renewal each year, entry may be highly unlikely. Furthermore, a large incumbent's insistence on supplying either all or none of a customer's demand may mean that potential rivals would have to enter on a larger scale than they otherwise would if they are to have any chance of winning customers. To the extent that sunk costs make up a substantial portion of entry costs, and that they vary positively with the capacity that an entrant builds, having to enter on a larger scale would increase an entrant's exposure to risk and therefore make entry less likely.

   Another scenario applies if, rather than signing exclusive contracts directly with customers, the incumbent operates in a market where it is necessary to use distributors. If enough of the available distributors sign long term exclusive contracts with the incumbent, this could effectively impose a vertical integration requirement on any new entrant (as well as any existing rivals). If that would involve additional sunk costs, it would make entry riskier and therefore less likely.

   It is especially important to bear in mind that just because some vertical arrangements, like exclusive dealing contracts, may raise entry barriers, that does not necessarily mean their net effects on consumer welfare are negative. Exclusive dealing arrangements give retailers incentives to provide pre-sale information and other services. Therefore, they may make

52 *Id*.

53 Tying and other bundling strategies are discussed in Barry Nalebuff, "Bundling as an Entry Barrier," 119 Quarterly Journal of Economics 159 (2004).

54 An often-cited article that deals with the effects of long-term contracts on entry is Phillippe Aghion & Patrick Bolton, "Contracts as Barriers to Entry," 77 American Economic Review 388 (1987) (showing that incumbents will sign long-term contracts that prevent entry even by some lower-cost producers). Some economists have argued that customers would never be so stupid as to sign long-term contracts that allow a firm to monopolise a market or to strengthen a dominant position. Therefore, they reason, such contracts must be efficient. Robert Bork, The Antitrust Paradox (1978). *But see* Phillippe Aghion & Patrick Bolton, "Contracts as a Barrier to Entry," 77 American Economic Review 388 (1987) (showing that long term contracts that inefficiently deter entry might be signed even though buyers were concerned that they might be helping the seller to monopolise).

customers better off despite any entry effects. In any event, the point of entry analysis is not to judge whether an entry condition itself is "good" or "bad" – what matters is how the condition affects the likelihood, timing, and extent of entry.

8. *Patent hoarding*. Although patents generally encourage innovation and have positive implications for consumer welfare, they can also constitute formidable entry barriers. Recognising that, firms sometimes build patent "fortresses" around their market positions by acquiring patents that collectively block all (or many) of the feasible methods for competing, even though they have no intention of using or licensing much of the patented technology. Alternatively, incumbents may amass patents that they do not intend to use commercially, but that their potential competitors are likely to infringe. One objective of this strategy could be to gain leverage against, and thus deter entry by, firms who do not have an equally formidable patent stockpile.[55]

4. Assessing barriers to entry

4.1 Important Factors in Entry Barrier Assessment

A number of considerations and suggestions from scholars may be helpful to enforcement agencies when they are assessing entry barriers.

1. *Differences in temporal perspective between merger and non-merger matters*. Although the same types of entry factors are considered in merger and non-merger cases, a major difference is that the alleged harm in most merger cases is prospective. Thus, the entry question is whether and when a merger will induce enough entry to substantially mitigate the merger's potential anticompetitive effects. In contrast, the alleged harm in most abuse of dominance or monopolisation cases has already occurred, so the entry question is often backward-looking: Did enough entry occur to cure the harm to competition? That makes the analysis easier because it focuses mainly on whether entry was sufficient, rather than on whether it will likely be sufficient or how long it will take for that to happen.

   However, not all unilateral conduct cases call for a purely retrospective entry analysis. For example, the allegedly unlawful conduct may still be happening during a competition agency's investigation, if not during any litigation that ensues. Consumers are not harmed by predatory pricing, for instance, until the recoupment phase begins, so the entry analysis may need to be forward-looking if that phase has not started yet. Similarly, it may not be clear yet whether entry that has already occurred will turn out to be sufficient to solve the competitive problem, meaning it may still be necessary to make to do some predictive analysis.

2. *The relevant time period in potential entrants' assessments of likely profitability*. Potential entrants will decide to incur any sunk costs of entry only if they anticipate profitable post-entry prices, as distinct from the post-merger (or post-anticompetitive-conduct) prices that prevail prior to entry. In other words, potential entrants have to take into account the effect that their own entry will have on the market price. If potential entrants believe that post-entry prices will be too low for them to enter profitably, then they will not enter. This is true even if the firms expect that the above-normal, pre-entry price would be profitable.

55 These strategies are discussed in more detail in OECD (2004), Intellectual Property Rights, DAF/COMP(2004)24.

3. *Assessing the significance of entry barriers by equating them with sunk costs*. Schmalensee has proposed that the height of entry barriers can be assessed simply by measuring the amount of sunk costs that potential entrants would need to incur.[56] He reasons that this method is consistent with the goal of protecting consumer welfare. The smaller sunk costs are, the lower the market price will be, and thus the higher consumer welfare will be. While this method captures the impact that sunk costs (and thus certain other factors such as scale economies) would have on entry, it seems to ignore other influences that could deter or prevent entry. For example, what if entry is simply not possible at any cost because of a blocking patent held by a rival?

   Moreover, knowing the magnitude of sunk costs alone is of no use unless it can be placed in some kind of relative context to guide policy decisions, and there does not yet appear to be anything of that kind available. Perhaps this is because it would be impossible to construct generally applicable indices that offered policy guidance based on the level of sunk costs alone. Sunk costs of, say, 10 million euros might create intolerable risks for some kinds of entrants yet seem quite reasonable to others. Furthermore, a firm might consider it worthwhile to risk 10 million euros to enter one market, yet the same firm might find it unacceptable to risk the same amount to enter a different market. Entry barrier analysis may simply need to be too case-specific for reliance on either general quantitative guidelines or a single statistical indicator.

4. *Salop's approach to assessing the ease of entry*. Salop has pointed out that it is not clear how much weight should be allocated to purely theoretical evidence on entry, such as hypothetical responses to hypothetical price increases, versus hard, factual evidence on entry, such as an incumbent's actual responses to entry that occurred in the past. Both are relevant, but an especially thorny problem exists when theory points toward one conclusion and the facts point toward the opposite one.[57]

   In an article that is now somewhat timeworn but remains very helpful, Salop suggested a practical approach to gauging the likelihood that entry will prevent an anticompetitive price increase.[58] In doing so, he demonstrates how facts can be woven together with theory in the context of an expert's affidavit in a hypothetical merger case. Salop recognised that entry barriers may be influenced by many factors, but he focused on what he considered to be the most controversial ones, organising them in four categories.

   The first category is cost and demand disadvantages. It includes situations in which entrants have uniformly higher costs than incumbents, as well as those in which entrants must provide discounts to offset perceived differences in quality in comparison with incumbent firms. It therefore is intended to incorporate factors such as restricted access to intellectual property rights and other resources, reputational effects, and brand loyalty. If enough is known about the impact of these effects, an agency might be able to develop an estimate of the amount by which an incumbent could raise its price without inducing entry. For instance, if the incumbent's costs are 15 percent below an entrant's, or the entrant must offer a 15 percent discount to overcome brand loyalty to the incumbent's product, then the entrant would be unable to stop the incumbent from raising its price by, say, ten percent.

56 Richard Schmalensee, "Sunk Costs and Antitrust Barriers to Entry," 94 American Economic Review, Papers and Proceedings 471, 473 (2004).

57 Steven Salop, "Measuring Ease of Entry," 31 Antitrust Bulletin 551, 552 (1986).

58 *Id.*; *see also* Steven Salop, Comment, Brookings Papers on Economic Activity, at 313, 316-18 (1991).

The second consideration is time to entry. The longer entry would take to accomplish, the less likely fear of entry is to deter an incumbent from raising its prices. This is true because incumbents not only have more time to earn supra-competitive profits in the interim, but they would also have more time to adjust their pricing between the time an entrant begins to enter and the time it completes its entry and becomes an effective competitor. It is important to bear in mind that the relevant time period is that which is required not only to accomplish entry itself, but to gain enough sales to become a significant competitive force in the market. It may take a substantial length of time, for example, not only to build new manufacturing plants, but to overcome buyer inertia or preference for a previously established brand and win enough customers to have a downward influence on the incumbent's price.

The third category is sunk costs. Although the work of scholars like Dixit did a great deal to raise awareness about the importance of sunk costs, it did not help much with the enforcement issues it raised, like how to recognize substantial sunk costs and how to determine when they are large enough to retard or prevent entry. Some mathematical models for gauging the significance of sunk costs have been proposed, but the assumptions one is required to make are often so extensive that their practical value is dubious. Ross, for example, proposed a model based on a) the amount of money invested in sunk costs; b) the probability that entry will be successful; and c) the value of successful entry. Even if one happens to know a), however, it can be extremely difficult to estimate b) and c) accurately, as legions of failed entrants would confirm. Ross acknowledges that, at least in some cases, "the best one can do is make an educated guess."[59] This may not be very reassuring for policymakers and judges.

There may be no way to avoid the fact that measuring sunk costs is not a simple task. To begin with, there is a common tendency to confuse sunk costs with fixed costs.[60] In addition, it may be difficult to determine what portion of an investment is sunk even when one has the correct definition in mind. If, for example, a company has invested in a rare piece of production equipment, it may take quite a bit of investigative work to come up with even a rough guess of whether and how much another firm might pay for it.

59 Thomas Ross, "Sunk Costs as a Barrier to Entry in Merger Cases," 27 University of British Columbia Law Review 75, 89 (1993). Ross presents a mathematically more sophisticated model in Thomas Ross, "Sunk Costs and the Entry Decision," 4 Journal of Industry, Competition and Trade, Bank Papers, 79 (2004). However, it is still dependent on obtaining the same elusive data as the earlier model. Accordingly, he notes that "[t]he most promising avenue for future theoretical work is to incorporate more general models of entrant uncertainty." *Id*. at 91.

60 The difference between fixed and sunk costs is explained in Part 3.A.

Moreover, as new work by Pindyck explains, uncertainty about how market conditions will develop in the future complicates sunk cost measurement. [61] Specifically, he notes, there is an opportunity cost when a firm invests now rather than waiting to gather more information about the probability of profits from the investment. In other words, the option to invest has value, and that value is forfeited when the investment is made. The loss of the option's value is also a sunk cost and, in Pindyck's view, it is "just as relevant for antitrust analysis (and business decision-making) as the direct cost of a machine or a factory."[62]

Salop's final category is economies of scale. The ways in which scale economies can affect the ease of entry were discussed above in Part 3.B.2. Salop suggested that scale economies can be measured by using the concept of minimum viable scale ("MVS"). He defined MVS as "the total sales a hypothetical new entrant would need to achieve in order to earn a sufficient rate of return . . . on its invested capital to justify its entry."[63] If the MVS cannot be reached, then the entrant's average costs will be too high to give it a satisfactory return.

The smaller MVS is, the more likely it is that entry will occur that is sufficient to counteract the feared harm to competition from the merger. The reason that is true is that the lower MVS is, all else being equal, the less entrants would risk in terms of sunk costs and the less demand they have to capture to reach profitability. On the other hand, the smaller MVS is, the more likely it is that entrants can reach viability without being so large that they irritate incumbents and cause them to cut their prices.[64] Such price cuts are exactly the result that is needed for entry to be considered "sufficient," but they would reduce entrants' profit margins and thereby increase their MVS, making entry less attractive. It can be seen, therefore, that there may be a tension between sufficient entry and attractive entry.

While acknowledging that it is difficult to draw a precise line between "low" and "high" MVS levels, Salop maintained that MVS could be a very useful concept. By comparing an estimate of MVS with the overall market size, he suggested, one could get a sense of how much of an obstacle scale economies were. In his hypothetical example, he concludes that an

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61 Robert Pindyck, "Sunk Costs and Real Options in Antitrust," in Issues in Competition Law and Policy (W.D. Collins, ed.) (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=742505.

62 *Id*. at 1. One thing Pindyck does not discuss is that there may also be an opportunity cost of *waiting* to invest. Sometimes when firms wait to make the investments necessary to enter a market, they lose their ability to capitalise on an opportunity that will not return, but would have generated profits for many years. One way of expressing this would be to say that, when a firm is contemplating entry in a market where profitability depends on "striking while the iron is hot," the option value of waiting to invest is negative. Therefore, in the presence of uncertainty, there is some amount of unavoidable risk associated with both investing and not investing.

63 Steven Salop, "Measuring Ease of Entry," 31 Antitrust Bulletin 551, 563 (1986). Note that MVS is not the same concept as minimum efficient scale, or "MES." MES is the smallest level of output at which average costs are minimized, and is determined only by how costs vary with output. MVS, on the other hand, depends not only on costs but on the price, as well.

64 One may wonder why an incumbent would not retaliate against even small scale entry. To be sure, that may happen in some cases, particularly if the incumbent can price discriminate and/or if it is concerned that an entrant with a foothold in the market is likely to develop into a substantial rival. One reason incumbents may prefer not to react to small scale entry, though, is that they may be unable to target only the new entrant's potential customers with price cuts. If, instead, the incumbent's price cuts would have to be given to all customers, then it may not be worthwhile for it to reduce its prices just for the sake of deterring a small entrant. Barry Nalebuff, "Bundling as an Entry Barrier," 119 Quarterly Journal of Economics 159, 165 (2004).

MVS of ten percent is part of a body of evidence that the fear of entry is unlikely to provide a significant competitive check on post-merger pricing.[65]

5. *Taking a more qualitative approach*. While Salop is not alone in trying to devise a way to measure entry barriers that is at least somewhat mathematical,[66] others place less faith in quantitative approaches. Baker, for example, states that enforcement agencies should not necessarily try to quantify entry-related concepts like MVS and sales opportunities available to potential entrants. He adds, however, that even if these concepts are not fleshed out with data, they nevertheless:

> *…can structure the analysis and frame the testimony of those experienced in actual entry efforts in the industry. For example, industry witnesses who believe that an entrant would need a minimum market share to break-even post-merger can be asked to explain why that share is so low or high. That will allow the court to see whether the entry plan the witnesses have in mind is plausible by evaluating alternative views about the nature and magnitude of the fixed expenditures required for entry. Such witnesses also might discuss how far prices are likely to fall following entry at a particular scale.* ***The point is to focus the entry inquiry on the factors that determine whether committed entry in the post-merger market environment is likely to be profitable and, thus, on whether entry is likely to deter or counteract the anticompetitive problem.***[67]

It seems clear enough that theory and mathematics alone cannot be expected to pull all of the weight in entry analysis. In actual cases it will always be necessary to look at qualitative factual evidence, as well. When agencies assess entry barriers, therefore, they will have to examine the documents of industry players, conduct interviews with their executives as well as those who work for potential entrants, take written and oral testimony, and study the circumstances and results of any entry that occurred in the past. Along those lines, Baker cautions against concluding too hastily that entry will necessarily solve competition problems in merger cases:

> *The idea that ease of entry is a trump must be applied with care, particularly when committed entry is at stake. Blind application of the doctrine may encourage courts to analyze the height of entry barriers in the abstract and not recognize that entry is relevant only to the extent that it cures the anticompetitive problem at issue. As a result, it may lead courts to presume that a firm that* ***could*** *enter the market likely* ***would*** *find it profitable to do so. Yet, when entry requires significant sunk investments, its profitability is a matter for analysis, not presumption. A court that disregards the entry likelihood issue, or presumes that examples of past entry are dispositive on the issue of the profitability of future entry, may find itself wrongly allowing anticompetitive mergers to proceed.*[68]

65 Steven Salop, "Measuring Ease of Entry," 31 Antitrust Bulletin 551, 564 (1986); see *id*. at 567-570 for an explanation of how MVS was calculated in Salop's hypothetical. Calculating the MVS will not necessarily be straightforward in actual cases. See Janusz Ordover & Jonathan Baker, "Entry Analysis Under the 1992 Horizontal Merger Guidelines," 61 Antitrust Law Journal 139 (1992) for a discussion of some of the complications that may arise.

66 *See, e.g.*, Timothy F. Bresnahan & Peter C. Reiss, "Do Entry Conditions Vary Across Markets?," Brookings Papers on Economic Activity, Microeconomics, at 833 (1988).

67 Jonathan Baker, "The Problem with *Baker Hughes* and *Syufy*: On the Role of Entry in Merger Analysis," 65 Antitrust Law Journal 353, 365 (1997) (emphasis added).

68 *Id*. at 371 (emphasis in original).

6. *Using instances of past entry to make inferences about the future*. Although Baker strikes a cautionary tone with respect to using examples of past entry to make predictions about the likelihood of future entry, Areeda and Hovenkamp are not quite as conservative: "The only truly reliable evidence of low barriers is repeated past entry in circumstances similar to current conditions. Indeed, repeated entry during a period of competitive prices makes entry even more likely in response to future attempts at monopoly pricing."[69] It is important to remember, though, that previous incidences of actual entry do not necessarily prove that it was easy, that it was competitively meaningful, or that it is likely to take place again. The price effects, if any, from past episodes of entry need to be examined, as does the viability of the entrant and its experience in trying to gain market share. Furthermore, when the alleged harm is prospective, one should ask whether future entrants could use the same strategies that have worked for others in the past, whether they would face the same costs, and whether they can reasonably expect to achieve the same profits that earlier entrants did.[70]

   Likewise, although an absence of actual or meaningful entry in the past is consistent with the presence of substantial entry barriers, it does not necessarily prove that significant entry is unlikely in the future. Consequently, the record of recent entry is certainly relevant, but it is only a part of the overall evidence needed to make an informed judgment.

7. *Using evidence on profit levels to make inferences about entry barriers*. The same is true with respect to evidence of persistent supra-competitive profits. Such evidence is generally consistent with, but neither necessary nor sufficient for, a finding that barriers are high and that entry is therefore unlikely. A government regulation might restrict the number of firms in an industry, for example. If many firms were permitted to compete and they do so vigorously, however, there will be no supra-competitive profits despite the impossibility of net entry. On the other hand, a pharmaceutical firm may have been earning supra-competitive profits from sales of a certain drug for many years because it owns a key patent, but if that patent is about to expire, the firm may soon face a host of new competitors selling generic versions of its drug.

   Similarly, evidence of a persistent lack of supra-competitive profits is generally consistent with, but neither necessary nor sufficient for, a finding that barriers are low and that entry is therefore easy. For instance, a firm may simply have been adept at spotting an emerging trend in consumer demand. If it created a new market, developed it, and made substantial profits for a few years, but those profits then attracted the attention of other entrepreneurs who figured out that they could easily enter the same market, there would be a record of high profits despite easy entry conditions. By the same token, low profits do not automatically indicate easy entry, as demonstrated by the earlier example of regulation that restricts the number of firms in a market.

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69 Phillip Areeda & Herbert Hovenkamp, IIA Antitrust Law) para. 420b (2002).

70 Andrew Gavil, William Kovacic & Jonathan Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 879-880 (2002).

8. *The importance of dynamics*. Carlton, among others, believes the definitional debate has given too much attention to the question of whether entry will eventually erode anticompetitive prices increases, and not enough to the question of how long it will take to do so. He therefore urges a more dynamic view of entry and entry barriers. His point is an important one because the long run curative effects of entry can take a very long time to appear. Thus, consumer welfare could suffer substantial harm if a court permits a merger, for example, because it concluded that entry will eventually restore competitive pricing but it ignored the fact that such entry would probably take many years. At the same time, Carlton acknowledges that certain merger guidelines "do a good job" of explaining this point.[71] We will now take a closer look at some of the relevant guidelines issued by competition agencies in various OECD countries.

4.2 How Entry Barriers Are Assessed in Agency Guidelines

Typically, guidelines issued by competition agencies aim to elevate the predictability, accuracy, and effectiveness of the enforcement program by describing the circumstances in which the agency is likely to take action. In doing so, many agency guidelines include a discussion of entry analysis. It is instructive to examine and compare the approaches taken in a sampling of jurisdictions. The sample is arranged chronologically by the date of issuance, using the latest edition currently available.

1. *United States Horizontal Merger Guidelines (1997)*. Barriers to entry influence two stages of horizontal merger analysis in the U.S. horizontal merger guidelines. First, they affect the process of identifying the firms that will be counted as participants in a market for the purpose of determining market concentration. All firms that would be likely to enter within one year in response to a small but significant non-transitory increase in price ("SSNIP") without having to commit significant investment in sunk costs of entry and exit are treated as though they are already in the market.[72] A "significant sunk cost," in turn, is defined as one that would not be recouped within one year of the commencement of the firm's supply response.[73]

   Entry that meets those conditions is called "uncommitted entry," which is another term for hit and run entry. Uncommitted entrants can quickly capitalise on any short-run profit opportunities that arise, including those due to attempts by incumbent firms to exercise market power. Such entrants can then make a cheap and hasty retreat out of the market when those opportunities vanish.

   Uncommitted entry may be accomplished by completely new (*de novo*) entry or entry via production substitution. That is to say, uncommitted entry may also occur when a firm that is already active in a different market is easily able to redirect some or all of its production capacity to the relevant market. For example, a company that makes stereo speakers might be able to switch to making electric guitar amplifiers relatively easily and quickly.

71 Dennis Carlton, "Why Barriers to Entry Are Barriers to Understanding," 94 American Economic Review, Papers and Proceedings 466, 469 (2004).

72. U.S. Dept. of Justice and Federal Trade Commission Horizontal Merger Guidelines (hereafter, "U.S. Guidelines") s. 1.32 (April 8, 1997). Uncommitted entrants are assigned market shares based on an assessment of their likely sales or capacity in reaction to a SSNIP, and these shares are included in concentration calculations for both the pre-merger and post-merger period. Similarly, firms that already intended to enter prior to the announcement of the merger, but have not done so yet, are counted as current market participants. *Id*. at ss. 1.3, 1.41.

73 U.S. Guidelines s. 1.32.

Second, if the post-merger level of and change in concentration are high enough to create a presumption that the merger is likely to have an anticompetitive effect, then it is necessary to analyse whether "committed entry" can be relied upon to counter that effect. Entry barriers have a leading role in that analysis. Committed entry would take longer than one year after the SSNIP and/or would require the entrant to commit significant investment in sunk costs of entry and exit. Committed entrants are different from hit and run entrants in that they must plan to remain in the market for more than just a short time. This is because once they decide to enter, they cannot easily exit. Therefore, before entering, committed entrants have to consider what the level of competition is likely to be in the post-entry period, and what its implications are for their expected profitability.

Notably, the analysis of committed entry is not conducted until after the level of competition that would likely exist without entry is considered. If that level is deemed adequate, then there is no need to examine committed entry. The order of this process is significant because it shows that high entry barriers do not necessarily determine the outcome of the agencies' investigations. It is possible, for example, that in spite of substantial entry barriers, there will be strong post-merger competition among the firms that are already in the market. The U.S. Guidelines therefore guard against making an inference that a merger will substantially lessen competition just because quick and effective entry happens to be unlikely.

The impact of committed entry is assessed according to whether it

i) is achievable within two years;
ii) will have a significant effect on price in the relevant market within two years of initial planning;
iii) will be profitable at pre-merger prices; and
iv) will be sufficient to return prices to their pre-merger levels.[74]

If all of those conditions are met, then the competition agencies will conclude that the fear of committed entry would deter or defeat any attempt to raise prices. In other words, when the U.S. Guidelines' criteria are satisfied, committed entry is a "trump."[75]

It can be seen that the analysis is driven by the three criteria of timeliness, likeliness, and sufficiency. The U.S. Guidelines consider entry to be timely only if it can begin to have a significant effect on prices in the relevant market within two years of initial planning. By incorporating that time limit, the authors of the guidelines appear to have reasoned that a longer delay before effective entry would probably not deter the exercise of market power.

The U.S. Guidelines' analysis of the likelihood of entry involves the concept of MVS in a manner that relies substantially on the suggestions outlined by Salop that were discussed above in Part 4.A.4. In the guidelines, MVS is defined as the smallest average annual level of sales that the committed entrant must persistently achieve for profitability at pre-merger

74 U.S. Guidelines ss. 3.0, 3.2-3.4. In establishing that these criteria are met, it is unnecessary to identify specific firms that are likely to enter. Instead, the analysis focuses on what a hypothetical firm would need to do to enter the market. *Id*. at s. 3.1.

75 Jonathan Baker, "The Problem with *Baker Hughes* and *Syufy*: On the Role of Entry in Merger Analysis," 65 Antitrust Law Journal 353, 362 (1997). Of course, uncommitted entry can also be a trump if so much of it is likely to occur that a market can be deemed unconcentrated. *Id*. at 365.

prices.[76] Stated another way, MVS is the least scale of production at which an entrant's average costs equal the pre-merger price. This is a reflection of the guidelines' focus on whether committed entry *would* occur, not merely whether it *could* occur.

It is important to notice that MVS is based on pre-merger prices. This may seem odd, at first, since entrants will weigh their prospects for successful entry based on what they expect the post-merger competitive environment to be. However, committed entrants plan to be in the market for a long time, and if they do cure the anti-competitive effects that a merger would otherwise cause, the post-merger price will eventually fall back to where it was before the merger (all else being equal), or perhaps even lower. It is therefore rational to assume that post-merger prices will be no higher than pre-merger prices.[77]

Entry is considered likely only when the MVS is smaller than the likely sales opportunities the entrant would have in the market. The U.S. Guidelines provide a rule of thumb for estimating those sales opportunities. The usual benchmark is in the vicinity of five percent of overall market demand.[78] Thus, when MVS substantially exceeds five percent of total market sales, the likelihood of committed entry is deemed questionable; when MVS is substantially less than five percent of total market sales, there is at least a reasonable likelihood of entry. The five percent benchmark may be adjusted up or down, however, to reflect known conditions. For example, a higher benchmark may be appropriate if the market is experiencing a long-term decline. On the other hand, a lower benchmark may be called for in a market that is expected to enjoy substantial long-term growth.

As Ordover and Baker observe with respect to MVS, the U.S. Guidelines "do not contemplate that the government or the merging parties attempt to estimate with mathematical precision the effect of factors that are unquantifiable. The Guidelines methodology seeks to structure the analysis of entry profitability in order to highlight the key factors on which the likelihood analysis depends."79 It is not difficult to see why the Guidelines do not implement a more precise scale – say, something akin to the Herfindahl-Hirschman Index – for the analysis of committed entry. Whereas HHI figures can be calculated with data on only one variable

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76 U.S. Guidelines s. 3.3.

77 One may sense a tension between the idea of assuming a SSNIP and yet assuming that post-merger prices will equal pre-merger prices. There is no conflict, however, because as Ordover and Baker have pointed out, "[e]ntry can be profitable at the pre-merger price in the post-entry economic environment even if it was not profitable at the same price in the pre-entry merger environment; this change in incentives is the focus of likelihood analysis. If the merger has the feared anticompetitive effect, industry output will decline, thereby creating additional potential sales for an entrant beyond what had previously been available. The result is to make entry more attractive than it had previously been. In short, the change in market structure resulting from the acquisition creates a gap in sales, raising the revenue potential for an entrant and softening the competitive environment facing the prospective new competitor. The Guidelines summarize this point by noting that a merger can create an additional 'sales opportunity' for an entrant." Janusz Ordover & Jonathan Baker, "Entry Analysis Under the 1992 Horizontal Merger Guidelines," 61 Antitrust Law Journal 139 (1992) (citing 1992 U.S. Guidelines s. 3.3).

78 U.S. Guidelines s. 3.3 & note 32.

79 Janusz Ordover & Jonathan Baker, "Entry Analysis Under the 1992 Horizontal Merger Guidelines," 61 Antitrust Law Journal 139 (1992); *see also* U.S. Guidelines s. 3.0 ("In assessing whether entry will be timely, likely, and sufficient, the Agency recognizes that precise and detailed information may be difficult or impossible to obtain. In such instances, the Agency will rely on all available evidence bearing on whether entry will satisfy the conditions of timeliness, likelihood, and sufficiency").

(market share), ease of entry is determined by a multitude of interdependent factors, including uncertainty. Entry analysis is therefore necessarily more of a flexible, qualitative, rule of reason process than a rigid, mathematical one that can be easily indexed.

The sufficiency criterion is necessary to account for the possibility that although entry might be profitable and speedy, it also might not make an appreciable difference to consumers. As the U.S. Guidelines put it, entry might be too limited in its "magnitude, character and scope to deter or counteract the competitive effects of concern."[80] For example, if incumbents control most of the assets required for entry, entrants might not be able to respond to the full extent of their sales opportunities. Therefore, recent instances of successful or failed entry are relevant under the guidelines' analysis, but just as a "starting point for identifying the necessary actions, time requirements, and characteristics of possible" means of entry.[81]

There is a tension between the likely and sufficient requirements in the U.S. Guidelines. The more sufficient entry is in the sense that it is likely to drive prices down, the less profitable entry will be and thus the less likely it is to occur.

2. *Australian Merger Guidelines (1999)*. Entry analysis under the Australian Guidelines shares a number of important similarities with entry analysis in the U.S. Guidelines. For example, the possibility of entry via supply side substitution is considered during the identification of market participants and the determination of market concentration. Entry requiring significant investment is not considered until later, and then only if the concentration figures indicate that there could be a substantial lessening of competition.[82] In addition, the impact of entry requiring significant investment is assessed in light of the same three criteria of timeliness, likeliness, and sufficiency that apply in the U.S. Guidelines:

> *The Commission considers that effective entry is that which is likely to have a market impact within a two year period, either be deterring or defeating the attempted exercise of significant market power by the merged firm. In some markets the threat of entry is sufficient to constrain firm conduct. In others, actual entry will be required. The latter would require entry on a sufficient scale and which offered a product sufficiently attractive to consumers to be effective.*[83]

However, there are also a number of noteworthy differences between the two sets of guidelines. For instance, the distinction between potential entrants that are counted as actual market participants for purposes of determining concentration levels, and potential entrants that are examined later in light of entry barriers, is not so clear in the Australian Guidelines. Which way potential entrants are analysed appears to depend solely on whether their entry would require "significant investment." The amount of time required to enter is not mentioned as a distinguishing factor.[84]

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80 U.S. Guidelines s. 3.0.

81 U.S. Guidelines s. 3.1.

82 *Compare* Australian Merger Guidelines (hereafter, "Australian Guidelines") ss. 5.52-5.53 *with* ss. 5.115-5.128.

83 Australian Guidelines s. 5.126.

84 Australian Guidelines ss. 5.52-5.53.

On the other hand, the Australian Guidelines give the term "barriers to entry" a precise definition: "any feature of a market that places an efficient prospective entrant at a significant disadvantage compared with incumbent firms." That definition is clarified with examples of factors that could constitute entry barriers, such as sunk costs and economies of scale and scope.[85] Each factor is described in its own section, allowing for a fuller explanation of entry barriers than is available in the U.S. Guidelines. Furthermore, the Australian Guidelines list the kinds of information that will be taken into account in assessing the height of entry barriers, such as the level of market growth or decline and the cost penalties for operating at sub-optimal capacity.[86]

Another distinguishing feature of the Australian Guidelines is that they provide for the assessment of entry barriers in Bainian terms: "The 'height' of barriers to entry indicates the extent to which incumbents can raise the market price above its competitive level without attracting entry."[87] As we saw earlier, however, Bain's view is subject to a certain amount of doubt. For example, it is possible for entry barriers to be quite high in a market, yet if it already has many competitors, the market still behaves competitively.

One helpful facet of the Australian Guidelines is that they expressly state that it is not necessary for a merger to heighten entry barriers for it to be anti-competitive. Such an outcome requires only that significant entry barriers exist, giving incumbents "discretion in pricing and other conduct."[88] This clarification helps to prevent confusion about the proper role for entry barriers in merger analysis.

3. *Canadian Merger Enforcement Guidelines (2004)*. The entry analysis in the Canadian Guidelines is very similar to that in the U.S. Guidelines, so the substantive structure will not be repeated here. What is most notable about the Canadian treatment of entry is that it is clearer than its U.S. counterpart. First, the Canadian Guidelines are highly specific. For example, like the U.S. Guidelines, they state that firms that would begin selling products in the relevant market within one year of a small price increase, and that could do so without investing in significant sunk costs of entry or exit, are counted as current market participants in the determination of market shares and concentration levels. This includes firms that could enter quickly by diverting their production capacity from other markets to the relevant market. The Canadian Guidelines, however, also contain a lengthy list of specific factors, including some that could prevent or retard such supply responses, that the Competition Bureau will take into account when identifying such firms. For example, switching costs, applicable intellectual property rights, tariffs and import quotas are among the many factors listed.[89]

Second, the Canadian Guidelines cite court decisions that help to illustrate points in the Guidelines. For example, a case is cited to support the principle that although small scale entry may have occurred in the past, if it did not have a demonstrable effect on incumbents' market share, it does not necessarily establish that sufficient entry is likely in the future.[90]

85 Australian Guidelines ss. 5.116-5.122.

86 Australian Guidelines s. 5.124. That list is supplemented in the Australian Competition & Consumer Commission's Guideline for Informal Merger Reviews (October 2004) at p. 16.

87 Australian Guidelines s. 5.123.

88 Australian Guidelines s. 5.123.

89 Competition Bureau Canada, Merger Enforcement Guidelines ss. 4.1-4.4 (2004).

90 *Id*. at s. 6.5 n.79 (citing *Canada (Commissioner of Competition) v. Superior Propane Inc.* (August 30, 2000), CT-1998/002 (Competition Tribunal) at para. 504).

Finally, there is a section entitled "Types of Barriers to Entry" in the Canadian Guidelines that contains many examples that help to illuminate the Bureau's entry analysis.[91] Regulatory barriers, sunk costs, economies of scale, and other types of conditions that affect entry are described, and there is also a separate appendix devoted to sunk costs that goes into considerable detail about market specific assets and learning, product differentiation, and strategic behaviour.[92] All of these explanatory features increase the transparency and predictability of the Canadian merger enforcement process.

4. *European Guidelines on the Assessment of Horizontal Mergers (2004)*. The entry analysis in the European Guidelines has the same basic components as its American, Australian, and Canadian counterparts. It allows "reasonably certain" entry to be counted as though the potential entrants are already in the market for the purpose of determining concentration (though there is no specific requirement regarding how quickly that entry should take place).[93] Then it uses the familiar likeliness, timeliness, and sufficiency criteria to determine whether other entry will be enough of a constraint on the merging parties to prevent them from posing a significant anti-competitive risk.

   The European Guidelines define entry barriers as "specific features of the market, which give incumbent firms advantages over potential competitors."[94] This pragmatic definition avoids the shortcomings associated with Bain's definition and is broad enough to encompass the wide variety of factors that can potentially affect the ease of entry. The guidelines helpfully list many of those factors.

   The European approach is a bit more qualitative than the Canadian and American approaches, as there is no need to estimate the size of a potential entrant's MVS or its likely sales opportunities. Instead, a series of factors that affect the likelihood of entry are described, and it is left to the Commission to apply the guidelines' approach to the particular facts and circumstances of each case.[95] The timeliness criterion is flexible, but the ordinary benchmark is that entry must occur within two years to be considered timely. Finally, the sufficiency element requires that entry be "of sufficient scope and magnitude to deter or defeat the anti-competitive effects of the merger."[96]

5. *United Kingdom Guidelines on Assessment of Market Power (2004)*. Entry barriers are relevant to the evaluation of market power in non-merger cases, as well as in merger cases, so it is also worthwhile to examine the approach used in non-merger guidelines. The U.K. Office of Fair Trading issued its Guidelines on the Assessment of Market Power just last year, and the section on entry barriers is an interesting counterpoint to the entry analyses in some of the merger guidelines described here.

   Like the Australian Merger Guidelines, the U.K. Guidelines on market power contain a precise definition of entry barriers. In the U.K. Guidelines they are "factors that allow an

91 *Id*. at ss. 6.8-6.17.

92 *Id*. at Appendix I.

93 Guidelines on the Assessment of Horizontal Mergers, 2004/C 31/03 (hereafter "European Guidelines"), para. 15.

94 European Guidelines para. 70.

95 European Guidelines paras. 5, 69.

96 European Guidelines paras. 74-75.

undertaking profitably to sustain supra-competitive prices in the long term, without being more efficient than its potential rival."[97] It can be seen that this definition would not acknowledge the presence of any entry barriers in situations like Demsetz's taxi medallion hypothetical, where net entry is impossible but pricing is still competitive.[98] Furthermore, as explained earlier, the focus on the long term does not seem to be advisable, since an absence or shortage of entry can cause substantial harm to consumer welfare in the short and medium terms, as well.

The U.K. Guidelines include helpful explanations of some of the major sources of entry barriers, including sunk costs, poor access to key inputs and distribution outlets, regulation, economies of scale, network effects, and exclusionary behaviour.[99] The section on regulation is noteworthy because it states that "regulation can lead to entry barriers when it does not apply equally to all undertakings. For example, incumbents might lobby for standards that are relatively easy for them to meet, but harder for a new entrant to achieve."[100] That passage seems to suggest that any sunk costs of complying with regulation would not count as an entry barrier so long as the regulation applied to all market participants equally. It was noted earlier, however, that sunk costs can create an important asymmetry between incumbents and potential entrants when the former have already paid those costs and the latter have not.[101] In fact, the sunk costs section of the U.K. guidelines acknowledges that this asymmetry can give incumbents a strategic advantage,[102] so it is not quite clear how such regulation would be treated.

Regarding the analysis of entry, the U.K. Guidelines use a thoroughly practical approach. There are no formulae or other mathematical requirements. Instead, the guidelines acknowledge that assessing the effects of entry barriers can be complex and that a variety of steps may be involved. Then they set forth a number of subjects on which incumbents and potential entrants could be usefully questioned and on which it might be helpful to obtain documentary evidence. Relatively fast and easy entry is taken into account as supply side substitution, just as it is in several other agencies' guidelines. Entry that will take longer than one year or require substantial sunk costs is analysed as new entry.[103]

5. How advocacy can break down barriers to entry – an example

As noted earlier, sometimes entry barriers themselves can come under legal attack, rather than being merely relevant circumstances in cases that focus on something else. For example, although many government regulations are obviously beneficial to society despite the fact that they make entry into certain markets more difficult, that is not always the case. Some regulations are broader than necessary to achieve their stated goals. Others may be so thinly disguised that it is clear their only purpose is to protect incumbents from competition. Competition agencies can play a vital role in scrutinising such regulations from a competition-oriented point of view and using their findings to advocate appropriate changes. At least one agency has had impressive results so far in its pro-active effort to do that.

97 United Kingdom Guidelines on Assessment of Market Power (hereafter, "U.K. Guidelines") s. 5.3 (2004).

98 *See* Part 2.B.2 above.

99 U.K. Guidelines ss. 5.8-5.28.

100 U.K. Guidelines s. 5.17.

101 *See* Part 3.A. above.

102 U.K. Guidelines s. 5.10.

103 U.K. Guidelines s. 5.31.

5.1 A Report by the Staff of the U.S. Federal Trade Commission

In July 2003, the Staff of the FTC issued a report entitled "Possible Anticompetitive Barriers to E-Commerce: Wine."[104] The report explores the ways in which various state governments restrict competition in American wine markets by making it difficult or impossible for out-of-state wine producers to sell wine directly to consumers in other states. After analysing these laws and the justifications given for them, comparing conditions among different states with different laws, and conducting an empirical study, the FTC Staff concluded that "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine."[105]

The report notes that the internet has given wine suppliers, especially small wineries, the opportunity to circumvent the traditional method of distributing wine through wholesalers and retailers by marketing and selling directly to consumers. Doing so may give consumers a greater variety of wines to choose from, as well as greater convenience and lower prices. Many states, however, have regulations that prohibit or severely curtail the direct shipment of wine to consumers. Their justification for these regulations is that, without them, there would be unacceptable risks that minors will have greater access to alcohol and that consumers will be able to avoid paying sales taxes on wine. The report recognises that these are potentially legitimate concerns, and that states must weigh policy choices for themselves. It also notes, though, that policymakers should have accurate information about the relevant tradeoffs when formulating their policies.

To better examine those tradeoffs, the FTC held a workshop in October 2002 that featured testimony by winery operators, wholesalers, state regulators, and economists. The Staff also gathered information from many other sources, including its own empirical study, in which it evaluated the impact of a state ban on interstate direct wine shipments in a Virginia town. The study compared the prices and choices that consumers in that town could find in their local stores with what they could find online. The Staff determined that there is greater choice available online, and that in many cases the internet offers consumers lower prices even after shipping costs are taken into account.[106]

Ultimately, the Staff concluded that direct shipping encourages price competition between offline and online wine sellers, and that consumer welfare is being significantly and unnecessarily harmed by the regulations that restrict direct shipping. The report does not argue with the merits of the policy goals that the states and wine distributors claim the regulations promote, namely tax collection and the prevention of sales to minors. However, the report observes that many states have been able to promote the same goals even though they have less restrictive laws on direct shipping. Furthermore, many of the states that restrict the shipment of wine directly to consumers from out-of-state wineries allow direct shipping by in-state wineries.[107] Therefore, the Staff recommended that states allow direct shipping from out-of-state wineries and retailers, as well as from in-state suppliers.[108]

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104 The report is available online at www.ftc.gov/os/2003/07/winereport2.pdf.

105 FTC Staff, Possible Anticompetitive Barriers to E-Commerce: Wine, p. 3 (2004).

106 *Id*. at 18-19.

107 *Id*. at 3.

108 *Id*. at 40. Notably, the FTC Staff's wine report is only the first of several planned reports that will examine barriers in a number of industries. Another report on contact lenses is already available, for example. Staff of the U.S. Federal Trade Commission, "Possible Anticompetitive Barriers to E-Commerce: Contact Lenses" (March 2004), available at: www.ftc.gov/os/2004/03/040329clreportfinal.pdf.

5.2 Granholm v. Heald

It took less than two years for the FTC Staff's wine report to play an influential role in the elimination of state regulations that ban interstate direct shipments of wine to consumers. In *Granholm v. Heald*, the U.S. Supreme Court relied heavily on the report and invalidated laws in Michigan and New York that prevented or deterred out-of-state wineries from selling directly to in-state consumers yet allowed in-state wineries to do so.[109]

The report's impact is impressive not only because it was found to be persuasive by the Supreme Court, but because *Granholm* is not even an antitrust case. It is a constitutional law case. The Court found that the regulations in question were an unconstitutional discrimination against interstate commerce, in violation of the Commerce Clause of the U.S. Constitution. *Granholm* is therefore binding on all U.S. states, with no possibility of recourse to the immunity doctrines that sometimes allow state governments to avoid application of the antitrust laws.

The Court cited the FTC Staff report more than ten times, adopting the Staff's consumer welfare analysis and echoing its conclusion that the regulations were not the least restrictive alternative for regulating interstate wine sales to minors and facilitating tax collection. In fact, the Court said the regulations were "the product of an ongoing, low-level trade war"[110] among the states, and added that it was "evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders."[111] Indeed, the Court found that the regulations in question were increasing the cost of out-of-state wines to consumers by directly or indirectly forcing them to buy the wines through the traditional distributor/retailer network.[112]

Granholm is a victory for consumer welfare. It also illustrates how effective the pro-active efforts of competition agencies can be when they take aim at regulatory barriers to entry.

6. Conclusion

Much of the academic discourse involving barriers to entry has been weighed down by terminology that does not always shed light on the practical entry issues faced by enforcement agencies and courts. In fact, the focus on crafting definitions has partially obscured more important questions about entry, such as how likely it is, how long it will take, and how effective it will be. The influence that entry barriers should have on competition decisions should turn on the degree to which they are likely to prevent or delay entry from curing anticompetitive effects, not on whether they fit into an abstract box with highly controversial dimensions. Fortunately, guidelines promulgated by the competition enforcement agencies of several OECD countries have done much to ensure that agencies focus on the right questions, even if many scholars do not. There is, however, a need for further study on how to measure and make predictions about entry in individual cases.

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109 125 S. Ct. 1885 (2005).

110 *Id*. at 1896.

111 *Id*. at 1892.

112 *Id*.

NOTE DE RÉFÉRENCE

1. Introduction

Bien que le débat sur la définition des barrières à l'entrée se poursuive depuis des décennies, il n'est pas encore tranché. En général, le terme fait référence à un obstacle qui rend difficile l'accès d'une entreprise à un marché. Une controverse persiste toutefois au sujet des types d'obstacles que l'on pourrait qualifier de «barrières à l'entrée » et qui seraient reconnus comme tels par les autorités de la concurrence et par les tribunaux. Certains auteurs ont soutenu, par exemple, qu'un obstacle ne constitue pas une barrière à l'entrée, à moins qu'il s'agisse de quelque chose que les entreprises en place n'ont pas eu à surmonter lorsqu'elles se sont implantées. D'autres affirment qu'une barrière à l'entrée est tout ce qui empêche l'entrée et a pour effet de réduire ou de limiter la concurrence, indépendamment de ses autres caractéristiques. Un certain nombre d'autres définitions ont été proposées au fil des ans, mais aucune jusqu'ici ne l'a clairement emporté. Parce que le débat n'est pas tranché, ni par les théoriciens, ni par les tribunaux, et que ces définitions continuent d'être employées, faute de mieux, comme outils d'analyse, le risque de confusion – et donc d'une politique de la concurrence sous optimale – persiste depuis des années.

Plus récemment, d'autres commentateurs ont déclaré que le débat sur les barrières à l'entrée, bien qu'intéressant intellectuellement, devait être considéré comme non pertinent pour la politique en matière de concurrence. Ce qui importe vraiment dans les cas concrets, disent-ils, ce n'est pas de savoir si un obstacle correspond à telle ou telle définition, mais plutôt la réponse à des questions plus pratiques, telles que celles de savoir si, quand et jusqu'à quel point l'entrée sur le marché a des chances de se réaliser.

Indépendamment de savoir s'il y a un consensus sur une définition précise, ou même si finalement la définition a de l'importance, il est indéniable qu'en tant que concept les barrières à l'entrée jouent un rôle important dans un grand nombre de sujets relatifs à la concurrence parce qu'elles sont essentielles pour l'analyse du pouvoir de marché. Les barrières à l'entrée peuvent retarder, diminuer ou entraver complètement le fonctionnement du mécanisme habituel qui contrôle le pouvoir de marché, à savoir l'attraction et l'arrivée de nouveaux concurrents. D'ailleurs, certains prétendent que le simple fait qu'un nouveau fournisseur puisse être encouragé à accéder au marché peut exercer une forte contrainte sur le comportement des entreprises en place, même lorsqu'elles ont des parts de marché très élevées.

Si une fusion risque d'accroître considérablement la concentration au point qu'une autorité de concurrence s'inquiète de ses effets anticoncurrentiels, par exemple, les barrières à l'entrée prendront toute leur importance parce que la concurrence ne sera pas réduite si des entreprises peuvent entrer facilement, rapidement et avec une importance suffisante sur ce marché. En conséquence, les autorités qui cherchent à bloquer une fusion devront généralement prouver que des barrières à l'entrée rendent improbable tout accès rapide et significatif au marché. De même, il est généralement nécessaire d'établir la présence d'obstacles importants à l'entrée pour prouver qu'une part de marché élevée se traduit en pouvoir de marché dans les cas de monopolisation ou d'abus de position dominante.[1] En outre, les barrières à l'entrée jouent un rôle indirect dans la détermination de la concentration d'un marché, car les

[1] Par contre, il est généralement inutile d'analyser les barrières à l'entrée lorsqu'on a des infractions directes, telles que des ententes sur les prix ou d'autres comportements constitutifs d'une entente.

concurrents potentiels sont habituellement traités comme s'ils étaient des concurrents effectifs, à condition toutefois que les barrières soient suffisamment basses pour leur permettre de pénétrer rapidement sur le marché.

Il est donc impératif que les autorités de concurrence comprennent bien pourquoi les barrières à l'entrée sont importantes pour la politique de la concurrence, comment elles affectent la concurrence dans des circonstances variées, et comment elles peuvent être correctement évaluées dans des cas particuliers. Cette note passe en revue quelques études théoriques sur les barrières à l'entrée ainsi que les méthodes d'analyse utilisées par diverses autorités de concurrence.

La section 2 examine un certain nombre de définitions des "barrières à l'entrée" proposées au cours des 50 dernières années, puis se demande si ces définitions ont de l'importance pour les autorités de concurrence et les tribunaux. La section 3 étudie certaines conditions qui influent fréquemment sur la facilité d'accès au marché, notamment les coûts irrécupérables et divers facteurs structurels et stratégiques. La section 4 traite plusieurs points qu'il peut être utile de garder à l'esprit lorsqu'on évalue l'importance des barrières à l'entrée et décrit les analyses d'entrée exposées dans plusieurs lignes directrices émanant d'autorités de concurrence. Enfin, la section 5 illustre la façon dont une démarche pro-active de la part des autorités de concurrence peut contribuer à supprimer les obstacles réglementaires à l'entrée.

Les principaux points développés dans ce document sont les suivants :

- Bien que les efforts déployés de longue date pour définir les barrières à l'entrée aient contribué à améliorer la compréhension théorique des phénomènes visant à dissuader ou à empêcher des concurrents d'entrer sur un marché, le manque de consensus a aussi généré de l'incertitude pour savoir comment analyser l'entrée dans des cas concrets. Finalement, la préoccupation concrète des autorités et des tribunaux ne devrait pas être de savoir comment définir les barrières à l'entrée, mais comment évaluer jusqu'à quel point les conditions de marché retarderont ou empêcheront l'arrivée de nouveaux venus d'éliminer les effets anticoncurrentiels en question dans des cas particuliers.

- On devrait considérer parmi les barrières à l'entrée non seulement les facteurs qui empêchent totalement l'entrée, mais aussi ceux qui la retardent. A l'évidence, le bien-être des consommateurs pâtit d'une politique de prix supérieurs au niveau de concurrence qui persiste indéfiniment à cause de barrières absolues à l'entrée. Mais le bien-être des consommateurs risque aussi de pâtir de barrières qui retardent l'entrée. Il n'y a probablement pas de ligne de démarcation parfaite entre les retards lourds de conséquences et ceux qui ne le sont pas, mais beaucoup d'autorités de concurrence ont retenu le délai de deux ans comme étant la référence appropriée dans les affaires de fusions.

- Une bonne analyse de l'accès au marché doit aller au delà de la simple question de savoir s'il existe des barrières à l'entrée et si de nouveaux venus pourraient *effectivement* entrer. Il faut aussi se demander si une entrée a des chances de se produire et, surtout si elle sera suffisamment importante pour régler tout problème majeur risquant de porter atteinte à la concurrence. Cela nécessitera une enquête factuelle et flexible, au cas par cas, plutôt qu'une réflexion convenue ou purement abstraite au sujet de ce qui constitue une barrière à l'entrée. Sinon, les autorités réglementaires et judiciaires courent le risque de conclure à tort que la simple possibilité qu'une entrée ait lieu, ou même la survenue effective d'une entrée quelle qu'elle soit, suffit à rendre toute intervention inutile.

- L'analyse d'entrée peut représenter une partie extrêmement importante des investigations et des affaires de concurrence, mais elle n'en détermine pas toujours l'issue. Plus précisément, il ne faudrait pas penser qu'une fusion amoindrira considérablement la concurrence ou qu'une pratique prétendument anticoncurrentielle aura le même effet, simplement parce que les barrières à l'entrée se trouvent être relativement hautes. Il est possible que malgré une faible probabilité de nouvelles entrées, la concurrence qui se développera après la fusion ou après la conduite incriminée soit vigoureuse parmi les entreprises qui sont déjà installées sur le marché. L'analyse d'entrée ne devrait donc être effectuée qu'après une évaluation du niveau de concurrence qui existerait probablement s'il n'y avait pas de nouveau venu.2 Si ce niveau est jugé convenable, alors il n'est pas nécessaire d'examiner les conditions d'entrée.

- De nombreux types de circonstances différentes peuvent constituer des barrières à l'entrée. Certaines barrières sont "structurelles," ayant plus à voir avec les conditions économiques fondamentales, telles que les coûts et la demande, qu'avec des mesures tactiques prises par les entreprises déjà en place pour évincer les nouveaux entrants. Elles comprennent des facteurs tels que les économies d'échelle et les effets de réseau. D'autres barrières sont « stratégiques », ayant été intentionnellement dressées ou renforcées par l'entreprise déjà installée, afin de dissuader d'éventuels candidats à l'entrée. Les barrières stratégiques pourraient inclure des facteurs tels que les stratégies de prix limite et les accords d'exclusivité.

- Les barrières à l'entrée ne doivent pas être considérées isolément. Parce qu'elles peuvent interagir et décupler leurs effets mutuels, ce qui pourrait sembler assez anodin pris individuellement peut devenir plus problématique lorsqu'on tient compte de la présence d'autres obstacles.

- Bien que la preuve d'entrées passées (ou d'absence d'entrée) puisse être utile pour évaluer l'importance des barrières fermant l'accès à un marché, une telle preuve ne doit pas être considérée comme déterminante par elle-même. L'existence d'épisodes antérieurs ne prouve pas automatiquement que l'entrée ait été facile, qu'elle ait été importante sur le plan de la concurrence, ou qu'il est probable que cela se reproduise. En outre, les candidats à l'entrée actuels risquent de ne pas avoir les mêmes conditions de marché que leurs prédécesseurs. De même, de longues périodes sans entrée nouvelle ne prouvent pas nécessairement que des entrées importantes ont peu de chances de se produire à l'avenir. De tels indices peuvent certes être considérés comme pertinents en tant qu'indices, mais il ne faut pas en tirer des conclusions.

- Un autre type de preuve qui est utile, mais pas forcément déterminant concerne les niveaux de profit des entreprises en place. Si les chiffres indiquant que les entreprises déjà installées réalisent régulièrement des profits élevés concordent généralement avec des barrières élevées à l'entrée, cela ne prouve nullement que de telles barrières existent, ni que c'est nécessaire pour en avoir la preuve. De la même manière, les chiffres indiquant que les entreprises en place ne réalisent pas de gros bénéfices correspondent généralement à des barrières peu élevées à l'entrée, mais cela ne prouve pas que les barrières sont peu élevées, et de toute façon d'autres types de preuves peuvent suffire à établir ce fait.

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2 L'"analyse d'entrée" ne fait ici référence qu'à l'analyse d'entrées « engagées ». La possibilité de faire une simple incursion (raid éclair – *hit and run*) est généralement prise en compte lorsqu'on recense les participants au marché dans le but de déterminer la concentration du marché. Ce détail est abordé dans la section 4.

- Il y a beaucoup de points communs dans les analyses d'entrée prescrites dans les lignes directrices émanant d'autorités de concurrence de divers pays Membres de l'OCDE. Par exemple, pour être reconnue comme quelque chose qui peut mettre en échec ou décourager l'exercice potentiel d'un pouvoir de marché, l'entrée doit souvent intervenir au moment opportun, être probable et suffisante selon les lignes directrices de nombreux pays. En outre, un délai de deux ans est généralement choisi comme étant le plus long délai acceptable avant que l'entrée ne se produise effectivement, si elle doit être considérée comme intervenant en temps opportun. Bien que certaines lignes directrices abordent l'analyse d'entrée de façon un peu plus quantitative que d'autres, il est généralement admis qu'il faut prendre en compte un large éventail de faits et de circonstances variés pour évaluer la facilité d'entrée.

2. Qu'est-ce qu'une barrière à l'entrée ?

2.1 Entrée

Avant d'examiner les diverses définitions des barrières à l'entrée qui ont été proposées au fil des années, il serait utile de commencer par définir l'entrée. Très simplement, entrée signifie apparition d'un nouveau producteur de biens ou de services sur un marché. Il y a deux grands types d'entrée. Le premier, généralement appelé « hit and run » (action éclair) ou entrée « sans engagement » est possible lorsqu'une firme peut entrer sur un marché sans avoir à payer des coûts irrécupérables d'un montant appréciable. Ces coûts irrécupérables sont ceux qu'une entreprise ne peut recouvrer, même si elle se retire du marché. Ils peuvent inclure, par exemple, les dépenses de publicité, les frais de licences ou de recherche et développement. Ces coûts et ce qu'ils impliquent pour l'analyse d'entrée sont examinés plus en détails dans la section 3.1.

L'auteur d'une opération éclair pénètre sur le marché parce qu'il perçoit une occasion d'engranger des bénéfices, même si ce n'est que pendant une brève période, sachant qu'il peut sortir du marché sans frais (ou presque) si cette occasion disparaît. Une telle opportunité peut surgir, par exemple, lorsqu'une opération de concentration se traduit par une hausse des prix. En théorie, aussi longtemps que les auteurs de l'action éclair ont suffisamment de capacités et ne sont pas désavantagés par les coûts, ils devraient pouvoir tirer les prix du marché vers le bas pour les ramener au niveau d'avant la concentration. Dans les faits, ce type d'entrée éclair semble toutefois peu fréquent.

La substituabilité au niveau de l'offre entre dans la même grande catégorie que l'entrée éclair. Si des firmes d'autres marchés peuvent facilement et rapidement détourner des ressources pour les placer sur le marché concerné (et les en retirer ensuite si nécessaire), cela aura aussi tendance à tirer les prix à la baisse.

Le type d'entrée le plus courant est généralement qualifié d'entrée « engagée ». L'entrée avec engagement implique des coûts irrécupérables d'un montant appréciable et ne sera tentée que par des firmes qui croient pouvoir finalement récupérer ces coûts et réaliser un bénéfice. Comme le raid éclair, l'entrée engagée peut faire échouer ou empêcher des hausses de prix anticoncurrentielles. Pour y parvenir, toutefois, les entrants engagés doivent être capables d'agir sur les prix rapidement et dans des proportions significatives. Il est souvent difficile de déterminer si c'est le cas ; c'est pourquoi l'analyse des entrées engagées tend à être plus compliquée que l'analyse des raids éclairs.

2.2 Définitions des barrière à l'entrée proposées dans la littérature économique

De nombreuses définitions des barrières à l'entrée ont été proposées par les économistes au fil des ans. Les plus connues sont celles qui figurent ci-dessous par ordre chronologique.[3]

1. *Bain*. Le débat sur la meilleure façon de définir les obstacles à l'entrée s'est ouvert il y a près de 50 ans, lorsque Joe Bain a publié son livre *Barriers to New Competition*. Dans ce qui devait devenir un classique de la littérature en matière d'organisation industrielle, Bain présentait les conclusions de la première étude approfondie des obstacles à l'accès au marché. Il définissait comme tel tout ce qui permet aux entreprises déjà implantées de réaliser des profits supérieurs à la normale sans attirer de nouveaux entrants. Plus précisément, il soutenait qu'une barrière à l'entrée est un avantage qu'ont les entreprises en place sur les entrants potentiels, qui peut être mesuré par le point jusqu'auquel les entreprises en place peuvent maintenir de façon persistante leurs prix au dessus des niveaux concurrentiels sans attirer de nouvelles entreprises sur le marché.[4] Selon Bain, « de façon persistante » signifie à longue échéance ou pendant une période suffisamment longue pour que tous les investissements en capital existants soient remplacés.[5]

   On remarquera que la définition de Bain englobe des phénomènes tels que les économies d'échelle et la différenciation de produits qui semblent être positivement corrélés à des profits élevés. Cette caractéristique de sa définition suscite beaucoup de controverses, certains commentateurs la trouvant trop large. En outre, selon l'interprétation que l'on a intuitivement d'une « barrière à l'entrée », si le terme possède une connotation négative (anti-concurrentielle), alors la définition de Bain semble encore plus large. [6] Après tout, une firme pourrait maintenir des prix supérieurs à la concurrence pour la seule et unique raison qu'elle a un produit meilleur que quiconque, ou parce qu'elle est plus efficiente. En fait, Bain a expressément qualifié les avantages absolus en matière de coûts de barrière à l'entrée.

   En même temps, la définition de Bain est trop étroite, car elle n'identifie aucune barrière à l'entrée lorsque les firmes en place ne réalisent pas de bénéfices supra-concurrentiels, alors même que de nouvelles entrées sont impossibles. Par exemple, la demande peut être insuffisante pour qu'un monopole, même solidement protégé, couvre ses coûts. Il semble illogique de dire qu'un tel marché ne comporte aucune barrière à l'entrée quand on sait qu'il en comporte, mais c'est le résultat auquel Bain parvient. C'est le problème lorsqu'on utilise les profits comme indicateur des obstacles à l'accès au marché.

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3 La liste s'inspire principalement de l'ouvrage de R. Preston McAfee, Hugo Mialon & Michael Williams, "What Is a Barrier to Entry?" 94 American Economic Review, Papers and Proceedings 461 (2004).

4 Joe Bain, *Barriers to New Competition* 3 (1956).

5 *Id*. à 6-7, 10-11, 17.

6 Le terme "barrière à l'entrée" ne devrait pas avoir automatiquement une connotation négative. D'abord, les obstacles à l'entrée, ou l'espoir d'en ériger, incitent davantage à créer de nouveaux produits et services. Les droits de propriété intellectuelle, par exemple, sont une incitation efficace à innover, précisément parce qu'ils contribuent à décourager et à empêcher les entrées. Voir OCDE (2004), Intellectual Property Rights, DAF/COMP(2004)24. Deuxièmement, certaines barrières à l'entrée réalisent d'importants objectifs sociétaux en dehors du champ de la politique de la concurrence. Les règlementations en matière de sécurité, par exemple, peuvent rendre plus difficile l'accès au marché du transport de déchets nucléaires, mais pratiquement tout le monde est d'accord pour dire qu'un certain degré de réglementation est nécessaire dans ce domaine.

Carlton prétend que la faiblesse de l'analyse d'entrée de Bain réside non pas dans sa définition, mais dans son incapacité à présenter une théorie cohérente montrant que les facteurs qui comptent en tant que barrières à l'entrée conduisent à des prix supra-concurrentiels. Selon Carlton, l'analyse de Bain repose sur la croyance selon laquelle les barrières déterminent le nombre de firmes sur un marché, ce qui détermine la compétitivité du marché et donc les taux de rendement de ses participants. En d'autres termes, Bain croit au paradigme structure-conduite-performance. Or, il a été démontré que ce point de vue est simpliste. Le nombre de firmes sur un marché est déterminé par leur capacité à réaliser des bénéfices, ce qui dépend de nombreux facteurs, et pas seulement de facteurs structurels comme le croyait Bain.[7] Néanmoins, des versions mathématiquement renforcées de la définition de Bain continuent d'être respectées par quelques théoriciens de l'organisation industrielle.[8]

2. *Stigler*. Douze ans après la parution du livre de Bain, George Stigler a proposé une opinion très différente. Au lieu de définir les obstacles à l'entrée par l'effet qu'ils produisent, il a déclaré qu'il existe des coûts que doivent supporter les nouveaux entrants, alors que les firmes en place ne les supportent pas. [9] (La plupart des commentateurs pensent qu'en plus des coûts que ne supportent pas actuellement les firmes en place, Stigler voulait inclure – ou du moins aurait dû inclure – les coûts que ces mêmes entreprises n'ont pas encourus non plus dans le passé.) Remarquons que dans la définition de Stigler les économies d'échelle ne peuvent pas être des barrières à l'entrée, à condition que les entrants aient accès à la technologie sur un pied d'égalité, parce qu'on suppose que les entreprises en place ont aussi rencontré les mêmes économies. Les coûts des immobilisations ne sont pas non plus des obstacles pour Stigler, à moins que les firmes en place n'aient jamais eu à les supporter. En outre, si la publicité est corrélée avec des profits élevés, Bain la considérerait comme une barrière à l'entrée, au contraire de Stigler pour autant que la publicité soit accessible à tout le monde dans les mêmes conditions. La définition de Stigler est donc plus étroite que celle de Bain.

Néanmoins, Schmalensee a démontré que, dans certaines conditions, la définition de Stigler est encore trop large.[10] Par contre, Demsetz a prouvé, dans un article devenu classique, que les deux définitions, celle de Bain et celle de Stigler, sont trop étroites. Demsetz prend l'hypothèse d'un marché de taxis sur lequel chaque chauffeur de taxi est tenu par l'administration d'obtenir une licence, le nombre de licences (sous forme de médaillon) étant limité. Les médaillons s'achètent à l'administration à des prix déterminés par le marché. L'obligation d'avoir un médaillon est une barrière à l'entrée dans la mesure où le nombre de médaillons disponibles est inférieur au nombre de taxis qui seraient exploités s'il n'y avait pas cette obligation. Dans cette situation, les taxis en place et les nouveaux taxis sont confrontés exactement au même coût d'entrée, de sorte que la définition de Stigler ne permet pas d'y voir une barrière. En même temps, parce que le processus de marché va dissiper le profit, la définition de Bain ne reconnaît pas non plus la barrière.[11] En conséquence, aucune des deux

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7 Dennis Carlton, "Why Barriers to Entry Are Barriers to Understanding," 94 American Economic Review, Papers and Proceedings 466, 467 (2004).

8 *Voir, par exemple,* Jean Tirole, The Theory of Industrial Organization 305-06 (1988); F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance 360 (3d ed. 1990).

9 George Stigler, *The Organization of Industry* 67 (1968).

10 Schmalensee suppose que les coûts variables sont nuls. *Voir* Richard Schmalensee, "Sunk Costs and Antitrust Barriers to Entry," 94 American Economic Review, Papers and Proceedings 471, 473 (2004).

11 Harold Demsetz, "Barriers to Entry," 72 American Economic Review 47, 48 (1982).

définitions ne peut aider de manière fiable à répondre aux questions importantes de savoir si l'entrée est probable et, dans l'affirmative, combien de temps il faudra pour qu'elle soit effective.

La définition de Stigler pourrait être trop étroite d'une autre façon en ne reconnaissant pas que dans certaines circonstances il est plus difficile pour les nouveaux venus de pénétrer sur un marché que pour une firme en place qui était la première à y entrer. Plus précisément, lorsqu'un marché est déjà occupé par une entreprise, les entrants potentiels risquent de se trouver face à une ou plusieurs marques bien établies, ainsi qu'à une demande insuffisante pour une exploitation efficiente. En revanche, la première firme qui s'est implantée sur le marché n'avait aucune marque rivale s'opposant à elle et a pu, du moins temporairement, profiter d'une courbe de demande correspondant à un marché inexploité réservé à elle seule. A partir de sa définition, il est difficile de dire si Stigler aurait essayé de tenir compte de ces difficultés en les supposant absentes (c'est-à-dire en supposant que les entreprises en place avaient été confrontées aux mêmes obstacles pour développer leur marque et aux mêmes économies d'échelle que les nouveaux entrants), ce qui ne semble pas réaliste, ou s'il aurait reconnu que la première firme sur un marché peut vraiment profiter d'avantages pouvant être qualifiés de barrières à l'entrée.

Enfin, bien que l'on ait généralement accepté dans les années 80 et 90 que les coûts irrécupérables puissent être source de barrières à l'entrée, la définition de Stigler les exclut. Les firmes en place comme les nouveaux entrants peuvent être obligés d'assumer des coûts irrécupérables avant de pénétrer sur un marché, et ne remplissent donc pas les critères de Stigler concernant les barrières à l'entrée. Les coûts irrécupérables peuvent néanmoins créer une asymétrie décisionnelle capable de dissuader les entrants, parce que les firmes en place les ont déjà payés, ce qui n'est pas le cas des entrants. Nous reviendrons plus loin sur cette asymétrie, dans la section 3.1.

3. *Ferguson*. Ferguson a défini la barrière à l'entrée comme quelque chose qui rend l'entrée non rentable, tout en permettant aux entreprises en place de fixer leurs prix au dessus du coût marginal et de réaliser de manière persistante des profits de monopole.[12] Bien qu'elle diffère de la définition de Bain, parce qu'elle précise qu'un obstacle à l'entrée rendra celle-ci non rentable, et qu'elle suppose que les entreprises en place font des profits de monopole, la définition de Ferguson reste sujette aux mêmes critiques que celle de Bain : trop large et pas assez large. Autrement dit, elle pourrait encore être considérée comme trop large parce qu'elle risque d'inclure des facteurs désirables tels qu'une qualité et une efficience supérieures, et elle pourrait être considérée comme trop étroite parce qu'elle n'inclut pas des facteurs qui à l'évidence rendent l'accès impossible mais ne permettent pas des profits de monopole.

4. *Fisher*. Fisher définit une barrière à l'entrée comme tout ce qui empêche l'accès au marché lorsque cette entrée serait socialement bénéfique.[13] Bien qu'elle tente d'introduire un élément normatif dans le discours sur les barrières à l'entrée, cette définition ne donne aucune indication pour identifier des obstacles socialement préjudiciables.[14] En outre, comme le

12 James Ferguson, Advertising and Competition: Theory, Measurement, Fact 10 (1974).

13 Franklin Fisher, "Diagnosing Monopoly," 19 Quarterly Review of Economics and Business 23 (1979).

14 Comme l'a déclaré Dennis Carlton, "Si le but de la définition des barrières à l'entrée est d'identifier certaines conditions (exogènes) qui ont des effets nocifs socialement, on ne devrait pas définir des "barrières" comme des conditions qui portent un préjudice social, à moins que l'on puisse identifier ces conditions *a priori* [.] Sinon, une telle définition ne sert pas à grand chose." Dennis Carlton, "Why

soulignent McAfee, Mialon et Williams, le bien-être social ne correspond pas toujours parfaitement au bien-être des consommateurs que les autorités chargées de la concurrence s'efforcent habituellement de protéger. Supposons, par exemple, qu'une firme décide de ne pas entrer dans un secteur parce qu'elle ne pense pas pouvoir récupérer les coûts d'investissement importants auxquels elle serait confrontée. Pour Fisher, ce résultat est exactement ce que la société voudrait (car la société prendrait en compte la répartition optimale des ressources). Fischer est donc du même avis que Stigler : des coûts d'immobilisation élevés ne sont pas des barrières à l'entrée. Du point de vue du consommateur, cependant, l'ajout d'une autre firme pourrait stimuler la concurrence et favoriser le bien-être des consommateurs – peut-être même suffisamment pour compenser la perte de profit de la firme. [15] C'est pourquoi la définition de Fischer ne semble pas être utile aux autorités chargées de la concurrence.

5. *Von Weizsacker*. Il définit, quant à lui, une barrière à l'entrée comme un coût qui doit être supporté par l'entrant, mais pas par les entreprises en place, et qui implique une distorsion dans l'affectation des ressources de la société.[16] Cette définition est semblable à celle de Stigler ; elle est même plus étroite car la différence de coût doit aussi réduire le bien-être social pour compter comme barrière à l'entrée. L'idée de Von Weizacker est que dans une industrie à la Cournot, il peut y avoir davantage de firmes que le nombre socialement optimal.[17] Il s'ensuit que les barrières à l'entrée peuvent effectivement avoir leur utilité. Si ce raisonnement et ce résultat semblent aller à l'encontre de ce qu'on pense intuitivement, c'est peut-être parce que dans le monde réel les exemples d'industries à la Cournot sont rares. En tout cas, parce qu'elle est centrée sur le bien-être social, la définition de Von Weizacker prête le flanc aux mêmes critiques que celle de Fisher.[18]

6. *Carlton et Perloff*. Ces deux auteurs définissent une barrière à l'entrée comme tout ce qui empêche une firme de créer instantanément une nouvelle entreprise sur un marché. Réalisant que leur définition n'est pas pratique, parce qu'elle signalerait pratiquement toujours la présence de barrières à l'entrée, ils l'ont affinée en précisant qu'à terme une barrière à l'entrée est un coût pour les entrants, alors que les entreprises en place ne supportent pas ce coût ou n'ont pas eu à le supporter.[19] En résolvant ce problème, les auteurs en ont toutefois créé un autre, parce que le long terme est trop long pour une politique de concurrence efficace lorsqu'il s'agit de barrières à l'entrée. Si les autorités chargées de faire respecter la loi ne reconnaissaient que les barrières à l'entrée de long terme, elles risqueraient d'autoriser des concentrations ayant des effets anticoncurrentiels à court et à moyen terme, mais qui du fait de

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Barriers to Entry Are Barriers to Understanding," 94 American Economic Review, Papers and Proceedings 466 (2004).

15 R. Preston McAfee, Hugo Mialon, & Michael Williams, "What Is a Barrier to Entry?," 94 American Economic Review, Papers and Proceedings 461, 463 (2004), available at http://userwww.service.emory.edu/~hmialon/B2E.pdf.

16 Carl von Weizsacker, "A Welfare Analysis of Barriers to Entry," 11 Bell Journal of Economics 399 (1980).

17 Une industrie à la Cournot est celle dans laquelle les firmes utilisent la production comme variable de choix stratégique plutôt que le prix du bien ou du service. Le bien ou le service est homogène et produit à coût constant.

18 Schmalensee critique Fisher et von Weizsacker pour cette raison. Richard Schmalensee, "Sunk Costs and Antitrust Barriers to Entry," 94 American Economic Review, Papers and Proceedings 471, 472 (2004).

19 Dennis Carlton & Jeffrey Perloff, Modern Industrial Organization 110 (1994).

l'absence de barrières à long terme n'auraient pas de tels effets à long terme. Cette politique ignorerait des facteurs tels que les coûts irrécupérables qui, par définition, n'existent pas à long terme. Elle semble donc trop permissive.

Comme l'écrivait la *Federal Trade Commission* des Etats-Unis dans une décision relative à une fusion :

> *A moins qu'il n'y ait une barrière à l'entrée . . ., le pouvoir de marché ne peut s'exercer indéfiniment. Tôt ou tard, de nouvelles firmes entreront sur le marché et ramèneront les prix à des niveaux concurrentiels. Du point de vue du public, toutefois, cela fait une grosse différence que cela se produise plus tôt ou plus tard. En pratique, il se peut qu'il n'y ait guère de différence entre une barrière absolue à l'entrée et des conditions d'entrée qui retardent pour des décennies le rétablissement des prix de concurrence.*

C'est pourquoi nous allons aussi examiner un deuxième type de barrière à l'entrée que l'on pourrait qualifier plus précisément d'obstacle à l'entrée. Un obstacle à l'entrée est toute condition qui retarde nécessairement l'entrée sur un marché pendant une durée importante et permet donc entre temps d'exercer un pouvoir de marché.[20]

Bien que le terme "obstacle à l'entrée" ne semble pas avoir été largement adopté en tant que terme de spécialité, l'argument sous-jacent est clair.

De plus, Carlton lui-même a reconnu le danger d'insister à l'excès sur le long terme lorsqu'il a écrit plus tard : "du point de vue pratique, le long terme peut être totalement sans intérêt. Il se peut qu'il faille tellement de temps pour y arriver que la persistance de bénéfices supra-concurrentiels jusqu'à ce moment là se révèle être ce qui importe en pratique, et non le fait que ces superbénéfices soient éliminés dans quelque avenir lointain."[21] Quant à savoir quelle est la durée trop longue pour tolérer la gêne de l'entrée sans reconnaître son effet sur les consommateurs, c'est là une question subjective. Les clés pour comprendre la façon dont diverses autorités de concurrence envisagent ce problème se trouvent dans leurs lignes directrices ; on en examinera quelques unes dans la section 4.2.

7. *McAfee, Mialon et Williams*. Enfin, McAfee, Mialon et Williams ont tenté de clarifier en partie la confusion qui règne sur les barrières à l'entrée en les divisant en deux catégories. Tout d'abord, ils ont défini une barrière économique à l'entrée comme un coût que doivent encourir les nouveaux entrants et que les firmes en place n'ont pas supporté ou n'ont pas eu à supporter. C'est simplement la définition de Stigler sous un emballage différent, pour clarifier les temps des verbes. Deuxièmement, ils ont défini une barrière antitrust à l'entrée comme « un coût qui retarde l'entrée et réduit par là même le bien-être social par rapport à une entrée immédiate mais également onéreuse."[22] Leur définition a toutefois, été immédiatement remaniée par Schmalensee, comme les "conditions qui restreignent la capacité des nouveaux entrants ... à contribuer à la réalisation des objectifs de la politique antitrust" qui, selon lui, ont trait au surplus du consommateur, ou au bien-être économique global de la société.[23]

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20 *Echlin Manufacturing Co.*, 105 F.T.C. 410, 486 (1985).

21 Dennis Carlton, "Why Barriers to Entry Are Barriers to Understanding," 94 American Economic Review, Papers and Proceedings 466, 468 (2004).

22 R. Preston McAfee, Hugo Mialon, & Michael Williams, "What Is a Barrier to Entry?," 94 American Economic Review, Papers and Proceedings 461, 463 (2004), disponible à l'adresse http://userwww.service.emory.edu/~hmialon/B2E.pdf.

23 Richard Schmalensee, "Sunk Costs and Antitrust Barriers to Entry," 94 American Economic Review, Papers and Proceedings 471 (2004).

McAfee, et al. et Schmalensee ajoutent un élément dynamique extrêmement important à leurs définitions des barrières antitrust à l'entrée. Il se trouve que leurs propositions sont les premières à reconnaître l'importance de facteurs qui retardent l'entrée au lieu de l'empêcher en permanence. Comme le note Schmalensee, toutefois, "les économistes semblent malheureusement n'avoir produit que très peu de théories potentiellement pertinentes et pratiquement aucune analyse empirique systématique des facteurs qui ralentissent l'entrée."[24] Indépendamment de la question de savoir si cette nouvelle terminologie permet de clore le débat sur les définitions ou se contente d'ajouter des catégories à la taxinomie des barrières à l'entrée, elle n'aide pas vraiment les responsables des politiques au delà de faire ressortir la nécessité de prendre en compte le rythme des entrées.

2.3 Est-ce que les définitions ont vraiment de l'importance ?

Une source de désaccord et de confusion au sujet des barrières à l'entrée est peut-être que le fondement de certaines d'entre-elles vient de ce qui a été écrit sur le paradigme structure-conduite-performance qui, nous l'avons montré, comporte de nombreux défauts théoriques. Une autre source de désaccord et de confusion viendrait du fait que lorsqu'on tente de définir les barrières à l'entrée, on ne précise pas toujours si l'on vise à identifier tout ce qui peut empêcher l'entrée ou seulement les obstacles qui justifient une quelconque intervention publique sur la base d'une politique. Il peut sembler évident que ce soit cette dernière interprétation qui soit pertinente pour la politique de la concurrence, mais en fait, c'est habituellement la première qui l'est.

En effet, dans les affaires relatives à la concurrence dans le monde réel, le problème des barrières à l'entrée se pose le plus souvent non pas à cause des barrières elles-mêmes qui seraient source de préjudice, mais parce que le préjudice concurrentiel que peut causer quelque autre événement ou comportement pourrait être compensé par une entrée, à moins qu'il n'y ait des barrières qui l'empêchent ou la découragent. Dans une affaire de concentration, par exemple, la préoccupation type du tribunal par rapport aux barrières à l'entrée est de savoir si elles sont suffisamment élevées pour empêcher ou décourager de nouvelles firmes d'entrer sur le marché, si toutefois l'opération se traduit par une hausse importante des prix. Pourtant, le souci n'est généralement pas de savoir si le tribunal devrait prendre une décision supprimant la barrière à l'entrée. C'est encore plus clair si l'on imagine un marché sur lequel l'une des barrières les plus importantes est une loi qui protège la santé publique en imposant aux vendeurs de respecter certaines règles de sécurité. Il est fort improbable que le tribunal invalide cette loi dans une affaire de concurrence, mais il devra la prendre en compte pour déterminer la difficulté d'entrer.[25]

Bien sûr, dans certains cas, ce qui est jugé au fond, c'est quelque chose qui pourrait être décrit comme une barrière à l'entrée. Cela peut arriver, par exemple, dans une affaire de contrats d'exclusivité. Dans une telle situation, il est demandé au tribunal de déterminer si la « barrière » justifie une intervention judiciaire. Cependant, même dans de tels cas, il y a souvent (ou il devrait y avoir) une enquête plus générale au sujet des barrières à l'entrée qui va au delà de celle qui est à l'origine de l'action en justice. Cette enquête plus large a lieu lorsque le tribunal tente de déterminer, à supposer que la barrière en question existe, si tout effet dommageable qu'elle pourrait avoir sur la concurrence a néanmoins des chances d'être annulé ou substantiellement atténué par une entrée. Supposons qu'un tribunal détermine, dans une affaire de prix d'éviction, que la partie assignée fixe en effet ses prix à un

24 *Id*. at 473.

25 Cependant, la concurrence souffre parfois de barrières juridiques à l'entrée qui ne peuvent se justifier même pour des raisons extérieures à la politique de concurrence. De telles lois sont des cibles très attirantes pour les initiatives des autorités de la concurrence. Voir exemple dans la section 5.

niveau inférieur aux coûts. Ces prix pourraient être considérés comme une barrière à l'entrée. Cependant, le tribunal pourrait aussi examiner si d'autres barrières empêcheraient les entrants de faire échec à une tentative du prédateur de récupérer ses pertes. En d'autres termes, le tribunal pourrait étudier si, par exemple, la nécessité d'investir des sommes considérables en coûts irrécupérables dissuaderait les entrants, même si le prédateur devait augmenter ses prix à un niveau supra-concurrentiel. Les coûts irrécupérables ne sont pas "illégaux," mais ils sont bien sûr pertinents. C'est pourquoi il n'est pas utile de limiter notre conception des barrières à l'entrée à un comportement ou à des caractéristiques de marché qui, par eux-mêmes, justifient une intervention.

Cependant, à cause des définitions opposées décrites dans la section 2.2 ci-dessus, le terme "barrières à l'entrée " est devenu si controversé qu'il est maintenant difficile de l'utiliser de manière largement acceptable. Ces dernières années, certains commentateurs ont relativisé le problème en soutenant que le débat sur la signification des "barrières à l'entrée " n'est pas essentiel pour la politique de la concurrence. Dans un article de 2004, par exemple, Carlton écrit : "Au lieu de se demander s'il existe une 'barrière à l'entrée' selon une quelconque définition, les analystes devraient plutôt expliquer comment se comportera l'activité au cours des prochaines années."[26] Posner est d'accord avec lui, ayant noté en 2002 que la question importante en pratique n'est pas de savoir si telle chose est ou n'est pas une barrière au sens de Stigler, mais si elle retardera une nouvelle entrée.[27] Werden aussi a abandonné volontairement le débat sur les définitions dans un article de 2001 en employant le terme moins controversé de "conditions d'entrée."[28]

Ces auteurs concluent qu'une réflexion abstraite, théorique, sur la définition des barrières à l'entrée a peu de chances d'être très utile dans les investigations et les décisions des autorités. En revanche, il est plus utile de s'interroger sur le fait de savoir si et quand une entrée a des chances de faire échec aux effets anticoncurrentiels dont se préoccupe l'autorité en charge de la concurrence ou le tribunal, étant donné les faits et circonstances de chaque affaire. C'est cette approche pragmatique que nous suggérons ici aussi. C'est pourquoi, bien que les termes de "barrière" et "barrière à l'entrée " apparaissent tout au long de cette note, nous n'avalisons aucune définition particulière. Ces termes visent seulement à désigner quelque chose qui est pertinent pour l'analyse d'entrée parce que tendant à retarder ou à empêcher l'entrée.

3. Conditions susceptibles d'influencer l'entrée

Une très large palette de conditions et de comportements peuvent exercer leur influence sur la facilité d'entrée. Cette partie de la note contient la description de nombreux facteurs qui sont généralement pertinents dans l'analyse d'entrée. Le but n'est pas de créer une liste de contrôle exhaustive, mais de donner suffisamment d'exemples pour illustrer le genre de considérations que les autorités et les tribunaux prennent en compte lorsqu'ils font une évaluation d'entrée. Les conditions se divisent en deux types fondamentaux – structurelles et stratégiques. Certaines ont des retombées sur les autres et aucune ne devrait être considérée isolément, car elles interagissent entre elles et se renforcent

26 Dennis Carlton, "Why Barriers to Entry Are Barriers to Understanding," 94 American Economic Review, Papers and Proceedings 469 (2004).

27 Richard Posner, Antitrust Law 74 (2d ed. 2002).

28 *Cf.* Gregory Werden, "Network Effects and Conditions of Entry: Lessons from the Microsoft Case," 69 Antitrust Law Journal 87 (2001). Certains travaux antérieurs de Werden suggèrent également que le fait d'adhérer strictement à certaines définitions des barrières à l'entrée pourrait conduire à des choix de politique incorrects. *Cf.* Gregory J. Werden & Luke M. Froeb, "The Entry-Inducing Effects of Horizontal Mergers," 46 Journal of Industrial Economics 525 (1998) (montrant que, dans certaines conditions, les coûts irrécupérables peuvent dissuader l'entrée, même sur un marché qui ne comporte aucune barrière au sens où l'entend Stigler).

l'une l'autre. Cependant, il y a un type de condition que l'on retrouve dans l'ensemble de la discussion ; c'est pourquoi nous l'avons indiqué en premier et séparément.

3.1 Coûts irrécupérables

Ces coûts correspondent à des investissements totalement attachés à un marché donné une fois qu'ils ont été engagés. Ils ne peuvent être récupérés, même si l'entreprise qui a investi se retire des affaires. A l'instar des barrières réglementaires, les coûts irrécupérables sont maintenant considérés par de nombreux commentateurs comme l'une des deux principales sources de barrières à l'entrée, parce qu'ils sont impliqués dans de nombreux autres facteurs qui peuvent faire obstacle à l'entrée.[29] Plusieurs études empiriques ont montré que les coûts irrécupérables ont des effets substantiels sur la façon dont les industries évoluent.[30]

Les coûts irrécupérables sont souvent confondus avec les coûts fixes, mais les deux ne sont pas nécessairement identiques. Les coûts fixes ne varient pas avec le niveau de production, mais certains d'entre eux peuvent être récupérés en cessant la production et en vendant ou en redéployant les actifs concernés. La vente et le redéploiement ne sont toutefois pas des possibilités envisageables en ce qui concerne les coûts irrécupérables. Supposons, par exemple, que l'université d'une petite ville décide de financer un programme d'astronomie et qu'elle ajoute un dôme d'observation doté d'un puissant télescope à l'un de ses bâtiments. Les coûts du dôme et du télescope sont fixes ; ils ne varient pas avec le nombre de fois où le dôme et le télescope sont utilisés. Supposons encore que cette ville connaisse une croissance explosive et que l'augmentation de l'éclairage qui en résulte perturbe gravement les observations nocturnes des astronomes locaux, empêchant la poursuite d'un usage productif du télescope situé dans le dôme. L'université peut transférer le télescope dans un campus annexe à 30 kilomètres où il en sera fait bon usage. Le télescope correspond donc à un coût fixe, mais non irrécupérable. Cependant, supposons que cela coûte plus cher de démonter et de déménager le dôme que d'en construire un autre sur le campus annexe. Dans ce cas, à moins que le collège ne réussisse à trouver quelque autre utilisation productive du premier dôme, son coût ne pourra être récupéré, de sorte qu'il s'agit d'un coût à la fois fixe et irrécupérable.

En général, les coûts irrécupérables peuvent agir sur l'entrée de deux manières. La première concerne les coûts irrécupérables des entreprises en place. Lorsque celles-ci ont déjà réalisé des investissements irréversibles qui contribuent à la fabrication, la distribution ou la vente de leurs produits, elles ne prendront pas nécessairement en compte le coût de ces investissements lorsqu'elles établiront leurs prix en réaction à l'entrée. La raison en est simple : l'argent est déjà sorti et rien ne le ramènera jamais.

Parce qu'il n'y a aucune façon de retrouver l'argent dépensé en coûts irrécupérables, une firme qui les a déjà absorbés pourrait logiquement ignorer ces coûts lorsqu'elle décide de ses prix. Ce qui signifie qu'un nouvel entrant, confronté à une firme en place qui a investi dans des coûts fixes importants, se trouve face à un rival qui pourrait réagir à son entrée en baissant ses prix en dessous du point où il couvre une partie de ses coûts irrécupérables. Autrement dit, la concurrence par les prix exercée après l'entrée par des firmes en place qui ont eu des coûts irrécupérables élevés peut être particulièrement

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29 Thomas Ross, "Sunk Costs and the Entry Decision," 4 Journal of Industry, Competition and Trade, Bank Papers, 79, 80 (2004).

30 *E.g.*, A. Gschwandtner & V. Lambson, "The Effects of Sunk Costs on Entry and Exit: Evidence from 36 Countries," 77 Economic Letters 109 (2002) (le nombre de firmes tend à moins varier avec le temps dans les industries à coûts irrécupérables élevés); Timothy Bresnahan & Peter Reiss, "Measuring the Importance of Sunk Costs," 34 Annales d'Économie et de Statistique 181 (1994) (le prix minimum qui déclenche l'entrée est uniformément plus élevé que le prix maximum qui déclenche la sortie).

acharnée. “Acharnée” signifie dans ce cas que ces entreprises installées peuvent être capables de dissuader non seulement les entrants qui seraient moins efficients, mais aussi ceux qui seraient tout aussi efficients, et mêmes certains qui seraient *plus* efficients.

Pour bien comprendre ce dernier point, n'oublions pas que si la firme en place a déjà investi dans les coûts irrécupérables nécessaires pour entrer sur le marché, ce n'est pas le cas des entrants potentiels. Bien que ces derniers puissent débourser de l'argent pour financer les coûts irrécupérables, entrer, et ensuite fixer rapidement un prix à un niveau insuffisant pour les récupérer (exactement comme le fait la firme en place), cela apparaîtrait comme une stratégie irrationnelle parce que l'entrant potentiel a encore le choix de ne pas perdre l'argent dépensé en coûts irrécupérables. Tout ce qu'il a à faire est de rester en dehors du marché. L'entreprise en place, ayant déjà réalisé l'investissement, n'a pas ce choix. Donc, en théorie du moins, l'entreprise en place peut fixer ses prix au niveau de ses coûts moyens autres qu'irrécupérables afin de dissuader les entrants.[31] Par conséquent, à moins qu'un entrant soit tellement plus efficient que l'entreprise en place qu'il puisse fixer un prix égal ou inférieur au coût moyen autre qu'irrécupérable de cette dernière tout en restant rentable (compte tenu de ses propres coûts irrécupérables), il est fort improbable qu'il entre.[32] Autrement dit, la capacité de rester rentable tout en fixant un prix égal ou inférieur au coût total moyen de l'entreprise en place peut simplement ne pas suffire.

La deuxième manière générale dont les coûts irrécupérables peuvent agir sur l'entrée implique une influence plus directe de ces coûts sur les entrants potentiels. Pour commencer, les coûts irrécupérables réduisent la probabilité d'une entrée-sortie éclair en imposant des coûts de sortie aux candidats à l'entrée. Plus les coûts irrécupérables sont élevés par rapport à l'opportunité de profit disponible, moins une incursion temporaire dans le marché sera attrayante. Cependant, l'entrée-sortie éclair semble être rare en règle générale, même lorsqu'il n'y a pas de coûts irrécupérables importants.

Outre l'influence qu'ils exercent sur les entrées-sorties éclair, les coûts irrécupérables augmentent aussi le risque associé à une entrée engagée. Il y aura pratiquement toujours au moins quelques risques que l'entrée ne réussisse pas, et cette probabilité est parfois grande. L'entrant peut sous-estimer ses coûts

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31 Pour une discussion mathématiquement plus rigoureuse de ces concepts, voir Stephen Martin, “Sunk Cost and Entry,” 20 Review of Industrial Organization 291 (2002) (montrant que les coûts irrécupérables peuvent rendre l'entrée non rentable en raison de leur effet sur les coûts unitaires après entrée des entreprises en place).

32 Les lecteurs intéressés par de plus amples détails sur l'entrée au plan économique remarqueront que cette description repose sur des hypothèses implicites. Il est possible que des coûts irrécupérables ne dissuadent *pas* une entrée si, par exemple, les produits ne sont pas homogènes et si les coûts marginaux ne sont pas constants et identiques entre firmes. Ces conditions sont supposées s'appliquer ici, mais de façon à permettre d'exprimer des généralités sur les coûts irrécupérables d'une manière relativement facile à comprendre. Une autre complication est que certaines études économiques avancées relatives à la théorie des jeux suggèrent d'autres raisons pour lesquelles les entrants pourraient quand même logiquement entrer sur un marché où une entreprise en place menace d'ignorer ses coûts irrécupérables dans ses décisions de prix. Ce pourrait être le cas lorsque, en supposant qu'un nouvel entrant « courageux » entre quand même, il s'avère que la stratégie optimale de l'entreprise en place serait de s'adapter à l'entrée plutôt que de continuer à la combattre en refusant de couvrir les coûts irrécupérables. Dans ce cas, on dit que l'entreprise en place a un problème d'“engagement” parce qu'elle ne peut pas menacer de façon convaincante de s'engager dans une stratégie selon laquelle elle ne réussirait pas à fixer un prix suffisamment élevé pour couvrir ses coûts irrécupérables. En fait, l'ensemble des travaux sur le comportement stratégique en réponse à l'entrée dans le cadre de la théorie des jeux représente un volume très important et couvre un large éventail de résultats possibles. Pour une brève explication de certains de ces travaux, voir Richard Gilbert, “Mobility Barriers and the Value of Incumbency” in 1 Handbook of Industrial Organization 509-510 (Richard Schmalensee & Robert Willig, eds. 1989).

d'exploitation, par exemple, et découvrir après coup qu'il ne peut rivaliser avec des entreprises plus efficientes. Ou alors, sur un marché en évolution rapide, la technologie de l'entrant peut être dépassée juste au moment où il entre sur le marché, de sorte que son produit est obsolète avant qu'il ait eu une chance de générer des profits. L'économie peut amorcer une phase de récession, ou l'un quelconque des multiples facteurs en jeu peut mal tourner. Les coûts irrécupérables peuvent être considérés comme le montant que le nouveau venu met en jeu en entrant. Si l'entrée se solde par un échec, les coûts irrécupérables seront perdus. C'est pourquoi, plus les coûts irrécupérables sont élevés par rapport au profit escompté, moins l'entrée sera attirante.

On peut voir que l'incertitude joue un rôle important à ce stade. L'incertitude sur les conditions futures du marché se conjugue avec le niveau des coûts irrécupérables pour influencer le risque que perçoit le futur entrant. En général, plus les coûts irrécupérables sont élevés, plus l'incertitude est grande au sujet des conditions qui influenceront le succès de l'entrée, moins il est probable que la firme entre. En revanche, l'incertitude ne sera guère dissuasive s'il n'y a pas de coûts irrécupérables. La raison en est simple : dans ces circonstances, même si l'entreprise échoue, elle pourra quand même récupérer la totalité de ses coûts.

De nombreux types différents d'investissements peuvent constituer des coûts irrécupérables. En voici quelques exemples :

- Pertes que les entreprises enregistrent presque toujours pendant la phase de démarrage, telles que les pertes dues aux prix promotionnels qui sont nécessaires pour inciter les clients à essayer un nouveau produit, ou les pertes résultant d'une exploitation à des niveaux de production initiale trop bas pour être efficaces.

- Investissements en capital humain, tels les coûts de recrutement et de formation.

- Investissements en équipements hautement spécialisés ou en bâtiments ayant une valeur de revente limitée.

- Dépenses en publicité et promotions.

- Dépenses de recherche et développement ne donnant pas de résultats avec d'autres utilisations.

- Argent dépensé pour se conformer aux réglementations officielles.

3.2 Conditions structurelles

Les barrières structurelles à l'entrée proviennent des conditions de base dans lesquelles s'exerce l'activité, telles que les coûts, la demande et la technologie. En général, les facteurs qui figurent dans cette rubrique, soit échappent largement au contrôle direct des entreprises en place, soit découlent des efforts qu'elles déploient pour soutenir la concurrence en général, plutôt que de stratégies spécifiques mises en oeuvre pour dissuader les candidats à l'entrée :

1. *Avantages de coût absolus.* Des avantages absolus en matière de coût existent lorsque la courbe de coût d'une entreprise en place est en dessous de celle d'un entrant à tous les niveaux de production. Aussi longtemps que l'entreprise en place fixe ses prix à un niveau inférieur au coût prévu par l'entrant, elle peut engranger des bénéfices supra-concurrentiels et l'entrée sera non rentable. Un avantage permanent de coût apparaîtrait, par exemple, s'il était exigé des nouveaux entrants qu'ils achètent certains biens d'équipement protégeant l'environnement que les entreprises en place ne sont pas tenues d'acheter. De même, une entreprise en place

pourrait tirer un avantage absolu d'un accès exclusif à des ressources ou à une technologie de production de niveau supérieur. Il importe toutefois de garder à l'esprit que si l'entreprise en place peut avoir pour l'instant une technologie supérieure, cela ne sera peut-être pas toujours le cas. La question clé est de savoir si le moteur du marché est l'innovation et donc si la technologie de l'entreprise en place peut être court-circuitée, ou du moins copiée. Dans l'affirmative, la question suivante est de savoir combien de temps cela prendra.

2. *Economies d'échelle*. Lorsque des économies d'échelle sont présentes, les coûts moyens diminuent à mesure que le nombre d'unités augmente au delà d'un certain volume de production. Dans ce cadre, même si les entreprises en place et les entrants ont les mêmes courbes de coût, l'entreprise en place a des chances de pouvoir fonctionner à des niveaux de production plus élevés où les coûts sont plus bas qu'ils ne le sont au niveau de production attendu d'un entrant potentiel, étant donné les différences probables de demande. Si c'est le cas, aussi longtemps que l'entreprise en place maintient ses prix à un niveau inférieur aux coûts prévus par l'entrant, même si la différence est faible, elle peut gagner des surprofits tout en étant sûre que l'entrée sera non rentable. En outre, même si l'entreprise en place fixe ses prix à un niveau suffisamment élevé pour permettre à un nouvel entrant de faire un bénéfice, le niveau de la concurrence après entrée risque d'être plus élevé du fait de cette entrée, tirant les prix en dessous du seuil auquel de nouveaux entrants peuvent survivre.

Box 1. Marchés contestables

C'est probablement dans la théorie des marchés contestables que l'entrée a le plus fort effet hypothétique sur la concurrence et les performances du marché.* Sur les marchés parfaitement contestables, l'entrée et la sortie sont sans coût et immédiates, et les entreprises de la place ne peuvent pas réagir instantanément à une entrée. De tels marchés fonctionnent toujours de façon concurrentielle, même s'il n'y a qu'une seule firme sur le marché. En effet, si les prix augmentent au dessus du niveau concurrentiel, l'occasion qui en résulte d'encaisser des surprofits attire instantanément de nouveaux entrants jusqu'à ce que le prix revienne au niveau concurrentiel.

Les conditions nécessaires à une constestabilité parfaite sont toutefois très strictes et il est probable qu'elles n'existent que rarement. Parce que les prix peuvent habituellement être modifiés à très brève échéance, par exemple, il est douteux que des entrants croient pouvoir entrer et pratiquer des prix plus bas que l'entreprise en place sans qu'elle réagisse rapidement.

Néanmoins, comme le soulignent Bishop et Walker, le concept des marchés contestables « est maintenant entré dans le vocabulaire juridique où il est utilisé de manière plus souple que dans la littérature économique. En gros, l'usage juridique du terme contestable s'applique aux marchés sur lesquels la concurrence potentielle est censée exercer une contrainte importante sur le comportement des firmes en place, c'est-à-dire où l'entrée est relativement facile et n'exige pas de coûts irrécupérables très importants. Bien que les économistes déplorent ce qu'ils considèrent comme un abus de langage, le point essentiel a bien été repris par les juristes : plus il est difficile d'entrer sur un marché, moins il convient d'accorder d'importance à l'entrée comme facteur influant sur le comportement concurrentiel sur ce marché."†

* William Baumol, John Panzar & Robert Willig, Contestable Markets and the Theory of Industry Structure (1982).

† Simon Bishop & Mike Walker, The Economics of EC Competition Law 61 (2d ed. 2002).

Un point important et intéressant au sujet des économies d'échelle est qu'elles ne peuvent pas empêcher ou dissuader l'entrée en l'absence de coûts irrécupérables. C'est une des conséquences de la théorie des marchés contestables. (cf. Encadré 1.) Une activité qui n'exige aucun investissement en coûts irrécupérables est idéale pour effectuer une entrée de type *hit and run*, surtout s'il est également possible d'entrer et sortir très rapidement. Chaque fois qu'un entrant potentiel a repéré une opportunité de faire des bénéfices anormalement élevés, il pourrait entrer, hausser la production jusqu'au niveau optimal, vendre en aussi grande quantité que possible, jusqu'à ce que les prix retombent aux niveaux concurrentiels, puis sortir sans coût du marché. En réalité, il existe peu de marchés (s'il en existe) où l'on peut entrer sans le moindre investissement en coûts irrécupérables.

Par contre, s'il y a des coûts irrécupérables non négligeables, ils génèrent habituellement des économies d'échelle. En effet, les coûts irrécupérables sont, au moins pendant un certain temps, des coûts fixes importants, et ce genre de coûts est souvent une source d'économies d'échelle.

Plus les économies d'échelle sont fortes, plus il est probable que les entrants devront réaliser une opération de dimension importante pour avoir des chances d'être compétitifs, et moins l'entrée sera attrayante en général. En effet, les entrants potentiels ont plus de chances de penser qu'ils seront incapables de gagner une part de marché suffisante pour survivre, ou que les prix élevés avant leur entrée sur le marché seront vite réduits par l'entreprise en place lorsqu'elle aura réagi à la présence du nouveau venu. Chaque scénario tend à retarder l'entrée en proportion du niveau des coûts irrécupérables qui sont nécessaires pour pénétrer sur le marché.

3. *Economies de gamme*. Lorsque des économies de gamme ou d'envergure sont présentes, des économies de coûts sont réalisées à cause des gains d'efficience associés à la production, la distribution ou la vente de plusieurs types de produits au lieu d'un seul. Par conséquent, même si un entrant potentiel a des chances d'être tout aussi efficient dans la distribution de raquettes de tennis, par exemple, qu'une entreprise en place, cette dernière risque d'avoir des coûts moyens plus bas du fait des économies qu'elle réalise en distribuant également des balles de tennis.[33] Si c'est le cas, aussi longtemps qu'elle maintient ses prix juste en dessous des coûts attendus de l'entrant, l'entreprise en place peut réaliser des surprofits tout en étant sûre que l'entrée sera non rentable.

La plupart des considérations relatives à l'entrée qui s'appliquent aux économies d'échelle s'appliquent aussi aux économies de gamme, y compris le fait que ces économies ne peuvent empêcher ou dissuader l'entrée en l'absence de coûts irrécupérables. De la même façon, plus les économies de gamme sont puissantes, plus il est probable que des entrants devraient entrer sur deux marchés de produits au moins pour avoir une petite chance d'être concurrentiels. Ce qui peut entraîner des coûts irrécupérables plus grands et donc un plus grand risque pour des entrants potentiels.

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33 Il est possible que certains entrants présentant un seul produit soient si efficaces ou produisent un article tellement supérieur qu'ils puissent surmonter les économies de gamme. Par exemple, prenons un service d'hospitalisation face à une petite entreprise spécialisée en cardiologie. Il est clair que les hôpitaux bénéficient des économies de gamme associées à l'offre d'une large palette de services de soins de santé. Cependant, un acteur spécialisé sur un petit créneau, offrant seulement l'un de ces services, comme des soins de cardiologie, pourrait être suffisamment efficient ou suffisamment compétent dans ce seul service pour être rentable, même s'il ne bénéficie pas des mêmes économies de gamme qu'un hôpital.

4. *Frais d'investissement élevés*. L'adjectif "élevé" contient en fait deux éléments : le montant absolu des frais qu'il est nécessaire d'engager pour pénétrer sur un marché, et le coût relatif de l'argent emprunté pour financer l'entrée. Ces deux éléments font partie des conditions d'entrée qui ont le plus contribué à alimenter le débat sur la définition des barrières à l'entrée. Quelques théoriciens affirment que des frais d'équipement élevés ne peuvent pas être considérés comme des barrières, parce que des marchés financiers qui fonctionnent bien apporteront leur concours à toute entreprise ayant un projet d'entrée raisonnable à un taux d'intérêt équitable, quel que soit le montant du financement nécessaire.[34] En outre, beaucoup d'entreprises sont capables de faire des dépenses d'investissement très substantielles sans aucun financement de l'extérieur, et elles le feront si elles pensent que le jeu en vaut la chandelle.

   D'autres soutiennent que les prêteurs ne voient pas tous les emprunteurs comme des égaux, ce qui crée des disparités dans les coûts de financement assumés par diverses entreprises. Des sociétés plus riches, plus expérimentées, seront habituellement en mesure d'obtenir des conditions de financement moins onéreuses que des nouvelles entreprises qui démarrent et qui ne sont pas connues, même si des ajustements sont faits pour tenir compte du facteur risque.[35] En tout cas, selon ces théoriciens, les marchés financiers ne fonctionnent pas toujours parfaitement.

   Enfin, quelques économistes se contentent de suivre l'approche pragmatique de Schmalensee. Selon lui, si les entrepreneurs pensent que le coût du capital est une barrière à l'entrée, cette perception a des chances d'influer sur leur décision d'entrée et devient de ce fait une barrière, quelle que soit l'opinion des économistes sur la rationalité de cette décision.[36]

   Plutôt que de se retrouver piégé dans une discussion visant à déterminer si des frais d'investissement élevés remplissent ou non une série de critères correspondant à l'idée qu'on se fait d'une barrière à l'entrée, il est probablement plus utile de se demander comment ces frais influencent la décision d'un entrant potentiel. Premièrement, il semble acquis que plus les frais d'investissement requis pour entrer sur un marché sont élevés, et plus la part de ceux-ci qui sera irrécupérable est grande, plus l'entrant potentiel estimera que l'entrée est risquée parce qu'il perdra plus d'argent si l'entreprise échoue. Toutes choses étant égales par ailleurs, plus il y a de risque, moins il est probable que l'entrée aura lieu. Deuxièmement, l'incidence que des frais d'investissement élevés ont des chances d'avoir sur l'évaluation du risque d'un entrant potentiel dépend beaucoup de la situation dans laquelle se trouve cet entrant. Un tout nouvel entrepreneur n'ayant pas d'autre activité, ni d'expérience, a plus de chances d'être rebuté par des frais d'investissement élevé qu'un conglomérat tentaculaire présent sur de nombreux autres marchés depuis des décennies. En d'autres termes, ce qui semble extrêmement risqué pour un entrant peut ne pas l'être du tout pour un autre.

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34 *Cf. par ex.*, George Stigler, The Organization of Industry 113-122 (1968); Robert Bork, The Antitrust Paradox 196-96 (1978); Richard Posner, "The Chicago School of Antitrust Analysis," 127 University of Pennsylvania Law Review 925, 929 (1979).

35 *Cf.* Mark Reinganum & Janet Smith, "Investor Preference for Large Firms: New Evidence of Economies of Size," 32 Journal of Industrial Economics 213 (1983); Joseph Stiglitz & Andrew Weiss, "Credit Rating in Markets with Imperfect Information," 71 American Economic Review 912 (1983).

36 Richard Schmalensee, "Horizontal Merger Policy: Problems and Changes," 1 Economic Perspectives 41 (1987).

5. *Effets de réputation*. Ce facteur dénote l'effet sur l'entrée que peut avoir la réputation de fiabilité ou de qualité d'une entreprise en place. Elle est distincte de la fidélité à la marque induite par la publicité, qui est abordée dans la section 3.3.4 ci-après. Il est certain, toutefois, que la réputation de qualité d'une firme peut être renforcée par la publicité, de même que par la qualité et la fiabilité de ses produits.

   Chaque fois que l'obtention de renseignements sur des produits n'est pas gratuite (c'est-à-dire la plupart du temps), les consommateurs trouveront souvent utile de s'appuyer sur la réputation et l'expérience d'une firme pour guider leurs décisions d'achat. Il va sans dire qu'ils auront tendance à préférer des firmes ayant une réputation établie en matière de qualité et de fiabilité. Pour surmonter cet effet et persuader les consommateurs d'essayer leurs produits, les nouvelles firmes devront souvent investir dans des prix promotionnels, afin de dédommager les consommateurs du risque qu'ils prennent en essayant le nouveau produit. Plus le risque perçu est élevé, plus la remise devra l'être aussi. Sur certains marchés, le risque perçu peut être si élevé que les clients seront vraiment réticents à essayer un nouveau produit, quel qu'en soit le prix, jusqu'à ce que plusieurs autres clients importants l'essayent, de sorte qu'il peut être extrêmement difficile de faire une entrée rentable. Une nouvelle société de logiciel, par exemple, pourrait souhaiter vendre un produit permettant de faire fonctionner les gros ordinateurs sans interruption, notifiant les erreurs (bugs) au fur et à mesure qu'elles se produisent et les rectifiant automatiquement. Mais si presque tous les gros clients de ce segment de marché utilisent le produit de la firme en place depuis dix ans et en sont totalement satisfaits, et que la fermeture des systèmes centraux, même pour quelques heures, serait considérée comme catastrophique, alors des entrants inconnus auront probablement beaucoup de difficultés à gagner des clients.

   La réputation peut aussi influencer le coût relatif du capital, car les prêteurs auront tendance à considérer les prêts à des firmes établies dont la réputation n'est plus à faire comme moins risqués que les concours à des firmes nouvelles qui n'ont pas encore de succès à afficher à leur palmarès. C'est pourquoi les entrants devront prendre en compte le coût des différences de réputation entre eux-mêmes et les entreprises en place lorsqu'ils évalueront la rentabilité probable de leur entrée.

   Néanmoins, certains tribunaux se sont montrés sceptiques face à l'idée de considérer les effets de réputation comme des barrières à l'entrée. Dans *Advo, Inc. v. Philadelphia Newspapers, Inc.*, par exemple, une cour d'appel a déclaré :

   > *Sur pratiquement tous les marchés, les nouveaux entrants et les clients soulignent l'importance de la réputation qu'a une entreprise de fournir un bien ou un service de qualité .... L'argument sans réserve [du requérant]. . implique qu'il existe des barrières à l'entrée, importantes au sens de la législation antitrust, sur tous les marchés. Nous estimons que cette proposition n'est pas plausible [.]*[37]

   Une autre décision en appel indique : "Nous ne voyons pas comment l'existence d'une réputation obtenue grâce à un service efficace peut constituer un obstacle à la concurrence ; elle en est plutôt le résultat naturel."[38]

   Cela soulève un point important d'ordre général. Il n'est pas contestable qu'une réputation

[37] 51 F.3d 1191, 1201-02 (3d Cir. 1995).

[38] *United States v. Syufy Enterprises*, 903 F.2d 659, 669 (9th Cir. 1990).

acquise grâce à la qualité du service rendu est un résultat naturel de la concurrence. Mais l'idée que cette même réputation puisse devenir un obstacle à la concurrence ne devrait pas être difficile à admettre non plus, parce que c'est certainement possible. Revenant à l'exemple ci-dessus au sujet du logiciel système, il est facile de voir que la probabilité de réussite d'un entrant sera d'autant plus grande qu'il n'y a pas d'entreprise place réputée déjà sur le marché. Cf. Encadré 2.

Encadré 2. Barrières à l'entrée et conduite illégale

L'une des raisons pour lesquelles les tribunaux hésitent à reconnaître la possibilité qu'une réputation puisse dissuader les nouveaux venus réside peut-être dans le fait que le terme « barrière à l'entrée » possède une connotation négative. Les tribunaux peuvent donc avoir l'impression, lorsqu'on leur demande de dire si des barrières à l'entrée existent, que c'est comme si on leur demandait de dire si l'entreprise en place a fait quelque chose d'illégal. Pourtant, ce n'est pas du tout le cas. Les tribunaux doivent veiller à ne pas confondre les tentatives du plaignant, qui cherche à prouver la présence de barrières à l'entrée, avec d'autres tentatives visant à prouver l'existence d'une conduite illégale, anticoncurrentielle.

Quelque chose qui dissuade l'entrée n'est pas nécessairement illégale. Ce peut même être le résultat d'une bonne concurrence, même si cela empêche de nouvelles entrées. Autrement dit, il apparaît clairement qu'il ne devrait pas être illégal que des entreprises opèrent dans des secteurs dotés de barrières à l'entrée élevées. Celles qui s'en plaignent devraient toutefois pouvoir s'appuyer sur tout obstacle présent à l'entrée pour tenter de réunir d'autres éléments de preuve dans des affaires de concurrence, tels que le fait que l'entreprise en place est dominante, ou qu'elle va devenir dominante si la fusion proposée est autorisée, sans avoir à prouver que la barrière elle-même est illégale.

Bien sûr, il est possible que la conduite prétendument anticoncurrentielle attaquée en justice corresponde en fait à la création ou au relèvement d'une barrière à l'entrée. Dans ce cas, toutefois, la conclusion juridique ne devrait pas dépendre du fait de savoir si la conduite s'est traduite par quelque chose que l'on peut qualifier de barrière à l'entrée, mais de savoir si la conduite entre dans le cadre d'une définition claire de « la concurrence par les mérites ». Cf. OCDE (2005), Competition on the Merits, DAF/COMP(2005)__ (à paraître), qui traite des efforts déployés pour rendre plus précis le terme de "concurrence par les mérites".

6. *Effets réseau*. On a des effets directs de réseau lorsque l'avantage qu'un consommateur tire d'un produit augmente non seulement avec la quantité de ce qu'il/elle consomme, mais avec le nombre d'autres personnes qui le consomment également. Des effets indirects se produisent lorsque des augmentations de taille du réseau stimulent la production de biens ou services complémentaires. D'importants effets de réseau tendent à stimuler la croissance des plus grands réseaux et le rétrécissement des plus petits. En fait, si les effets de réseau sont suffisamment forts, un marché peut naturellement basculer vers ou graviter autour d'un seul réseau. Bien qu'il puisse exister des entrants potentiels, la position de la firme dominante est solidifiée dans une certaine mesure parce que les effets de réseau ont créé une sorte de fossé autour d'elle. Pour franchir ce fossé, un entrant devra offrir un produit concurrentiel tellement plus attrayant que les clients de l'entreprise en place seront prêts à abandonner les avantages qu'ils avaient à appartenir au réseau dominant.[39] Plus les effets de réseau sont forts, plus ces

[39] Pour une illustration intéressante et utile de la façon dont les effets de réseau ont influencé le résultat d'une célèbre affaire de monopolisation, cf. Gregory J. Werden, "Network Effects and Conditions of Entry: Lessons from the Microsoft Case," 69 Antitrust Law Journal 87 (2001).

avantages sont grands et donc plus un entrant aura de difficulté à réussir sa pénétration sur le marché.

Comme l'indique Werden, "les effets de réseau font partie des déterminants des conditions d'entrée dans de nombreux secteurs d'activité, et ils peuvent créer un obstacle à l'entrée vraiment redoutable, suffisant pour autoriser les prix à rester au dessus des niveaux concurrentiels pendant un temps assez long sans attirer des entrants."[40] Il fait toutefois aussi une mise en garde : "l'évaluation des conditions d'entrée en présence d'effets de réseau risque d'être un processus complexe et extrêmement détaillé."[41]

7. *Obstacles juridiques/réglementaires*. Certains lecteurs jugeront peut-être qu'il est exagérément optimiste d'inclure les obstacles réglementaires dans la section des conditions structurelles et non dans celle du comportement stratégique. Il est vrai que beaucoup d'entreprises ont réussi à manipuler les régimes de réglementation dans le but de décourager les entrées. A moins que la réglementation elle-même ne soit remise en cause, ce qui importe toutefois ce n'est pas tant *pourquoi* la réglementation existe, mais le seul fait *qu'elle* existe.

En outre, bien que les économistes tenants de l'Ecole de Chicago aient tendance à considérer les restrictions réglementaires ou juridiques imposées par les Etats comme les barrières à l'entrée les plus importantes, on ne peut nier que bon nombre de ces restrictions servent d'autres objectifs politiques importants. Les règlementations concernant la sécurité et l'environnement peuvent constituer à l'évidence des barrières à l'entrée, mais elles peuvent être nécessaires pour s'assurer ce que les fabricants de sièges auto pour enfant travaillent correctement, par exemple, ou que des produits chimiques toxiques ne sont pas déversés dans l'eau distribuée à une collectivité. En outre, certaines « barrières » juridiques peuvent même être plus favorables que néfastes à la concurrence et au bien-être des consommateurs. Un brevet peut empêcher des rivaux d'entrer sur un marché en imitant le produit de l'entreprise en place, mais le produit pourrait ne pas exister du tout s'il n'y avait pas la protection qu'offrent les brevets. Qui plus est, certains brevets permettent de disposer de nouveaux produits qu'il aurait été impossible de créer sans les technologies brevetées.[42]

Par ailleurs, certaines restrictions imposées par les pouvoirs publics, telles que les droits de douane et les contingents d'importation, ont expressément pour but d'élever des barrières à l'entrée et de limiter la concurrence. D'autres encore ont la prétention de servir quelque objectif socialement méritoire, mais soit n'y réussissent pas, soit le font de telle manière que l'entrée s'en trouve découragée inutilement. Un exemple de ce type de barrière est examiné dans la section 5.

Indépendamment de la valeur sociale globale d'une réglementation gouvernementale ou d'une barrière juridique, lorsque les autorités évaluent les perspectives d'entrée sur un marché donné, elles devront prendre en compte ces restrictions, parce qu'elles risquent de rendre la tâche des nouvelles entreprises qui veulent entrer beaucoup plus difficile, plus onéreuse et plus longue.

40 *Id*. at 108.

41 *Id*. at 88.

42 Pour un examen plus détaillé de l'interaction entre droits de propriété intellectuelle et politique de la concurrence, cf OCDE (2004), Droits de propriété intellectuelle, DAF/COMP(2004)24; *voir aussi* Burton Ong, "Building Brick Barricades and other Barrier to Entry: Abusing a Dominant Position by Refusing to Licence Intellectual Property Rights," [2005] European Competition Law Review 215.

8. *Barrières à la sortie*. Plus cela coûte cher de sortir d'un marché, plus ce sera risqué d'y entrer. De même que l'entrée sur un marché n'est généralement pas sans coût, la sortie est rarement gratuite. Une entreprise peut avoir à verser des indemnités de perte d'emploi à ses employés, par exemple, ou supporter des coûts si elle met fin de manière anticipée à des contrats avec des clients ou des fournisseurs. En outre, tous les coûts irrécupérables que l'entreprise a pu absorber et qui n'ont pas encore été couverts ou totalement amortis peuvent aussi être considérés comme des coûts de sortie. Ces types de coûts rendent la sortie d'un marché moins attrayante et, s'ils sont suffisamment élevés, ils peuvent même la rendre pratiquement impossible. Ils peuvent donc être considérés comme des « barrières à la sortie ». Cependant, la probabilité de barrières à la sortie et leur importance seront aussi prises en compte par un entrant potentiel lorsqu'il prendra rationnellement sa décision d'entrer ou non sur un marché.

   De plus, la présence de barrières à la sortie peut aussi influer sur le comportement des entreprises en place. Lorsque ces dernières ne peuvent quitter un marché sans encourir des pertes considérables, toute menace de leur part de répondre de manière agressive à une entrée devient plus crédible. Les barrières à la sortie peuvent donc avoir un rôle doublement négatif et agir également comme barrière à l'entrée. Elles rendent l'entrée plus risquée non seulement en raison des coûts incombant à un entrant qui déciderait de quitter le marché, mais aussi en incitant davantage les entreprises en place à lutter contre des entrées plutôt qu'à y céder.

9. *Avantages du premier à prendre pied sur un marché*. Certains marchés dotent le premier entrant d'avantages de longue durée ou permanents qui lui permettent d'engranger des surprofits sans attirer d'entrants. Le premier arrivant peut développer une forte fidélité à sa marque, par exemple, en étant connu comme la firme la plus ancienne dans cette activité. Ou alors, l'activité peut avoir une courbe d'apprentissage longue et importante sur laquelle aucun entrant ne peut rattraper la première entreprise. Cette entreprise peut amplifier cet effet en maintenant son prix en dessous du prix auquel elle optimise son profit afin de stimuler la demande, accélérant par là ses progrès sur la courbe d'apprentissage. Autre possibilité : le marché a des effets de réseau et le premier arrivant est capable de l'influencer avant que d'autres entreprises n'y entrent.

10. *Intégration verticale*. En agissant à deux stades de la chaîne de production, une entreprise en place peut rendre l'entrée plus difficile en s'accordant certains avantages qui ne peuvent être copiés que par d'autres firmes qui sont intégrées de la même façon. Si la réalisation de cette intégration ajoute considérablement au temps nécessaire pour pénétrer sur le marché ou aux coûts irrécupérables qui risquent d'être engagés, l'entrée pourra être retardée. Les questions clés sont les suivantes : quelle est l'ampleur des avantages de l'intégration ; est-ce que l'intégration est vraiment essentielle pour les obtenir ; et dans l'affirmative, est-ce que l'intégration peut être reproduite, à quelle vitesse et avec quelle difficulté ?

3.3 Comportement stratégique des entreprises en place

Comme l'indique la liste ci-dessus, la hauteur des barrières à l'entrée dépend d'une grande variété de facteurs, notamment les circonstances technologiques et historiques qui se traduisent par des avantages en matière de coûts, tels que la possession de ressources naturelles ou de droits de propriété intellectuelle décisifs. Cependant, les actions et réactions des entreprises en place importent aussi.

Cette catégorie comprend des conditions d'entrée qui ont été créées intentionnellement ou renforcées par l'entreprise en place – parfois, mais pas toujours, dans le but de décourager l'entrée.[43] Parfois, ces stratégies sont employées pour empêcher l'entrée, et parfois pour exercer des représailles contre une entrée qui a déjà eu lieu. Les entreprises en place peuvent aussi menacer simplement de les mettre en oeuvre. Les menaces ne sont toutefois dissuasives que si elles sont crédibles. C'est à dire qu'une simple menace d'adopter un comportement qui rendra l'entrée non rentable ne sera dissuasive que si les entrants croient que l'entreprise en place mettra sa menace à exécution si l'entrée s'effectue. Plusieurs de ces stratégies ont été examinées en détail lors de précédentes tables rondes du Comité de la concurrence de l'OCDE :

1. *Prix d'éviction*. Une entreprise qui veut et qui peut fixer ses prix à un niveau inférieur à un certain seuil de ses propres coûts pendant une certaine durée, ou qui peut menacer de le faire de façon crédible, peut faire renoncer des candidats à l'entrée dans certaines circonstances. Il est possible que la seule réputation de l'entreprise en place suffise à exercer cet effet dissuasif, notamment lorsque ladite entreprise a déjà utilisé dans le passé les prix d'éviction pour éliminer ses rivaux ou pour les dissuader d'entrer. Lorsque des sociétés réussissent à acquérir ou à maintenir une position dominante en érigeant des barrières à l'entrée avec des stratégies anticoncurrentielles telles que les prix d'éviction, alors la barrière à l'entrée peut être considérée comme illégale.[44]

2. *Prix-limite*. Lorsque des entreprises implantées sur un marché adoptent des stratégies de prix-limite, elles ne fixent pas des prix inférieurs à leurs coûts, mais elles ne maximisent pas non plus à dessein leur profit à court terme. Le prix est fixé à un niveau relativement profitable qui correspond à un niveau de production laissant non satisfaite juste une petite demande résiduelle, trop faible pour que l'entrée soit rentable (c'est-à-dire que l'entrant ne serait pas en mesure de récupérer son coût total moyen au prix en vigueur). En sacrifiant une partie de ses profits, l'entreprise installée maintient les postulants en dehors du marché et peut donc réaliser des surprofits en continu (mais pas au niveau d'un monopole). D'ordinaire, les stratégies de prix-limite ne fonctionnent qu'en présence d'économies d'échelle ou de gamme, parce que quelque chose doit empêcher les entrants d'opérer de façon efficace au niveau de demande disponible.[45]

   Le modèle classique des prix-limite que nous venons de décrire suppose que l'entreprise déjà installée peut persuader les entrants potentiels que son niveau de production restera identique même si de nouveaux venus arrivent. C'est une hypothèse essentielle. Les postulants peuvent croire effectivement que la stratégie de maximisation du profit de l'entreprise en place en cas d'entrée sera de s'adapter à cette entrée en réduisant sa propre production, au lieu de se battre contre les nouveaux venus en maintenant sa production. Cela pourrait se produire, par exemple, si les postulants croient qu'ils peuvent facilement et rapidement atteindre un niveau de production auquel leurs coûts seront égaux, ou même inférieurs à ceux de l'entreprise en

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43 Des enquêtes ont montré que les comportements ou stratégies visant à décourager l'entrée ne sont pas rares. Cf. par exemple, Robert Smiley, "Empirical Evidence on Strategic Entry Deterrence," 6 International Journal of Industrial Organisation 167 (1988).

44 Les prix d'éviction ont été le thème central du débat lors d'une récente table ronde du Comité de la concurrence de l'OCDE. *Cf.* OCDE (2005), Predatory Foreclosure, DAF/COMP(2005)14.

45 La documentation sur les prix-limites et d'autres formes de dissuasion à l'entrée est abondante et complexe. Pour une introduction sérieuse, cf. Jean Tirole, The Theory of Industrial Organization, 367-375 (1989); *voir aussi* Richard Gilbert, "Mobility Barriers and the Value of Incumbency" in 1 Handbook of Industrial Organization Ch. 8 (Richard Schmalensee & Robert Willig, eds. 1989).

place (par exemple, si les économies d'échelle sont faibles, ou les entrants ont une technologie supérieure). Dans ce cas, le prix et la quantité produite par l'entreprise installée avant l'entrée pourraient être simplement ignorés par les postulants, car ils n'auraient aucun effet sur le prix d'équilibre après l'entrée. En fait, l'entreprise en place peut tout aussi bien fixer son prix au niveau du prix de monopole avant l'entrée et profiter des bénéfices aussi longtemps qu'elle le peut, parce qu'elle ne sera de toute façon jamais capable de décourager les entrées avec une stratégie de prix-limite.

1. *Surinvestissement intentionnel en capacités et coûts irrécupérables*. Une façon pour l'entreprise en place de contourner le problème de sa crédibilité en fixant des prix-limite consiste à investir dans des capacités excédentaires. Spence a prétendu qu'une entreprise installée pourrait, sous certaines conditions, abaisser son coût marginal après entrée (et donc son prix crédible après entrée) en investissant dans des capacités supplémentaires.[46] Cela entraînerait une baisse de la rentabilité attendue par les postulants, qui pourrait suffire à les dissuader. Dans cette situation, le prix de l'entreprise en place avant l'entrée de nouveaux venus n'est pas un indicateur fiable de son prix après entrée, de sorte que l'entreprise installée est mieux positionnée pour maintenir un prix de monopole avant entrée.

   Si nous prenons comme point de départ la discussion précédente sur les coûts irrécupérables, nous pouvons intégrer l'idée de Dixit selon laquelle l'efficacité d'une extension des capacités comme moyen de décourager l'entrée est plus grande lorsque la totalité ou une grande partie de l'investissement en capital qui y est associé est irrécupérable.[47] En créant intentionnellement une surcapacité pour augmenter le niveau des coûts irrécupérables, une entreprise installée peut renforcer ses chances de fixer des prix si bas et de laisser si peu de demande résiduelle qu'aucun nouvel entrant ne peut espérer faire le moindre bénéfice. Autrement dit, cette stratégie permet à l'entreprise en place de s'engager à produire à un niveau de production qui rationnellement ne serait pas viable si les dépenses étaient réversibles. De cette manière, l'entreprise en place convertit un engagement en atout stratégique. Cela pourrait ressembler à une stratégie autodestructrice, mais il est possible que l'entreprise installée soit plus rentable avec cette stratégie qu'elle ne l'aurait été si elle n'avait pas investi dans cette surcapacité et qu'une entrée ait réussi. Cela a notamment toutes les chances d'être vrai, par exemple, dans un scénario impliquant un entrant potentiel plus efficient.

2. *Remises de fidélité et ristournes groupées*. Les firmes dominantes sont parfois capables d'ériger des barrières à l'entrée en accordant des remises à des clients qui prouvent leur loyauté en achetant certains montants ou pourcentages de leurs besoins à l'entreprise. De même, des entreprises dominantes qui ont de multiples lignes de produits réussissent parfois à empêcher ou à décourager l'entrée en associant des ristournes à l'achat d'articles de plusieurs ou de toutes ces lignes de produits. Cependant, les remises de fidélité et les ristournes groupées ne constituent pas toujours des barrières à l'entrée, loin de là.[48]

46 A. Michael Spence, "Entry, Capacity, Investment and Oligopolistic Pricing," 8 Bell Journal of Economics 534 (1977).

47 *Cf.* Avinash Dixit, "The Role of Investment in Entry Deterrence," 90 Economic Journal 95 (1980).

48 Les remises de fidélité et les ristournes groupées ont aussi fait l'objet de récentes tables rondes à l'OCDE. Cf. OCDE(2002), Loyalty and Fidelity Discounts and Rebates, DAFFE/COMP(2002)21; *voir aussi* OCDE (2005), Concurrence par le mérite, DAF/COMP(2005)__ (à paraître).

3. *Différenciation des produits et publicité*. Bain considère que la différenciation des produits est le seul facteur important qui permet aux firmes de réaliser des surprofits.[49] Les produits qui sont différentiés ne sont pas perçus par les consommateurs comme étant parfaitement interchangeables. La différenciation peut être le résultat de la publicité, de réelles différences de qualité, de différences de réputation ou de quelque autre facteur important pour les consommateurs. Même si les firmes n'investissent pas dans la différenciation de leurs produits dans le but précis d'élever des barrières à l'entrée, [50] elles ont néanmoins le contrôle des montants dépensés, de sorte que cela semble être plus un facteur stratégique qu'un facteur structurel.

   La différenciation des produits peut déboucher sur la fidélité à une marque. Lorsqu'ils sont fidèles à certaines marques, les consommateurs sont probablement moins enclins à essayer une nouvelle marque. Pour surmonter ce problème, les entrants potentiels vont peut-être devoir investir dans des tarifs promotionnels ou dans des campagnes publicitaires (ou les deux à la fois) pour inciter les consommateurs à acheter leurs produits.

   Dans quelle mesure un besoin perçu d'investissement dans la différenciation de produits retardera ou empêchera l'entrée de firmes ? Cela dépendra grandement de la part de ces investissements qui sera irrécupérable. C'est, pour l'essentiel, la même chose que pour les économies d'échelle que nous avons évoquées précédemment. En théorie du moins, les économies d'échelle et les dépenses de publicité ne devraient freiner l'entrée que si elles impliquent des coûts irrécupérables. Par exemple, si une start-up potentielle détermine qu'elle doit dépenser un million d'euros en publicité pour avoir une chance raisonnable de réussir sur un marché, elle considérera probablement cette dépense comme irrécupérable. Cela va augmenter son évaluation du risque associé à cette entrée. Cependant, s'il existe un conglomérat qui a des vues sur ce même marché et qu'il prévoit d'utiliser le même nom de marque que celui qu'il utilise sur d'autres marchés, il peut considérer qu'une partie de ses dépenses de publicité est récupérable, parce que celles-ci vont augmenter la valeur de sa marque sur d'autres marchés, même si l'entreprise échoue finalement sur ce nouveau marché.

   Il existe aussi une interaction intéressante entre économies d'échelle et publicité par rapport à leur effet sur l'entrée. Bien qu'une entreprise entrante doive peut-être dépenser au moins autant qu'une entreprise en place sous forme de publicité pour inciter les consommateurs fidèles au produit de l'entreprise en place à essayer une nouvelle marque, pour l'entreprise en place ces coûts sont répartis sur une plus large – peut-être même beaucoup plus large – gamme de produits. Le coût par unité produite de la publicité sera donc plus élevé pour les entrants, à moins que et jusqu'à ce qu'ils connaissent une croissance importante, de sorte qu'il leur est plus difficile d'être compétitifs.

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49 Joe Bain, Barriers to New Competition 123 (1956).

50 Au lieu de cela, elles peuvent investir dans la différenciation de produits parce que cela maximise leurs bénéfices, indépendamment de tout effet sur l'entrée. *Voir* R. Dorfman & P. Steiner, "Optimal Advertising and Optimal Quality," 44 American Economic Review 826 (1954) (théorème introductif décrivant comment des firmes peuvent choisir un niveau optimal de publicité pour maximiser le profit).

Il existe une école de pensée qui considère que la publicité réduit les barrières plutôt qu'elle ne les renforce.[51] Ceux qui soutiennent cette position soulignent qu'en informant les consommateurs de la disponibilité de nouveaux produits, de leurs caractéristiques et de leur prix, la publicité abaisse le coût de recherche de solutions de rechange et diminue par conséquent la fidélité aux marques ainsi que l'inertie des consommateurs. Par essence, disent-ils, la publicité augmente l'élasticité prix croisée de la demande et augmente la fréquence des changements de marque. Ces remarques supposent que les entreprises en place, tout comme les candidats à l'entrée, investissent dans la publicité. Cependant, même si l'entreprise en place est la seule à investir, les entrants peuvent quand même profiter des dépenses de publicité de l'entreprise en place si elles débouchent sur une clientèle mieux informée et/ou une plus grande demande du marché. Il est donc difficile de dire qui a la tâche la plus ardue : la première firme ou les entrants ultérieurs ?

Il peut donc y avoir une tension inhérente entre la tendance qu'a la publicité à créer et à éroder la fidélité aux marques, et à augmenter et à abaisser le risque de l'entrée. En cherchant à déterminer laquelle de ces deux forces opposées est la plus forte, Kessides a construit un modèle et l'a appliqué à un ensemble de données comprenant des industries manufacturières américaines qui ont expérimenté des entrées nettes pendant six ans. Ses conclusions indiquent que même si la publicité crée effectivement une barrière de coûts irrécupérables à l'entrée, elle réduit aussi le risque de l'entrée tel qu'il est perçu par l'entrant, et ce dernier effet domine par rapport au premier. Ce qui amène Kessides à conclure que l'impact global de la publicité sur l'entrée est positif dans la plupart des branches.[52]

4. *Ventes liées*. Cette liaison peut rendre l'entrée plus difficile dans certaines situations. Supposons qu'une entreprise soit en position dominante sur le marché du produit A et qu'elle décide de conditionner la vente de A à l'achat de son produit B (ou qu'elle offre une remise importante pour l'achat de A et B ensemble plutôt que séparément). Une entreprise envisageant d'entrer sur le marché B devra peut-être entrer sur le marché A et associer également les deux produits si elle veut avoir des chances de réussir. Cependant, l'entrée sur le marché du produit A risque de ne pas être facile, d'autant que l'entreprise en place est déjà en position dominante sur ce marché. Si cette dernière a un accès exclusif à certains droits de propriété intellectuelle essentiels, par exemple, ou si A est un produit essentiel pour sa mission et si l'entreprise en place a une solide réputation de fiabilité, le candidat à l'entrée n'ira pas loin. [53]

5. *Arrangements commerciaux exclusifs*. Plus est grande la demande qu'une firme en place a le droit exclusif de satisfaire, moins un nouvel entrant a de chances de tenter une entrée. Un cas extrême serait une entreprise installée ayant de longue date des contrats d'approvisionnement exclusif - accords visant à assurer la satisfaction de 100 pour cent des besoins d'un acheteur – avec chaque client du marché.[54] Si relativement peu de

51 *See* Ioannis Kessides, "Advertising, Sunk Costs, and Barriers to Entry," 68 Review of Economics and Statistics 84, 84 & n.5 (1986) (citant plusieurs études anciennes soutenant ce point de vue).

52 *Id*.

53 Tying and other bundling strategies are discussed in Barry Nalebuff, "Bundling as an Entry Barrier," 119 Quarterly Journal of Economics 159 (2004).

54 Un article souvent cité qui traite des effets des contrats à long terme sur l'entrée est celui de Phillippe Aghion & Patrick Bolton, "Contracts as Barriers to Entry," 77 American Economic Review 388 (1987)

contrats sont renouvelés chaque année, l'entrée risque' d'être hautement improbable. Par ailleurs, le fait qu'une grosse entreprise en place insiste pour satisfaire la totalité de la demande d'un client ou rien peut vouloir dire que ses rivaux potentiels devront entrer à une échelle plus grande qu'ils ne l'auraient fait autrement s'ils veulent avoir une petite chance de gagner des clients. Dans la mesure où les coûts irrécupérables représentent une part substantielle des coûts d'entrée et où ils varient en proportion des capacités qu'un entrant met en place, le fait de devoir faire une entrée sur une plus large échelle augmente l'exposition au risque et rend donc moins probable l'entrée du postulant.

C'est un autre scénario qui s'applique si, au lieu d'avoir signé des contrats d'exclusivité directement avec ses clients, l'entreprise en place opère sur un marché où il est nécessaire de recourir à des distributeurs. Si les distributeurs disponibles sont suffisamment nombreux à signer des contrats d'exclusivité à long terme avec l'entreprise en place, cela pourrait effectivement imposer une obligation d'intégration verticale à tout nouveau venu (ainsi qu'aux éventuels rivaux existants). Si cela implique des coûts irrécupérables supplémentaires, l'entrée s'en trouvera plus risquée, et donc moins probable.

Il est particulièrement important de garder à l'esprit que ce n'est pas parce que quelques accords verticaux, tels que les contrats d'exclusivité, peuvent ériger des barrières à l'entrée, que leurs effets nets sur le bien-être des consommateurs sont nécessairement négatifs. Les arrangements d'exclusivité incitent les détaillants à fournir avant la vente des informations et d'autres services. C'est pourquoi ils peuvent être favorables aux clients, malgré d'éventuels effets sur l'entrée. En tout cas, l'objet de l'analyse d'entrée n'est pas de juger si une condition d'entrée est « bonne » ou « mauvaise » – ce qui importe, c'est comment cette condition influe sur la probabilité, le moment et l'étendue de l'entrée.

6. *Thésaurisation de brevets*. Bien que les brevets encouragent généralement l'innovation et aient des conséquences positives sur le bien-être des consommateurs, ils peuvent aussi constituer des barrières à l'entrée redoutables. Reconnaissant cela, certaines firmes construisent parfois des « forteresses » de brevets autour de leurs positions de marché en acquérant des brevets qui bloquent collectivement la totalité (ou bon nombre) des méthodes permettant l'exercice de la concurrence, alors qu'ils n'ont nullement l'intention d'utiliser ou de concéder des licences pour une bonne partie de la technologie brevetée. Les entreprises en place peuvent amasser des brevets qu'elles n'ont pas l'intention d'utiliser commercialement, mais que leurs concurrents potentiels ont des chances d'enfreindre. Un des objectifs de cette stratégie pourrait être d'exercer un effet de levier contre l'entrée, et donc de dissuader d'entrer des firmes qui ne disposent pas d'un stock aussi conséquent de brevets.[55]

(montrant que les entreprises en place veulent signer des contrats à long terme qui empêchent d'entrer même quelques producteurs à plus bas coût). Certains économistes ont soutenu que les consommateurs n'étaient pas stupides au point de signer des contrats à long terme permettant à une entreprise de monopoliser un marché ou de renforcer une position dominante. Leur raisonnement est donc que de tels contrats doivent être efficaces. Robert Bork, The Antitrust Paradox (1978). *Mais voir* Phillippe Aghion & Patrick Bolton, "Contracts as a Barrier to Entry," 77 American Economic Review 388 (1987) (montrant que des contrats à long terme ne décourageant pas l'entrée pourraient être signés même si les acheteurs craignent que cela puisse aider le vendeur à monopoliser le marché).

55 Ces stratégies sont examinées plus en détail dans OCDE (2004), Droits de propriété intellectuelle, DAF/COMP(2004)24.

4. Evaluation des barrières à l'entrée

4.1 Facteurs importants dans l'évaluation d'une barrière à l'entrée

Un certain nombre de considérations et de suggestions des théoriciens peuvent être utiles aux organismes chargés de faire respecter la loi lorsqu'ils évaluent les barrières à l'entrée.

1. *Différences de perspective temporelle entre les questions de fusion et les autres.* Bien que l'on prenne en compte les mêmes types de facteurs à l'entrée dans les affaires de fusion et dans les autres affaires, une différence majeure est que le préjudice invoqué dans la plupart des affaires de fusion est éventuel. Aussi, la question par rapport à l'entrée est-elle de savoir si et quand une fusion induira suffisamment d'entrée pour atténuer sensiblement les effets anticoncurrentiels potentiels de la fusion. Par contre, le préjudice invoqué dans la plupart des affaires d'abus de position dominante ou de monopolisation a déjà été constaté, de sorte que la question de l'entrée est souvent posée rétrospectivement : les entrées ont-elles été suffisantes pour réparer le préjudice porté à la concurrence ? Cela rend l'analyse plus facile, parce qu'elle se concentre principalement sur la question de savoir si les entrées étaient suffisantes, plutôt que de savoir selon quelle probabilité elles le seront ou combien de temps il faudra pour qu'elles se produisent.

   Cependant, les affaires impliquant un comportement unilatéral n'appellent pas toutes une analyse d'entrée purement rétrospective. Par exemple, le comportement prétendument illégal peut encore advenir au cours d'une enquête lancée par l'autorité de la concurrence, voire pendant tout procès qui s'ensuit. Les consommateurs ne sont pas lésés par des prix d'éviction, par exemple, jusqu'à ce que commence la phase de récupération, de sorte que l'analyse d'entrée peut avoir besoin d'être prospective si cette phase n'a pas encore commencé. De la même façon, il se peut qu'on ne sache pas encore si l'entrée qui est déjà effective se révélera suffisante pour résoudre le problème de concurrence, ce qui signifie qu'il sera peut-être encore nécessaire de faire quelques analyses prédictives.

2. *Le bon moment pour évaluer la rentabilité probable des entrants potentiels.* Les candidats à l'entrée ne décideront d'assumer des coûts d'entrée irrécupérables que s'ils anticipent des prix rentables après entrée, différents des prix après fusion (ou après conduite anticoncurrentielle) qui prévalent avant l'entrée. En d'autres termes, les entrants potentiels doivent prendre en compte l'effet que leur propre entrée aura sur le prix du marché. Si des entrants potentiels croient qu'après leur entrée les prix seront trop bas pour assurer leur rentabilité, alors ils n'entreront pas. Cela est vrai même si les firmes pensent que le prix au dessus de la normale avant entrée serait rentable.

3. *Evaluer l'importance des barrières à l'entrée en les assimilant aux coûts irrécupérables*. Schmalensee a proposé d'évaluer la hauteur des barrières à l'entrée tout simplement en mesurant les coûts irrécupérables que les entrants potentiels devraient débourser.[56] Son raisonnement repose sur le fait que cette méthode est compatible avec l'objectif de protection du bien-être des consommateurs. Plus les coûts irrécupérables sont faibles, plus le prix du marché sera bas, et donc plus grand sera le bien-être des consommateurs. Si cette méthode prend bien en compte l'incidence que les coûts irrécupérables (et donc certains autres facteurs, tels que les économies d'échelle) auraient sur l'entrée, elle semble ignorer d'autres influences qui pourraient décourager ou empêcher l'entrée. Par

[56] Richard Schmalensee, "Sunk Costs and Antitrust Barriers to Entry," 94 American Economic Review, Papers and Proceedings 471, 473 (2004).

exemple, que se passe –t-il si l'entrée n'est simplement pas possible, quel qu'en soit le coût, à cause du blocage d'un brevet détenu par un rival ?

De plus, on sait que l'ampleur des coûts irrécupérables ne sert à rien en soi, à moins de pouvoir être replacée dans un contexte relatif quelconque permettant d'orienter des décisions stratégiques ; et il semble qu'on ne dispose pas encore de quelque chose de ce genre. C'est peut-être parce qu'il serait impossible de construire des indices généralement applicables permettant de faire des choix stratégiques basés sur le seul niveau des coûts irrécupérables. Des coûts irrécupérables de 10 millions d'euros, par exemple, pourraient créer des risques intolérables pour certaines catégories de candidats à l'entrée, mais paraître tout à fait raisonnables pour d'autres. En outre, une firme peut décider que cela vaut la peine de risquer 10 millions d'euros pour entrer sur tel marché, alors que la même firme peut trouver inacceptable de risquer le même montant pour pénétrer sur un autre marché. L'analyse du point de vue des barrières à l'entrée doit peut-être simplement être trop spécifique pour s'appuyer soit sur des directives quantitatives générales, soit sur un seul indicateur statistique.

4. *L'approche de Salop pour évaluer la facilité d'entrée*. Salop a montré qu'il était difficile de savoir exactement combien de poids il convenait d'accorder à des observations purement théoriques sur l'entrée, telles que des réactions hypothétiques à des hausses de prix hypothétiques, face à des éléments de preuve factuels sur l'entrée, telles les réactions effectives d'une entreprise en place à une entrée qui ont été observées dans le passé. Les deux sont pertinents, mais le problème devient particulièrement épineux lorsque la théorie fait pencher pour une conclusion alors que les faits tendent vers la conclusion opposée.[57]

Dans un article qui date un peu, mais qui reste néanmoins très utile, Salop a suggéré une approche pratique pour mesurer la probabilité qu'une entrée empêche une hausse de prix anticoncurrentielle.[58] Ce faisant, il montre comment des faits peuvent s'associer à la théorie dans le contexte d'un affidavit d'expert, dans une affaire de fusion hypothétique. Salop reconnaît que les barrières à l'entrée peuvent être influencées par de nombreux facteurs, mais il se concentre sur ce qu'il considère comme les plus controversés et les organise en quatre catégories.

La première catégorie concerne les désavantages en matière de coûts et de demande. Cela comprend les situations dans lesquelles les entrants ont uniformément des coûts plus élevés que les entreprises en place, ainsi que celles dans lesquelles les entrants doivent offrir des remises pour compenser les différences de qualité perçues par rapport aux firmes déjà sur le marché. L'idée est donc d'incorporer des facteurs tels que l'accès restreint aux droits de propriété intellectuelle et à d'autres ressources, les effets de réputation et la fidélité à une marque. Si l'information sur l'impact de ces effets est suffisante, on devrait pouvoir faire une estimation du montant dont une entreprise en place pourrait augmenter son prix sans inciter à l'entrée. Par exemple, si les coûts de l'entreprise en place sont inférieurs de 15 pour cent à ceux d'un entrant, ou si l'entrant doit offrir une remise de 15 pour cent pour surmonter la fidélité au produit de l'entreprise en place, alors l'entrant ne sera pas en mesure d'empêcher l'entreprise en place d'augmenter son prix de dix pour cent, par exemple.

57 Steven Salop, "Measuring Ease of Entry," 31 Antitrust Bulletin 551, 552 (1986).

58 *Id.*; *voir aussi* Steven Salop, Comment, Brookings Papers on Economic Activity, at 313, 316-18 (1991).

Le deuxième élément pris en considération est le moment de l'entrée. Plus il faudra de temps pour accomplir cette entrée, moins la crainte de voir arriver des nouveaux venus ne dissuadera l'entreprise en place d'augmenter ses prix. En effet, non seulement les entreprises en place ont plus de temps pour engranger des surprofits dans l'intervalle, mais elles auront aussi plus de temps pour ajuster leurs prix entre le moment où un entrant commence à pénétrer sur le marché et le moment où il a achevé son processus d'entrée et devient effectivement un concurrent. Il importe de garder à l'esprit que le bon moment est celui auquel il faut non seulement accomplir l'entrée elle-même, mais réaliser suffisamment de ventes pour devenir un concurrent important sur le marché. Cela peut prendre un certain temps, non seulement pour construire de nouvelles usines de fabrication, par exemple, mais aussi pour surmonter l'inertie des acheteurs ou leur préférence pour une marque précédemment établie et acquérir une clientèle suffisante afin d'influencer à la baisse le prix de l'entreprise en place.

La troisième catégorie concerne les coûts irrécupérables. Bien que les travaux de théoriciens tels que Dixit aient beaucoup contribué à faire prendre davantage conscience de l'importance des coûts irrécupérables, ils n'ont guère aidé à résoudre des problèmes de mise en application, tels que comment reconnaître des coûts irrécupérables importants, et comment déterminer s'ils sont suffisamment importants pour retarder ou empêcher l'entrée. Certains modèles mathématiques ont été proposés pour mesurer l'importance des coûts irrécupérables, mais les hypothèses sur lesquelles ils reposent sont souvent si vastes que l'on peut douter de leur valeur pratique. Ross, par exemple, a proposé un modèle basé sur a) le montant des fonds investis en coûts irrécupérables ; b) la probabilité que l'entrée réussisse ; et c) la valeur d'une entrée réussie. Même si l'on parvient à connaître a), il peut néanmoins être extrêmement difficile d'estimer b) et c) avec précision, comme le confirmeraient les légions d'entrants qui ont échoué. Ross admet qu'au moins dans certains cas, « le mieux que l'on puisse faire est une estimation éclairée. »[59] Ce n'est peut-être pas très rassurant pour les décideurs et les juges.

Il n'y a peut-être aucun moyen d'éviter cela : la mesure des coûts irrécupérables n'est pas une mince affaire. Pour commencer, on a tendance à confondre les coûts irrécupérables avec les coûts fixes.[60] En outre, il peut être difficile de déterminer quelle part d'un investissement est irrécupérable, même si l'on a la définition correcte à l'esprit. Par exemple, si une société a investi dans un équipement de production rare, il faudra peut-être pas beaucoup de travail d'enquête avant de savoir, même approximativement, si une autre firme serait prête à payer pour cela, et combien elle serait prête à payer.

59 Thomas Ross, "Sunk Costs as a Barrier to Entry in Merger Cases," 27 University of British Columbia Law Review 75, 89 (1993). Ross présente un modèle mathématiquement plus compliqué dans Thomas Ross, "Sunk Costs and the Entry Decision," 4 Journal of Industry, Competition and Trade, Bank Papers, 79 (2004). Cependant, il reste dépendant de l'obtention des mêmes données aléatoires que le modèle précédent. En conséquence, il note que "les perspectives les plus prometteuses pour les travaux théoriques futurs consistent à incorporer des modèles plus généraux d'incertitude sur les entrants." *Id*. at 91.

60 La différence entre coûts fixes et coûts irrécupérables est expliquée dans la section 3.1.

En outre, comme l'explique Pindyck dans de nouveaux travaux, l'incertitude au sujet de l'évolution future des conditions de marché complique la mesure des coûts irrécupérables. [61] Plus précisément, indique –t-il, il y a un coût d'opportunité lorsqu'une firme investit maintenant, au lieu d'attendre de rassembler davantage d'informations sur la probabilité de profits résultant de l'investissement. Autrement dit, le choix d'investir a une valeur, et cette valeur est perdue lorsque l'investissement est réalisé. La perte de la valeur du choix est aussi un coût irrécupérable et, de l'avis de Pindyck, elle est « tout aussi pertinente pour l'analyse antitrust (et la prise de décision de l'entreprise) que le coût direct d'une machine ou d'une usine. »[62]

La dernière catégorie de Salop vise les économies d'échelle. Les différentes façons dont les économies d'échelle peuvent influer sur la facilité d'entrée ont été examinées plus haut dans la section 3.2.2. Salop pense que les économies d'échelle peuvent être mesurées en utilisant le concept d'échelle minimum viable ("EMV"). Il définit l'EMV comme "le total des ventes qu'un nouvel entrant hypothétique devrait réaliser pour obtenir un taux de rendement suffisant ... sur son capital investi et justifier son entrée."[63] Si l'EMV ne peut être atteinte, les coûts moyens de l'entrant seront trop élevés pour lui donner un rendement satisfaisant.

Plus l'EMV est petite, plus il est probable qu'une entrée suffisante aura lieu pour contrecarrer le préjudice que l'on craint que la fusion ne porte à la concurrence. La vraie raison est que plus l'EMV est basse, toutes choses étant égales par ailleurs, moins les entrants ne prendront de risques en termes de coûts irrécupérables, et moins la demande qu'ils doivent conquérir sera grande pour atteindre la rentabilité. Par ailleurs, plus l'EMV est petite, plus il est probable que les entrants puissent parvenir à être viables sans être grands au point d'irriter les entreprises en place et les amener à diminuer leurs prix.[64] Ces

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61 Robert Pindyck, "Sunk Costs and Real Options in Antitrust," in Issues in Competition Law and Policy (W.D. Collins, ed.) (à paraître), disponilble à l'adresse : http://papers.ssrn.com/sol3/papers.cfm?abstract_id=742505.

62 *Id*. Pindyck n'aborde pas le problème qu'il peut y avoir aussi un coût d'opportunité à *attendre* pour investir. Parfois, lorsque des firmes tardent à faire les investissements nécessaires à l'entrée sur un marché, elles perdent leur capacité à capitaliser sur une occasion qui ne se reproduira pas, mais qui aurait généré des profits pendant de nombreuses années. Une façon d'exprimer cela serait de dire que lorsqu'une firme envisage d'entrer sur un marché où la rentabilité dépend de sa capacité à "battre le fer quand il est chaud", la valeur du choix d'attendre pour investir est négative. C'est pourquoi, en présence d'une incertitude, il y a un certain risque inévitable aussi bien à investir qu'à ne pas investir.

63 Steven Salop, "Measuring Ease of Entry," 31 Antitrust Bulletin 551, 563 (1986). On notera que l'EMV n'est pas le même concept que l'échelle minimum efficace ou « EME ». L'EME est le plus bas niveau de production auquel les coûts moyens sont réduits au minimum et n'est déterminée que par la façon dont les coûts varient avec la production. L'EMV, en revanche, dépend non seulement des coûts, mais aussi du prix.

64 On peut se demander pourquoi une entreprise en place n'engagerait pas des représailles, même contre une entrée à petite échelle. Bien sûr, cela peut arriver dans certains cas, notamment si l'entreprise en place peut faire une discrimination par les prix et/ou si elle craint qu'un entrant ayant pris pied sur le marché risque de devenir un rival important. Une des raisons pour lesquelles les entreprises en place peuvent préférer ne pas réagir à une entrée à petite échelle, toutefois, est qu'elles peuvent être incapables de cibler seulement les clients potentiels du nouvel entrant avec leurs baisses de prix. Si les baisses de prix de l'entreprise en place devaient être consenties à tous les clients, cela ne vaudrait peut-être plus la peine de réduire les prix dans le seul but de dissuader un petit entrant. Barry Nalebuff, "Bundling as an Entry Barrier," 119 Quarterly Journal of Economics 159, 165 (2004).

baisses de prix sont exactement le résultat qui est nécessaire pour que l'entrée soit considérée comme « suffisante », mais elles réduiront les marges bénéficiaires des entrants et augmenteront par là leur EMV, rendant l'entrée moins attrayante. On voit donc qu'il risque d'y avoir une contradiction possible entre entrée suffisante et entrée attrayante.

Tout en reconnaissant qu'il est difficile de tirer un trait précis entre niveaux d'EMV « bas » et « haut », Salop maintient que ce concept pourrait être très utile. En comparant une estimation d'EMV avec la taille du marché mondial, on peut avoir, d'après lui, une idée de l'obstacle que représentent les économies d'échelle. Dans l'exemple qu'il prend comme hypothèse, il conclut qu'une EMV de dix pour cent fait partie d'une accumulation de preuves selon lesquelles la crainte de l'entrée a peu de chances d'être un facteur concurrentiel important qui influe sur la politique des prix après fusion.[65]

5. *Adopter une approche plus qualitative*. Si Salop n'est pas le seul à essayer de concevoir un moyen de mesurer les barrières à l'entrée qui soit au moins un peu mathématique,[66] d'autres ont moins confiance dans les approches quantitatives. Baker, par exemple, déclare que les autorités chargées de faire respecter la loi ne devraient pas nécessairement essayer de quantifier des concepts liés à l'entrée, tels que l'EMV et les occasions de vente dont disposent les entrants potentiels. Il ajoute toutefois que même si ces concepts ne sont pas accompagnés de données, ils peuvent néanmoins :

> *...structurer l'analyse et servir de cadre aux témoignages de ceux qui ont l'expérience d'efforts déployés effectivement pour entrer dans la branche. Par exemple, on peut demander à des témoins qui croient qu'un entrant aurait besoin d'une part de marché minimum pour rentrer dans ses fonds après la fusion d'expliquer pourquoi cette part est si faible ou si élevée. Cela permettra au tribunal de voir si le plan d'entrée que les témoins ont à l'esprit est plausible, en évaluant d'autres points de vue sur la nature et l'ampleur des frais fixes qu'il est nécessaire d'engager pour entrer. Ces témoins pourraient aussi débattre de l'ampleur de la baisse des prix qui a des chances de se produire après une entrée à une certaine échelle.* ***L'important est d'axer l'enquête à l'entrée sur les facteurs qui déterminent si l'engagement pris d'entrer dans l'environnement de marché consécutif à la fusion a des chances d'être rentable et donc, sur la question de savoir si l'entrée a des chances d'être dissuasive ou de neutraliser le problème anticoncurrentiel.***[67]

Il semble assez clair qu'il ne faut pas s'attendre à ce que la théorie et les mathématiques portent à elles seules tout le poids de l'analyse d'entrée. Dans la pratique, il sera toujours nécessaire d'examiner aussi des preuves factuelles qualitatives. Lorsque des autorités

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65 Steven Salop, "Measuring Ease of Entry," 31 Antitrust Bulletin 551, 564 (1986); cf. *id*. pp 567-570 pour une explication de la façon de calculer l'EMV dans l'hypothèse de Salop. Le calcul de l'EMV n'est pas nécessairement facile dans les cas concrets. Voir Janusz Ordover & Jonathan Baker, "Entry Analysis Under the 1992 Horizontal Merger Guidelines," 61 Antitrust Law Journal 139 (1992) pour une discussion au sujet de certaines complications qui peuvent surgir.

66 *Voir, par exemple*, Timothy F. Bresnahan & Peter C. Reiss, "Do Entry Conditions Vary Across Markets?," Brookings Papers on Economic Activity, Microeconomics, at 833 (1988).

67 Jonathan Baker, "The Problem with *Baker Hughes* and *Syufy*: On the Role of Entry in Merger Analysis," 65 Antitrust Law Journal 353, 365 (1997).

évaluent les barrières à l'entrée, elles devront donc examiner les documents des acteurs de la branche, interviewer leurs dirigeants ainsi que ceux qui travaillent pour des entrants potentiels, recueillir des témoignages écrits et oraux, et étudier les circonstances et les résultats de toute entrée qui a eu lieu dans le passé. Moyennant quoi, Baker met en garde contre toute conclusion hâtive selon laquelle l'entrée résoudra nécessairement les problèmes de concurrence dans les affaires de fusion :

> *L'idée selon laquelle la facilité d'entrée est un atout doit être maniée avec précaution, surtout lorsqu'une entrée engagée est en jeu. Une application aveugle de la doctrine risque d'encourager les tribunaux à analyser abstraitement la hauteur des barrières à l'entrée, sans reconnaître que l'entrée n'a de sens que dans la mesure où elle règle le problème anticoncurrentiel en question. De sorte que cela risque de conduire les tribunaux à présumer qu'une entreprise qui* ***pourrait*** *entrer sur le marché trouverait* ***probablement*** *qu'il est rentable de le faire. Pourtant, lorsqu'une entrée exige d'importants investissements irrécupérables, sa rentabilité est à analyser, pas à présumer. Un tribunal qui ne prend pas en considération la question de la probabilité de l'entrée, ou qui présume que des exemples d'entrées passées règlent la question de la rentabilité de l'entrée future, peut se trouver amené à autoriser à tort des fusions anticoncurrentielles.*[68]

6. *Utilisation d'exemples d'entrées passées pour faire des inférences au sujet de l'avenir.* Bien que Baker prenne des précautions par rapport à l'utilisation d'exemples d'entrées passées pour faire des prédictions au sujet de la probabilité d'entrées futures, Areeda et Hovenkamp ne sont pas aussi prudents : "La seule preuve vraiment fiable de barrières relativement faibles est la répétition d'entrées passées dans des circonstances similaires aux conditions actuelles. En effet, des entrées répétées au cours d'une période de prix concurrentiels rendent l'entrée encore plus probable en réponse à de futures tentatives de fixation de prix de monopole"[69] Il importe de se rappeler toutefois que l'existence de précédents en matière d'entrée ne prouve pas nécessairement que c'était facile, que c'était pertinent du point de vue de la concurrence, ou qu'il est probable que cela se reproduise. Les effets de prix éventuels des épisodes d'entrée précédents méritent d'être examinés, de même que la viabilité de l'entrant et son expérience en matière de tentatives de gagner une part de marché. En outre, lorsque le préjudice invoqué est éventuel, on devrait se demander si les futurs entrants pourraient utiliser les mêmes stratégies que celles qui ont fonctionné pour d'autres dans le passé, s'ils seraient confrontés aux mêmes coûts et s'ils peuvent raisonnablement s'attendre à réaliser les mêmes bénéfices que leurs prédécesseurs.[70]

De même, bien qu'une absence d'entrée effective ou significative dans le passé soit compatible avec la présence de barrières à l'entrée substantielles, elle ne prouve pas nécessairement qu'une entrée importante est improbable à l'avenir. En conséquence, le nombre des entrées récentes est certainement pertinent, mais ce n'est qu'une partie de l'ensemble des preuves nécessaires pour se faire une opinion en connaissance de cause.

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68 *Id*. p. 371 (anglais seulement).

69 Phillip Areeda & Herbert Hovenkamp, IIA Antitrust Law) para. 420b (2002).

70 Andrew Gavil, William Kovacic & Jonathan Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 879-880 (2002).

7. *Utilisation de preuves sur les niveaux de profit pour tirer des conclusions sur les barrières à l'entrée.* Il en va de même pour les preuves de surprofits persistants. De telles preuves sont généralement compatibles, mais ni nécessaires, ni suffisantes, avec la conclusion que les barrières sont élevées et que l'entrée est donc improbable. Une réglementation gouvernementale peut restreindre le nombre de firmes dans une branche d'activité, par exemple. Si beaucoup d'entreprises sont autorisées à se faire concurrence et le font énergiquement, cependant, il n'y aura pas de surprofits, malgré l'impossibilité d'entrées nettes. En revanche, une firme pharmaceutique peut avoir réalisé des super profits grâce aux ventes d'un certain médicament pendant de nombreuses années parce qu'elle possède un brevet clé, mais si ce brevet est sur le point d'expirer, la firme risque de se trouver bientôt face à une foule de nouveaux concurrents vendant des versions génériques de son médicament.

   De la même façon, la preuve d'une absence persistante de surprofits est généralement le signe, mais ce n'est une condition ni nécessaire, ni suffisante - que les barrières sont faibles et que l'entrée est donc facile. Par exemple, une firme peut simplement avoir l'art de repérer une nouvelle tendance dans la demande des consommateurs. Si elle a créé un nouveau marché, l'a développé et a réalisé des bénéfices substantiels pendant quelques années, mais que ces bénéfices ont attiré l'attention d'autres entrepreneurs qui se sont imaginé qu'ils pouvaient facilement entrer sur le même marché, on aura enregistré des profits élevés malgré des conditions d'entrée faciles. De même, de faibles profits n'indiquent pas automatiquement une entrée facile, comme l'a montré l'exemple précédent de réglementation qui restreint le nombre de firmes sur un marché.

8. *Importance de la dynamique.* Carlton, entre autres, estime que le débat sur les définitions a accordé trop d'attention à la question de savoir si l'entrée va finir par éroder les hausses de prix anticoncurrentielles, et pas assez à la question de savoir combien de temps il faudra pour y parvenir. Il appelle donc de ses voeux une vue plus dynamique de l'entrée et des barrières à l'entrée. C'est important, car les effets curatifs à long terme de l'entrée peuvent mettre très longtemps à apparaître. Aussi le bien-être des consommateurs pourrait-il être considérablement mis à mal si un tribunal autorisait une fusion, par exemple, parce qu'il a conclu que l'entrée finira par rétablir les prix de concurrence, alors qu'il a ignoré le fait qu'une telle entrée prendra probablement des années. En même temps, Carlton reconnaît que certaines lignes directrices sur les fusions "sont une bonne chose " du fait qu'elles expliquent cela.[71] Nous allons maintenant examiner de plus près certaines lignes directrices publiées par les autorités de la concurrence dans divers pays de l'OCDE.

4.2 Comment sont évaluées les barrières à l'entrée dans les lignes directrices officielles

En général, les lignes directrices émanant des autorités de la concurrence visent à élever la prévisibilité, la précision et l'efficacité du programme d'application de la loi en décrivant les circonstances dans lesquelles l'autorité prendra probablement des mesures. Ce faisant, beaucoup de lignes directrices incluent une discussion de l'analyse d'entrée. Il est instructif d'examiner et de comparer les approches retenues dans un échantillon de juridictions. L'échantillon est organisé chronologiquement, par date de publication, et utilise la dernière édition disponible.

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71 Dennis Carlton, "Why Barriers to Entry Are Barriers to Understanding," 94 American Economic Review, Papers and Proceedings 466, 469 (2004).

1. *Lignes directrices des Etats Unis concernant les fusions horizontales (1997).* Les barrières à l'entrée influencent deux stades d'analyse des fusions horizontales dans les lignes directrices américaines. Premièrement, elles affectent le processus d'identification des firmes qui seront comptées comme participants au marché, dans le but de déterminer la concentration du marché. Toutes les firmes qui seraient susceptibles d'entrer sur le marché dans un délai d'un an en réaction à une hausse de tarif faible mais significative et durable ('SSNIP') sans avoir à engager des investissements importants en coûts irrécupérables à l'entrée et à la sortie sont traitées comme si elles étaient déjà sur le marché.[72] Quant au « coût irrécupérable important », il est défini, quant à lui, comme celui qui ne sera pas récupéré dans un délai d'un an à partir du moment où la firme aura commencé à réagir.[73]

   Une entrée qui réunit ces conditions est appelée "entrée sans engagement," ce qui est une autre façon de nommer une entrée éclair (hit and run). Les entrants non engagés peuvent capitaliser rapidement sur toute opportunité de profit à court terme qui se présente, y compris les occasions dues à des tentatives faites par les firmes installées d'exercer un pouvoir de marché. Ces entrants peuvent alors se retirer à bon compte et en toute hâte du marché lorsque ces occasions disparaissent.

   Une entrée sans engagement peut s'effectuer sous forme d'une entrée entièrement nouvelle (*de novo*) ou par le biais d'une substitution de production. C'est-à-dire qu'une entrée sans engagement peut aussi avoir lieu lorsqu'une firme qui est déjà active sur un marché différent est à même de rediriger facilement tout ou partie de sa capacité de production vers le marché concerné. Par exemple, une société qui fabrique des haut-parleurs stéréo pourrait se mettre à produire des amplificateurs de guitare électrique relativement facilement et rapidement.

   Deuxièmement, si le niveau et le changement de degré de concentration après la fusion sont suffisamment élevés pour laisser supposer que la fusion aura probablement un effet anticoncurrentiel, alors il est nécessaire d'analyser si l'on peut compter sur une "entrée engagée" pour contrer cet effet. Les barrières à l'entrée jouent un rôle pilote dans cette analyse. Une entrée engagée prend plus d'une année après le SSNIP et/ou nécessite que l'entrant engage un investissement important en coûts irrécupérables d'entrée et de sortie. Les entrants engagés diffèrent de ceux qui se contentent d'entrer et sortir immédiatement (hit and run) en ce qu'ils doivent prévoir de rester sur le marché un certain temps. Une fois qu'ils ont décidé d'entrer, ils ne peuvent pas sortir facilement. C'est pourquoi, avant d'entrer, les entrants engagés doivent se demander quel niveau de concurrence ils ont des chances de trouver dans la période suivant l'entrée, et quelles en seront les conséquences pour leur rentabilité.

   On remarquera que l'analyse d'une entrée engagée n'est pas effectuée tant que le niveau de concurrence qui existerait probablement sans entrée n'a pas été pris en compte. Si ce niveau est jugé adéquat, il n'est pas nécessaire d'examiner l'entrée engagée. L'ordre dans

72 U.S. Dept. of Justice and Federal Trade Commission Horizontal Merger Guidelines (ci-après les "lignes directrices américaines") s. 1.32 (8 avril 1997). Les entrants non engagés se voient attribuer des parts de marché sur la base d'une évaluation de leurs ventes probables ou de leur capacité à réagir à un SSNIP, et ces parts sont comprises dans les calculs de la concentration, aussi bien avant qu'après la fusion. De même, des firmes qui avaient déjà l'intention d'entrer avant l'annonce de la fusion, mais qui ne l'ont pas encore fait, sont comptées comme des participants au marché. *Id*. à ss. 1.3, 1.41.

73 Lignes directrices américaines s. 1.32.

lequel se déroule ce processus est important, car il montre que des barrières à l'entrée élevées ne déterminent pas nécessairement le résultat des enquêtes menées par les autorités. Il est possible, par exemple, qu'en dépit de barrières substantielles à l'entrée, il y ait une vive concurrence après la fusion entre les firmes qui sont déjà sur le marché. Les lignes directrices américaines mettent donc en garde contre le risque de conclure trop rapidement qu'une fusion diminuera considérablement la concurrence simplement parce qu'une entrée rapide et efficace est improbable.

L'incidence d'une entrée engagée est évaluée selon les critères suivants :

i) elle est réalisable en deux ans ;
ii) elle aura un effet significatif sur le prix du marché concerné dans les deux ans de la planification initiale ;
iii) elle sera rentable aux prix d'avant la fusion ; et
iv) elle sera suffisante pour ramener les prix à leurs niveaux d'avant la fusion.[74]

Si toutes ces conditions sont remplies, alors les autorités de la concurrence pourront tirer la conclusion que la crainte d'une entrée engagée risque de décourager ou de faire échec à toute tentative de relèvement des prix. En d'autres termes, lorsque les critères des lignes directrices américaines sont satisfaits, l'entrée engagée est un "atout."[75]

On peut voir que l'analyse repose sur les trois critères d'opportunité, de probabilité et de suffisance. Les lignes directrices américaines considèrent que l'entrée n'intervient en temps opportun que si elle peut commencer d'avoir un effet significatif sur les prix du marché considéré dans les deux ans qui suivent la planification initiale. En intégrant cette limite de temps, les auteurs des lignes directrices semblent avoir pensé qu'un délai plus long avant une entrée effective n'éviterait probablement pas l'exercice d'un pouvoir de marché.

L'analyse que font les lignes directrices américaines de la probabilité d'entrée intègre le concept d'EMV d'une manière qui s'appuie quant au fond sur les suggestions esquissées par Salop, qui ont été examinées ci-dessus dans la section 4.1.4. Dans les lignes directrices, l'EMV est définie comme le plus petit niveau annuel moyen de ventes que l'entrant engagé doit réaliser en permanence pour être rentable aux prix d'avant la fusion.[76] Autrement dit, l'EMV est la plus petite échelle de production à laquelle les coûts moyens d'un entrant sont égaux au tarif d'avant la fusion. Cela reflète l'importance que portent les lignes directrices à la question de savoir si une entrée engagée **risque de** se produire, et pas seulement si elle **peut** se produire.

Il importe de remarquer que l'EMV s'appuie sur les prix d'avant la fusion. Cela peut sembler étrange à première vue, car les entrants vont évaluer leurs perspectives de

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74 Lignes directrices américaines ss. 3.0, 3.2-3.4. Lorsqu'on examine si ces critères sont remplis, il n'est pas nécessaire d'indiquer les firmes qui vont probablement entrer. L'analyse se concentre plutôt sur ce qu'une firme hypothétique aurait besoin de faire pour entrer sur le marché. *Id*. at s. 3.1.

75 Jonathan Baker, "The Problem with *Baker Hughes* and *Syufy*: On the Role of Entry in Merger Analysis," 65 Antitrust Law Journal 353, 362 (1997). Bien évidemment, l'entrée sans engagement peut aussi être un atout s'il est probable qu'il s'en produise tant qu'on pourra considérer ce marché comme non concentré. *Id*., 365.

76 Lignes directrices américaines, s. 3.3.

réussite sur la base de ce qu'ils s'attendent à trouver comme environnement concurrentiel après la fusion. Cependant, les entrants engagés prévoient d'être sur le marché pendant assez longtemps, et s'ils réussissent à supprimer les effets anticoncurrentiels qu'une fusion causerait, le prix d'après la fusion finira par revenir à ce qu'il était avant la fusion (toutes choses étant égales par ailleurs), ou peut-être même à un niveau inférieur. Il est donc rationnel de supposer que les prix après la fusion ne seront pas plus élevés que les prix avant la fusion.[77]

L'entrée est considérée comme probable seulement lorsque l'EMV est inférieure aux occasions de vente que l'entrant aurait sur le marché. Les lignes directrices américaines fournissent une méthode empirique pour estimer ces opportunités de ventes. Le repère habituel se situe aux alentours de cinq pour cent de la demande globale du marché.[78] Aussi, lorsque l'EMV dépasse nettement les cinq pour cent du total des ventes sur le marché, la probabilité d'une entrée engagée est considérée comme faible ; lorsque l'EMV est nettement inférieure à cinq pour cent des ventes totales, on a au moins une probabilité raisonnable d'entrée. Le seuil des cinq pour cent peut être ajusté à la hausse ou à la baisse, cependant, pour tenir compte des circonstances. Un chiffre plus élevé peut être approprié, par exemple, si le marché est dans une phase de régression à long terme. En revanche, un chiffre plus bas sera peut être souhaitable sur un marché dont on attend qu'il profite d'une croissance importante à long terme.

Comme l'observent Ordover et Baker par rapport à l'EMV, les lignes directrices américaines « ne prennent pas en compte le fait que les pouvoirs publics ou les parties à une fusion tentent d'estimer avec une précision mathématique l'effet de facteurs qui ne sont pas quantifiables. La méthodologie des Lignes directrices cherche à structurer l'analyse de rentabilité de l'entrée afin de mettre en évidence les facteurs clés dont dépend l'analyse de probabilité."[79] Il n'est pas difficile de voir pourquoi les Lignes directrices n'appliquent pas un barème plus précis – quelque chose comme l'indice Herfindahl-Hirschman, par exemple – pour l'analyse de l'entrée engagée. Tandis que les chiffres de l'IHH peuvent être calculés avec des données sur une seule variable (part de

77 On peut ressentir une tension entre l'hypothèse d'un SSNIP et la supposition que les prix d'après la fusion seront égaux aux prix d'avant. Il n'y a pas conflit, cependant, car comme l'ont montré Ordover et Baker, "l'entrée peut être rentable au prix d'avant la fusion dans l'environnement économique après l'entrée, même si elle n'était pas rentable au même prix dans l'environnement de la fusion avant l'entrée ; ce changement d'incitations est au centre de l'analyse de probabilité. Si la fusion a l'effet anticoncurrentiel que l'on craint, la production de la branche diminuera, créant par là des ventes potentielles supplémentaires pour un entrant au delà de ce qui était disponible antérieurement. Le résultat est de rendre l'entrée plus attrayante qu'elle ne l'avait été. En bref, le changement de structure du marché qui résulte de l'acquisition crée un écart dans les ventes, augmentant le potentiel de recettes pour un entrant et adoucissant l'environnement concurrentiel auquel sera confronté le futur nouveau concurrent. Les lignes directrices résument ce point en notant qu'une fusion peut créer une 'opportunité de ventes' supplémentaire pour un entrant." Janusz Ordover & Jonathan Baker, "Entry Analysis Under the 1992 Horizontal Merger Guidelines," 61 Antitrust Law Journal 139 (1992) (citing 1992 U.S. Guidelines s. 3.3).

78 Lignes directrices américaines, point 3.3 & note 32.

79 Janusz Ordover & Jonathan Baker, "Entry Analysis Under the 1992 Horizontal Merger Guidelines," 61 Antitrust Law Journal 139 (1992); *voir aussi* Lignes directrices américaines point 3.0 ("En évaluant si l'entrée sera opportune, probable et suffisante, l'autorité reconnait que des informations précises et détaillées peuvent être difficiles ou impossibles à obtenir. Dans ces cas là, l'autorité s'appuiera sur toutes les preuves disponibles pour savoir si l'entrée satisfait aux conditions d'opportunité, de probabilité et de suffisance").

marché), la facilité d'entrée est déterminée par une multitude de facteurs interdépendants, dont l'incertitude. L'analyse d'entrée est donc nécessairement plus un processus flexible, qualitatif, de bon sens, qu'une analyse rigide, mathématique, pouvant être facilement intégrée dans un indice.

Le critère de suffisance est nécessaire pour tenir compte de la possibilité que, bien qu'elle puisse être rentable et rapide, l'entrée puisse aussi ne pas faire de différence appréciable pour les consommateurs. Comme l'indiquent les Lignes directrices américaines, l'entrée peut être trop limitée en « ampleur, caractère et envergure pour prévenir ou contrer les effets concurrentiels préoccupants. »[80] Par exemple, si les entreprises en place contrôlent la plupart des actifs nécessaires à l'entrée, les entrants peuvent ne pas être en mesure de réagir dans toute la mesure de leurs opportunités de vente. C'est pourquoi des exemples récents d'entrées réussies ou ratées sont pertinents par rapport à l'analyse des lignes directrices, mais seulement comme « points de départ pour identifier les actions à mettre en oeuvre, les impératifs de calendrier et les caractéristiques des modes d'entrée possibles. »[81]

Il y a une contradiction possible entre les critères de probabilité et de suffisance dans les lignes directrices américaines. Plus une entrée est suffisante au sens où elle a des chances de faire baisser les prix, moins elle sera rentable, et donc moins elle aura de chances de se produire.

2. *Lignes directrices australiennes (1999).* L'analyse d'entrée selon les Lignes directrices australiennes partage un certain nombre de similitudes importantes avec celle des lignes directrices américaines. Par exemple, la possibilité d'entrer au moyen d'une substitution du côté de l'offre est envisagée pendant la phase d'identification des participants au marché et de détermination de la concentration du marché. L'entrée nécessitant des investissements importants n'est prise en compte que plus tard, et seulement si les chiffres relatifs à la concentration indiquent qu'il pourrait y avoir un amoindrissement important de la concurrence.[82] En outre, l'impact d'une entrée nécessitant d'importants investissements est évalué à la lumière des trois mêmes critères d'opportunité, de probabilité et de suffisance que dans les Lignes directrices américaines :

> La Commission considère qu'une entrée effective est celle qui a des chances d'avoir un impact sur le marché dans un délai de deux ans, soit en prévenant, soit en faisant échec à la tentative d'exercer un pouvoir de marché important de la part de la firme qui a fusionné. Sur certains marchés, la menace d'entrée est suffisante pour contraindre une firme à adopter un certain comportement. Sur d'autres, il faudra une entrée effective. Cette dernière devra se faire à une échelle suffisante et offrir un produit suffisamment attrayant pour les consommateurs.[83]

Cependant, il y a aussi un grand nombre de différences à relever entre les deux séries de lignes directrices. Par exemple, la distinction à faire entre des entrants potentiels qui sont

80 Lignes directrices américaines, s. 3.0.

81 Lignes directrices américianes, s. 3.1.

82 *Comparer avec les* Lignes directrices de l'Australie en matière de fusions (ci-après, "Lignes directrices australiennes ") ss. 5.52-5.53 *avec* ss. 5.115-5.128.

83 Lignes directrices australiennes, point 5.126.

comptés comme des participants effectifs au marché dans le but de déterminer les niveaux de concentration, et des entrants potentiels qui sont examinés ultérieurement à la lumière des barrières à l'entrée, n'est pas aussi claire dans les Lignes directrices australiennes. La façon dont les entrants potentiels sont analysés semble dépendre seulement de la réponse à la question de savoir si leur entrée nécessitera un « investissement important ». Le laps de temps nécessaire pour entrer n'est pas mentionné comme facteur distinctif.[84]

Par ailleurs, les Lignes directrices australiennes donnent au terme "barrières à l'entrée" une définition précise : "toute caractéristique de marché qui place un candidat à l'entrée efficace dans une position notoirement désavantageuse par rapport aux firmes en place. » Cette définition est clarifiée par des exemples de facteurs qui pourraient constituer des barrières à l'entrée, tels que les coûts irrécupérables et les économies d'échelle et de gamme.[85] Chaque facteur est décrit dans sa propre section, ce qui permet de mieux expliquer les barrières à l'entrée que dans les Lignes directrices américaines. En outre, les Lignes directrices australiennes énumèrent les types d'information qui seront pris en compte dans l'estimation de la hauteur des barrières à l'entrée, tels que le niveau de croissance ou de déclin du marché et la sanction pécuniaire d'un fonctionnement à une capacité sous-optimale.[86]

Une autre caractéristique distinctive des Lignes directrices australiennes est qu'elles évaluent les barrières à l'entrée dans les termes utilisés par Bain : « La 'hauteur' des barrières à l'entrée indique dans quelle mesure les entreprises en place peuvent relever le prix du marché au dessus de son niveau de concurrence sans attirer d'entrée."[87] Comme on l'a vu précédemment, toutefois, l'opinion de Bain est entachée d'un certain doute. Par exemple, il est possible que les barrières à l'entrée soient assez élevées sur un marché, mais s'il compte déjà de nombreux concurrents, le marché se comportera quand même de façon concurrentielle.

Une facette utile des Lignes directrices australiennes est qu'elles déclarent expressément qu'il n'est pas nécessaire qu'une fusion relève les barrières à l'entrée pour qu'elle soit anti-concurrentielle. Ce résultat exige seulement que d'importantes barrières à l'entrée existent, laissant aux entreprises en place « tout pouvoir en matière de fixation des prix et autres types de conduite."[88] Cette clarification contribue à éviter toute confusion au sujet du rôle des barrières à l'entrée dans une analyse de fusion.

3. *Fusions – Lignes directrices canadiennes pour l'application de la loi (2004)*. L'analyse d'entrée que l'on trouve dans les Lignes directrices canadiennes est très semblable à celle des Lignes directrices américaines, si bien que nous n'allons pas la reprendre ici quant au fond. Ce qui est le plus remarquable au sujet du traitement canadien des barrières à

84 Lignes directrices australiennes, points 5.52-5.53.

85 Lignes directrices australiennes, points 5.116-5.122.

86 Lignes directrices australiennes, point 5.124. Cette liste est complétée dans l'Australian Competition & Consumer Commission's Guideline for Informal Merger Reviews (Ligne directrice de la Commission australienne de la concurrence et des consommateurs pour des examens informels en matière de fusion) (Octobre 2004), p. 16.

87 Lignes directrices australiennes, point 5.123.

88 Lignes directrices australiennes, point 5.123.

l'entrée, c'est qu'il est plus clair que son homologue américain. Tout d'abord, les Lignes directrices canadiennes sont très spécifiques. Comme les Lignes directrices américaines, elles précisent, par exemple, que les entreprises qui commenceraient à vendre leurs produits sur un marché dans le délai d'un an après une petite hausse des prix, et qui pourraient le faire sans investir dans des coûts irrécupérables importants à l'entrée ou à la sortie, sont comptés comme des participants au marché lorsqu'il s'agit de déterminer les parts de marché et les niveaux de concentration. Cela englobe des firmes qui pourraient pénétrer rapidement en retirant des capacités de production d'autres marchés pour en doter le marché en cause. Cependant, les Lignes directrices canadiennes contiennent aussi une longue liste de facteurs spécifiques, notamment ceux qui pourraient empêcher ou retarder de telles réactions de l'offre, que le Bureau de la concurrence prendra en compte lors de l'identification de telles firmes. Par exemple, les coûts de transfert, les droits de propriété intellectuelle applicables, les droits de douane et les quotas d'importation font partie des nombreux facteurs listés.[89]

Deuxièmement, les Lignes directrices canadiennes citent des décisions de justice qui aident à illustrer certains points. Par exemple, une affaire est citée à l'appui du principe selon lequel bien qu'une entrée à petite échelle ait pu se produire dans le passé, si elle n'a pas eu d'effet évident sur la part de marché des entreprises en place, cela ne prouve pas nécessairement qu'une entrée suffisante a des chances de se produire à l'avenir.[90]

Enfin, les Lignes directrices canadiennes comportent une section intitulée "Types de barrières à l'entrée" qui contient de nombreux exemples aidant à comprendre l'analyse d'entrée du Bureau de la concurrence.[91] Barrières réglementaires, coûts irrécupérables, économies d'échelle et autres types de circonstances qui influent sur l'entrée y sont décrits, et l'on trouve aussi une annexe séparée consacrée aux coûts irrécupérables, qui entre dans le détail des atouts et de l'apprentissage spécifiques au marché, de la différenciation des produits et du comportement stratégique.[92] Toutes ces explications augmentent la transparence et la prévisibilité du processus canadien d'application de la loi sur les fusions.

4. *Lignes directrices européennes sur l'appréciation des concentrations horizontales (2004)*. Dans les Lignes directrices européennes, l'analyse d'entrée comporte les mêmes éléments de base que dans leurs homologues américaines, australiennes et canadiennes. Elle permet de compter des entrées « raisonnablement certaines » comme si tous les entrants potentiels étaient déjà sur le marché, afin de déterminer le degré de concentration (bien qu'il n'y ait pas d'exigence spécifique concernant la vitesse à laquelle les entrées devraient avoir lieu).[93] Elle utilise ensuite les critères qui nous sont devenus familiers de probabilité, de moment opportun et d'échelle suffisante pour déterminer si d'autres entrées exerceront une contrainte suffisante sur les parties à la concentration pour les empêcher de représenter un risque anticoncurrentiel important.

89 Bureau de la concurrence, Canada, Fusions – Lignes directrices pour l'application de la loi, points 4.1-4.4 (2004).

90 *Id*. au point 6.5 n.79 (citant *Canada (Commissaire de la concurrence c. Supérieur Propane Inc.* (30 août 2000), CT-1998/002 (Tribunal de la concurrence) au paragraphe 504).

91 *Id*. au point. 6.8-6.17.

92 *Id*. à l'Annexe I.

93 Lignes directrices sur l'appréciation des concentrations horizontales, 2004/C 31/03 (ci-après "Lignes directrices européennes"), paragraphe 15.

Les Lignes directrices européennes définissent les barrières à l'entrée comme des "caractéristiques spécifiques du marché qui donnent aux firmes en place des avantages par rapports à des concurrents potentiels."[94] Cette définition pragmatique évite les insuffisances associées à la définition de Bain et est suffisamment large pour englober la multitude de facteurs variés qui sont susceptibles d'influer sur la facilité d'entrée. Les Lignes directrices énumèrent utilement bon nombre de ces facteurs.

L'approche européenne est un peu plus qualitative que les approches canadienne et américaine : il n'est pas nécessaire d'apprécier la taille de l'EMV d'un entrant potentiel, ni ses opportunités de ventes probables. En revanche, une série de facteurs susceptibles d'avoir une influence sur la probabilité d'entrée sont décrits et il est laissé à la Commission le soin d'appliquer l'approche des Lignes directrices en fonction des faits et circonstances particuliers à chaque cas.[95] Le critère du moment opportun est flexible, mais le point de repère ordinaire est que l'entrée se produise dans un délai de deux ans pour être considérée comme intervenant en temps utile. Enfin, le critère de suffisance exige que l'entrée soit « d'une ampleur et d'une importance suffisantes pour dissuader ou contrecarrer les effets anticoncurrentiels de l'opération [de fusion]."[96]

5. *Lignes directrices du Royaume-Uni sur l'évaluation du pouvoir de marché (2004)*. Les barrières à l'entrée sont un élément pertinent pour l'évaluation du pouvoir de marché dans les affaires de fusion ou autres, de sorte qu'il est également intéressant d'examiner l'approche utilisée dans les lignes directrices ne concernant pas les fusions. L*'Office of Fair Trading* du R.U. a publié l'année dernière ses Lignes directrices sur l'évaluation du pouvoir de marché, et la section sur les barrières à l'entrée est un contrepoint intéressant aux analyses d'entrée contenues dans certaines lignes directrices relatives aux fusions décrites ici.

A l'instar des Lignes directrices australiennes sur les fusions, les lignes directrices britanniques sur le pouvoir de marché contiennent une définition précise des barrières à l'entrée. Les Lignes directrices britanniques évoquent des « facteurs qui permettent à une entreprise de maintenir à long terme une politique de prix supérieurs à la concurrence sans être plus efficiente que son rival potentiel."[97] Cette définition ne reconnaîtrait pas la présence de barrières à l'entrée dans des situations telles que l'hypothèse des licences de taxi de Demsetz où l'entrée nette est impossible, alors que le prix reste concurrentiel.[98] En outre, comme on l'a expliqué précédemment, il vaut mieux ne pas mettre l'accent sur le long terme, car une absence ou une pénurie d'entrées peut aussi causer un préjudice important au bien-être des consommateurs à court et moyen terme.

Les Lignes directrices britanniques contiennent des explications utiles de certaines grandes sources de barrières à l'entrée, notamment les coûts irrécupérables, l'accès restreint à des intrants et à des débouchés essentiels, la réglementation, les économies

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94 Lignes directrices européennes, paragraphe 70.

95 Lignes directrices européennes, paragraphes 5, 69.

96 Lignes directrices européennes, paragraphes 74-75.

97 Lignes directrices du Royaume-Uni sur l'évaluation du pouvoir de marché (ci-après, "Lignes directrices britanniques") point 5.3 (2004).

98 *Cf.* section 2.2.2. ci-dessus.

d'échelle, les effets de réseau et le comportement d'exclusion.[99] La section sur la réglementation est intéressante, car on y lit que « la réglementation peut conduire à des barrières à l'entrée lorsqu'elle ne s'applique pas également à toutes les entreprises. Par exemple, des entreprises en place pourraient faire pression pour appliquer des normes qu'il leur est relativement facile d'atteindre, ce qui ne sera pas le cas pour un nouvel arrivant."[100] Ce passage semble suggérer que des coûts irrécupérables de mise en conformité avec la réglementation ne compteraient pas comme barrière à l'entrée, pour autant que la réglementation s'appliquerait également à tous les participants au marché. On a noté précédemment, toutefois, que les coûts irrécupérables peuvent créer une asymétrie importante entre entreprises en place et entrants potentiels lorsque les premiers ont déjà payé ces coûts alors que les derniers ne l'ont pas fait.[101] En fait, la section sur les coûts irrécupérables des Lignes directrices britanniques reconnaît que cette asymétrie peut donner un avantage stratégique aux entreprises en place,[102] de sorte qu'on ne sait pas très bien comment il faudrait traiter une telle réglementation.

En ce qui concerne l'analyse d'entrée, les Lignes directrices britanniques utilisent une approche éminemment pratique. Il n'y a ni formule, ni autre exigence mathématique. Les lignes directrices reconnaissent que l'évaluation des effets des barrières à l'entrée peut être complexe et qu'elle peut se faire en plusieurs étapes. Ensuite, elles présentent un certain nombre de sujets sur lesquels les entreprises en place et les entrants potentiels pourraient être utilement interrogés et sur lesquels il pourrait être utile d'obtenir des justificatifs. Une entrée relativement rapide et facile est prise en compte en tant que substitution du côté de l'offre, tout comme dans les lignes directrices de plusieurs autres autorités. Une entrée qui prendra plus d'une année ou qui nécessitera des coûts irrécupérables importants est analysée en tant qu'entrée nouvelle.[103]

5. Comment un soutien actif peut faire tomber des barrières à l'entrée – un exemple

Comme on l'a noté plus haut, il arrive parfois que les barrières à l'entrée fassent elles-mêmes l'objet d'une procédure, au lieu d'être simplement des circonstances pertinentes dans des affaires centrées sur autre chose. Par exemple, bien que beaucoup de réglementations gouvernementales soient à l'évidence bénéfiques pour la société, malgré le fait qu'elles rendent l'entrée sur certains marchés plus difficiles, ce n'est pas toujours le cas. Certaines réglementations sont plus larges qu'il ne faudrait pour atteindre les objectifs déclarés. D'autres sont à peine déguisées, leur seul objectif étant clairement de protéger les entreprises en place de la concurrence. Les autorités de la concurrence peuvent jouer un rôle capital en examinant de près ces réglementations d'un point de vue orienté vers la concurrence et en s'appuyant sur leurs conclusions pour prôner les changements appropriés. Au moins une autorité a obtenu des résultats impressionnants en déployant tous ses efforts en ce sens.

99 Lignes directrices britanniques, points 5.8-5.28.

100 Lignes directrices britanniques, point 5.17.

101 *Cf.* section 3.1. ci-dessus.

102 Lignes directrices britanniques, point 5.10.

103 Lignes directrices britanniques, s. 5.31.

5.1 Rapport de la U.S. Federal Trade Commission

En juillet 2003, les agents de la *Federal Trade Commission* (FTC) ont publié un rapport intitulé “Barrières anticoncurrentielles éventuelles au commerce électronique : le cas du vin.”[104] Le rapport examine les moyens employés par divers Etats pour restreindre la concurrence sur les marchés américains du vin en rendant difficile, voire impossible, aux producteurs non résidents de l’Etat, la vente directe à des consommateurs d’autres Etats. Après avoir analysé ces lois et les justifications qui leur ont été fournies, avoir comparé les conditions des différents Etats appliquant des lois différentes, et avoir effectué une étude empirique, les agents de la FTC ont conclu que « les interdictions d’expédition directe entre Etats représentent la plus grande barrière réglementaire au commerce électronique élargi dans le domaine du vin.”[105]

Le rapport note que l’Internet a donné aux fournisseurs de vin, notamment aux petits établissements vinicoles, l’occasion de contourner la méthode traditionnelle de distribution du vin par l’intermédiaire de grossistes et détaillants, en commercialisant et en vendant directement aux consommateurs. Cela peut donner aux consommateurs un plus grand choix de vins et leur apporter une plus grande commodité et des prix plus bas. Beaucoup d’Etats ont toutefois des réglementations qui interdisent ou limitent considérablement l’expédition directe de vin aux consommateurs. Ces réglementations sont justifiées par le fait que sans elles on courrait des risques inacceptables que des mineurs aient trop facilement accès à l’alcool et que des consommateurs échappent au paiement des taxes sur les ventes de vin. Le rapport admet que ces préoccupations sont légitimes et que les Etats doivent faire des choix politiques. Il note aussi, cependant, que les décideurs devraient avoir des informations précises sur les avantages et les inconvénients à mettre en balance lorsqu’ils formulent leurs politiques.

Pour mieux examiner ces compromis, la FTC a tenu en octobre 2002 un atelier présentant le témoignage de responsables d’établissements vinicoles, de grossistes, d’autorités réglementaires et d’économistes. Les agents de la FTC ont aussi recueilli des informations de nombreuses autres sources, y compris de leur propre étude empirique dans laquelle ils évaluent l’impact de l’interdiction par un Etat des expéditions directes de vin entre Etats dans une ville de Virginie. L’étude compare les prix et les choix que les consommateurs de cette ville peuvent trouver dans leurs magasins locaux avec ce qu’ils peuvent trouver en ligne. Les agents ont constaté qu’il y a un plus grand choix disponible en ligne et que, dans de nombreux cas, l’Internet offre aux consommateurs des prix plus bas, même après prise en compte des frais d’expédition.[106]

Finalement, les agents ont conclu que l’expédition directe encourage la concurrence par les prix entre marchands de vin en ligne ou non, et que les réglementations qui restreignent l’expédition directe portent atteinte de façon importante et sans nécessité au bien-être des consommateurs. Le rapport n’aborde pas les arguments de fond, à savoir la collecte d’impôts et la prévention des ventes aux mineurs qui, selon les Etats et les distributeurs, justifient les réglementations. Cependant, le rapport constate que beaucoup d’Etats ont pu promouvoir ces mêmes objectifs, bien qu’ils aient des lois moins restrictives sur l’expédition directe. En outre, bon nombre des Etats qui restreignent l’expédition de vin directement aux consommateurs à partir d’établissements vinicoles situés en dehors de leur territoire, autorisent l’expédition directe à partir d’établissements implantés sur leur territoire.[107] Par conséquent, les agents

[104] Le rapport est disponible en ligne à l’adresse www.ftc.gov/os/2003/07/winereport2.pdf.

[105] FTC Staff, Possible Anticompetitive Barriers to E-Commerce: Wine, p. 3 (2004).

[106] *Id.*, 18-19.

[107] *Id.*, 3.

de la FTC recommandent que les Etats autorisent l'expédition directe, aussi bien des établissements vinicoles et des détaillants situés dans d'autres Etats que des fournisseurs locaux.[108]

5.2 Granholm c. Heald

Il a fallu moins de deux ans pour que le rapport sur le vin des agents de la FTC joue un rôle dans l'élimination des réglementations étatiques qui interdisaient les expéditions directes entre Etats de vin aux consommateurs. Dans l'affaire *Granholm c. Heald*, la Cour suprême américaine, s'appuyant sur ce rapport, a invalidé des lois dans les Etats du Michigan et de New-York qui empêchaient ou dissuadaient des établissements vinicoles situés hors de ces Etats de vendre directement à des consommateurs ressortissants de leur Etat, alors que les établissements locaux étaient autorisés à le faire.[109]

L'impact du rapport est impressionnant, non seulement parce qu'il a été jugé persuasif par la Cour Suprême, mais parce que *Granholm* n'est même pas une affaire de concentration. C'est un précédent d'ordre constitutionnel. La Cour a décidé que les réglementations en question étaient une discrimination anticonstitutionnelle contre le commerce inter-Etats, en violation de la clause sur le commerce de la Constitution américaine. *Granholm* s'impose donc à tous les Etats américains, sans possibilité de recourir à la doctrine de l'immunité qui permet parfois à des autorités étatiques d'éviter l'application de la législation antitrust.

La Cour a cité le rapport des agents de la FTC plus de dix fois, souscrivant à l'analyse du bien-être des consommateurs faite par ces agents, et se faisant l'écho de leur conclusion selon laquelle les réglementations ne sont pas la solution la moins restrictive pour réglementer les ventes de vin aux mineurs d'un Etat à l'autre et pour faciliter la collecte de taxes. En fait, la Cour a déclaré que les réglementations étaient "le produit d'une guerre commerciale permanente, de bas niveau"[110] entre Etats et a ajouté qu'il était "évident que le but de la législation du Michigan et de New York était d'accorder aux établissements vinicoles de ces Etats un avantage concurrentiel sur les établissements situés au delà des frontières de ces Etats."[111] En effet, la Cour a estimé que les réglementations en question augmentaient le coût pour les consommateurs des vins ne provenant pas de l'Etat en les obligeant directement ou indirectement à acheter du vin par l'intermédiaire de leur réseau traditionnel de distributeurs/détaillants.[112]

Granholm est une victoire par rapport à l'objectif qui est de promouvoir le renforcement du bien-être des consommateurs. Ce cas illustre aussi combien les efforts des autorités de la concurrence peuvent être efficaces lorsqu'ils prennent pour cible les barrières réglementaires à l'entrée.

6. Conclusion

Une grande partie du discours théorique sur les barrières à l'entrée a été dévalorisée par une terminologie qui n'a pas toujours jeté la lumière sur les questions pratiques liées à l'entrée que se sont

108 *Id.*, 40. Notons que le rapport sur le vin des agents de la FTC est seulement le premier de plusieurs rapports prévus qui vont étudier les barrières dans un certain nombre de branches d'activité. Un autre rapport sur les lentilles de contact est déjà disponible, par exemple : Staff of the U.S. Federal Trade Commission, "Possible Anticompetitive Barriers to E-Commerce: Contact Lenses" (Mars 2004), disponible à l'adresse : www.ftc.gov/os/2004/03/040329clreportfinal.pdf.

109 125 S. Ct. 1885 (2005).

110 *Id.*, 1896.

111 *Id.*, 1892.

112 *Id.*

posées les autorités chargées de faire respecter la loi et les tribunaux. En réalité, l'accent mis sur la mise au point de définitions a partiellement obscurci des questions plus importantes relatives à l'entrée, telles que celles concernant la probabilité, la durée du processus et son efficacité. L'influence que les barrières à l'entrée devraient avoir sur les décisions en matière de concurrence devrait porter sur la question de savoir jusqu'à quel point ces barrières ont des chances d'empêcher les entrées d'éliminer les effets anticoncurrentiels, non pas de savoir si elles entrent dans une case abstraite dont les dimensions sont extrêmement controversées. Heureusement, les lignes directrices promulguées par les autorités chargées de faire respecter la loi sur la concurrence de plusieurs pays de l'OCDE ont fait beaucoup pour garantir que les autorités se concentrent sur les bonnes questions, même si de nombreux théoriciens ne le font pas. Il est cependant nécessaire de réaliser une autre étude portant sur comment mesurer et faire des prévisions au sujet de l'entrée dans des cas particuliers.

CANADA

1. Introduction

As indicated in the Secretariat Note, barriers to entry are relevant in virtually every type of case that does not involve a *per se* offence. In Canada, assessing barriers to entry is important whenever there is a competition test, and since competition tests occur in the majority of the sections under the Competition Act, they have played an important role in cases dealing with abuse of dominance, mergers and criminal conspiracy. In fact, the role of entry barriers is considered important enough for merger analysis that it is explicitly included in subsection 93(d) of the Canadian Competition Act[1].

The Competition Bureau of Canada ("Bureau") is of the view that the relevant issue is not whether an impediment satisfies a certain definition of a barrier to entry. Rather, what is important is how barriers to entry affect the timeliness, likelihood and sufficiency of entry.

1.2 Outline of the Paper

The purpose of this paper is to present the Bureau's approach to analysing the role of entry barriers and to review how they have been considered in cases before Canada's Competition Tribunal ("Tribunal"). Section II discusses the importance of entry barriers in merger assessment, with a focus on the *Merger Enforcement Guidelines* ("MEGs")[2]. Section III, is a discussion of the role of entry barriers in abuse of dominance. Section IV discusses how entry barriers can be important in criminal conspiracy cases as a result of the "undueness" test under Section 45 of the Competition Act. Finally, there is a brief conclusion.

2. Mergers

Under subsection 92(1) of the Competition Act, the Tribunal may make an order when it determines that a merger "prevents or lessens, or is likely to prevent or lessen, competition substantially." A substantial prevention or lessening of competition results from mergers that are likely to create, maintain or enhance the ability of the merged firms to unilaterally, or in coordination with other firms, exercise market power.

The existence of significant barriers to entry can determine the outcome of a merger review. In determining the extent of the prevention or substantial lessening of competition, the Competition Tribunal may consider barriers to entry. Section 93 of the Competition Act states:

> "In determining, for the purpose of section 92, whether or not a merger or proposed merger prevents or lessens, or is likely to prevent or lessen competition substantially, the Tribunal may have regard to the following factors: …
>
> (d) any barriers to entry into a market, including

1 Available electronically at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1140&lg=e.

2 Commissioner of Competition, *Merger Enforcement Guidelines*, (2004). Available electronically at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1245&lg=e.

(i) tariff and non-tariff barriers to international trade,
(ii) interprovincial barriers to trade, and
(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers; ...”

The first step in the Bureau’s competition analysis is to determine the relevant product and geographic markets in order to identify a set of participants that could potentially face increases in market power due to the merger. The next step is to examine the level of market concentration and the extent of anti-competitive effects (both unilateral and coordinated).[3] The Bureau, in its analysis of competitive effects, then tries to determine whether timely entry by potential competitors will likely occur on a sufficient scale and scope to constrain a material price increase in the relevant market or a substantial part of the relevant market.

The importance of entry barriers in the Bureau’s competition analysis is explained in the MEGs, which state:

“In the absence of impediments to entry, a merged entity’s attempt to exercise market power, either unilaterally or through coordinated behaviour with its rivals, is likely to be thwarted by entry of firms that:

- are already in the relevant market and can expand production or sales;
- are not in the relevant market but operate in other product or geographic markets and can switch production or sales into the relevant market; or
- can begin production or sales into the relevant market *de novo*.”[4]

If entry barriers are low, then even if the merged entity has high market shares, the entity may not have significant market power. With low entry barriers, any attempt by the merged entity to exercise its market power will be mitigated by the arrival of new entrants. Furthermore, even the possibility of entry may be sufficient to mitigate the exercise of market power.

The Tribunal has supported this view in a number of decisions. In *Hillsdown*[5], the Tribunal stated that “in the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time”[6], the reason

3 For a discussion of the Bureau’s approach to unilateral and coordinated effects, see Part 5 of the *Merger Enforcement Guidelines*.

4 The discussion presented in this section is based on “Part 6 - Entry” of the *Merger Enforcement Guidelines*.

5 *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.*, (1992), 41 C.P.R. (3d) 289. The Director sought an order that Hillsdown Holdings divest itself of its Orenco rendering facility at Dundas Ontario on the grounds that the acquisition of this facility substantially lessened competition in the Ontario market for rendering services. Through its subsidiary, Maple Leaf, Hillsdown already operated a rendering plant in Moorefield Ontario. The Tribunal found that the acquisition of Orenco did not substantially prevent or lessen competition and declined to grant the divestiture order.

6 See *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.*, (1992), 41 C.P.R. (3d) 289, at 324.

being that an increase in price "would cause competitors to enter the market and the additional supplies created in that manner would drive prices back to the competitive level."[7] As well, in *Southam*[8], the Tribunal observed "[i]n light of the fact that all the other relevant elements clearly point to a substantial lessening of competition, the question is whether entry barriers are sufficiently low that actual entry or threat of entry can be relied on to conclude that the acquisitions have not lessened competition substantially and are not likely to do so."[9]

The Bureau's focus is on whether entry will be timely, likely and sufficient. In assessing the conditions of entry, the Bureau considers the amount of time required for a potential entrant to become an effective competitor in response to a material price increase. In general, the longer it takes for potential entrants to become effective competitors, the less likely it is that the incumbent firms will be deterred from exercising market power. In the Bureau's analysis, entry into the market must occur within a two-year period. In *Hillsdown*, the Tribunal "was of the view that de novo entry would likely take approximately 18 months to accomplish."[10] In *Superior*[11], the Tribunal noted that "if the impact on price is delayed beyond a reasonable period, then entry for the purpose of the Act has not occurred," and that "the appropriate length of time for judging the impact of entry is a matter of opinion; however, the Tribunal notes that the MEGs, ... refer to a period of two years."[12]

In assessing whether future entry is likely to occur, the Bureau generally starts with an assessment of firms that appear to have an entry advantage. The MEGs note that, while other potential sources of competition may be relevant, the typical sources of potential competition come from (i) fringe firms already in the market; (ii) firms that sell the relevant product in adjacent geographic areas; (iii) firms that produce products with machinery or technology that is similar to that used to produce the relevant product; (iv) firms that sell in related upstream or downstream markets; (v) firms that sell through similar distribution channels; or (vi) firms that employ similar marketing and promotion methods. Furthermore, a history of entry and exit from a particular market provides useful information on the likelihood of entry occurring in a timely manner and on a sufficient scale, though it is not the sole determinant as to whether it will likely occur. In *Hillsdown*, the Tribunal stated that the "test as to whether potential entry will discipline the market is whether such entry is likely to occur, not merely

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7 Ibid.

8 *Director of Investigation and Research v. Southam Inc.*, (1992), 43 C.P.R. (3d) 161. The Director sought an order requiring Southam, the owner of the only two daily newspapers in the Vancouver area, to divest the two largest of the thirteen community newspapers it had acquired as well as a real estate publication, *The Real Estate Weekly*. The concern was that there would be a substantial lessening of competition in both the newspaper retail advertising market and in the print real estate advertising market. The Tribunal found that there was not a substantial lessening of competition in the newspaper retail advertising market. However, it did find that there would be one in the print real estate advertising market in the area of Vancouver known as the North Shore, and thus ordered Southam to divest either *The Real Estate Weekly*, or *The North Shore News*.

9 See *Director of Investigation and Research v. Southam Inc.*, (1992), 43 C.P.R. (3d) 161, at 306.

10 See *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.*, (1992), 41 C.P.R. (3d) 289, at 326.

11 *Commissioner of Competition v. Superior Propane Inc.*, (2000), CT-1998/002, at 128. The Commissioner sought an order to dissolve the merger of Superior Propane Inc. and ICG Propane Inc., the two largest distributors of propane in Canada. While the Tribunal concluded that the merger substantially lessened competition, the Tribunal in the first hearing decided to allow the merger on the basis of the efficiency defence.

12 *Commissioner of Competition v. Superior Propane Inc.*, (2000), CT-1998/002, at 128.

whether it could occur."[13] The Tribunal also extensively examined the history of entry and exit in *Southam*, and *Superior*.

With respect to sufficiency, the Bureau considers whether entry is likely to be on a scale and scope that will be sufficient to eliminate a material price increase. As Trebilcock et al (2002) argue,

> "[d]etermining whether entry will occur on a 'sufficient scale' entails an assessment of minimum efficient scale in light of total market demand: it is normally assumed that entry at less than minimum efficient scale will not be sufficient to constrain market power, as sub-optimal production puts entrants at a cost disadvantage. The higher the ratio of minimum efficient scale is to total market demand, the less likely it is that entrants will believe they can attract the level of sales needed to be profitable."[14]

Unlike large economies such as the United States, this is of particular concern for a small economy such as Canada where the costs of entry may be significantly larger than potential revenues earned in the market. As a result, the number of potential viable entrants that can mitigate significant price increases will be smaller for Canada relative to the United States, and thus, each jurisdiction may come up with different results regarding the viability of entry in their competition analysis.

Sufficiency was raised as an issue in *Hillsdown*, where the Tribunal noted that there may not be a sufficient supply of rendering material for a potential entrant to build a plant of sufficient size to compete, and in *Southam* where the Tribunal stated "that it is easy to start a community newspaper but difficult to survive."[15] Thus, even though entry may be easy, it should be considered as a means of mitigating market power only when it is viable for the entrant to remain in the market post-entry.

The Bureau realizes that barriers to entry can take many forms, ranging from absolute restrictions that preclude entry (e.g. regulatory barriers), to sunk costs and factors that raise the cost and risks associated with entry. The importance of the latter were noted by the Tribunal in *Laidlaw*[16] which stated that "while commencing a business may in some cases be easy, new entrants may find it difficult to survive for a variety of reasons, including strategic behaviour of incumbents."[17]

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13 See *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.*, (1992), 41 C.P.R. (3d) 289, at 327.

14 Trebilcock, M., R.A. Winter, P. Collins, and E.M. Iacobucci, (2002), *The Law and Economics of Canadian Competition Policy*, University of Toronto Press: Toronto. See page 258.

15 See *Director of Investigation and Research v. Southam Inc.*, (1992), 43 C.P.R. (3d) 161, at 279.

16 *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.*, (1992), 40 C.P.R. (3d) 289. The Director alleged that Laidlaw Waste Systems Ltd. had abused its dominant position in the market for commercial waste collection and disposal on Vancouver Island. The Tribunal held that Laidlaw's large market share and number of customers under contract made it difficult for new entrants to attain minimum efficient scale. The Tribunal prohibited Laidlaw from entering into or enforcing in its existing meeting competition, liquidated damage and exclusivity clauses in the Vancouver Island markets. The Tribunal also limited the initial and renewal terms to a single year and required that all contracts be terminable on 30 days notice by either party. Finally, Laidlaw was prohibited from acquiring any competitors for a period of three years.

17 *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.*, (1992), 40 C.P.R. (3d) 289, at 331.

The Bureau also realizes that sunk costs can affect the likelihood of entry. Trebilcock et al (2002) define sunk costs as "investments committed to the market once made and which cannot be avoided by withdrawing from the market."[18] Their importance is that sunk costs "are irrelevant to the pricing decisions of incumbent firms and can be ignored in setting prices, while new entrants must price to recoup them."[19] The Bureau's assessment of sunk costs also focuses on the time required to become an effective competitor, the probability of success, and whether these factors justify making the investments required.

Note that new entrants must often incur various start-up costs, such as acquiring market information, developing and testing product designs, installing equipment, engaging personnel and setting up distribution systems. The MEGs also indicate that:

> "Potential entrants may also face significant sunk costs due to the need to:
>
> (i) make investments in market specific assets and in learning how to optimise the use of these assets;
> (ii) overcome product differentiation-related advantages enjoyed by incumbents; or
> (iii) overcome disadvantages presented by the strategic behaviour of incumbents."

Appendix I provides the MEGs' description of how these potential sources of sunk costs can create significant impediments to entry.

The MEGs indicate that other potential sunk costs include reputation, exclusive contracts, economies of scale and market maturity. Establishing a reputation as a reliable or quality seller constitutes a barrier to entry when it is a crucial element in attracting buyers, particularly in industries where services are an important element of the product. In *Superior*, the Tribunal noted that "reputation is an important feature of propane suppliers to which customers attach value," and "that the time to gain a reputation may make profitable entry more difficult and hence delays the competitive impact that an entrant would have in the marketplace."[20]

Exclusive contracts with automatic renewals, rights of first refusal and termination fees may also constitute a barrier to entry. Contracts that limit buyer switching may make it difficult for firms to gain a sufficient customer base to be profitable, and thus can make entry unattractive. As well, the deterring effects of such contracts are more pronounced when economies of density or scale are important since they make it difficult for new or smaller firms to achieve minimum efficient scale. Exclusive contracts were a concern in both *Laidlaw* and *Superior*. In *Superior* the Tribunal explicitly stated that it "accepts that the provisions in the contracts, including long-term exclusivity, automatic renewal, termination fees, right of first refusal (Superior only), and tank ownership significantly raise the cost of entry and expansion and hence constitute a barrier to entry."[21]

With economies of scale, entry on a small scale may be difficult unless the entrant can exploit a niche. On the other hand, if there is entry on a large scale, it may expand supply capacity beyond market demand, thus lowering market prices and making entry less attractive. However, as the Tribunal points out in *Southam*:

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18 Trebilcock, M., R.A. Winter, P. Collins, and E.M. Iacobucci, (2002), *The Law and Economics of Canadian Competition Policy*, University of Toronto Press: Toronto. See page 260.

19 Ibid.

20 *Commissioner of Competition v. Superior Propane Inc.*, (2000), CT-1998/002, at 157.

21 *Commissioner of Competition v. Superior Propane Inc.*, (2000), CT-1998/002, at 150.

> "Economies of scale without sunk costs are not enough either. Although a struggle for the customers needed to achieve adequate scale will take place, by definition the entrant has nothing to lose if there are no sunk costs. If the entrant attempt does not succeed, the entrant has merely to sell the assets invested in the attempt and walk away."[22]

Market maturity can also impede entry. Entry may be less difficult in the start-up and growth stages of a market, where the dynamics of competition generally change more rapidly. Mature markets exhibit flat or declining demand, making it more difficult for profitable entry because sales must come from existing rivals. Finally, other cost advantages that may deter entry include control over access to scarce or non-duplicable resources such as land, natural resources and distribution channels.

3. Abuse of Dominance

Barriers to entry also play a key role in abuse of dominance cases. Subsection 79(1) of the Competition Act states:

> "Where, on application by the Commissioner, the Tribunal finds that
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice."

As indicated in the *Enforcement Guidelines on the Abuse of Dominance Provisions*[23], the Bureau considers control to be synonymous with market power, where market power is the ability to profitably set prices above competitive levels for a considerable period of time. Note that high market shares in and of themselves are not sufficient to prove market power. As discussed above, without barriers to entry, any attempt by a firm (or group of firms jointly) with a high market share to exercise market power is unlikely to be successful due to the possibility of entry or expansion of existing firms.

In *NutraSweet*[24], NutraSweet supplied 95 percent of the aspartame market in Canada.[25] The Tribunal found that there were significant barriers to entry into the aspartame market due to process patents associated with producing aspartame held by incumbents, significant economies of scale and sunk costs, and a long start-up time of around two years.

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22 See *Director of Investigation and Research v. Southam Inc.*, (1992), 43 C.P.R. (3d) 161, at 281.

23 Commissioner of Competition, *Enforcement Guidelines on the Abuse of Dominance Provisions*, (2001). Available electronically at http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1251&lg=e.

24 *Director of Investigation and Research v. NutraSweet Co.*, (1990), 32 C.P.R. (3d) 1. The Director alleged that The NutraSweet Company had abused its dominant position in the market for the high intensity sweetener aspartame. The acts found to be anticompetitive by the Tribunal were trademark display and cooperative marketing allowances (i.e. a branded ingredient strategy); exclusive use and supply clauses; and meet-or-release and most-favoured nation clauses. The Tribunal ordered The NutraSweet Company not to enter into, or enforce, the following contractual provisions with Canadian customers: (i) exclusive use or supply clauses; (ii) allowances for displaying the trademark or logo; (iii) meet-or-release clauses; and (iv) most favoured-nation clauses unless all of the competitors of the customer have similar price protection.

25 *Director of Investigation and Research v. NutraSweet Co.*, (1990), 32 C.P.R. (3d) 1.

In *Laidlaw*, the Tribunal's concern was that Laidlaw's various contracting practices had the effect of raising barriers to entry.[26] It should be noted that in *Laidlaw*, the anticompetitive act by the dominant firm was the creation of the barrier to entry.

As stated earlier, reputation may be a barrier to entry. In *Tele-Direct*[27], the Tribunal concluded that barriers to entry (other than "niche" entry) to the telephone directory market were significant, given the requirement of significant sunk costs and the reputation of the incumbent, as well as the incumbent's affiliation with telephone companies.[28]

The importance of entry barriers also arose in *Nielsen*[29], where the Tribunal stated that given Nielsen's 100 percent market share of the market for scanner-based market tracking services, they were "prepared to find that, *prima facie*, Nielsen has market power, or control, in the relevant market absent some evidence that there are no barriers to entry."[30] Thus, the extent of barriers to entry were the determinative factor in assessing the degree of market power.

Given the emphasis by the Tribunal on barriers to entry in abuse of dominance cases, the MEGs discussion of barriers is also relevant to the Bureau's analysis of market power under subsection 79(1) of the Competition Act.

4. Criminal

Due to the "undueness" test in Section 45 of the Competition Act, barriers to entry can also play a significant role in criminal proceedings. Subsection 45(1) states:

> "Everyone who conspires, combines, agrees or arranges with another person
>
> (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
> (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
> (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

26 *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.*, (1992), 40 C.P.R. (3d) 289.

27 *Director of Investigation and Research v. Tele-Direct (Publications) Inc.*, (1997), 73 C.P.R. (3d) 1. The Director alleged that Tele-Direct (Publications) Inc. (the Publisher of several yellow page directories) had abused its dominant position in the markets for advertising services and advertising space. The main issue was tying advertising services to advertising space. The Tribunal found that Tele-Direct's refusal to deal with consultants and putting obstacles in the way of the successful entry of an independent publisher were anticompetitive acts. The Tribunal ordered Tele-Direct that customers using consultants must be treated no differently than customers that do not.

28 *Director of Investigation and Research v. Tele-Direct (Publications) Inc.*, (1997), 73 C.P.R. (3d) 1.

29 *Director of Investigation v. D&B Companies of Canada Ltd.*, (1996), 64 C.P.R. (3d) 216. The Director alleged that Nielson had abused its dominant position in the provision of scanner data from supermarkets to manufacturers of the products sold. The concern was the long term (three years or more) exclusive contracts that Nielson had with every major Canadian supermarket chain. The Tribunal prohibited Nielson from enforcing its current exclusive contracts and from entering into any new ones. As well, all existing customer contracts were terminable by the customer upon eight months notice. Finally, Nielson had to supply its competitor IRI with historical data upon request.

30 *Director of Investigation v. D&B Companies of Canada Ltd.*, (1996), 64 C.P.R. (3d) 216.

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both."

Unlike other provisions of the Competition Act, Section 45 has remained virtually unchanged since 1889. While Section 45 has been in existence for over one hundred years, there is only one case related to the interpretation of the term "unduly" – the Supreme Court of Canada decision in *PANS*.[31] Gonthier J., writing for the court, stated that Section 45(1):

"... lies somewhere on the continuum between a *per se* rule and a rule of reason. It does allow for discussion of the anti-competitive effects of the agreement, unlike a *per se* rule, which might dictate that all agreements that lessen competition attract liability. On the other hand, it does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would. Since 'unduly' in [Section 45(1)(c)] leads to a discussion of the seriousness of the competitive effects, but not all relevant economic matters, one may say that this section creates a partial rule of reason."[32]

Gonthier J. found that the "undueness" of a horizontal agreement requires an assessment of both the degree of market power and whether the behaviour of the parties is likely to injure competition, though he did conclude that a "moderate amount" of market power would be sufficient to meet the requirements of Section 45. Gonthier J. also provided a non-exhaustive list of economic factors worthy of consideration, including (i) the number of competitors and the concentration of competition; (ii) barriers to entry; (iii) geographic distribution of buyers and sellers; (iv) product differentiation; (v) countervailing power; and (vi) cross-elasticity of demand.[33] The court considered the small number of pharmacies outside of the agreement, the significance of barriers to entry on a sufficient scale to alter the Pharmacy Association of Nova Scotia's conduct, and product homogeneity to find that the Association had a moderate degree of market power.

5. Conclusion

Barriers to entry have played a significant role in Canada's competition enforcement efforts, as can be seen by the fact that they are relevant in a number of significant Canadian antitrust cases. Through its discussion in the *Merger Enforcement Guidelines*, the Bureau has made an attempt to explain why barriers to entry are significant, how they affect competition under various circumstances, and how they can be assessed and interpreted. While trying to define what constitutes an entry barrier is of interest, it

31 *R. v. Nova Scotia Pharmaceutical Society*, (1992) 2 S.C.R. 606. The Crown alleged that the sale or supply of drugs and pharmacists' dispensing services to subscribers of prepaid insurance plans was unduly lessened within the province of Nova Scotia between 1974 and 1986. The Crown also alleged that competition was unduly lessened in the sale or supply of drugs and dispensing services for cash or on credit to the public in Nova Scotia between 1974 and 1986. The Pharmacy Association of Nova Scotia solicited (and received from ninety-two percent) from all pharmacies within Nova Scotia powers of attorney to permit the Society to negotiate and sign contracts with third party insurers on behalf of the pharmacies. In its negotiations with third party insurers the Society was not adverse to threatening to terminate its members' participation in a particular insurer's prepaid schemes. The court denied conviction on the grounds that the Crown failed to show objective intent to unduly lessen competition.

32 *R. v. Nova Scotia Pharmaceutical Society*, (1992) 2 S.C.R. 606 at 650. This discussion is based on Trebilcock, M., R.A. Winter, P. Collins, and E.M. Iacobucci, (2002), *The Law and Economics of Canadian Competition Policy*, University of Toronto Press: Toronto, pages 113-117.

33 *R. v. Nova Scotia Pharmaceutical Society*, (1992) 2 S.C.R. 606 at 653.

appears that both the Bureau and the Tribunal agree that the meaningful issue is not whether an impediment satisfies a certain definition of what an entry barrier is, but rather, the key is to understand whether and when entry is likely to occur.

APPENDIX I

APPENDIX I OF THE MERGER ENFORCEMENT GUIDELINES:

ADDITIONAL INFORMATION ON SUNK COSTS

This appendix further describes how the potential sources of sunk costs identified in Part 6 can deter entry. Sunk costs are important to the entry analysis because, when present, they provide a cost advantage to incumbents who can ignore such costs in their pricing decisions because they have already been committed.

Market Specific Assets and Learning

Entry that requires sunk cost investments may be deterred by the effect that entry itself has on prices. Entry can be deterred by lower prices for two main reasons. First, where significant economies of scale, scope, or density exist, a potential entrant will recognize that output added to the market by any new entry on a minimum efficient scale will exert downward pressure on prices.[1] The greater the ratio of minimum efficient scale to total market output, the greater the price depressing effect of entry at that scale, and the less likely it is that such entry will occur.

Second, a potential entrant recognizes the ability of profit-maximizing incumbents to affect the post-entry price. In particular, incumbents may make new entry unprofitable by maintaining their own output at levels that yield prices that are below the potential entrant's long run average total costs, which includes any sunk costs that would be incurred upon entry.[2] This deterrent effect is enhanced by increased risk and uncertainty based on incumbents vigorously fighting to defend their market position, particularly in stable or declining markets, or where they have significant excess capacity.[3]

The assessment of entry also involves a determination of whether viable entry is likely to be deterred by the existence of advantages that incumbents gain through experience. In some markets, entry by potential entrants may be deterred or hindered by the fact that it takes several years to debug plants, acquire essential production and marketing experience and otherwise learn the tricks of the trade. In other markets, entry may be deterred or hindered by virtue of the fact that knowledge may only be acquired in such a way that potential entrants cannot realistically expect to catch up with incumbents in the foreseeable future.

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1 See ¶ 8.14 of these guidelines. Economies of scale, scope and density can also exist in relation to other aspects of a business, such as distribution, marketing and management. As discussed in *Laidlaw*, *supra* note 80, the need to establish route density to be profitable may be an entry deterrent.

2 For incumbents, such costs have already been committed and are no longer considered relevant for pricing decisions. The same is not true for new entrants. It is this asymmetry between incumbents and persons contemplating entry that confers the advantage on the former.

3 Due to the fact that many Canadian markets support only a small number of firms, as a result of the existence of scale economies, the Bureau is frequently presented with this source of entry impediment.

Product Differentiation

Firms typically attempt to differentiate their products in several ways including:

- distinguishing the physical nature of the product (its features, durability and quality);
- offering superior pre or post-sales service, including warranties;
- selling from locations that are more convenient to access, or that require less transportation costs to reach, than rival sales locations; and,
- creating perceived attributes through marketing, advertising, labelling, packaging, etc.

When products are successfully differentiated, buyers are generally not indifferent to branded and unbranded products. When buyers find a brand that they like, the brand often becomes the standard against which products of new entrants are judged. In essence, buyers develop brand loyalty, which is generally rooted in satisfactory past experience and in the quality assurance provided by the brand name. Quality assurance is in turn ordinarily reinforced through advertising and other forms of promotion.

Where significant brand loyalty exists, buyers are often reluctant to switch immediately to a new product in response to a material price increase. This reluctance can be heightened by the significant risk associated with purchasing a new product where the product:

- is a component in a production process that will have to be shut down if the product fails to perform as expected;
- is resold by buyers who must therefore place their own reputation at risk;
- is not one which is cheaply sampled;
- is a durable good that is infrequently purchased; or,
- where timeliness of delivery and technical support are important.

To convince buyers to sample their products, new entrants must often offer a lower price, a superior product, and/or engage in more extensive and more frequent advertising and promotion than incumbent firms. Each of these sources of asymmetry between new entrants and incumbent firms is a source of additional sunk costs that ordinarily deter or delay entry. This is particularly so with goods that are purchased on a self-serve basis, and where there are significant costs associated with obtaining information about a product and its performance relative to other products in the relevant market.

These disadvantages increase as the proportion of total market output accounted for by minimum efficient scale increases. In short, the more sales that must be made to attain minimum efficient scale, the greater are the sunk entry costs that must be incurred in terms of product discounts, advertising and other forms of promotion.[4]

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4 It is important to recognize that there are often economies of scale in advertising that disadvantage new entrants until they reach the level of sales where their per-unit advertising costs are comparable with those of incumbents.

Moreover, as the level of minimum efficient scale increases, potential entrants are more likely to fear that they will not gain sufficient sales to justify committing to these sunk costs, and/or that the prospect of slow buyer-acceptance will increase their exposure to additional sunk costs.

Strategic Behaviour

Several kinds of strategic behaviour serve to impose sunk costs on new entrants or delay the ability of a new competitor to eliminate a material price increase. Such behaviour may occur prior or subsequent to entry, and may not necessarily be designed to have an entry-deterring effect.

To assess the extent that a material price increase is likely to induce entry on a scale and scope that is sufficient to eliminate such a price increase within two years, particular attention is paid to determining whether entry is likely to be impeded or delayed by one or more of the following:

- existing exclusive dealing or tying arrangements;
- buyers facing significant switching costs;[5]
- existing contracts that are long term in nature, and/or that include "meet the competition" or automatic renewal clauses;
- high levels of investment in research and development or advertising by incumbents, or a likelihood that such investments will be made;
- incumbents having filled most significant product niches or geographic location opportunities;
- incumbents having acquired patents for a variety of ways of making a product;
- incumbents having signalled through responses to past entry initiatives that existing excess capacity will be employed to depress prices in response to an attempt to enter; or,
- an expectation that incumbents will likely respond to entry by vigorously defending their market positions.[6]

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5 Suppliers can impose significant switching costs on buyers in various ways, including: by making rebates or discounts contingent on total fidelity or a long term commitment; by imposing liquidated damages for breach of contract; by requiring the buyer to include the trade mark of the relevant product on the packaging when it is resold; by manipulating the compatibility of product components; or by requiring buyers to purchase the suppliers' equipment. See for example, *Superior Propane*, *supra* note 8 at ¶ 147.

6 See for example *Superior Propane*, *supra* note 8 at ¶ 152 - 153.

CZECH REPUBLIC

Concept of barriers to entry in the practice of the Czech competition office

The competition law of the Czech Republic does not expressly define the notion of barriers to entry. The Office for the Protection of Competition of the Czech Republic (hereinafter referred to as "the Office") has dealt with the issue of barriers to entry since the beginning of its existence and yet it has not encountered a case where the non-existence of a precise legal definition of barriers to entry would have meant an obstacle to effective application of its powers.

The Office holds the view that barriers to entry shall be deemed to mean such circumstances that make new undertakings' entry into an economic sector more difficult regardless duration of barriers to entry. The barriers may have legal nature (for instance licences, duties), as well as other than legal nature (high entry investment costs, brand loyalty etc.). A specific type of a barrier to entry, consisting in refusal of access to the so called essential facilities, is defined in the Czech Competition Act within the non-exhaustive list of forms of abusing dominant position (see art. 11, par. 1, letter f):

> „Refusal to grant other undertakings access, for a reasonable reimbursement, to own transmission grids or similar distribution networks or other infrastructure facilities, which are owned or used on other legal grounds by the undertaking in dominant position, if other undertakings are unable for legal or other reasons to operate in the same market as the dominant undertakings without being able to jointly use such facilities, and such dominant undertakings fail to prove, that such joint use is unfeasible for operational or other reasons or that they cannot be reasonably requested to enable such use; the same proportionately applies also to the refusal of access, for a reasonable reimbursement, of other undertakings to the use of the intellectual property or access to the networks owned or used on other legal grounds by the undertaking in a dominant position, if such use is necessary for participation in competition in the same market as the dominant undertakings or in any other market"

1. Assessment of barriers to entry

The assessment of the existence of a barrier to entry is carried out by the Office as a part of examining potential competition, i.e. in assessment of the supply substitution in individual antitrust and merger cases. Here the premise is applied that the higher barriers to entry of new undertakings into and industry and the higher the costs connected to overcoming these barriers, the smaller is the probability of entry to the relevant market. Existence of barriers to entry increases the market power of undertakings already operating on the market. In the Office´s practice, the concept of barriers to entry in principle does not vary in connection with the type of the investigated case. In order to carry out a sound evaluation of particular barriers to entry´s importance, the Office has to have sufficient knowledge of existence and impact of factors which allow overcoming the barriers, or reducing their importance. The Office usually focuses on:

- total costs of the entry (research and development, establishing distribution networks and service networks, promotion, advertisement, servicing etc.) in extent corresponding to the costs of potential competitive undertaking;

- any legal barriers to entry, such as government authorisation or standardisation in any form;

- any restrictions following from the existence of industrial or other intellectual property rights on the relevant markets and any restrictions resulting from license agreements to the objects of these rights;

- to which extent are the undertakings concerned licensees or licensors as regards the object of industrial or other intellectual property;

- the importance of economies of scale resulting from the extent of production on relevant markets;

- access to sources of supplies, indispensable for operation on relevant markets, e.g. accessibility of raw materials.

1.2 Ex-ante vs. Ex-post approach

In merger cases the Office identifies barriers to entry by means of the notification form which must be filled by the parties to a concentration as a part of their application for approval of a transaction. In this way it is ascertained whether in previous five years there has been a relevant market entry, as well as whether a possibility of new undertakings‘ entry exists. The Office especially examines whether a merger will result in creating new barriers to entry or whether the current barriers will be strengthened. The „ex-ante“ approach is thus prevailing.

In antitrust cases, on the contrary, the “ex post” approach is applied, due to the fact that the circumstance establishing a barrier to entry has already had a negative effect on the competition environment.

2. Duration of entry barriers

The period over which the Office would expect an actual barrier to entry to exist is not set by law. The duration of barriers to entry and their impact on competition is always considered on a case by case basis. However, in cases of abuse of dominant position the Office applies a view that if there has been e.g. a refusal of an access to essential facilities in the long term, the duration constitutes an aggravating circumstance that shall be taken into account in setting the amount of fine.

2.1 Competition advocacy and barriers to entry

In its assessment, the Office takes regard of the nature of a particular barrier to entry. When the barriers are of a legislative nature, the Office strives to draw attention to such cases and deals with them in the framework of its competition advocacy. There, the Office consistently uses as an effective instrument in relation to newly proposed legislative acts, policies or other materials the so called interministerial commentary procedure, within the framework of which the Office receives all these documents for comments before their adoption. If the Office indicates any of its comments as “essential”, the institution proposing the document may only agree with such comment in full and modify the material accordingly. Otherwise, the comment is subject to further consultations between the Office and the proposing institution. If an agreement on the issue is not reached, it is finally resolved by the decision of the Government after consideration of both the proposing institution and the Office´s arguments. However, most comments of the Office are fully accepted already by the proposing institutions. Besides the interministerial commentary procedure, the Office co-operates closely in particular with sectoral regulatory institutions, such as the Czech Telecommunications Office or the Energy Regulatory Office and where appropriate also with other relevant entities.

For example, in the latter part of the 90’s the Office dealt with the behaviour of professional associations that had been issuing rules of order creating barriers to admission of new members, such as imposing different requirements related to the period of expert practice and the degrees of post – graduation examinations, the age of applicant or fixing the minimum amount of fees for professional performances (price). For a considerable period of time the professional bodies held the view that competition law did not apply to their actions. Consistent advocacy of competition in relation to professional bodies, particularly chambers and associations, supplemented by a higher number of interventions by the Office against these professional bodies in administrative proceedings, resulted in delineation of the positions of professional bodies towards competition law. The High Court confirmed the supremacy of competition law over the legal rules regulating the operation of professional chambers At the same time, the number of cases of violation of the Competition Act by professional bodies considerably declined.

In 2004 the Office enforced in the process of drafting the Act on postal services that the monopoly position held by the company Česká pošta, a.s. would not be extended to the delivery of direct – mail services. The former drafted act stipulated that these services could be provided only by a holder of a postal licence (the company Česká pošta, a.s.) in the future, which would deprive other undertakings of the possibility of being active on the market. The act on postal services was passed in such a wording that does not result in impeding competition, on the contrary, it contributes to the development of liberalisation on the market for postal services.

The abovementioned case illustrates the fact that the Office encounters barriers to entry mostly on markets that are going through a process of liberalisation. The most notable cases dealt with in the energy and telecommunication sector are described below:

- ***Vertical agreement on prohibition of the re – import of electricity***

In 2003 the Office assessed in an administrative proceeding conduct by the company ČEZ, a.s. (hereinafter referred to as „ČEZ“) that was negotiating in some agreements with its customers a clause according to which electricity which was subject to these agreements must not have been imported back to the Czech Republic. The Office came to the conclusion that such agreements were prohibited within the meaning of the Competition Acts because they resulted in impediment of competition on a given relevant market, although they did not contain a sanction for infringing them.

In considering the conduct of ČEZ, the Office took in account the fact that the anti – competitive nature of such agreements is obvious especially in those cases where a supplier of the product held a highly dominant position, and further in those cases where there was a significant difference between the price for the product supplied onto the domestic market and the price of the product intended for import. Both these prerequisites were met in the case in question. By stipulating, in the sales agreements on supply of electricity intended for import, clauses according to which such electricity must not have been imported back to the Czech Republic, it restricted purchaser's choice of its customer and created a barrier to potential competitors‘ entry into the Czech electricity market. This behaviour led to a restriction of other competitors‘ possibility to offer to their customers their products on more favourable conditions. ČEZ considered electricity that was imported from the Czech Republic an important potential competitive product to whose price it would have been forced to adjust itself on the Czech market. However, as the examined agreements on electricity supply included the clause on prohibition of the re – import of such electricity, a prerequisite for preventing these competitors, unacceptable for the company ČEZ, from entering the Czech market was created. The clause on prohibition of the re – import applied in the period of continuous liberalisation of the market had from the viewpoint of effects on competitive environment amplified adverse impacts. Performance of such a clause resulted in absolute territorial protection of the company ČEZ on the domestic market for electricity supply and might have subsequently resulted in affecting sales prices of a given product to the detriment of end – consumers.

Considering the above – mentioned facts, the Office came to a conclusion that within the sales agreements on supply of electricity intended for import, which the company ČEZ was negotiating with some of its business partners, there were clauses restricting other contractual party's free decision as regards a choice of a customer. The Office considered these agreements to be agreements prohibited, null and void and imposed a fine on the company ČEZ. The Office took into consideration the fact that in electricity sector legislative pre – conditions for the development of fair competition and contest among undertakings were created, however, anti – competitive clause on prohibition of the re – import of electricity included by the company ČEZ into examined agreements on electricity supply restricted these pre – conditions. The company ČEZ has lodged an appeal against the decision. The decision statement was, in substance, upheld by a second – instance body in 2004.

- ***Abuse of dominant position on the market for supplying defined business entities with public telecommunication services via public fixed-line telecommunication networks***

In the autumn of 2002 the Office received several complaints concerning possible abuse of dominant position by the ČESKÝ TELECOM, a.s. (hereinafter referred to as "ČTc") in relation to the preferential tariff programmes' offer. During the preliminary investigation the Office ascertained that the ČTc actually made offers to a number of end customers – business entities in this case – concerning the above mentioned preferential tariff programmes or business terms that contained potentially anti-competitive price provisions. On the basis of the above-mentioned facts the Office opened administrative proceedings accusing ČTc of possible abuse of dominant position in 2003. The Office considered the special preferential tariff programmes' offer made to the business sector to be capable of creating barriers to the development of the competition in the business customers' market of fixed-line telecommunication services. During the administrative proceedings it was proved that ČTc entered into agreements with business entities on supplies of tariff programmes in which its customers were obliged to make a minimum amount of calls every month - charged by so called "contract fees". If the amount of calls was lower than the contract minimum, the customer was charged both prices for calls that were made and the prices for the rest of the calls that were not (the difference between the contracts fees and prices of calls that were made). It was also proved during the administrative proceedings that some contracts between ČTc and its customers included an obligation not to cancel the tariff contract before a fixed date given in the contract on supplies of tariff programmes, or an obligation upon the customers to use exclusively the voice-transmitting service provided by ČTc, at all customer's land-lines. Besides the above – mentioned facts it was also proved that ČTc, while entering the above – mentioned contracts, exercised individual conditions different from the conditions included in the General business conditions and terms or that it created programmes that were applied with the aim to gain or maintain the customer to the competitors' detriment. On the basis of this programmes whose conditions were adjusted by ČTc contracts for the supply of tariff programmes considering individual needs of individual customers ere concluded.

By means of this conduct ČTc created barriers to the development of the competition on the market for supplying defined business entities with public telecommunication services via public fixed-line telecommunication networks. It therefore abused its dominant position causing the detriment of both competitors and consumers in the market.

ČTc was imposed a fine and a duty to remove to the obligation to make a minimum amount of calls every month - so called "contract fees", the provision not to cancel the tariff contract before a fixed given date or the provision to use exclusively the voice-transmitting services provided by ČTc, at all customer's land-lines from the contracts in question. Apart from that it was also imposed upon ČTc to bring the supplying of advantaged tariff programmes to an end and set the conditions for the supplying of advantaged tariff programmes in such way a that it will not be possible to supply the advantaged tariff programmes according to the individual conditions. The decision entered into force in 2004. ČTc complied with the remedial measure.

FINLAND

The approach of the Finnish Competition Authority (hereinafter the FCA) to barriers to entry is provided in the Merger Guidelines whereby the FCA defines and categorises barriers to entry and provides some examples of forms that barriers to entry can take. In the Finnish competition law enforcement practice, barriers to entry have been identified e.g., in the telecommunications sector.

1. The definition of entry barriers

As regards the definition of barriers to entry, the FCA has stated in the Merger Guidelines that barriers to entry affect the likelihood and extent to which the threat of potential competition constrains the ability of the incumbents to act independently of other market participants. The FCA's statement in the Merger Guidelines - arguably influenced by the approach according to which any impediment that has the effect of reducing competition constitutes a barrier to entry - is also applicable in abuse of dominant position cases. A barrier to entry can thus be defined in the Finnish competition law as an impediment that fulfils the criteria of affecting the constraining effect of the threat of potential competition.

In the Merger Guidelines barriers to entry are divided into legal, economical and technical barriers. Legal barriers to entry may consist of intellectual property rights, production quotas set by the public administration, licences and type approvals. Economical barriers to entry may consist of the high costs of market entry and exit, in particular compared to the expected revenues. The presumption is that entry is likely if the expected revenues are high. Economical barriers to entry may also consist of the threat to use excess capacity, the lack of distribution channels and supply sources, the strength of the incumbents' brands, cooperation between suppliers and customers and the cross-ownerships. Technical barriers to entry may consist of economies of scale and scope, production processes and innovations. The presumption is that barriers to entry are high if the volume that is needed to attain the economies of scope possessed by the incumbents is large. Technical barriers to entry may also consist of economies of scale possessed by conglomerates and vertically integrated firms. As regards vertically integrated firms, barriers to entry may result from the requirement of simultaneous entry to different market levels and from the fact that it may be disadvantageous to operate at only one market level.

In the Finnish competition law enforcement practice it is not required that, as a result of barriers to entry, entry would be foreclosed entirely. The existence of barriers to entry may, as such, indicate the incumbents' ability to restrain entrants from achieving a market position that would be competitively significant. Entry costs are assessed to prevent entry when they are significant and do not affect the behaviour of the incumbents.

It is recognised in the Merger Guidelines that the significance of barriers to entry varies in the context of different markets and different market phases. In some markets, a single factor, e.g. the lack of distribution channel, raw material, technology or strong brand can be decisive. The significance of barriers to entry is assessed in the light of previous entry and the market position achieved by an entrant.

According to the Merger Guidelines the FCA also takes into account barriers to exit while it assesses barriers to entry. Barriers to exit consist of costs materialising in the event of market exit. Even a minor risk of failure is assessed to deter entry if entry costs are significant and investments related to these costs cannot be exploited in other businesses.

2. Measuring/Assessing entry barriers

In merger cases, the FCA receives information about the barriers to entry from the replies of its questionnaires to competitors, customers, suppliers and eventually to trade associations. Market participants are requested to provide information about the types of barriers to entry in the market and to assess their significance as well as to provide information about firms that have recently entered or exited market and the alleged reasons for entry or exit. In addition, the notifying parties must also provide similar information in the notification form.[1]

3. Does the concept of entry barriers change from one type of competition case to another?

In the Finnish competition law enforcement practice, the substantive evaluation of barriers to entry does not change according to the type of competition case. A certain factor is identified as a barrier to entry if it fulfils the general criteria set for a barrier. The FCA therefore evaluates barriers to entry similarly in merger cases and abuse of dominant position cases.

However, it could be asked whether barriers to entry have different roles in the assessment in merger cases compared to abuse of dominant position cases and whether any potential differences in their roles could affect to the concept of barriers to entry. In merger cases the focus of the FCA's analysis has been on the constraining effect of entry, i.e. whether the exercise of market power could be constrained by potential competition or not. If the FCA identifies barriers to entry in a concentrated market, it is more likely to conclude that the merger creates or strengthens a dominant position which significantly impedes competition. As regards vertical mergers, competition concerns have typically derived from the merged entity's incentive to foreclose entry with the effect of price increases. However, the FCA has identified competition concerns only when one of the merging parties has already had market power in one of the markets concerned.

In abuse of dominant position cases, the FCA's analysis has focused on the behaviour of the incumbents, e.g. the incumbents' pricing which deters entry, enabling the FCA to conclude the existence of competition constraints. Behaviour which has been identified as a barrier to entry has thus simultaneously fulfilled the criteria of abusive conduct. As regards the assessment of dominant position in abuse of dominant position cases, the role of barriers to entry in the FCA's analysis has not been decisive. This is mostly due to the fact that in this context a dominant position is analysed *ex ante*.

4. Duration of entry barriers

The Merger Guidelines do not provide for any minimum amount of time an impediment must persist. The Guidelines state explicitly that it is not required that entry is foreclosed for an indefinite time. It is sufficient that barriers to entry delay and constrict entry within the time frame that is considered significant for the functioning of competition. This time frame varies in the context of different markets.

5. Structural versus strategic barriers to entry

The Merger Guidelines recognise that barriers to entry can also be divided into natural and strategic barriers to entry. Natural barriers to entry are defined as barriers which are not created by the incumbents.

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[1] The notification shall be made in accordance with the decision on the Obligation to Notify a Concentration by the Ministry of Trade and Industry (499/1998). In section 7.2.5 of the notification form the notifying party or parties have to provide information about the recent entries and exits as well as to provide information about the main factors affecting the ease of market entry or exit or the profitability of business operation.

They mostly consist of the above-mentioned technical barriers. Strategic barriers to entry result from the behaviour of the incumbents and consist of the incumbents' ability to raise the rivals' costs or to reduce the expected revenues. The Merger Guidelines further state that the rivals' costs can be raised by raising the costs of access to supply or distribution. Similar effects may result where demand and therewith the success of entry is significantly affected by advertising. Entry may be deterred as a result of increased advertising by the incumbents possessing significant economic resources. Incumbents may also price their products in a way that reduces the customers' ability to switch suppliers and that therewith reduces the rivals' revenues.

The division of barriers to entry into different categories does not affect the way they are assessed in the Finnish competition law enforcement practice. Any factor fulfilling the criteria of barriers to entry will be taken into account regardless of whether it is categorised as a structural or a strategic barrier.

6. Is it necessary to agree on a specific definition of entry barriers?

It could be asked whether it is sufficient that the competition authority identifies certain factors that render entry and concludes e.g. in merger cases that the alleged exercise of market power of the merged entity is not constrained by potential competition, or whether these factors should be defined as barriers to entry.

If the presumption is that barriers to entry must be defined, a key question is when an obstacle becomes a barrier. In other words, not all factors that complicate entry are considered to fulfil the criteria of barriers to entry. The way barriers to entry are defined reflects the scope of obstacles fulfilling the criteria of barriers to entry. The scope of any impediment having the effect of reducing competition is wider than the scope of impediments that the incumbents did not encounter when they entered the market.

The explicit definition of barriers to entry may increase the predictability of competition policy. However, it should be noted that barriers to entry are always analysed in the context of industry. In the Finnish competition law enforcement practice this flexibility is reflected e.g., in the Merger Guidelines which state that the significance of the barriers to entry varies in the context of different markets and different market phases.

7. Experience with entry barriers

7.1 Abuse of dominant position

The FCA and the Market Court have assessed barriers to entry, among others, in the telecommunications sector. In this sector barriers to entry have mainly consisted of the behaviour of the incumbents, i.e. the ability to control access to supply and infrastructure and the ability to raise the rivals' costs and restrain entrants from achieving a market position that would be competitively significant.

Some of the cases in which the FCA and the Market Court have analysed barriers to entry are discussed below.

In October 2004, the FCA decided to propose to the regional telephone company Lännen Puhelin Inc. an infringement fine of one million euros for abuse of dominant position in the broadband service market. According to the proposal made by the FCA to the Market Court, Lännen Puhelin had breached the Competition Act by refusing to grant access to the regional network governed by Lännen Puhelin on conditions whereby competitors, too, could have offered broadband connections to consumers at a profitable price. The entry of competing operators into the broadband market requires that they are able to rent a so-called ADSL wholesale product from the company governing the regional network. The FCA stated in its proposal that the price charged by Lännen Puhelin for the broadband wholesale product together with the technical characteristics of the product rendered competitors' entry into Lännen Puhelin's operating area unlikely. The FCA concluded that the pricing and technical characteristics led to restriction of competition. Lännen Puhelin offered competitors wholesale products which were based on two different technologies. As regards the product based on ATM technology, Lännen Puhelin applied so-called price-squeeze. As regards the product based on IP/Ethernet technology, the FCA stated that the technical characteristics of the product were such that only the own service provider of Lännen Puhelin has been able to use it to offer broadband connections to the consumers. Lännen Puhelin did not provide its competitors with an ADSL network product which would have enabled them to enter the market. As a result of this, Lännen Puhelin has been the sole provider of broadband connections in the region with its more than a 90 per cent market share. The case is still pending at the Market Court.[2]

In December 2001, the Competition Council (currently the Market Court) issued a decision concerning the alleged restrictive practices of Sonera Plc, Finland's largest mobile phone operator, with regard to its roaming prices. The Competition Council confirmed the FCA's view that Sonera does not have a dominant position in the market for access to national mobile phone networks. The Council did, however, overturn the FCA's decision to the extent that Sonera's pricing had no harmful effects on economic competition, and referred the case back to the FCA. The objective was to establish the degree to which Sonera could possibly otherwise prevent or slow down the competitors' entry to the field of business through the pricing of its network services.[3]

In May 2001, the Competition Council issued a decision in Elisa Communications Plc, Turun Puhelin Inc. and Salon Seudun puhelin Inc. where it stated that each of these telephone companies had a dominant position with regard to offering fixed subscriber lines within its own operating area, and that the companies had abused their dominant positions by pricing the subscriber lines in a way that was discriminatory, tying and unreasonable. The competition restriction was implemented both by using dual pricing where new customers, i.e. mainly new competitors, were charged clearly higher prices than old customers, and through tying contractual terms where the prices were tied to the term of the agreement. The companies controlling the subscriber line network had been charging their competitors a substantially higher price for the bottleneck utility than the price offered to their own service operator. The monopolistic pricing had rendered the competitors' entry into the local markets unprofitable. The actions were also deemed to have resulted in the market shares of these companies remaining at over 90 per cent in their traditional operating areas. With their pricing of subscriber lines, the companies had prevented new companies from entering the market and protected their own dominant positions.[4]

The FCA has examined the potential competition restraints in the broadband Internet service markets. The aim of this project was to eliminate competition restraints that were identified. In its report of 2002 the FCA found that the major problems in the wholesale market of broadband services involved pricing. In order to access the Internet, the service provider obtains network capacity from the network operator. Telecom companies have a legal obligation to also lease network access to outside service providers. Prior to the start of the FCA's project almost all local telecom companies collected such high broadband access charges that entry of competing operators was virtually impossible. The FCA thus intervened forcefully with the terms for network access applied by local telecom companies.[5] The cases were settled in order to achieve a quick result in the market that experiences high growth.

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2 Press release, 27 October 2004, FCA proposes infringement fine of one million euros to Lännen Puhelin.

3 FCA's Yearbook 2002, pp. 21-22.

4 FCA's Yearbook 2002, p. 21.

5 Press release, 27 June 2003, FCA's ADSL project increases choice in broadband Internet service market; Press release, 28 June 2002, Competition Concerns on broadband service market.

As regards other sectors, the FCA issued a decision in May 2005 where it stated that Suomen Numeropalvelu Ltd (Finnish Telephone Number Service, hereinafter SNOY) has committed abuse of dominant position. SNOY maintains a national database of telephone subscriber information and resells the information to companies offering telephone directory services. In this market SNOY has no competitors at the moment. In addition, SNOY is also active in the downstream market. SNOY claimed that its customer companies offering telephone directory services cannot offer their services to end customers for free and without prior registration over the Internet. The FCA found that SNOY's conduct was ultimately an attempt to prevent the entry of competitors offering a new type of service. The FCA ordered SNOY to terminate the restrictive conduct and proposed competition infringement fine.[6]

7.2 Mergers

In merger cases, the FCA assesses barriers to entry in its assessment of competitive constraints, i.e. in the context of the likelihood of entry. Barriers to entry have consisted of e.g. the incumbents' ability to control access to supply, infrastructure and distribution, the ability to raise the rivals' costs and restrain entrants from achieving a market position that would be competitively significant and the strength of the incumbents' brands.

Some of the cases in which the FCA has analysed barriers to entry are discussed below.

In August 2001, the FCA conditionally approved an acquisition whereby Sonera Plc (Sonera) acquired control in local telephone companies, Loimaan Seudun Puhelin Inc. (LSP) and Turun Puhelin Inc. (TP). The FCA found that the acquisition would have led to the creation or strengthening of a dominant position significantly impeding competition at least in the markets of leasing network subscriber line, leasing the trunk network and leasing cable television network and the equipment required for the maintenance of the mobile phone networks locally and the markets of the mobile telephony services nationally. In addition, the FCA stated that the acquisition would have clearly increased Sonera's market power at least in the market of data transmission and Internet services and telecom services and long-distance and international telecom services in Finland. This is e.g. due to LSP and TP having acted as the major distribution channels of certain products of Sonera's competitors. The FCA stated that the elimination of the LSP and TP as distribution channels would have weakened the positions of the recent entrants and potential competitors. As regards Sonera's market position in the markets of the mobile telephony services nationally, the FCA stated that e.g. the following factors made entry difficult: In order to provide services an entrant is required to have its own mobile phone network or be able to otherwise exploit an already established network. The building costs of the network are significant and the fact that 70 per cent of customers already had a subscriber connection rendered the network investment unprofitable. Without its own network, an entrant has to gain access to the network which is operated and priced by the competitor. In addition, the FCA stated that the established incumbents have an apparent incentive to prevent the commencing of the network effects related to the entrants' business operations and independent of the incumbents' network at an earliest possible stage. The FCA also took into account that, despite its economical resources, Telia failed to achieve a competitively significant market position in Finland. Telia's failure was assessed to indicate difficulties associated with entry. The FCA concluded that the acquisition would have resulted in a situation where one group of companies in the LSP's and TP's operating area would have simultaneously controlled all major customer interfaces and the infrastructure needed in the supply of the competing fixed network and mobile telephony services. The key conditions imposed on the acquisition included that LSP and TP give up the majority of the mobile telephony infrastructure they had previously leased to Sonera's competitors and that Sonera sell the local fixed area

6 Press release, 18 May 2005, FCA orders SNOY to terminate restrictive conduct and proposes competition infringement fine of 150'000 euros.

network it had constructed in the LSP and TP's operating area. In addition, TP undertook to sell one of its regional telecom centres and to lease part of its cable television network capacity to its competitors.[7]

In February 2001, the FCA conditionally approved an acquisition whereby Finland Post Inc. acquired control in Atkos Printmail Inc. Finland Post is a monopolist in the delivery of addressed letters in Finland whereas Atkos Printmail provides its customers with printing, mailing and direct marketing services. The FCA stated that the merger provided Finland Post with an opportunity to use postal charges to cross-subsidise the competing elements of the eLetter service, such as printing and mailing. The merger resulted also in Finland Post having the ability of using package pricing and joint marketing to make it more difficult for new players to enter the market. The merger was subject to a conditional approval whereby Finland Post committed e.g. to offering the delivery services for products similar to the eLetter at terms and conditions that are general, equal, non-discriminatory and transparent, to external companies and companies within the Finland Post Group. This remedy was assessed to reduce the risk of cross-subvention associated with the merger.[8]

In June 2000, the FCA conditionally approved an acquisition whereby Valio Inc. acquired control in Osuuskunta Maito-Pirkka, Kainuun Osuusmeijeri and Aito Maito Inc. Valio is vertically integrated group which manufactures, distributes and markets several dairy products whereas the targets of the acquisition were regional dairies. As a result of the merger, e.g. the share of the Valio Group in the purchase of raw milk from producers increased up to approximately 80 per cent. The FCA stated that Valio's competitors may be dependent on Valio's supply of raw milk. The main competitive problems were e.g. related to the purchase of raw milk by Valio's actual and potential competitors and deliveries of raw milk to the producers of upgraded products. Valio committed e.g. to selling an annual maximum of 150 million litres of raw milk to its competitors at its own purchase price and to offering logistical services to competitors. The commitment regarding logistics was assessed to create possibilities to tender different logistical systems and lower the access threshold to the market by potential competitors.[9]

7 FCA's Yearbook, 2002, pp. 33; Press release, 6 August 2001. Acquisition of Loimaan Seudun Puhelin by Sonera approved conditionally.

8 FCA's Yearbook, 2002, pp. 31-32.

9 Press release, 20 June 2000. Conditional approval of acquisition of Osuuskunta Maito-Pirkka, Kainuun osuusmeijeri and Aito Maito by Valio.

FRANCE

Le Conseil de la concurrence utilise la notion de barrières à l'entrée dans les deux volets de son intervention : *ex post* pour l'analyse des pratiques anticoncurrentielles, *ex ante* dans les concentrations.

En matière de concentration, le Conseil effectue un exercice prospectif consistant pour l'essentiel à évaluer si l'opération concernée risque de contraindre structurellement le jeu concurrentiel sur un marché donné ou d'augmenter la probabilité de survenue de pratiques anticoncurrentielles de la part de la nouvelle entité en mettant notamment l'accent sur les pratiques d'exclusion de concurrents. Dans l'analyse des effets des opérations de concentration, le Conseil de la concurrence se concentre largement sur l'évaluation de la concurrence potentielle et notamment sur la crédibilité de l'entrée de nouveaux offreurs sur un marché pertinent en se fondant sur l'importance des barrières à l'entrée.

En matière d'abus de position dominante, il ne s'agit plus d'évaluer la probabilité de survenue d'un comportement anticoncurrentiel mais de qualifier un tel comportement. Les barrières à l'entrée sont l'un des éléments essentiels à la conduite de l'analyse concurrentielle d'un marché, tant sur le plan de l'appréciation de la position dominante simple ou collective d'un acteur ou d'un groupe d'acteur, que sur le plan de l'appréciation des effets potentiels ou réels d'une pratique anti-concurrentielle avérée ou présumée (y compris les ententes). Dans les affaires notamment d'abus de position dominante ou d'abus de dépendance économique, le Conseil de la concurrence constate au cas par cas, de manière directe ou indirecte, l'existence de barrières à l'entrée sur un marché pertinent donné pour ensuite évaluer leur impact. Il suit en cela une procédure en trois étapes :

> "Il convient dans un premier temps de délimiter le marché pertinent sur lequel l'entreprise ou le groupe d'entreprises en cause opèrent. Dans un deuxième temps, il est nécessaire de déterminer la position que ces dernières occupent sur ce marché puis, dans un troisième temps, au cas où la position dominante est caractérisée, d'examiner ces pratiques en vue de déterminer si elles présentent un caractère abusif et anticoncurrentiel. Le Conseil ne peut examiner les pratiques prétendument abusives mises en œuvre par une entreprise, dès lors qu'il constate que celle-ci n'est pas en position dominante sur un marché"[1].

La première étape de cette procédure s'avère également utile lors de l'analyse des pratiques d'ententes, notamment pour ce qui est de la recherche d'éléments facilitant l'entente ou le contrôle interne de l'entente (mise en place de mécanismes de rétorsion). Ces éléments facilitant sont en général structurels et comprennent les barrières à l'entrée : il est en général plus facile de construire une entente sur un marché comportant de fortes barrières à l'entrée. La détection de barrière à l'entrée intervient ainsi à chacun des stades de l'analyse : définition de marché, définition de la dominance, analyse du comportement anti-concurrentiel présumé et de ses effets. Au cours des deux premiers stades, à l'instar de l'analyse des ententes, les éléments recherchés sont le plus souvent structurels, et on s'intéresse communément aux barrières dites "*naturelles*" à l'entrée que l'on oppose à celle recherchés au troisième stade, les barrières comportementales (c'est à dire à l'initiative d'une entreprise ou d'un groupe d'entreprise).

Dans son rapport d'activité pour l'année 2000, le Conseil de la concurrence établissait une définition de ses barrières :

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1 Rapport annuel du Conseil de la concurrence, 2004, pp 227-228.

"On peut distinguer plusieurs catégories de barrières à l'entrée. Certaines sont liées à l'importance des économies d'échelle dans le secteur concerné. Plus les économies d'échelle sont importantes, plus la part de marché que doit conquérir un nouvel entrant afin d'atteindre le seuil de rentabilité est importante, rendant peu probables de nouvelles entrées. D'autres barrières s'expliquent par les avantages de coûts accumulés par les entreprises déjà présentes sur le marché, par rapport à un nouvel entrant, comme par exemple un savoir-faire, des brevets ou des marques. Les barrières réglementaires comprennent les réglementations, normes ou certifications spécifiques à l'activité ou au produit. Les barrières comportementales, telles que l'attachement à la marque ou à une technologie, les habitudes nationales ou régionales, ou encore le comportement d'achat des distributeurs, sont également susceptibles de rendre peu crédible l'hypothèse de nouvelles entrées".

1. Les barrières naturelles

La liste des facteurs qualifiés par le Conseil de la concurrence de barrières naturelles à l'entrée, serait longue et fastidieuse, tant la jurisprudence est abondante en la matière. Parmi les barrières naturelles, on retrouve par exemple dans la jurisprudence récente :

- Les barrières réglementaires comme les appellations d'origine :

  "le groupe Société se trouvait en position dominante sur le marché du roquefort, position renforcée (…) par le fait qu'une barrière à l'entrée de type réglementaire existait en raison de l'obligation faite aux producteurs de n'utiliser, pour la fabrication du roquefort, que du lait de brebis provenant exclusivement du "rayon roquefort" et de l'affiner dans les caves du village de Roquefort dont le groupe est le principal propriétaire[2] (04-D-13)" ;

- la rareté des ressources, le niveau d'investissement :

  "d'un point de vue structurel, l'ART estime que le marché de détail [de la téléphonie mobile] se caractérise par (…) de fortes barrières à l'entrée : naturelles (les fréquences sont des ressources rares), réglementaires (nombre limité d'autorisations : 3 en GSM, 4 en UMTS, dont l'une n'a pas été attribuée ; coûts fixes importants (le déploiement d'un réseau mobile coûte environ 7 milliards € selon les estimations fournies par SFR). (…) L'importance des barrières à l'entrée est confirmée par le fait que la quatrième licence UMTS disponible n'a pas fait l'objet, jusqu'à présent, de candidatures" (avis 05-A-09 avis rendu à l'ARCEP dans le cadre de l'analyse des marchés régulables des communications électroniques[3]).

- le niveau de prix lorsqu'il est fixé de manière réglementaire :

  "la faiblesse du prix fixé par les pouvoirs publics pour les MNC remboursables (…) à 1,81 € et inchangé depuis 1988 (…) constitue par elle-même une importante barrière à l'entrée. Le Conseil de la concurrence considère que le niveau du prix fixé pour les MNC remboursables est une barrière à l'entrée puisqu'il empêche de facto des laboratoires qui seraient des entrants potentiels d'envisager une activité rentable dans ce domaine" (avis concentration relatif à la fusion des sociétés Boiron et Dolisos dans le secteur de l'homéopathie, 05-A-01).

- les effets de gamme :

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2 Op. cit. pp 230.

3 Voir également la décision 04-D-48 ou l'avis 04-A-17.

> « sur le marché des SNC, l'effet de levier produit par la détention d'un portefeuille de médicaments en nom de marques, dont certaines notoires, rend également les entrées plus difficiles sauf pour les laboratoires déjà présents sur les marchés des MNM" (avis concentration 05-A-01).

Au travers de l'analyse de ces barrières à l'entrée le Conseil cherche à évaluer les possibilités d'entrée ou de sorties des acteurs sur le marché, et donc d'évaluer la force des barrières à l'entrée. La richesse de la jurisprudence est un excellent indicateur de la difficulté à quantifier le niveau d'une barrière à l'entrée.

Les deux cas suivants illustrent des cas simples partant de la question la plus basique en matière de barrières à l'entrée : y-a-t-il eu des entrants ? Ils montrent toute l'ambiguïté soulevée par l'appréciation de ce type de barrières et illustrent la difficulté voire l'impossibilité de mise en place de critères d'appréciation. Dans sa décision 04-D-17 relatif à des pratiques de Wanadoo sur le marché de l'ADSL, le Conseil estimait que :

> "le secteur est encore en forte expansion et le développement rapide de nouveaux entrants et de certains concurrents comme 9Télécom, AliceADSL (filiale de Télécom Italia), Cegetel et Télé2 France, laisse penser qu'il n'existe pas de barrières insurmontables à l'entrée sur le marché de l'accès à Internet".

Il emploie ici une sorte de "backward induction" : la constatation d'entrées sur un marché permet de conclure que les barrières même si elles existent ne sont pas "insurmontables" et donc ne sont en quelques sortes pas avérées. Cependant, la réciproque est fausse. Dans l'avis concentration 03-A-15 relatif à l'acquisition de la société Atos Investissement par la société Experian Holding France, le Conseil précisait que :

> "l'absence d'entrée récente sur le marché n'est pas, en l'absence d'éléments objectifs indiquant l'existence de barrières à l'entrée, de nature à démontrer à elle seule que l'entrée sur le marché est impossible, dans la mesure où cette absence d'entrée peut être due à de nombreux autres facteurs. Au cas d'espèce, (…) l'absence d'entrée constatée depuis trois ans sur le marché du traitement de chèques devait être replacée dans un contexte de baisse de la rentabilité des opérateurs".

2. Les barrières comportementales ou stratégiques

Contrairement aux barrières naturelles, les barrières stratégiques sont l'effet du comportement des entreprises en place. Ce comportement peut être loyal et représentatif de la concurrence sur le marché étudié (concurrence par les mérites) ou déloyal (c'est à dire anti-concurrentiel). En matière de pratiques anti-concurrentielles (ententes ou abus de position dominante), le Conseil qualifie la pratique puis l'examen des effets permet d'évaluer l'impact de la pratique sur l'entrée ou la sortie du marché. Fondamentalement, toutes les pratiques anti-concurrentielles sont susceptibles d'être à l'origine d'une barrière artificielle à l'entrée. La réciproque est bien entendu fausse : une barrière artificielle à l'entrée, comme l'investissement publicitaire ou les droits de propriété, peut être levée par des acteurs sans comportement anti-concurrentiel. La jurisprudence est une fois de plus riche en la matière. Les pratiques de prix (prédation, ciseau tarifaire, prix excessifs), de dissuasion, ou les stratégies plus complexes agissant sur la demande (fidélisation des consommateurs, exclusivité, augmentation des coûts de changements d'opérateurs) ou sur les coûts des concurrents sont susceptibles de créer des barrières artificielles ou stratégiques à l'entrée. Quelques exemples de la jurisprudence récente permettent d'apprécier les difficultés inhérentes à l'évaluation de ces barrières.

En ce qui concerne les clauses d'exclusivité, le Conseil a, dans son affaire 04-MC-02 relative à des pratiques d'Orange Caraïbes considéré :

> "qu'il pouvait être raisonnablement présumé que la clause d'exclusivité liant Orange Caraïbe au seul réparateur de terminaux mobiles constituait un abus de position dominante. Une telle clause crée en effet une barrière à l'entrée pour les nouveaux entrants en augmentant artificiellement le coût d'entrée par des coûts fixes importants, difficilement amortissables sur une part de marché nécessairement très faible".

Les pratiques étaient d'autant plus graves que le marché en cause était proche de la saturation. Cependant dans l'affaire 02-D-03 relative à la publicité cinématographique, le Conseil estimait que la clause d'exclusivité ne constituait pas une barrière à l'entrée sur le marché de la publicité, cinématographique locale puisque sur ce marché les sociétés concurrentes étaient en constante progression.

Le caractère notoire des marques, la réputation des entreprises en place ou encore la forte différentiation des produits peuvent également apparaître comme une barrière à l'entrée : l'entrée est contrainte par l'ampleur de l'effort publicitaire (revêtant la forme d'un coût perdu) nécessaire à la pénétration du marché. Dans l'avis 02-A-07 relatif à la concentration Seb-Moulinex, le Conseil soulignait que :

> "La notoriété des marques commercialisées par le groupe Seb pourrait, en cas d'attachement des consommateurs à la marque, constituer une barrière à l'entrée puisque l'acquisition d'une forte notoriété suppose des dépenses de publicité importantes qui sont éventuellement perdues en cas d'échec".

Cependant, comme dans l'affaire relative n° 00-A-07 relative à l'acquisition de certains actifs du groupe Benckiser (dont la marque de cirage Baranne) par le groupe Sara Lee (qui exploitait la marque de cirage Kiwi), le Conseil rejetait l'existence de barrières insurmontables à l'entrée :

> "la constatation selon laquelle il n'existait pas (…) d'alternative à l'offre proposée par les groupes parties à l'opération, a été relativisée par l'analyse de la notoriété des marques et de l'attachement des consommateurs aux marques notoires. Il a en effet été considéré que, si Kiwi et Baranne étaient bien les seules marques notoires présentes sur le marché, les consommateurs ne manifestaient pas à ces marques un attachement tel qu'il puisse empêcher l'entrée sur le marché de nouveaux produits, telles que des marques étrangères ou des marques de distributeurs".

Certaines pratiques paraissent indissociables de l'existence de barrières à l'entrée. Dans l'affaire n° 04-D-10 relatif à la carte illimitée d'abonnement annuel dans les cinémas UGC, le Conseil a rappelé que pour qu'une stratégie de prédation puisse se développer, il faut :

> "D'une part, que les concurrents ne puissent pas résister trop longtemps aux prix bas et décident de sortir assez vite du marché et d'autre part, qu'il existe des barrières à l'entrée substantielles sur le marché considéré, de manière à ce que les prix élevés pratiqués dans le futur n'induisent pas le retour des concurrents évincés ou l'entrée de nouveaux opérateurs".

Dans la décision 03-D-43 relative au non-respect des injonctions prononcées à l'encontre de la société France Télécom dans le secteur des annuaires, le Conseil a considéré que des prix excessifs, tant pour la mise à disposition de la base annuaire complète, que pour la consultation en ligne, avaient eu pour effet de créer une barrière artificielle à l'entrée sur les marchés en aval et d'empêcher le développement d'activités concurrentes de celles de France Télécom, en particulier les services d'annuaire et de renseignement.

3. Vers une définition générale

L'évaluation des barrières issue de la pratique ne peut être que subjective et qualitative : subjective parce que relative à un secteur donné à un cas d'espèce à un temps donné, qualitative parce qu'il est difficile de quantifier l'impact que pourrait avoir une barrière à l'entrée sur la constestabilité d'un marché. Le seul élément sur lequel tout à chacun s'entend est que le nombre ou la combinaison de plusieurs barrières à l'entrée conduit à une contestabilité moindre du marché. Ainsi, l'exercice consistant à dresser une liste des barrières existant sur un marché est un premier pas vers l'évaluation de celles-ci. Étant issue de l'expérience, l'évaluation des barrières à l'entrée apparaît comme un processus qui relève de la boîte noire. Il est en cela difficile de le définir.

L'expérience montre donc que les barrières à l'entrée couvrent le champ de l'ensemble des définitions de la littérature économique telles que répertoriées par Mc Afee, Mialon et Williams (2004)[4]. Le pragmatisme conduit naturellement à définir la notion de façon plus large :

> Une barrière à l'entrée est tout élément structurel ou stratégique qui, seul ou en combinaison avec d'autres, affaiblit ou tend à affaiblir de manière persistante la contestabilité d'un marché ou d'un secteur donné.

Deux idées essentielles émanent de cette définition. La première idée est qu'une barrière à l'entrée est un facteur qui tend à éloigner les conditions de marché des conditions de référence de la concurrence pure et parfaite : tout élément induisant une déviation de cette référence contribue à contraindre la libre entrée ou sortie du marché et constitue, en soi, une barrière à l'entrée. La seconde est l'introduction d'un caractère temporel : une barrière à l'entrée n'existe que si elle dure longtemps par comparaison au "*temps normal*" du marché. Ce "*temps normal*" est bien entendu fonction du secteur concerné : dans le secteur des nouvelles technologies, le temps normal peut être de quelques mois alors qu'il se compte en année dans des secteurs plus matures comme le bois ou le textile.

La question principale et délicate en droit de la concurrence demeure néanmoins avec cette définition: est-ce que une barrière stratégique est anti-concurrentielle, i.e. mise en place par un ou des acteurs économiques pour protéger leur marché et affaiblir sa constestabilité ? Il est possible de répondre à cette question par une autre tirée de la jurisprudence du Conseil. En effet, dans sa décision n° 04-D-48 du 14 octobre 2004 relative à des pratiques mises en œuvre par France Télécom, SFR Cegetel et Bouygues Télécom, le Conseil précisait que :

> "les tarifs de détail qui (…) ne permettent pas à un concurrent ayant les mêmes coûts que France Télécom de faire des offres compétitives (…) élèvent les barrières à l'entrée sur les marchés des communications fixes vers mobiles aux entreprises par des moyens ne relevant pas de la concurrence par les mérites".

Dans le même sens, dans sa décision 03-D-01 relative au comportement de sociétés du groupe L'Air liquide dans le secteur des gaz médicaux, le Conseil a constaté que les sociétés :

> "ont renforcé les barrières à l'entrée sur le marché des gaz médicaux par des moyens excédant les limites d'un comportement compétitif normal et d'une concurrence légitime".

La vraie question semble donc une question usuelle du droit de la concurrence : est-ce que la barrière à l'entrée est issue d'une pratique usant de moyens ne relevant pas de la concurrence par les mérites ?

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4 R. Preston Mc Afee, Hugo M. Mialon, et Michael A. Williams, « *When are sunk costs barriers to entry? Entry barriers in economic and antitrust analysis* », American Economic Review, mai 2004, vol. 94, n° 2.

GERMANY

Introduction

Generally speaking, barriers to market entry create conditions which make it difficult for new competitors to enter the market. They are therefore a significant indicator for the extent to which potential competition exists. Where a market is characterised by high barriers to entry, the incentive to enter the market is low and consequently potential competition is weak. Where a market is characterised by low barriers to entry, however, it is to be expected that further companies will enter the market. Consequently, barriers to market entry have an impact on the competitive behaviour of undertakings, both, those that are already active in the market and orientate their market strategy towards potential competitors, and those that are potential competitors and consider entering the market. There are three forms of market entry: (1) market extension, (2) product extension by established companies by external or internal diversification into a different market or (3) start-up of a company.

1. The definition of barriers to entry

International discussion of this issue in scientific literature is still largely dominated by the definitions of *George Stigler* and *Joe S. Bain*. *Stigle*r defines barriers to entry as "...a cost of producing ... which must be borne by a firm which seeks to enter a industry but which is not to be borne by firms already in the industry."[1] *Bain* sees barriers to entry as "the extent to which, in the long run, established firms can elevate their selling prices above the minimal average costs of production and distribution…without inducing potential entrants to enter the industry."[2]

Barriers to entry play a significant role in German decision-making practice. They are one of the criteria which are taken into account as part of an overall appraisal of various market characteristics when establishing whether a dominant position can be affirmed. Just as market shares give an indication of the relationship between the current competitors, barriers to entry provide information on the significance of potential competitors for competition in the market concerned. However, the practice of German competition authorities and courts is not based on a general definition of barriers to entry. Rather, the focus is on the actual market situation which is established by means of market analysis. The structural characteristics of a market and the competitive behaviour of the market participants are examined with regard to their tangible effects on the market. Based on the results of these examinations it is established whether the market is characterised by high barriers to entry and to what extent potential competition really exists.

The decision-making practice of the Bundeskartellamt has shown, however, that both the possibilities of established companies to avoid competitive pressure (barriers to entry according to *Bain'*s definition) and the low profit expectations of potential competitors (barriers to entry according to *Stigler*'s definition) can constitute barriers to entry. This is based on the opinion that the differences between the definitions of *Bain* and *Stigler* are blurred and that they are often interdependent or overlap each other. This is

1 Stigler, Barriers to Entry, Economies of Scale, and Firm Size in: Stigler, The Organization of Industry, p. 67.

2 Bain, Barriers to New Competition, p. 3.

particularly the case because in practice often several factors have an accumulated effect on the competitive situation in a market.

For example, the Bundeskartellamt assumed market dominance in several merger cases concerning cable network operators in the telecommunications sector also because potential newcomers to this market were faced with high barriers to entry in the form of necessary investments in their own networks. On the one hand considerable investment costs are a factor potential competitors have to take into account because they reduce their profit expectations. On the other hand, they reduce competitive pressure for the established companies simply by constituting a barrier for newcomers. Where the established companies have further structural advantages, such as company size or product differentiation, competitive pressure decreases even further. At the same time investment risks for potential competitors rise and their profit expectations fall.

2. Different types of barriers to entry

According to the Bundeskartellamt's decision practice barriers to entry can be roughly divided into three categories:

- **statutory** barriers to entry
- **structural** barriers to entry
- **strategic** barriers to entry

2.1 Statutory barriers to entry

Statutory barriers to entry are those set up in the context of the state's monopoly on power in the form of laws, regulations and administrative practice. Legal provisions or administrative regulations may restrict entry or the use of certain parameters by companies, thereby decreasing potential competition in favour of established companies. Some examples of the decision practice in Germany are:

- restrictions on granting permission for operations that are damaging to the environment, or special waste disposal regulations[3];
- nation-wide individual procedures for the clearance of pharmaceuticals[4]
- the protection of patents[5] and
- restrictions on granting permission for transport companies in the local public transport sector[6].

Statutory regulations may also be used by established suppliers in individual cases in order to consciously extend barriers to entry, thereby deterring potential suppliers from entering the market. This shows once more that no clear-cut distinctions can be made between the categories of barriers to entry. An example of this is the targeted and comprehensive use of commercial legal protection, particularly the

3 112 WuW/E BKartA 2247, 2250 "Hüls/Condea" (1986), cf. also Commission, judgment of 20.09.1995 "Orkla/Volvo" OJ. EC 1996 L 66/17, para. 106.

4 WuW/E BKartA 2591, 2601 "Fresenius/Schiwa" (1993).

5 Bundeskartellamt "Degussa/Elephant Holding BV",1993/94 Activity Report, p. 79; Bundeskartellamt case "BTR/MCC Holding" 1997/98 Activity Report, p. 128/9, Bundeskartellamt, decision of 20.09.1999 "Henkel/Luhns", p. 32.

6 WuW/E BKartA 937, 943 „ÖPNV Saarland“

method of protecting the whole environment around an innovation and possible technological alternatives by protective rights (so-called "ring fencing").[7]

2.2 Structural barriers to entry

Structural barriers to market entry usually arise from certain technological or demand-related industry characteristics, but may also lie in the resources that are required to be successful on the market. They are not generally created intentionally to prevent entry.

In most cases, structural barriers to entry involve one or more of the following factors:

Resources

A substantial deterrent potential exists, for example, if the market leader has considerable market-specific resources at its disposal.[8] This is particularly true with regard to limited resources in the hands of established companies, for example raw material, waste storage sites or take-off and landing slots at airports.[9]

Market trends

Individual market phases can constitute structural barriers to market entry. For example, market capacity is higher in the experimental and expansion phase than in the mature market and stagnation phase.

Transport costs / proximity to customers

Transport cost disadvantages are a significant product-related barrier to entry unless they can be offset by other cost advantages, e.g. of production.[10]

Economies of scale

Size alone does not lead to competitive efficiency and a deterring potential. But a deterring potential exists, for example, if costs of R&D, production or sales decrease with growing company size, and entry necessitates a high output in order for the new entrant to make a profit. Especially when the sunk costs are high, it makes sense for established producers to maintain a high long-term output. The result may be that new entrants cannot assume that they will achieve an output allowing them to break even in the medium term, and therefore decide not to enter the market. The greater the market share that is required to achieve the same economies of scale as established competitors, the higher the barriers to market entry due to the necessary initial capital requirements and risks to be borne by new entrants.

Economies of scope

Diversified companies in particular often have advantages through economies of scope. These arise when a company is engaged in a number of commercial activities at lower costs than would be incurred if

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7 Cf. Bundeskartellamt, decision of 20.09.1999 "Henkel/Luhns, p. 30 ff.

8 WuW/E BGH 2276, 2283 "SZ-Donau Kurier" (1986); "RAG/VEBA" 1995/96 Activity Report, p.152.

9 WuW/E BKartA 2391, 2394 "DLT/Südavia" (1989).

10 WuW/E BKartA 2865 "Kali+Salz/PCS" (1997), Bundeskartellamt case "Ruhrkohle/Veba", 95/96 Activity Report, p. 152.

different companies carried out each activity separately. Economies of scope are also involved when vertically-integrated companies have advantages that may require a new entrant to enter the market at more than one level at the same time.

Technical barriers to entry

High barriers to entry also exist when entry does not appear to be impossible in the long term, but, due to the need for technical development, is not likely in the short term.

2.3 Strategic barriers to entry

Strategic barriers to entry are intentionally set up by incumbents in a market in order to deter potential suppliers from entry. By their market conduct, established companies may erect de facto barriers for new entrants, thereby impeding their entry. The practice of all manufacturers in a particular industry to conclude long-term supply contracts[11] or exclusive contracts with their customers[12], is an example of strategic barriers to entry. Demarcation and concession agreements[13], industry-wide or individual companies' standards for complementary goods[14] or the development of propriety technical access systems[15] have similar effects. If they have been created by advertising and inter-brand competition, buyer preferences may suggest that there are strategic barriers to entry. This may entail cost disadvantages for new entrants compared with established companies until the former have attracted attention and won a reputation of their own.[16] Conversely, strategic market conduct by customers and the threat that they may switch to another supplier can lead to potential competitors effectively limiting the scope of powerful companies.[17]

2.4 Special case: Access to network based markets and essential infrastructure facilities

In decision practice the way in which a barrier to entry is determined does not differ according to whether a merger or abuse of power is under examination. However, there are a number of markets in which such activities are only possible through the establishment or co-utilisation of costly networks. Classical examples of these markets, previously often characterised as natural monopolies, are those for gas and electricity, telecommunications and rail services. In these markets newcomers intending to enter into competition with the network owner have to use the existing networks if they do not wish to go to the lengths of setting up their own networks (often impossible in practice). Very high barriers to entry are immanent in the structure of these markets. All these cases raise the difficult question of under which conditions competitors can claim a right to co-utilise existing networks. As a solution to this problem, often discussed under the key term “essential facilities doctrine”, a provision was adopted in the 6th Amendment to the German Act against Restraints of Competition in 1999 stating explicitly that the denial of access by a dominant company to its networks or other infrastructure facilities without any objective

11 VEBA/SW Bremen, 1995/96 Activity Report, p.121; BGH WuW/E DE - R 32 "Stadtwerke Garbsen"; BGH WuW/E DE - R 24 "Stromversorgung Aggertal"; Bundeskartellamt decision of 25.02.1999 "Lekkerland/Tobaccoland", p. 18.

12 WuW/E BKartA 2215 f. "Linde-Agefko" (1985).

13 WuW/E BKartA 2157 f. "EVS-TWS" (1984).

14 133 WuW/E BKartA 2894 "Herlitz/Landré" (1997).

15 Commission, judgment of 09.11.1994, "MSG Media Service", OJ EC 1995 No. L. 364/1.

16 WuW/E BKartA 2376 "Melitta/Kraft" (1989); WuW/E BKartA 2591 "Fresenius/Schiwa" (1993); WuW/E BKartA 2865 "Kali+Salz/PCS" (1997); WuW/E BKartA 2905 "Merck/KMF" (1997).

17 Bundeskartellamt decision of 03.03.2000 "Cisco/IBM", p. 20 f.

justification constitutes abusive conduct. On the basis of this provision the Bundeskartellamt has executed abuse proceedings in particular against gas and electricity providers.

3. Competition law enforcement: Long-term gas supply contracts as a barrier to entry

A current example of the Bundeskartellamt's decision-making practice regarding barriers to entry is the problem of long-term gas supply contracts between gas transmission companies and distributors. A survey has shown that almost three quarters of the contracts concerned cover 100 per cent of the gas distributor's requirement or at least quantities of between 80 per cent and 100 per cent of the distributor's requirement. Almost all of these contracts run for more than four years, in some cases up to twenty years. This combination of long contract periods on the one hand and a high degree of requirement satisfaction on the other leads to considerable foreclosure effects. The Bundeskartellamt considers these long-term gas supply contracts to be one of the major reasons for the unsatisfactory competitive situation in the gas sector.

The Bundeskartellamt initially tried to achieve a consensus-based solution in order to counteract this restraint of competition. It took up the problem of long-term gas supply contracts *ex officio* without immediately initiating prohibition proceedings against the companies. Instead the authority conducted numerous discussions with the gas transmission companies, trading companies and distributors. The purpose of these discussions was to find a solution which serves the interests of effective competition and provides both the established and new gas suppliers with a clear schedule for their planning processes.

A key elements paper in which the Bundeskartellamt explained its assessment criteria under competition law served as a basis for the discussions. This discussion paper was published and thus made available to the general public with the possibility to comment on it. The Bundeskartellamt then sent a letter to 15 gas transmission companies stating the obligations necessary for the companies to undertake to prevent the authority from initiating formal prohibition proceedings.

The most important element was a limitation of the contract periods. The gas transmission companies were asked to undertake the obligation not to exceed a term of 4 years for contracts covering more than 50 per cent and up to 80 per cent of the distributor's requirement, and not to exceed a term of 2 years for contracts covering more than 80 per cent of the requirement. These terms were set according to the percentage of the distributor's actual requirements. Contract-splitting in terms of quantities or periods of supply was thus inadmissible. Furthermore the terms represented upper limits which were not to be exceeded, not even on a short-term basis. After all, the contracts concluded by gas transmission companies were to be assessed as a whole and the supply shares of affiliated companies added up. Within the context of the formal obligation the Bundeskartellamt intended to accept certain levels of excepted quantities for long-term supply contracts to allow the gas transmission companies some scope in drawing up their contracts. This was also meant to create scope for the companies' individual needs. The contracts were to be adjusted to the Bundeskartellamt criteria mentioned above within one year. For the gas year 2006/2007 a higher excepted quantity was granted which was to be considerably reduced in the following year.

However, the attempt to open up long-term gas supply contracts by consensus has failed, in particular due to the fact that the market leader, E.ON/Ruhrgas, was not prepared to sign the formal obligation required. The Bundeskartellamt will now tackle long-term gas supply contracts in prohibition proceedings.

HUNGARY

1. Barriers to entry in the case law of the GVH

1.1 Definition

Though barriers to entry were analysed in a number of cases no general definition was elaborated in the jurisdiction of the GVH. It is clear however that the concept of entry barriers is not restricted to cost elements as non-cost barriers such as administrative and legal barriers were also taken into account. In certain cases in order to make the analysis complete even non-market related conditions influencing market entry were taken into account as barriers to entry. Concerning the first question it can therefore be said that according to the practice of the GVH "any impediment that has the effect of reducing competition" constitutes an entry barrier.

Up till now the lack of a strict definition for entry barriers did not cause problems. This is mainly due to the fact that few decisions dealing more in details with barriers were challenged before courts and therefore the GVH was not obliged to defend its statements. Concerning a prohibited merger of two political newspapers in its judgement overruling the decision of the GVH the court only challenged the significance of the identified barriers and not the concept itself. Therefore as it seems that there is no disagreement between the court and the GVH on the concept of entry barriers in theory the establishment of a definition would not raise debates. However on the other hand a clear definition could cause problems in certain situations. Sometimes the GVH faces circumstances which do influence market entry or performance but which do not form part of normal market conditions. Such a circumstance was noted in a case concerning mosquito extermination services. In that case the GVH established that the financial and other common barriers for the provision of such services were low, however market entry was still restricted as semi-illegal lobbying and personal relationships were also necessary for successful market entry. In order to be able to characterise market conditions the GVH took this circumstance into account if it was an entry barrier though it would be hard to establish a definition covering such market particularities.

1.2 Barriers

In recent case law the following elements were recognised:

- High costs of entry including investments, marketing costs are entry barriers. It was also acknowledged however that the profitability of the market or the low level of sunk costs is a factor to be taken into account at the analysis of the significance of financial entry barriers. The GVH established that in the case of rapidly growing markets investments can be quickly recovered reducing the significance of high up front investments. Low exit costs may also counterbalance the financial obstacles of entry. Similarly, concerning the wholesale of pharmaceutical products it was stated that low level of fixed margins of 5-7% may reinforce the restrictive effect of the need for high up front investments as reaching of minimum efficient scale and therefore profitability requires more time.

Many aspects of administrative entry barriers were identifiable. Legal provisions influenced entry through the establishment of obligatory notifications, standards, administrative qualifications and authorisations, required minimum level of professional expertise, minimum level of stock, minimum standard for storage. Due to the financial burden imposed on the party, the minimum time frame delaying the entry and other impediments, these provisions might constitute significant barriers.

The abolishment of a 5% custom was also considered as a reduction of entry barriers.

The need for vertical integration and the necessity for the establishment of distribution channels was also recognised as a barrier to entry. Access to or acquisition of intellectual property rights may also be crucial for successful entry as it was the case concerning the merger of two music publishers.

1.3 Measuring

A minimum level or amount as a prerequisite of the existence of a barrier was never put at issue. In many cases, mainly in the telecommunications sector, barriers were considered as evidently high without detailed calculations.

In other cases though there could have been place for assessment the measuring of the level of the entry barrier was neglected. In a case concerning the coffee market it was established that market entry is barred by high marketing costs necessary for the introduction of a new brand. Though it could have been possible to submit a calculation comparing e.g. the percentage of marketing costs with that of other sectors or to establish a sector specific amount or share that makes that level high, it was not detailed what was the measure for the establishment of this statement. It should be added that the infringement at issue was a restrictive agreement and therefore barriers were only mentioned at the description of the market and was not essential for the outcome of the case.

In an other case concerning a merger in the sector of wholesale of pharmaceuticals similar issues arose. It was established that "significant" up front investments were required for market entry. It was also identified that the new entrant had to suffer losses for a "relatively long" period until it reaches the minimum efficient level of trade. However similarly to the other case the measure of the "significant" and "relatively long" nature of the barriers was not presented. As the merger was cleared the parties did not turn to court and therefore the GVH was not required to elaborate on its view.

Based on the practice of the GVH it can be said that entry barriers of cost nature are considered as high in two situations. One is the case of specific sectors where it is axiomatic that entry costs are high. Such a sector is for instance the fixed telecommunications market. The other case is where at first glance it can be seen in general that costs of entry are high and possibly other factual circumstances - like the lack of market entry - also uphold this fact. In the latter case however the statement on the high level of the barrier is based on impressions, which might prove to be false under scrutiny.

In the case of non-cost barriers the evaluation of the level of a certain barrier is also much likely based on impressions though some room could still be open to assess why the need for an authorisation qualifies as a high entry barrier as in such a case the barrier itself surely consists of measurable cost and time elements.

1.4 Classification

Entry barriers are not approached differently in dominance and merger cases nor difference between structural and strategic barriers were made.

IRELAND

1. Introduction

The Irish Competition Authority's ("the Authority") response to the OECD questionnaire on barriers to entry is divided into three main sections.

- First, a short theoretical background on the topic is presented and the Authority's approach is then illustrated in the context of the Authority's guidelines and notices.
- Second, a brief analysis of different antitrust cases and court proceedings involving mergers and monopolisation practices is reported. In particular, this section provides examples illustrating how barriers to entry have been identified and measured by the Authority, and how determinant the assessment of the magnitude of these was for the decision of the case. Furthermore, some recent market studies conducted by the Advocacy Division of the Authority are also considered.
- The final section concludes the paper, outlining the practical difficulties encountered by the Authority and possible areas of improvement.

2. Barriers to Entry: Theoretical Background and the Authority's Approach

Barriers to entry have been a much debated concept in the economic literature and so far a single generally accepted definition has not emerged.

In 1956 Bain provided the first thorough study of barriers to entry.[1] In his view, there are exogenous factors of an industry structure that can influence how competition occurs in that industry: fixed costs, expenditure in R&D or advertising, scale economies and product differentiation were identified as the main barriers to entry. In 1968 Stigler[2] questioned this view on the ground that Bain's barriers to entry are often costs borne by the incumbents while he argued that what is critical for the definition of a barrier to entry is the concept of asymmetry between the incumbent(s) and the potential entrant(s). From this perspective, a barrier to entry is a cost that must be borne by potential entrants and that was and/or is not borne by the incumbents. Consequently, Bain's scale economies and large capital requirements are not barriers to entry as long as they were costs borne by the incumbent(s).

In recent decades new developments in Industrial Organisation ("IO") have shown that Stigler's definition does not capture the entire story and that, at the same time, Bain's concept of a barrier to entry is too broad. The New IO instead has emphasised the importance of the strategic behaviour of market players, e.g., first–mover advantage, the commitment value of market strategies and the "sunk" nature of some fixed costs when considering barriers to entry.[3] Within this new framework, the investment decision of the incumbent may convey information to the potential entrant(s) about its commitment to stay in the

1. Bain (1956), *Barriers to new competition: Their character and consequences in manufacturing industries*. Cambridge, MA, Harvard University Press.

2 Stigler (1968), *The organization of industry*. Chicago, IL: University Chicago Press.

3 See Tirole (1989), *The Theory of Industrial Organization*, MIT Press, Cambridge, MA.

industry as the dominant player in order to deter or discourage entry. The commitment value of investment decisions crucially depends on the extent to which the investment is sunk, i.e., unrecoverable. Thus, a potential entrant may be deterred from entering the industry not only because he expects that the incumbent will fiercely "fight" him (given its commitment to stay into the industry) but also because the new entrant might have to bear large costs in case of exit from the industry. Thus, in this new view Bain's fixed costs are barriers to entry to the extent that there are sunk.

Various types of investment decisions can have commitment value: from the traditional investments in production capacity to the expenditures in R&D or in advertisement in order to establish a reputation or brand loyalty. While the commitment value of investment in capacity usually arises from the natural features of the market (e.g., "natural monopoly"), other types of investment can be seen as the outcome of business strategies in order to dominate the market and deter any possible entry (e.g., advertising spend). Thus, this investment may generate "endogenous" sunk costs.[4]

A number of other definitions of barriers to entry have been proffered over the years, but none of them seems to be entirely convincing.[5] Some commentators suggest the discussion about this conceptual definition of a barrier to entry is not very important in practical terms since antitrust authorities are not interested in whether or not an impediment will actually satisfy a certain definition; rather, the concept of barrier to entry provides competition authorities with a framework to analyse the likelihood and ease of entry in a industry. Furthermore, the dynamics of barriers to entry has increasingly received attention[6]: what matters from an antitrust authority's viewpoint is the timing of entry, and how the timing is affected by possible barriers to entry. For instance, in a merger case the authorities should focus on how fast entry will erode any price increase caused by the merger and not whether it eventually will do so.

This "pragmatism" partly characterises the approach of the Authority. In its view, barriers to entry matter because it is important to determine whether or not entry will alleviate or deter anticompetitive conduct. Although in its merger guidelines[7] the Authority does not provide any definition of barriers to entry and does not appeal to Stigler's or Bain's contributions, it emerges from various published documents such as market studies and consultation documents that the Authority considers barriers to entry to be any direct or indirect limits or restrictions on the ability of a potential firm to enter a particular market. Thus, in the Authority's view there are two main types of barriers to entry:

- Those that may arise exogenously, because of asymmetries, cost advantages; and
- Those that may arise endogenously as outcome of a strategic decision or commitment of the incumbent(s).

It can be noted that the first type of barriers are typically Stiglerian barriers such as regulatory or administrative restrictions, switching costs or transactions costs. The second type refers in general to

4 Sutton's book (*Sunk costs and market,* MIT Press, London, 1991) first underlined the importance of sunk costs into the industry and the distinction between exogenous and endogenous sunk costs.

5 For a review see McAfee, Mialon and Williams (2004), "What is a Barrier to Entry?," *94 American Economic Review, Papers and Proceedings 461*, available at http://userwww.service.emory.edu/~hmialon/B2E.pdf.

6 In his article ("Why Barriers to Entry Are Barriers to Understanding", 94 *American Economic Review, Papers and Proceedings 466*, 2004), Carlton pointed out the fact that ignoring dynamics may lead to consider as barriers to entry also the adjustment costs that an industry has to bear when moving from one equilibrium to another with entry.

7 The Authority's merger guidelines are available for download from www.tca.ie.

barriers created by the incumbents such as reputation or brand loyalty as underlined by the new IO framework. The Authority also acknowledges that some barriers can be classified under either the two types: scale and scope economies, sunk costs or switching costs, for instance, may be endogenously created by the incumbents in order to deter entry and are not associated with the features of the market in itself.[8]

In the merger guidelines (par. 5.7, p.23) the Authority provides a list of possible barriers to entry that is not intended to be exhaustive.[9] For the analysis of mergers, the Authority also defines its three-step approach in assessing the possibility of profitable entry in an industry at current market prices[10]:

- First, the Authority would assess whether or not entry would be "timely" (within two years11);
- Second, it would examine whether or not entry would be profitable at existing prices ("likelihood"); and
- Third, it would determine whether or not timely and likely entry would return prices to their pre-merger levels.

Clearly, this approach recognises the importance of dynamics in the context of the definition, measurement and duration of possible barriers to entry for a given industry.

3. Evidence in Assessing Barriers to Entry

When the Authority has to determine empirically whether or not there are barriers to entry in a certain industry and, in the positive case, to assess how "high" they are likely to be, it emphasises two types of evidence: (i) **events** of recent entry into the industry; (ii) **market characteristics** that may preclude a timely and likely entry in the near future. In the Authority's experience, especially with reference to mergers, the empirical assessment of these types of evidence plays a central role in the investigation and various sources of evidence are taken into account: submissions from third parties, internal documents of the parties involved in the investigations, market enquires and customer surveys; in some cases, Authority's case officers have also been able to view companies' production and distribution sites. Moreover, these types of evidence are usually accompanied by an empirical analysis of the past evolution of the operating margins of the undertakings in question, with particular attention to those time periods where entry into the industry is observed.

The first type of evidence is not always available: for instance, a sector can be characterised by waves of consolidation; however, this is not proof of existence of barriers to entry since, in theory, the threat of entry alone can sufficiently constrain the market power of the incumbents. The second type of evidence is

8 This is clear in the IBM-Schlumberger case, discussed in the next section, where the costs in building a reputation represent a very high barrier to entry to the market of business recovery services, given their nature of sunk costs. Endogenous switching costs are opposed to exogenous ones, that arise for instance from regulatory or administrative restrictions.

9 The list includes: assets necessary for production or supply of relevant products (such as natural resources) under the control of incumbents, exclusive access to superior technologies or ownerships of patents and other intellectual property rights, scale and scope economies, regulatory and administrative barriers, switching costs or transaction costs, long-term contracts. The list does not mention explicitly sunk costs as barriers to entry.

10 See par. 5.3-5.5, p.22 of the Merger Guidelines.

11 However, this time period may vary depending on the features of the industry in question.

more difficult to gather and assess because of asymmetric information, non-availability of data etc; sometimes only qualitative judgments can be made of how a certain market characteristic may turn out to be a "high" a barrier to entry.

In general, in the Authority's experience, these two sorts of evidence point in the "same direction". That is, typically, evidence of past entry is accompanied by evidence of market characteristics that point to low existing barriers to entry (see discussion of *Grafton-Heiton* and *Drogheda* cases below) and, vice-versa, evidence of high barriers to entry often comes together with evidence of no entry in the recent history of the industry (see discussion of *Uniphar-Ammado* and *IBM–Schlumberger* cases below). Difficulties may arise when these two types of evidence diverge (i.e., point in opposite directions) as in the insurance sector: the Authority's study shows that although the market is characterised by some impediments to entry, these barriers have not proved insurmountable as evidenced by historical experience of limited successful entry.

A few cases of mergers and monopolisation practices are presented below in more detail in order to show the Authority's approach to the issue of barriers to entry.

3.1 IBM - Schlumberger: a blocked merger in the market for business recovery services

In the proposed acquisition of Schlumberger Business Continuity Services (Ireland) Limited ("SBCS") by IBM Ireland Limited ("IBM")[12], the Authority blocked the deal because the proposed merger would have created a super-dominant position in the market for business recovery services.

In analysing entry, the Authority identified three main barriers: (i) the reputation of the provider – it emerged that this is crucially important for customers who place a premium on reliability of service and can be acquired only through years of experience; (ii) large sunk costs - the cost of equipment is high, specific and irreversible; (iii) long-term contracts – contracts are typically of 3-5 year duration with only 25% of contracts becoming available in any particular year. This last barrier compounds the reputation effects. While barriers (i) and (iii) are clearly strategic ones (i.e., directly created by the incumbents), the sunk costs associated with the equipment are specifically linked to the features of the market and therefore represent exogenous barriers to entry.

Business customers submitted that switching costs are high since moving to other suppliers would undermine the relationship with their current supplier. In this sense, they are artificially created by the incumbents. Furthermore, the most likely entrant, the UK firm Sungard, confirmed to the Authority that the 70% of set-up costs are sunk and it would be difficult to enter a mature market with customers locked into long-term contracts. Finally, market enquires from parties, customers and other providers showed that the existing suppliers (from the low-value segments of the market) lacked the requisite capability, capacity, industry reputation and experience to constrain a short-run exercise of market power. That is why, although entry into the industry was observed, the two new operators could only position themselves in the low-value segment of the market.

3.2 Grafton - Heiton: competition in geographic markets for DIY products and builders materials

In the acquisition of Heiton Group plc ("Heiton") by Grafton Group plc ("Grafton")[13], the parties overlapped in two main distinct relevant markets: supply of "do-it-yourself" ("DIY") products and supply of building materials ("builders merchanting").

12 Merger decision M/04/032 is available for download from www.tca.ie.

13 Merger decision M/04/051 is available for download from www.tca.ie.

The Authority found substantial evidence of entry in the two markets in the past, both from chain and independent stores. It was also very important to consider the expansion plans by the existing suppliers, although these plans were made independently of the proposed merger. In an industry that has been growing very fast in the recent years, the Authority observed that market characteristics pointed to low barriers to entry: low switching costs for customers and low set-up costs.[14] The competitors who declared their intentions to expand were considered by the Authority well-placed to enter not only those geographic markets where the merged entity would be a monopolist, but also markets where it is present in general.

3.3 Uniphar – Ammado: a merger in the market for wholesale supply of human pharmaceutical products[15]

In a market where the prices of the products are determined by the State and the demand by the patients through their GPs, competition between wholesalers occurs on (i) discounts (that are negotiated on an individual basis) and (ii) quality and reliability of service (timely delivery). In fact, pharmacies make orders via an electronic system allowing for the selection of the supplier and the possible switch to a second supplier in case the first one does not sell the required product.[16]

The proposed acquisition was allowed to proceed by the Authority although there was no evidence of past entry and entry in the near future was thought to be very unlikely. Market enquires revealed that factors (i) and (ii) crucially depend on the relationships with suppliers (e.g., loyalty to a particular supplier leading to high switching costs). The Authority's site visits confirmed that capital requirements are necessary to develop an automated depots and efficient distribution networks; in turn, this equipment could be justified by a necessary critical mass of customers. Even in the case of a well-financed entrant (i.e., the "deep pocket" story), reputation and loyalty were considered critical factors that require time to establish (more than two years).

Despite these high barriers to entry, the Authority's approval depended crucially on the market evidence gathered via a sample survey of Irish pharmacies showing that competition for discounts or higher quality of services were not fiercer in those geographic areas where only the two parties were present than in those areas where other suppliers were also present.

3.4 Drogheda Newspapers: Predatory Pricing in Local Newspaper Advertising[17]

In January 2003, the *Drogheda Leader* ("the Leader") alleged that Independent Company Limited ("DIC") was abusing its dominant position in the market for advertising in the Greater Drogheda area by engaging predatory pricing in January 2003. The Leader is a weekly freesheet newspaper established in 1995.

However, the Authority's investigation found that DIC did not have a dominant position (despite its high market share of 60-70%) and thus there was no scope for predatory pricing. The determining factor for the decision was primarily the evidence of successful entry of the complainant Leader, which grew its market share at the expense of DIC's paid-for newspaper. This rapid growth of the new entrant forced the

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14 Only an entrant in the builders merchanting market needs to have sufficient financial baking to be able to offer credit terms to customers.

15 Merger decision M/04/020 is available for download from www.tca.ie.

16 The electronic ordering system works at sequential basis: if also the second supplier is not able to deliver the product, a pharmacy can switch immediately to a third one and so on.

17 Enforcement decision E/05/001 is available for download from www.tca.ie.

DIC to launch the freesheet Extra in 1997. This was a rational strategy to compete against the innovative Leader.

The costs of establishing the business did not appear to be sunk and barriers to expansion are very low; also, submissions from customers (advertisers) revealed that switching costs are insignificant.

3.5 Cylinder LGP consultation document: the anti-competitive effects of exclusive dealer agreements[18]

In the market for the distribution of cylinder LGP, the Authority found that the major barrier to expansion (rather than entry) was created by the exclusive dealer agreements in force between the two major suppliers.

Analysis of entry and exit in the industry revealed that during the period 1994-1999, in which the Authority issued a category licence[19] allowing exclusive agreements of no more than two years, three new suppliers entered and the rate of dealer switching was high. On the other hand, after 1999 the industry was characterised by growing concentration: two successful new suppliers were acquired by the two major suppliers and one exited the market in 2002. Furthermore, the rate of dealer switching also declined after 1999. In sum, in Authority's view these long-term contracts acted as artificial barriers to entry strategically set-up by the incumbents.

Other entry costs were also considered, such as scale economies: they were relatively important in the case of Premier, the supplier that exited the market in 2002 because of difficulties in acquiring critical mass. In fact, scale economies are more difficult to achieve in presence of exclusive agreements.

3.6 Insurance Study: the consumer confidence and lack of information sharing deter entry into the Irish non-life insurance market

In this study ("Competition Issues in the Non-Life Insurance Market"[20]), the Authority indicated the presence of two types of barriers: regulatory requirements and business practices. Among the regulatory barriers, the study mentions the functioning of the Insurance Protection Fund[21] and some solvency requirements which raise the uncertainty for consumers, thus reducing their willingness to purchase insurance from foreigner suppliers on a cross-border basis. Hence, consumer confidence creates a (Stiglerian) barrier to entry to non-Irish insurers. The sources of these barriers came from the study of the regulations in place and market enquires among insurers that successfully entered the market in the recent past.

According to recent entrants, lack of information and data about the various segments of the market was a major impediment to entry. A necessary condition for entry into an insurance market is access to detailed information on the risks presented by the buyers. However, only incumbent insurers have the

18. The document released in September 2004 is available for download from www.tca.ie.

19 In 1994, the Authority set out its views on the market based on the information it had on hand at the time in the Cylinder LPG Category Licence (Authority Decision 364, 28th October 1994). This category licence set out the relevant market as the cylinder LPG market and allowed for exclusive agreements of not more than two years in duration that did not include certain proscribed terms. Following on from this, the Authority explicitly excluded the cylinder LPG market from the general rules that govern vertical agreements.

20 This study is available for download from www.tca.ie.

21 With this fund, buyers of insurance would still have some protection against losses or claims.

information, giving them a competitive advantage on the potential entrants (first-mover advantage). However, incumbents have also strong incentives to maintain this information asymmetry in order to deter the new entrants. Thus, this barrier to entry can be classified under either types (Stiglerian and strategic).

Finally, while there is some competition (given the evidence of recent entry), the Authority found that this competition is sluggish because of these barriers to entry and mobility.

3.7 Banking Study: the anti-competitiveness of clearing system access and infrastructure

In December 2004, the Authority published its recommendations to increase the level of competition in the non-investment banking sector, namely the personal current account ("PCA") market ("Study of Competition in the Provision of Non-investment Banking Services in Ireland: Report and Recommendations"[22]).

In the PCA market, several entry barriers were identified, mainly due to business practices and government regulations. The first category includes the current structure of the clearing system[23] managed by a pool of Irish banks. The system was found to be not "entrant-friendly", because it is based on (i) a bilateral exchanges system that is difficult to adapt to new entrants and (ii) access rules that envisage "impact costs" that must be borne by the entrant. The bilateral system was originally set-up as outcome of a business practice and, in this sense, it can be seen as a Stiglerian barrier. However, innovative and more flexible structures, which would result in substantial reductions of these costs for entrants, are available. Thus, it is difficult to assess to what extent this barrier to entry can be still viewed as the outcome of an historical legacy or, rather, intentional inaction on behalf of incumbents who are reluctant to innovate the system because of the threat of entry.

Under the second category, the study found a series of regulatory restrictions which raise switching costs for customers.

Finally, there was no history of successful entry in the PCA market up until the time of the study; on the contrary, only exit was observed.

3.8 Retail Planning Guidelines: Review of the floor-space cap on retail warehouses

In a submission to Government in 2003 ("Submission on the Review of the floorspace cap on Retail Warehouses contained in the Retail Planning Guidelines 2000")[24], the Authority welcomed the abolition of a restriction on the floor-space of retail warehouses for certain areas because it prevented the entry of new suppliers and thus reduced incentives on existing operators for efficiency and innovation. In fact, this restriction acts in two ways: first, it restricts the range of retail distributors (limiting entry); second, limiting floor-space restricts shelf space capacity and thereby restricts consumer choice, inter-brand competition (with downward pressures on prices), opportunities for innovation and improvement in product quality and variety.

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22. This study is available for download from www.tca.ie.

23 The clearing system is the mechanism by which funds are moved between financial institutions to complete or settle transactions.

24 This submission (S/03/004) is available for download from www.tca.ie.

4. Conclusion

As shown in the above sections, the Authority's approach to barriers to entry is not constrained by a certain definition but, instead, is characterised by a more pragmatic vein: it considers any limits and restrictions on the ability of the potential firm to enter a given market. From a theoretical point of view, these limits can be roughly classified in two categories: Stiglerian barriers to entry, that arise exogenously or naturally or indirectly, and "strategic" barriers to entry, that arise directly from incumbents' actions or inactions. However, the identification and assessment of these barriers to entry are based on the context of the actual market characteristics in question and evidence of recent entry.

Thus, although the concept of barriers to entry, in terms of a general framework, does not change from one type of investigation to another (e.g., from a merger case to abuse of dominance case), the identification and assessment of barriers to entry are likely to be case-dependant, with no difference between merger and abuse of dominance type of investigation. This leaves some discretionary power to the Authority: for instance, the evidence of entry does not always point unambiguously to the picture of a contestable market. In the insurance study, the Authority found high barriers to entry despite the actual evidence of successful new players; in the *Grafton-Heiton* case, instead, the evidence of past entry and expansion plans were considered sufficient to say that entry barriers were not high even though this evidence was not strictly related to the merger in question.

As illustrated in the above sections, the measurement of a barrier to entry is often carried out on a qualitative basis because of a lack of information and/or data. However, while Stiglerian barriers (regulatory or administrative restrictions, switching costs and transactions costs) are usually easy to identify and quantify, the Authority's experience shows that it is more difficult to measure the other type of barriers to entry: those related to reputation effects or other restrictions created strategically by the incumbent(s). In these cases, the Authority's judgement was based on whether or not there is evidence of entry, on the submissions from customers, third parties and potential entrants (as in the *IBM–Schlumberger* case) and economic theory. Furthermore, in some other cases it is even difficult to identify this type of barrier: in the banking study, for example, the clearing system adopted by the incumbent banks can be either seen simply as an exogenous barrier (i.e., absolute cost advantage in Stiglerian terms) or a business practice that is artificially maintained in order to deter entry (i.e., strategic barrier).

In conclusion, the conceptual framework for barriers to entry that emerges from the different types of investigations carried out by the Authority is consistent overall. Moreover, in the merger cases this framework is more explicitly formulated by the Authority's guidelines. In the Authority's experience, certain barriers to entry are more difficult to classify in terms of either Stiglerian or strategic type. However, this theoretical uncertainty appears to be not relevant in practical terms for the merit of the specific decision upon an antitrust case.

JAPAN

1. Introduction

The Japan Fair Trade Commission (hereinafter referred to as the "JFTC") has never given a general definition of entry barriers in the past. Entry barriers, however, refer to, in general, obstacles to companies when trying to enter the market. Specifically, the following are considered to be entry barriers: costs and know-how necessary for entry, trade practices in each industry, government regulations, existence of essential facilities to enter the industry, etc. When these entry barriers unfairly impede new entry into a market and substantially restrict competition in the domestic market, the JFTC must address such barriers by actively applying the provisions of the Antimonopoly Act. It has been pointed out since the "Structural Impediment Initiative Talks" (SII), held in the 1990s that such entry barriers make it difficult for domestic businesses, and sometimes foreign companies, to newly enter the Japanese market.

The JFTC expresses its approach to entry barriers in guidelines and individual review examples. The JFTC also indicates its views on entry barriers in guidelines to studying the electric power industry and other fields where regulations are being relaxed to encourage new entry and to ensure conditions for fair competition between new entrants and incumbent operators. The JFTC is striving to tackle the problem of entry barriers which may concern competition policy, such as the ability to control product prices through brand power, by conducting fact-finding surveys.

The following examples demonstrate the JFTC's position toward entry barriers indicated in guidelines, etc. as well as entry barrier problems.

2. Approach to entry barriers in review of business combination

2.1 Views on entry barriers in the Merger Guidelines

The JFTC, in the "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination" (published on May 31, 2004)[1] cites the easiness of entry into a relevant market as one of the determining factors to decide whether or not the effect of a business combination may substantially restrain competition in the market. In other words, the easiness of entry into the market may prevent the parties concerned from raising the price. The JFTC comprehensively considers the following factors with regard to the possibility of entry:

a) existence of the legislative entry regulations;
b) degree of entry barrier in practice (e.g. the minimum scale of the capital for entry, the geographical and social conditions of location, technical conditions, conditions for the purchase of raw materials, sales conditions, state of the differentiation of goods, state of competitors such as entry and exit, change of the number of competitors, the trend of the change of the cumulative market shares of top three companies, etc.);
c) existence of companies that can supply goods without significant change in the production facilities;

1 http://www.jftc.go.jp/e-page/legislation/ama/MAreview.pdf

d) existence of entry plans by other companies;
e) likelihood of the entry to the domestic market by foreign companies.

2.2 Case example of difficulty in new entry

2.2.1 Business Consolidation by Japan Airlines Co., Ltd. and Japan Airsystem Co., Ltd. through Establishment of a Holding Company (published on April 26, 2002)[2]

The JFTC pointed out that taking into account the factors below, the planned integration was likely to substantially restrain competition in the domestic air transportation market.

a) The reduction in number of major airlines from three (JAL, JAS and ANA) to two will facilitate the concerted actions of fare-setting by major airlines, which have already been conducted in a concerted manner in the past; and
b) As the number of airlines operating on an air route decreases, airfare discounts, etc. become smaller, hence the reduction in the number of major airlines will seriously affect competition.
c) In addition to the above mentioned circumstances, Haneda Airport (Tokyo International Airport), under the overcrowded schedule, has little room to increase takeoff and landings and has no slot to allocate for newcomers because all of them have already been occupied by the incumbent airlines. This inability of new airlines to acquire slots is an “entry barrier.” Therefore, the entry of new players is unlikely to deter concerted fare-setting actions.

In response to the JFTC’s views, the parties concerned submitted the following remedies to the JFTC for facilitating entry and business expansion by new airlines:

a) To return some of the takeoff-and-landing slots currently held by the parties at Haneda Airport to the Ministry of Land, Infrastructure and Transport;
b) To make the airport facilities that the parties are using available for new airlines and also to cooperate with new airlines by means of undertaking aircraft maintenance etc.;

In addition,

a) New airlines have not been allowed to hold more than 6 slots at Haneda Airport in the past. Since the Ministry of Land, Infrastructure and Transport planned to create “competition promotion slots” at Haneda Airport, they can now receive more than 6 slots.

It is believed that these and other measures help to eliminate the lack of open slots, which has constituted an absolute “entry barrier” to new airlines. Also, the cooperation in using airport facilities, aircraft maintenance service, etc. simplifies the entry and business expansion by new airlines. For these reasons, the JFTC considers that the proposed integration plan would not substantially restrain competition within the domestic air transportation market.

2. http://www.jftc.go.jp/e-page/pressreleases/2002/april/020426JJ.pdf

3. Approach to entry barriers indicated in guidelines concerning anticompetitive acts

3.1 Views on entry barriers in the "Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act"[3]

In accordance with Subsection 9, Section 2 of the Antimonopoly Act, the JFTC designates acts including "Concerted Refusal to Deal," etc. as Unfair Trade Practices prohibited by Section 19 of the Antimonopoly Act. Since there are various conceivable unfair trade practices, the JFTC has published the "Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act, " clarifying that distribution systems and business practices that strongly hinder fair competition are problems under the Antimonopoly Act.

The JFTC, in Part I of these guidelines, cites examples of cases in which efforts are made to collaborate with other firm(s) to exclude competitors to ensure that an existing transaction relationship can continue in a closed manner, such as vertical deals among producers restricting competition in the market and entry by new entrants, thus adversely affecting competition in the market. These pose a problem with regard to the Antimonopoly Act.

The JFTC also lists, in Part II of said guidelines, with regard to transactions in distribution, examples of cases where non-price vertical restraints by manufacturers, etc., such as those on distributors' handled products, sales territories, customers, etc., limit competition among distributors or impede new entry, thus adversely affecting competition in the market and constituting a problem under the Antimonopoly Act.

In Part III of the guidelines, the JFTC clearly indicates that it considers the difficulty of entering the market and other things in determining whether a sole distributorship contract between competitors in itself constitutes a problem under the Antimonopoly Act. In addition, the JFTC also cites examples of cases in which non-price restraints such as those on handling competitors' products and sales territories stipulated in a sole distributorship contract could constitute a problem under the Antimonopoly Act by impeding entry.

3.2 Approach to entry barriers indicated in the "Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act"[4]

The Antimonopoly Act prohibits not only entrepreneurs but also trade associations that are combinations of entrepreneurs or federations of combinations of entrepreneurs from engaging in conduct that restrains or impedes competition and, from the perspective of eliminating entry barriers, that limits the number of current and/or future entrepreneurs in a particular industry.

The JFTC published the "Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act" in which it lists examples of specific activities to clarify what constitutes a problem under the Antimonopoly Act. With regard to entry barriers, for example, item 5-1-3, "Unjustly restricting joining or unjustly expelling" in Part II-5, "Conduct that restricts the entry of firms, etc.," states that unjustly restricting joining into a trade association or unjustly expelling a firm from a trade association, when it is difficult to do business without joining the association, constitutes a problem under the Antimonopoly Act.

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3 http://www.jftc.go.jp/e-page/legislation/ama/distribution.pdf

4 http://www.jftc.go.jp/e-page/legislation/ama/tradeassociation.pdf

3.3 Views on entry barriers indicated in the "Guidelines for Patent and Know-how Licensing Agreements under the Antimonopoly Act"[5]

With regard to the application of the provisions of the Antimonopoly Act to restraints in patent and know-how licensing agreements, the JFTC expressed its views comprehensively in publishing "Guidelines for Patent and Know-how Licensing Agreements under the Antimonopoly Act" (published on July 30, 1999). In this, it clarifies that with regard to licensing agreements through a patent pool, for instance in cases where business activities are difficult in a particular product field without patents collected in a patent pool and other licenses being granted, if multiple rights-holders refuse to grant licenses without reasonable reason to new entrants or particular existing firms and thus impede the entry or business of other firms, this constitutes a problem under the Antimonopoly Act. The JFTC published, concerning patent pools, on June 29, 2005, "Guidelines on Standardisation and Patent Pool Arrangements"[6] in which it clearly states its views.

4. Case Example (a case of exclusion of other firms by further strengthening existing entry barriers)

4.1 Case against 11 entities, including Sankyo Co., Ltd. (JFTC Recommendation Decision as of August 6, 1997)

Firms engaged in the manufacture or manufacture and trade of "pachinko" machines and the Japan Game Machine Patent Administration Federation engaged in the management and administration of the patents, etc. owned by these firms (hereinafter referred to as the "Game Machine Patent Federation"), in combination and collusion, under a policy for excluding entry, refused to grant licenses to use the patents, etc. owned or managed and administered by the Game Machine Patent Federation to third parties, and thereby prevented the business of others from planning to manufacture "pachinko" machines. This conduct substantially restricted competition, contrary to the public interest in the field of "pachinko" machine production in Japan, and was not recognised as an exercise of rights under the Patent Law or the New Utility Model Law. It was therefore found unlawful as Private Monopolisation[7].

Acts raising entry barriers by the parties committing such a violation with a view to impeding new entry are as follows:

- Under a policy for deterring entry into the field of manufacturing "pachinko" machines, the Game Machine Patent Federation did not grant licenses to use patents, etc., relating to the manufacture of "pachinko" machines which it owned or managed and administered to persons other than its members at the time of licensing. Furthermore, in licensing agreements, the Game Machine Patent Federation included a provision concerning changes of business status stating that when the business status of the other party to the agreement concerned was materially changed, including a change of trade name, the agreement may be cancelled, and ensured the inclusion of the said provision in an agreement, thus impeding entry into the field.

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5 http://www.jftc.go.jp/e-page/legislation/ama/patentandknow-how.pdf

6 http://www.jftc.go.jp/e-page/legislation/ama/patentpool.pdf

7 "Private monopolisation," prohibited in the first part of Section 3 of the Antimonopoly Act, is defined in Paragraph 5, Section 2 of the same act as follows: "entrepreneurs, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, from excluding or controlling the business activities of other entrepreneurs, thereby substantially restricting, contrary to the public interest, competition in any particular field of trade." The conduct of "exclusion," one of the modes of violation under private monopolisation, is a form of misconduct which makes other entrepreneurs' activities difficult to continue or discourages new entry in the particular field of trade.

- When a leading manufacturer who was not a member of the Game Machine Industry Association decided to enter the industry as a new phase, the firms and the Game Machine Patent Federation, in licensing the patents, etc. managed and administered by the Game Machine Patent Federation, decided to use a three-party licensing agreement including the owner of the patent to be licensed in the parties thereto in addition to the Game Machine Patent Federation and provided a provision concerning the change of business status therein stating that the other party should notify the owner of the patents, etc. of its changed corporate structure and business status for approval and that if approval was not obtained, the licensing agreement concerned would become invalid, and thereby strengthened the barrier to entry through acquisition, etc.

- The firms and the Game Machine Patent Federation, to protect the market share of existing “pachinko” machine manufacturers and to maintain the system for avoiding price competition, etc. among manufacturers, obtained new patent rights, etc. and strived to collect patent rights, etc. owned or managed and administered by the Game Machine Patent Federation to strengthen the barrier to entry. In addition, the Game Machine Patent Federation decided not to license such patent rights, etc. to new entrants, thus excluding entry into the field of manufacturing “pachinko” machines.

To eliminate the violations by the manufacturers and distributors of “pachinko” machines and the Game Machine Patent Federation under the above-mentioned entry barrier, the JFTC ordered Sankyo Co., Ltd. and 10 other firms to cease their policy for excluding entry into the field of “pachinko” machine manufacture and to withdraw the measures concerning the licensing of patent rights, etc. based on said policy.

5. Approach to entry barriers regarding relaxation of regulations and competition policies in the public utility industry

5.1 Views on entry barriers indicated in the “Guidelines for Proper Electric Power Trade” (published on December 20, 1999, subsequently revised on July 25, 2002, and on May 20, 2005)[8]

In the electric power supply market, geographical monopolisation in retail supply has so far been approved by entrance restraints under the Electricity Utility Law, and the harmful effects accompanying monopolisation have been handled by regulations on business activities (regulation on rates, obligation to supply, etc.) under the provisions of the Electricity Utility Law. However, the Electricity Utility Law was revised in 1995, thus introducing competition among suppliers. In introducing competition and with the emergence of new entrants in the retail supply business, as a basis for competition, existing nationwide transmission networks owned by general electric power companies or wholesale electric companies transmitting electricity must inevitably be opened to new entrants under the same conditions as those applicable to general electric power companies. Therefore, in the revised Electricity Utility Law, a consignment supply system has been incorporated to guarantee impartial and fair utilisation of networks owned or operated by general electric power companies or wholesale electric companies.

In view of the following characteristics of the electric power market, however, the establishment of a consignment supply system alone may not actually encourage new participation or competition in the electric power market:

- Even at present, in the retail supply business, existing general electric power companies have an almost 100% market share in each of the service areas.

8 http://www.jftc.go.jp/e-page/legislation/ama/electric.pdf (not yet updated to the latest version)

- Because there are only 10 existing general electric companies and 1 wholesale electric company, they will be likely to collaborate even if there is no contact among them with regard to their intentions.

- As a result of the revision of the Electricity Utility Law of 2003, new entrants, who have no means to compete other than to depend on the consignment supply of the relevant general electric power company which is also a competitor and has a marketing department as well as a monopolistic network, will be at a disadvantage if this matter is not dealt with properly by the general electric power company.

- The general electric power companies, by possessing large-scale power generating facilities and network control systems, can more easily achieve an energy supply of the same volume at the same time than new entrants.

Under these circumstances, measures are necessary in order to make the electric power market function competitively. The Ministry of Economy, Trade and Industry having jurisdiction over the Electricity Utility Law and the JFTC having jurisdiction over the Antimonopoly Act, bearing responsibility for areas in their respective jurisdictions and for coordinating with each other, formulated and published guidelines for proper electric power trade that are consistent with the Electricity Utility Law and Antimonopoly Act.

The guidelines state that trade practices whereby an electric power company is recognised as refusing consignment supply by, for instance, not properly disclosing the information necessary for consignment supply, or where an electric power company places a restriction, without good reason, on the utilisation of connection lines and other facilities in applications from new entrants, are likely to be in violation of the Antimonopoly Act.

5.2 Views on entry barriers indicated in the "Guidelines for Proper Gas Trade" (published on March 23, 2000; partially revised on August 6, 2004)[9]

Although the reforms of the gas utility industry system undertaken since 1994 made progress such as encouraging the entry of new companies and reducing gas charges to some extent, the gas market still has the following characteristics. There remains concern that, even after implementing the specific system established through the current reforms of the gas utility industry system, the principle of competition may not effectively work in the gas market.

- In terms of gas supply through conduits, the general gas companies still hold large market shares in their respective service areas;

- In some districts, it is difficult to install new conduit networks in addition to the existing networks; and

- While the general gas companies are shifting their supply to high calorie gas, there are limited sources of liquefied natural gas (LNG) and natural gas which are major raw materials of those gases.

For this reason, the Ministry of Economy, Trade and Industry, which is responsible for implementing the Gas Utility Law, and the JFTC, responsible for implementing the Antimonopoly Act, bearing

9 http://www.jftc.go.jp/e-page/legislation/ama/gas.pdf (not updated to the latest version yet)

responsibility in their respective jurisdictions and collaborating with each other, prepare and publish guidelines concerning proper gas trade that are consistent with the two laws.

These guidelines point out that since Japan depends on LNG imports for a large portion of its domestic gas supply, the LNG stations are the starting points of conduit networks. Third parties should be encouraged to use LNG stations to promote new entries in the market and to diversify gas procurement sources to invigorate the gas market and develop conditions for fair competition. The guidelines state that if an LNG station operator unreasonably rejects an application for use from a gas company who needs to use the station for its business activities but the gas company is in a competitive relationship with the operator or the operator's related company, or unreasonably delays negotiations on where the operator can open its station to other gas companies, then such action hinders the business of the applicant and may constitute a violation of the Antimonopoly Act.

5.3 Views on entry barriers indicated in the "Guidelines for Promotion of Competition in the Telecommunications business field" (published on November 30, 2001; partially revised on June 18, 2004)[10]

The circumstances in the telecommunications business field are as follows:

- A competitive situation is hard to achieve because there are telecommunications carriers that are assumed to have market power, due to bottleneck facilities, essential and not substitutable, on which other telecommunications carriers need to rely, or large market shares.

- Reliance on other telecommunications carriers is inevitable in a so-called network industry, where interconnection with competitors greatly increases the benefit of users, and where the provision of service is difficult without interconnection.

- The speed of change in the market and of technological advances is extremely rapid.

Considering these characteristics in the telecommunications business field and also the fact that it is in transition from a monopoly to a competitive market, in order to more actively promote fair competition in the telecommunications business field, measures are needed to promote fair competition, as well as to ensure the regulations necessary to secure public interest and the benefits of users, through the Telecommunications Business Law. It is also necessary to promote deregulation and to eliminate behavior that restricts competition under the Antimonopoly Act, which is a general rule for competition.

For this reason, the JFTC, which oversees the Antimonopoly Act, and the Ministry of Internal Affairs and Communications, which oversees the Telecommunications Business Law, bearing responsibility in their own jurisdictions, jointly formulated and published the guidelines for promoting competition in the telecommunications business field.

For instance, as an interpretation of the Antimonopoly Act relating to the interconnection and sharing of telecommunications facilities, the guidelines state that if telecommunications carriers, who have facilities which are essential in providing telecommunications services but which are difficult to imitate in the construction of new facilities using carriers' own investments, reject competitors' requests to connect to subscriber line networks and other essential facilities owned by the telecommunications carriers, or offer unfavorable terms and treatment to competitors in such transactions compared with those offered to their own departments or to their affiliates, then such behavior hinders new entrants and their business. If competition in the market is thereby substantially restricted, such behavior is regarded as Private

10. http://www.jftc.go.jp/e-page/legislation/ama/telecom.pdf (not yet updated to the latest version)

Monopolisation and is considered a violation of the provisions of Section 3 of the Antimonopoly Act. The guidelines also state that even if the above-mentioned behavior does not substantially cause restraint of competition in the market, but could impede fair competition, then it is considered an Unfair Trade Practice that is banned by Section 19 of the Antimonopoly Act.

6. Concerning the survey on brand power from viewpoint of competition policy (published on June 4, 2003)[11]

In recent years, partly due to economic maturity and consumers' diverse preferences, the effect of brand power on competition has been growing in importance. In this context, the JFTC conducted a survey on the effect of brand power on the market behaviors of companies and consumers in order to better understand the situation and to organise the issues of competition policies.

The JFTC, based on the findings, made statements on the ability to control product prices and the enhancement of entry barriers by brand power as follows:

The questionnaire survey revealed that consumers feel deep loyalty to their favorite brand products which they bought by their own choice, and therefore individual brand products have a certain ability to control product prices. In addition, for instance, if a brand's image is excessively boosted by spending heavily on advertising, thus raising entry barriers by increasing the cost for new entrants or deepening consumers' brand loyalty, then companies have greater control of product prices, which is undesirable in terms of competition policies. For that reason, it is necessary to observe competitive conditions in markets where influential brands are being built.

7. Conclusion

As described above, entry barriers are not always violations of the provisions of the Antimonopoly Act. The JFTC, however, properly addresses individual cases where there is a violation of the provisions of the Antimonopoly Act in a market with high entry barriers, considering the situation of such entry barriers. The JFTC also strives to grasp the problems of entry barriers through surveys, etc.

11 http://www.jftc.go.jp/e-page/pressreleases/2003/june/030604.htm

KOREA

1. Definition of Entry Barriers

A variety of definitions of entry barriers have been proposed over the years, but none has emerged as a clear consensus.

Joe. S. Bain defined that "a barrier to entry is an advantage of established sellers in an industry over potential entrant sellers, which is reflected in the extent to which established sellers can persistently raise their prices above competitive levels without attracting new firms to enter the entry" and pointed out economies of scale, capital requirements and absolute cost advantages as structural factors creating entry barriers[1].

On the other hand, Stigler defines that "a barrier to entry is a cost of producing which must be borne by firms who seek to enter an industry but is not borne by firms already in the industry[2]".

In Korea, a barrier to entry is not defined in the competition law or relevant guidelines nor in a written decision of the KFTC or a written judgment of a court. But a barrier to entry is a factor to consider when determining the possibility of market dominance of a company or competition-restrictiveness of an M&A. And related guidelines lay down factors to consider in determining the presence an entry barrier.

2. Entry Barriers in Competition Law and Related Guidelines

2.1 Competition Law

Korea's competition law (the Monopoly Regulation and Fair Trade Act) stipulates that the existence of an entry barrier should be considered when making a decision on market dominance.

Subparagraph 7, Article 2 of the MRFTA : In determining whether an enterpriser is "a market-dominating enterpriser", his market share, whether and to what extent any barriers to enter into his market exist, and the relative size of competitive enterprisers shall be comprehensively taken into account.

2.2 Related Guidelines

Entry barriers are stipulated in two guidelines: the Guidelines for Reviewing Abuse of Dominance and the M&A Review Guidelines.

The Guidelines for Reviewing Abuse of Market Dominance prescribe the "existence and degree of an entry barrier" as a factor in determining whether a firm is a market-dominating company. It is stipulated that "if new entries in the relevant market can be made easily in the near future, the enterpriser is less likely to be a market-dominating enterpriser".

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1 Bain, J. (1956), Barriers to New Competition, Cambridge, MA: Harvard University Press, p.3

2 Stigler, G. (1968), The Organisation of Industry, Chicago, IL: University of Chicago Press, p. 67

The M&A Review Guidelines include the "likelihood of new entries" in factors to take into account in deciding the competition-restrictiveness of an M&A, stipulating that "If new entries in the relevant market can be made easily in the near future, the number of competitors reduced by a business combination is likely to rise and, therefore, the merger is less likely to substantially restrict competition".

2.3 Assessing Entry Barriers

According to the two Guidelines, when assessing the likelihood of new entries, the following factors are considered: (The same factors are applied when judging whether a company is a market-dominating enterpriser and whether an M&A substantially restrains competition.)

- presence/absence of legal or institutional barriers to entry;
- the size of minimum capital required;
- production technology requirements including patents and other intellectual property rights;
- conditions of location;
- conditions of purchase of raw material;
- the distribution network and the cost of establishing sales network;
- the level of product differentiation;
- the proportion and change of import;
- tariffs and various non-tariff barriers.

The two Guidelines also prescribe that new entries into a given market are deemed easy if there is a company falling under the following categories:

- a company which has newly entered in the relevant market for the past three years;
- a company which has publicly announced its intent, plans, etc. to invest and participate in the market;
- a company which is deemed likely to participate in the market in the near future without a significant burden of cost of entry or exit in response to a meaningful and no transitory increase in price in the market, such as being able to enter in the relevant market without a significant modification to its existing production facilities.

2.4 Structural and Strategic Barriers to Entry

Structural barriers to entry are usually defined as those stemming from basic characteristics of an industry, such as production technology, laws and institutions, and costs and demand. Strategic barriers to entry are intentionally set up by incumbents in a market in order to deter potential suppliers from entry. Incumbents strategically use first mover's advantage arising from asymmetry of entry.

The factors related to new entries stipulated in the two Guidelines include both structural barriers (legal or institutional barriers to entry, the size of minimum capital required, production technology requirements, conditions of location, conditions of purchase of raw material and tariffs and various non-tariff barriers) and strategic barriers (the level of product differentiation).

Some entry barriers are clearly divided into structural and strategic barriers. However, most barriers have both aspects. For example, sunk costs act as a structural barrier to entry for new firms since sunk costs create exit costs and risk. At the same time, they function as a critical factor helping incumbents strategically deter new entrants. Product differentiation can be used as a strategy to deter entry while products already differentiated by many other factors can act as a structural barrier to entry.

In its law enforcement activities, the KFTC does not separate structural barriers from strategic barriers and makes a decision on the presence of entry barriers, comprehensively taking into account the factors stipulated in the Guidelines.

3. Cases of Entry Barriers

3.1 Abuse of Market-Dominating Position

In determining whether a firm is in a market-dominating position, the presence and degree of entry barriers is considered. However, there are not many cases where a barrier to entry is the only decisive factor in the decision. A barrier to entry is comprehensively considered with many other factors including market share, turnover and competition in the relevant market.

3.1.1 Posco's Refusal to Deal

Posco, a leading iron and steel maker in Korea, refused to supply Hyundai Hysco, a cold rolled steel producer, with hot coil which is the raw material for cold rolled steel. The decision acknowledged that Posco is in a market-dominating position based on the fact that a high barrier to entry exists since trillions of Won(billions of dollars) is needed to construct an integrated steel mill, along with other factors such as Posco's market share, turnover and ranking in the industry.

3.1.2 Credit Card Companies' Abuse of Dominance

Four credit card companies committed an act of price abuse by raising or maintaining cash advance fees and overdue interest despite plummeting costs due to declining deposit interest rate and bad debt ratio. When deciding whether credit card companies held a market-dominating position, the presence of entry barriers was taken into consideration, together with market share and the degree of market concentration. The KFTC considered that structural entry barrier existed in the credit card industry because the industry was operating under the permission system pursuant to the Specialised Credit Financial Business Act. It was also considered that there has been no new entrant in the credit card market over the past six years.

3.2 M&A

3.2.1 M&A between Moohak and Daesun

This case is about a merger between Moohak Soju, the No.1 soju producer in the Gyeongnam province, and Daesun Distilling Co., the No.1 soju producer in Busan . (Busan is adjacent to Gyeongnam). Soju is popular Korean wine. The market was defined as the soju production and distribution market in Busan-Gyeongnam province. Criteria for competition-restrictiveness were the degree of market concentration, possibility of market dominance abuse, likelihood of new entries and possibility of collusion. The KFTC challenged the M&A on the ground that it might restrain competition in the market.

With regard to the likelihood of new entries, it was judged that no legal and institutional barriers exist in the production market, but that an entry barrier related to distribution does. The incumbent distributors in the Busan-Gyeongnam region have long been doing business with Daesun and Moohak. So, new entrants found it difficult to open business with these distributors. Furthermore, the new entrants could not have distribution network of their own since, under the Liquor Tax Act, soju manufacturers were banned from engaging in manufacturing and wholesaling at the same time. Therefore, it was deemed that the difficulty in securing distribution network was a substantial barrier to entry.

Another important factor deterring new entrants was that consumption of soju was influenced by consumer taste and that it takes time and money to develop brand awareness. According to a survey by the Gallup Korea among consumers in the Busan-Gyeongnam region on why they prefer a certain soju brand, 69.9% said, “We are accustomed to the taste”, while 23.3% responded, “It is a product made in our region.” A mere 1.6% of the respondents said, “Because it is cheap.” Considering such inherent characteristics of soju and the consumption propensity, it was decided that a substantial barrier to entry exists in the relevant market.

In its decision on this case, the Seoul High Court said, “Although legal barriers were removed, a substantial barrier to entry exists in the markets of Busan and the Gyeongnam province as a strong preference of residents for regional soju brands is developed due to a combination of various factors such as efforts of the regional soju manufacturers to develop new products and strengthen sales promotion and the growing regionalism caused by political changes, and because of the characteristics of the market, high logistics costs and difficulty in securing distribution channels, simple price strategies are not enough for competitors to increase supply in the market or for soju producers of other regions to newly enter the market.”

3.2.2 M&A between Samick and Young Chang

This case is about the M&A between Samick Musical Instrument Co. and Young Chang Piano Co., two piano makers in Korea. In this case, the relevant market was defined to include domestic markets of upright piano, grand piano and digital piano. The KFTC challenged the M&A on the ground that it would result in restriction of competition. The decision was made based on a comprehensive consideration of the degree of market concentration, level of foreign competition in the market, likelihood of new entries, existence of similar goods and adjacent markets and possibility of collusion by competitors.

As to the likelihood of new entries, it was judged that in spite of no legal and institutional barriers to entry, it is in effect impossible to enter the domestic piano market since domestic demand was stagnant and more than 50 billion Won(5 million dollars) would be required for a new entrant to establish production facilities matching those of the two piano makers. In addition, even the two companies were moving their production facilities to China and Indonesia due to rising labor cost in Korea.

4. Conclusions

An entry barrier is not defined in the Korean laws and it is hard to find a clear definition of an entry barrier in a written decision or judgment. However, because a barrier to entry is an important factor of consideration in competition law enforcement, the Guidelines for Reviewing Abuse of Market-Dominating Position and the M&A Review Guidelines prescribe matters to consider when determining the presence of an entry barrier. As seen in the cases aforementioned, the likelihood of new entries is considered as a factor in competition law enforcement.

With an increasing number of cases involving entry barriers and lively discussions about entry barriers, more efforts will be made to clearly define a barrier to entry and develop diverse and systematic assessment methods. In this regard, it is meaningful to hold the roundtable on barriers to entry and discuss law enforcement experiences of OECD member countries. The KFTC expects to make a contribution to this work.

MEXICO

1. Introduction

This contribution briefly delves into the academic and policy debate over the definition and assessment of barriers to entry. It then discusses how Mexico's competition authority, empowered by its law (Federal Law of Economic Competition or FLEC) and its code of regulations (Regulations to the FLEC or RFLEC), uses this analysis in merger reviews, anticompetitive conduct investigations, and in fulfilling its responsibilities relating to regulated sectors and its analysis of regulatory burdens (the latter, part of its advocacy activities). The document goes on to present some of the most representative analyses of barriers to entry that the Federal Competition Commission (FCC or Commission) has undertaken, grouping them according to the three processes mentioned above. The final section presents some concluding remarks.

2. Defining and assessing barriers to entry

2.1 The international debate over their definition and assessment

There is no one agreed upon definition among economists of what constitutes a barrier to entry. McAfee, Mialon and Williams (2004), for example, identify seven definitions of barriers to entry proposed by the economics literature. These include Bain's earliest definition: an advantage for established sellers that confers them an ability to raise prices without attracting new firms to the industry; Stigler's definition of a cost incurred by an entrant into an industry but not by an incumbent; and Carlton and Perloff's definition, based on Stigler, which introduces a dynamic element to Stigler's definition by stating that a barrier to entry is anything that prevents an entrepreneur from instantaneously creating a new firm in the market, while "[a] long-run barrier to entry is a cost necessarily incurred by a new entrant that incumbents do not (or have not had to) bear".[1]

In the academic field, fixed costs,[2] economies of scale, capital requirements and sunk costs are recurring discussion elements in identifying potential barriers to entry. More recently, however, studies no longer focus on whether they constitute barriers to entry or not, but on the dynamic aspects of these elements: how long they can effectively dissuade or impede entry. Carlton (2004), for example, argues that the more interesting question for antitrust authorities is not whether price will eventually equal the competitive level once entry occurs, but how long it will take before price reaches the competitive level.

Antitrust authorities present variants of the Bain and Stigler definitions of barriers to entry. The European Union, for example, defines them as "specific features of the market, which give incumbent firms advantages over potential competitors".[3] The United Kingdom's Office of Fair Trading (the OFT)

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1 See McAfee, Mialon and Williams (2004).

2 See Schmalensee (2004) and Baumol, Panzar and Willig (1988). The latter authors develop a model where they show that fixed costs affect incumbent and entrant firms alike at equal outputs, which, following Stigler, would mean that they are not entry barriers as entry barriers would fall upon de entrant but not the incumbent, at equal outputs.

3 European Union, *Guidelines on the assessment of horizontal mergers under the council regulation on the control of concentrations between undertakings* (2004).

considers that "[e]ntry barriers may be broadly defined as any feature of a market that gives incumbent firms an advantage over potential entrants, such that incumbents can persistently raise their prices above (or reduce quality below) competitive levels without new firms entering the market".[4] Australia considers that a barrier to entry is "any feature of a market that places an efficient prospective entrant at a significant disadvantage compared with incumbent firms".[5]

The process of identifying and analysing barriers to entry has important implications for antitrust analysis. For antitrust authorities, the significance of barriers to entry relates both to the increased likelihood of a finding of monopoly power when they are present, as well as a means of determining whether a proposed merger should be challenged. Commonly identified barriers include: (1) those that relate to production technology, such as high capital expenditures, large sunk costs, long lead times, evidence of a large minimum scale of operation for efficient production, specialised knowledge, technology or resources that is not readily obtained; (2) those that relate to the legal framework or government actions, such as government imposed restrictions, legal license requirements, and intellectual property rights. The OFT refers to these situations, where government regulations such as licensing intellectual property rights or preferential access to essential facilities that limit the number of entrants to a market, as absolute advantages; and (3) those related to marketing practices, including exclusivity arrangements, investments in branding, advertising and in product differentiation, or any costs or limits to buyer switching, such as entrenched buyer preferences (e.g. brand loyalty).

In the case of merger review, the United States' *Horizontal Merger Guidelines* (US Guidelines), for example, consider that entry is easy if it is "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern." The US Guidelines present a 3-step methodology to assess whether committed entry would deter or counteract a competitive effect of concern. The first step assesses whether entry can achieve significant market impact within a timely period. The second step assesses whether committed entry would be a profitable and, hence, a likely response to a merger having competitive effects of concern. The third step assesses whether timely and likely entry would be sufficient to return market prices to their premerger levels. This end may be accomplished either through multiple entry or individual entry at a sufficient scale. In its analysis of competitive effects of proposed mergers, Canada's Competition Bureau also considers "whether timely entry by potential competitors would likely occur on a sufficient scale and magnitude scope to constrain a material price increase in the relevant market or a substantial part of the relevant market."[6] Similarly, entry must be likely, timely (within a two-year period) and sufficient in scale and scope.

The European Union's Guidelines on the assessment of horizontal mergers under the council regulation on the control of concentrations between undertakings (EU Guidelines), establish that barriers to entry have an impact on expected profitability of entry by determining the risks and costs of entry. They establish that entry can be "considered a sufficient competitive constraint on the merging parties … [if it is] shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger." In its Mergers Procedural Guidance, the OFT also echoes the EU Guidelines in establishing that concerns for a potentially anticompetitive merger may be offset if entry is "sufficient in scope, timeliness and likelihood" to deter a firm's attempt to capitalise on the loss of rivalry in the market. To assess whether entry will occur in the event that the merging parties seek to exercise market power, the OFT may review barriers to entry, evidence of planned entry by third parties and minimum viable scale needed for entry. In the case of Australia, their Merger Guidelines state that "effective entry is that which is likely to have a market impact within a two year period, either by deterring or defeating the attempted exercise of

4 United Kingdom, *Mergers: substantive assessment guide* (2002).

5 Australia, *Merger guidelines* (1999).

6 Canada, *Merger enforcement guidelines* (2004).

significant market power by the merged firm." For actual entry, it is a requisite that it tale place "on a sufficient scale" and that the product offered is "sufficiently attractive to consumers to be effective".

Whereas merger analysis evaluates likely entry, and thus the existence of barriers to entry, in a prospective manner in order to determine whether entry can solve a potential competition problem, market power analysis undertaken in abuse of dominance or monopolisation offences tends to be retrospective. In unilateral conduct investigations, because the analysis of barriers is tied to the allegations of anticompetitive practices brought by private parties or the antitrust authority, the relevant question is not whether entry is easy, but whether entry is easy enough to solve the competition problem at hand.[7]

2.2 Assessing barriers to entry in the Commission's antitrust analyses

Although market power cannot be assessed solely from the existence of entry barriers and/or a dominant market share, competition analysis relies on identifying and assessing the effects of barriers to entry on competition conditions when making a market power determination. The FCC uses market power analysis in three distinct processes: investigations on relative monopolistic practices, merger review, and as part of the FCC's additional responsibilities concerning regulated sectors and the issuing of opinions on regulations that may hamper the competitive process in general. The law and its rulings lay out the elements that need to be analysed in order to determine whether barriers to entry are present in a relevant market. These include capital requirements, efficiency of financial markets, adjustment, fixed, and sunk costs, as well as regulatory burdens.

Under the law, relative monopolistic practices are anti-competitive unilateral conducts, which include abuse of dominance or monopolisation offences as well as vertical practices. They are reviewed under a rule of reason analysis, which takes into account whether the economic agent(s) allegedly responsible for anticompetitive conduct(s) possess market power (as defined under article 13) in the relevant market (as defined under article 12). The analysis of barriers to entry make up the third and final stage of the merger review process, following the determination of the relevant market and after estimating the probable effects of the merger on the degree of market concentration, as measured through concentration indices.[8] In the case of regulated sectors and opinions on regulations, the Commission has three distinct responsibilities, which will be discussed in more detail in section V: (1) determining whether economic agents may participate in privatisation proceedings and in auctions for concessions, licenses and permits issued by the federal government, (2) making a determination on effective competition conditions in the relevant market, which, if lacking, will trigger price regulation by the corresponding sectoral authorities, and (3) issuing opinions regarding the regulatory framework underlying any market, including proposed changes to this framework by any public or private entity (a competition advocacy activity). For its first two responsibilities, the FCC must make a determination on market power in the relevant market(s). Its last responsibility requires it to assess impediments to the competitive process, that is, an analysis of barriers to entry.

The requirement to assess barriers to entry is specifically stated under article 13, index II of the FLEC, as one of the elements that must be considered when determining an agent's market power

2. The existence of entry barriers and any elements that may foreseeably alter said barriers such as other competitors' supply

Article 11 of the Rulings of the FLEC (RFLEC) elaborates on the types of elements that can be construed as barriers to entry when undertaking this analysis. Index I of this article considers capital

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7 Refer to the discussion in Gavil, Kovacic and Baker (2002), p. 870.

8 Mexico, *Concentraciones: Apuntes para el análisis económico* (2004).

requirements, that is, "financial costs or the costs of developing alternative channels". It also considers whether financial markets are efficient, that is, if conditions of "limited access to financing" exists. Index II takes into account adjustment costs, "[the] term for recouping the required investment", and whether costs are effectively sunk, "[the] return for alternative uses of infrastructure and equipment". Index IV takes into account fixed costs such as advertising and investments in brands or trademarks as barriers to entry. Marketing and business practices, such as exclusive arrangements, lie within the definition of barriers provided in index VI. Finally, indexes III, V and VII considers normative barriers: regulation and regulators' actions, including the use of intellectual and industrial property as barriers to entry, and regulation relating to international trade as a special case of barriers to entry.

3. Analyses of barriers to entry: relative monopolistic practices

The cases discussed in this section illustrate the variety of elements that can be construed as barriers to entry. In the first case, exclusive arrangements are used as barriers to entry. The next set of cases exemplify how economic agents have used patents to bar entry into public bidding processes. Analysis relating to monopolistic practices in the market for distribution and sale of gasoline are described next, together with the subsequent agreement that the FCC reached with Mexico's national petroleum monopoly, Pemex, to establish conditions that would allow a more efficient response to local demand conditions. A final sub-section includes brief comments on an investigation involving relative monopolistic practices, where barriers played an important role in market power determination.

3.1 Exclusive arrangements as barriers to entry

3.1.1 FCC v. Modelo and CCM[9]

In 1999, the Commission opened an investigation at the national level into the market for beer distribution, to determine whether exclusive distribution agreements between the two national breweries, Grupo Modelo (Modelo) and Cervecería Cuauhtémoc Moctezuma (CCM), and local authorities were anticompetitive. In Mexico, beer manufacturers are vertically integrated into distribution, and although exclusivity contracts are a common practice in the industry, the highly concentrated nature of the market was likely foreclosing alternative distribution channels for competitors and reducing choices for consumers.

In accordance with article 41 of the RFLEC,[10] the two breweries, asked for a six month period to review their exclusivity contracts and propose a solution. Modelo and CCM acknowledged that they had entered into exclusive contracts with local authorities throughout the country to distribute and sell the different brands of beer they produce, and offered the following commitments: (1) to no longer subscribe exclusivity contracts with local authorities; (2) to eliminate direct distribution and encourage independent distributors to eliminate this practice; (3) to no longer renew contracts and encourage their independent distributors not to renew similar contracts. The FCC considered that these commitments were convenient and feasible as they had the same scope, could be verifiable and would immediately limit the practice.

9 File IO-04-1999.

10 This article states that "At any stage of a proceeding pursued before the Commission, and before the latter emits a definitive judgment, the alleged violator shall be entitled to present a written compromise whereby it undertakes to suspend, suppress, correct or not carry out the alleged relative monopolistic practice or prohibited concentration…"

3.2 The use of intellectual property as barriers to entry in public bidding processes

Although both articles 28 in the federal constitution and 5 of the FLEC state that privileges granted to inventors are not monopolies, the use of market power created by the temporary privileges granted to authors and artists or to inventors, to undertake anticompetitive practices is considered unlawful. The two cases presented here illustrate examples where ill-defined property rights for patents have been used to erect barriers to entry for participants in public procurement processes. Both cases relate to participation in bids to supply medicines for government health agencies, and both relied on the interpretation that patent holders and government agencies gave to article 41, index I of the Law for Acquisitions, Leases and Public Sector Services (LAASSP), to bar entry. The legal precept 'opens the door' for an agency to assign any acquisition, lease or service directly to a supplier who is the owner of a patent by stating that:

> ARTICLE 41.- Agencies and entities, under their own responsibility, **may** enter intro contracts for acquisitions, leases and services, without being subject to the public auction process, through invitation processes to at least three persons or by direct allocation, when:
>
> I. These relate to art, or goods and services for which there are no alternatives or technically feasible substitutes, the contract may only be entered into with a determined person because he or she is the holder of rights or exclusive licences of patents, copyrights, or other exclusive rights; … [**emphasis added**]

3.2.1 RIMSA v. Roche[11]

In 2003, RIMSA opened a complaint against Roche for relative monopoly power in the market of distribution and trade of the active pharmaceutical ingredient (API) *Filgrastim*.[12] RIMSA alleged that Roche was hindering competition by using its exclusive license for the patent, which had been declared null by the Mexican Institute for Industrial Property (IMPI) in 2002, and invoking article 41 in the LAASSP to bar it from participating in the Mexican Social Security Administrator's (IMSS) public procurement process for this drug. Based on the LAASSP, public health institutions have eliminated *Filgastrim* from the list of products subject to public auction, and granted Roche 90% of the sales of *Filgrastim* to the public sector. The case was closed as Roche proved that the Fiscal and Administrative Federal Justice Court had granted it a provisional suspension of the patent's nullity, meaning that, until the Court reaches a verdict, the patent's owner keeps its rights.

3.2.2 Landsteiner and PIHCSA v. Merck[13]

In 2004, Landsteiner and PIHCSA opened a complaint against Merck, alleging that it has been misleadingly claiming to be the holder of a patent for API *Alendronate*.[14] According to the complainants, Merck has been using various patents that describe its use in certain processes, to bar others from producing drugs using the substance *Alendronate*, which is not protected by a patent. Landsteiner and

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11 Files DE-54-2003 and RA-03-2005.

12 Filgrastim stimulates the formation of one type of white blood cell, the neutrophil. It is used to prevent infectious complications associated with a decrease in the number of neutrophils in the body (neutropenia). Neutropenia may develop in cancer patients receiving chemotherapy or undergoing bone marrow transplantation. http://www.medicinenet.com/filgrastim/article.htm

13 Files DE-13-2004 (Landsteiner), DE-18-2004 (Pihcsa) and RA-01-2005.

14 Alendronate is in a class of medications used to strengthen bone. Alendronate is used to treat osteoporosis (thinning of bone) in women after menopause. http://www.medicinenet.com/alendronate/article.htm

Pihcsa noted that *Alendronate* is a substance marketed in Mexico since 1994, that is generally known and part of the state of the art since 1981.

As in the case of *Filgrastim*, both parties alleged that Merck had challenged the health sector's public procurement processes involving *Alendronate*, by invoking article 41 of the LAASSP. Merck had also used the *amparo*[15] procedure to bar Landsteiner from manufacturing and marketing this product and used this ruling to bar competitors from participating in public sector auctions for this API. IMPI also stated that the chemical compound *Alendronate* was not protected by a patent and there was no exclusive right associated with its production. Nevertheless, Merck showed that the patents mentioned in the complaint are under legal dispute, which means that, until a verdict is reached, it retains the rights for their use and exploitation.

In light of the evidence, and because determining the property rights for patent licenses lies outside of the realm of the Commission's powers, it resolved to close both cases. Nonetheless, the competition authority considers that both cases exemplify how patent owners are using ambiguities in the LAASSP to pressure health authorities from holding conventional auction processes, thus barring entry and shielding themselves from competition. The FCC sees its subsequent role in similar cases as one of advocacy with the government agencies involved.

3.3 Barriers to entry in franchises for gasoline stations

Production and marketing of gasoline and diesel in Mexico is reserved for the state, who undertakes this activity through Petroleos Mexicanos (Pemex).[16] At the retail level, Pemex distributes and markets gasoline through franchising agreements and a gasoline supply contract that it can only sign with Mexican nationals.[17]

In 1993, its first year of operations, the FCC opened an investigation into possible monopolistic practices consisting in Pemex establishing exclusive territories in gasoline distribution contracts. Although the investigation uncovered that minimum distances was not a condition in the franchise agreement, Pemex did use them as a criteria to grant these. The investigation also uncovered that the number of gasoline stations in the country was below what would prevail under competition conditions and that the franchise agreement included a sub franchise agreement, which restricted complementary products that a gasoline station could sell, as well as its working relationships with third parties. This clause in the agreement represented an important barrier to entry for downstream competitors, by effectively closing gasoline stations as a potential distribution channel.

The FCC concluded that Pemex had to reduce its discretion in setting the terms of its agreements and make the granting of franchises a more transparent process, both to foster an increase in the number of gasoline stations and to prevent possible anticompetitive practices. In June of 2004, the Commission and Pemex signed a coordination agreement (agreement) whereby artificial barriers to entry were eliminated and which allowed the diversification of businesses. The agreement ensured that the franchise granting process would be non-discriminatory, would eliminate criteria that limited the number of stations and the

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15 An *amparo* is a proceeding established in Articles 103 and 107 of the Mexican Constitution to provide all persons with protection against unconstitutional acts by the government. It is available to any party who can raise a claim that he/she is being subjected to an unconstitutional law or that his/her due process rights are being infringed. Due process, in this context, is not limited to procedural issues but can attack the merits of an agency's decision because the definition of due process in Article 16 of the Mexican Constitution requires that agency orders articulate the "legal basis and justification for the action taken".

16 See constitutional article 27 and its associated Law (1958), regarding the petroleum branch.

17 Article 6 of the Foreign Investment Law, states that all societies will exclude foreigners regarding retail of gasoline and distribution of liquefied petroleum gas.

distance between them in a given geographic area, and would allow the transfer of franchises among persons. One of the immediate effects of this agreement was a significant increase in the number of stations: between 1994 and 2005 the number of gas stations was duplicated. In spite of this, the average number of users served per gasoline station in Mexico is still well above its equivalent in other Latin American countries.

In 2005, the FCC analysed 2 projects that sought to modify Pemex's franchise agreements. The first seeks to exclude spaces located in shopping complexes from being given a gasoline franchise; the project alleges that these spaces violate the clause excluding foreigners from participating in this business. The second project is part of an initiative to reform the Industrial Property Law, and has Pemex and the association of franchise owners among its backers; it argues that exclusive territories are necessary to preserve the value of a franchise. In both instances, the FCC issued a negative opinion because it considered that they would introduce artificial barriers to entry. Both sides are still debating and lobbying both projects.

3.4 Other assessments of barriers to entry

3.4.1 Raising rivals' costs: the case of liquefied petroleum gas distributors[18]

Gas Supremo filed a complaint against Gas de Cuernavaca, Gas de Cuautla, Gas Modelo, Compañía Hidro Gas de Cuernavaca, Gas del Sol, and Gas de Morelos for delaying its construction of a storage plant for liquefied petroleum (LP) gas distribution in the municipality of Yautepec, Morelos. The 6 defendants hold permits to distribute LP gas through storage plants in several municipalities in the State of Morelos. The investigation uncovered that Gas Supremo had taken more than 18 months to install its plant and begin operations (instead of the expected 6 months) because the defendants had sought administrative prohibitions banning the works, alleging various risks. The Commission treated the accused firms as a single economic group, as they were linked through common shareholders who are also members of their respective boards of directors.

The geographic dimension of the relevant market was limited to the state of Morelos since this state has a limited capacity of substituting LP gas for other energy sources, and there is difficulty in obtaining or transporting LP gas from other states. In addition, the lack of substitutes in the relevant market, together with the high market shares wielded by the defendants in every municipal district in which they met Gas Supremo, led to a substantial market power determination by the Commission. Furthermore, the FCC found that the person acting as proxy for the defendants was also acting as a proxy for people who had requested similar administrative bans against Gas Supremo in the state of Puebla. Hence, the defendants were aware of their proxy's actions and were able to profit from Gas Supremo's delayed entry into the relevant market. The Plenum resolved that the accused were guilty of raising a rivals' costs of entry into the market, a relative monopolistic practice, and fined them accordingly.

4. Analyses of barriers to entry: merger review

The recently released guidelines and economic analysis notes, which describe the Commission's procedures to resolve merger notifications, also expand on the elements and methodology of analysis used by the FCC when assessing barriers to entry. In merger reviews, the Commission bases its analysis of market power on changes in the degree of market concentration and on the existence of barriers to entry. Barriers play a prominent role since, "the Commission will not object the concentration, regardless of the

[18] File DE-65-2000.

degree of market concentration reached" as long as there are no barriers to entry.[19] The guidelines reiterate that an agent's ability to fix prices, the existence of barriers to entry and other restrictions to the competition process, are elements associated with market power. They note the following as additional elements assessed in the Commission's analyses when making a determination of market power: a persistently high market share; a market share greater than or equal to 35% and a contribution to market concentration of 50% or more;[20] persistently high (extra normal) profits; high degree of excess capacity relative to competitors; entry regulations; conditions that facilitate collusion; and the behaviour of economic agents.

Because of the variety of barriers analysed in each merger case, they have not been grouped according to types of barriers, but each is presented individually. The cases reviewed correspond to the airline industry, pension fund administrators, the media sectors, soft drinks, pharmaceuticals, and plastics. Barrier assessment includes capital requirements; normative barriers; entry restrictions, in the form of common practices by established economic agents; investments in brand value, advertising, research and development and other investments; as well as tariff barriers.

4.1 Cintra

In the early 1990s Aerovías de México (Aeromexico) and Mexicana de Aviación (Mexicana), the two largest air carriers in Mexico went into bankruptcy due to high operational costs and debt. Before the FLEC entered into force, the Federal Government authorised Aeromexico, the airline with the better financial situation, to acquire control of Mexicana, its main competitor in the market. In 1994 creditor banks took over both airlines. In May 1995, these banking institutions requested the FCC authorisation to create Cintra, a holding company that would serve as a temporary financial vehicle to improve the financial situation of both airlines. Their argument for the concentration was a failing firm defence, and they claimed that the operation would help them: (i) achieve the recovery and economic survival of the airlines through the capitalisation of the banking debt; (ii) enhance the companies' operation through new investments, and (iii) sell each of the companies under independent sale schemes, when financial solvency was re-established.

In August 1995, the FCC authorised the creation of Cintra, subject to measures aimed at preventing abuses of market power and ensuring the separate operation of the airlines so that, once the financial and operative restructuring process ended, they could be sold off separately.[21] The FCC reserved itself the power to impose fines and order partial or total divestiture of the airlines if there was substantial damage to competition. Changes in ownership since 1995, led to the government holding a controlling interest in CINTRA.[22] In September 2000, CINTRA's shareholders submitted a consultation with the FCC noting that the separate operation of the airlines was not feasible, and arguing that the splitting of Cintra would: promote a destructive competition among airlines; not allow the companies to be sufficiently profitable to

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19 Although there are exceptions, this is a general condition, p. 25 of *Concentraciones: Apuntes para el análisis económico* (2004).

20 This contribution to market concentration is measured as $h_i = \left(\frac{q_i}{H}\right) * 100$ where *qi* is the market share and *H* is the Herfindahl index. The variable *hi* is the basis for calculating the dominance index (ID), and it measures the size of an economic agent's participation relative to the average size of agents in the relevant market.

21 In its initial decision, the FCC resolved the divestiture would take place after a three year period. However, after an appeal for review presented by the shareholders, the FCC modified its previous resolution.

22 The transactions to transfer Cintra's shares to government funds were authorised by the FCC, subject to the accomplishment of the conditions imposed in the previous resolution.

face market competition from international airlines; and harm the recovery value from the sale of the assets.

In its response, the FCC concluded that the merger of Aeromexico and Mexicana would increase concentration to a very high level in all of the most important routes in the country in a definite and irreversible manner. It would also impose important economic and legal barriers that would hinder access to both national and foreign competitors and strengthen the companies' market power. The Commission also identified important normative barriers such as: cabotage,[23] which is reserved exclusively for Mexicans; foreign investment limits; grand fathering rights, which govern the allocation of slots in airports; and limits to the granting of new concessions to serve a route, which can only be given to existing airlines. Among the principal economic barriers identified were: high costs of entry and exit associated to the investments, technical requirements and service quality; trademarks and market knowledge; commercial practices of established firms, including loyalty programmes, interlineal agreements and shared codes; and first mover advantages, which are especially important in major and congested national and international airports.

In 2004 and 2005, shareholders submitted consultations to the FCC on different schemes to divest Aeromexico and Mexicana's assets. This year, CINTRA has made public its intention to sell both airlines and their subsidiaries separately, as well as the air-cargo unit, Aeromexpress, and the flight-training unit, Alas de America. The government has announced its willingness to sell between 51 and 100% of its holdings in each airline group to separate buyers through a public auction process. The proceedings consider the FCC's participation in assessing and issuing opinions on the auction call and each prospective bidder.

4.2 Afores (compulsory private pension funds)[24]

In April 1999, Grupo Financiero Bancomer (Bancomer), Aetna International Inc (Aetna) and Ixe Grupo Financiero (Ixe) notified a concentration whereby Bancomer, the second largest financial group in the country, and Aetna would purchase Afore XXI and its associated Siefore from Ixe.[25] Afore XXI was jointly owned by Ixe and the Mexican Social Security Administrator (IMSS). In addition to the FCC's authorisation, the transaction was subject to authorisations by the National Commission of the Savings for Retirement System (CONSAR) and the Ministry of Finance and Public Credit (SHCP).

The merger implied that Bancomer/Aetna would potentially concentrate 34% of the market. Although concentration indices did not surpass the thresholds established by the FCC, the merger was not authorised because it violated market participation thresholds established by CONSAR.[26] Furthermore, LSAR imposed restrictions to an economic agent's participation in more than one Afore and it was considered that the current market structure barred entry, since most workers had already registered in one Afore, so that the only avenue for growth by Afores was through mergers and acquisitions as account transfers were

23 Cabotage is defined as the exclusive right of a country to control the air traffic within its borders.

24 File CNT-55-99.

25 An Afore is a pension fund administrator. By law, they must have a specialised pension fund investment society (Siefore), which is responsible for the investment of pension funds in low risk financial instruments as established by the sectoral regulator, CONSAR (National Commission of the Savings for Retirement System).

26 The Savings for Retirement System Law (LSAR), established that no administrator would be allowed to have a market participation above 20% in the savings for retirement system market, and this participation could only change at the discretion of the regulator.

uncommon and limited, in spite of differences in returns. The Commission resolved to object the transaction.

4.3 Televisa / Acir

In September 2000, the Commission analysed a merger notification between Televisa, one of two television consortia in Mexico, and Grupo Acir, whereby Televisa was to hold 50.01% of the shares of the new group. The relevant market was defined as advertising sales in radio. Even though concentration indices did not surpass the Commission's thresholds, the fact that Televisa played an important role in other substantially related markets was taken into consideration in the FCC's decision, as it would give it an important bargaining position in the new firm and would grant it an advantage over its competitors, who would not be able to offer advertising sales in other media, specifically television and magazines.

In addition, other market participants expressed a concern about Televisa's common sales practices. In 1997, a large fraction of Televisa's advertising sales were made under its "*Plan Frances*" (French Plan). The Plan offered a price guarantee and bonus advertising time to clients who paid in advance for an equivalent amount of advertising time in Televisa's TV networks and media, for the subsequent year. This practice amounted to Televisa's bulk packaging of its advertising sales in different media (for example, it offered discounts on radio advertisements if the client bought advertisements in magazines or TV). The Commissions regarded these activities as an entry barrier, and objected to the merger between Televisa and Acir.

4.4 Coca-Cola / Cadbury

In December 1998, The Coca Cola Company (TCCC) and Cadbury Schweppes, Plc (CS) notified their intention to carry out a concentration. The transaction involved TCCC's purchase of several brands, property of CS, in two relevant markets: carbonated drinks and bottled natural water. Both markets had a national geographic dimension.

In its determination of TCCC's degree of market power in the carbonated drinks market, the Commission took into account a number of facts, among them that the carbonated drinks market is highly concentrated and that TCCC's market share of 64.4 percent would increase to 71 percent as a result of the transaction and that concentration indices surpassed the Commission's thresholds. Furthermore PepsiCo, its closest competitor, had a market share of 18 percent while the remainder of the market was divided among small and medium size firms.

In addition, in its barriers to entry assessment, the Commission determined that although there were no normative barriers to enter the market, including restrictions to foreign investment and ownership, economic barriers were significant. TCCC had an extensive brand portfolio endowed with high market value, reinforced by its remarkable capacity to advertise its brands, and strengthened by its distribution network, which was the largest in the country. This infrastructure would be of great strategic value to the merged entity in strengthening its market power in the carbonated drinks market. Moreover, TCCC's practice of granting of territorial exclusivity barred entry of new Coca Cola distributors in the same geographic area.

Based on these findings, the FCC determined that the TCCC/CS merger would substantially diminish competition in the carbonated drinks market. Thus, it would allow TCCC to: (i) unilaterally fix prices and restrict supply; (ii) foreclose competitors from the relevant market of carbonated drinks and (iii) engage in monopolistic practices. On these grounds the acquisition was blocked.

4.5 Bayer / Aventis[27]

In 2004, the Commission received notice of an international merger whereby Bayer would acquire all the stocks from Aventis Corporation. The relevant markets identified consisted of the following products: fungicides, herbicides, insecticides, growth regulators, nutrients, seed treatments, non-agricultural insecticides and rodenticides.

The merger analysis showed R&D to be extremely important for agrochemical companies like Bayer and Aventis, and a significant entry barrier into the market: Bayer & Aventis spend 11% of their annual sales in R&D, and it takes from 8 to 10 years for a product in the laboratory to be introduced to the market. Although generic producers are potential competitors, competition by these agents is limited since production cannot begin until patents expire and these companies must overcome significant technological restrictions. In fact, the complex know-how has made it unnecessary for R&D-based firms, such as the parties to the transaction, to patent their products in Mexico. Moreover, access to the principal ingredients is controlled and sometimes blocked by the original producers of the active substance. In addition, advertising was also an important barrier in the market, as it creates leading brands, which give firms bargaining power over distribution channels. The Commission decided to condition the merger on the divestment of certain trademarks and assets.

4.6 Sanofi / Aventis[28]

In June 2004, the Commission received notice of an international merger whereby Sanofi-Synthélabo, SA (Sanofi) would acquire stock from Aventis, SA (Aventis). In Mexico, their subsidiaries concurred in 23 medicine therapeutic classes of level 3 and 7 for future products. Within the medicine classification, the Commission concluded that both anti-arrhythmic and digestive medicines by Sanofi and Aventis had different attributes and therefore belonged to different markets. For injected anticoagulants, vitamins A, D and their combinations, trichomonacides, specific anti-rheumatic agents and non-specific vaccines, concentration indices exceeded the Commission's pre-established parameters.

R&D was identified as a barrier to entry, as it represents a significant investment,[29] and brand recognition was also considered an important hurdle that a new entrant had to overcome. Another barrier to entry arose in both prescription and over-the-counter (OTC) medicines, where promotional material, advertisements in specialised magazines, congresses and spending in promotions in other media represented between 6% and 10% of the companies' worldwide sales. Patents were also identified as a common element that allowed firms to use or license a drug in an exclusive way for a period of 20 years, legally isolating them from competition. Furthermore, the Commission identified common industry practices used to extend market power after a patent expired such as: continuing to sell their products in the generic market too; registering new patents over medicines whose patent is about to expire by changing or adding new attributes; developing products with controlled innovation; and developing and trading OTC products for products where they face increased competition. The Commission decided to condition the merger on the divestment of certain trademarks and assets.

27 File CNT-008-2002.

28 File CNT-046-2004.

29 Firms in the industry invest between 15% and 19% of its worldwide sales in R&D, and it takes from 8 to 10 years to trade the product.

4.7 *SC Johnson / Bayer*[30]

In 2002, the FCC analysed a merger notification between SC Johnson & Son (SCJ) and Bayer. The operation included the acquisition by SCJ of intellectual property assets and patents related to household pesticides and personal mosquito repellents, as well as household cleaning products and air fresheners (excluding patents for the active ingredients). The relevant markets were those where the parties coincided: the manufacture and marketing of domestic insecticides and personal repellents, with a national geographic dimension.

Concentration indices were above the thresholds established by the FCC and the analysis found that barriers could impede the entry of new firms to the relevant markets. These barriers included R&D, which is essential to compete in the industry, where firms spend 8% of their sales since insects develop a resistance to these products and active substances can lose effectiveness over time. Moreover, R&D is important because the industry is constantly trying to reduce the toxicity of the active ingredients used in their products. Additionally, advertising investments are important as they introduce products and ensure the agents' a significant share and access to the market. In light of this, the Commission decided not to block the merger as it would empower SCJ to unilaterally fix prices or to substantially limit the supplies in the relevant markets.

The parties appealed this decision and proposed to separate trademarks and undertake other measures to preserve competition. The Commission considered that these proposals would reduce the degree of concentration and allow more competitive prices and supply; it resolved to condition the concentration based on the conditions presented by the parties.

4.8 *Industrial Camesa and Grupo Primex: an example of tariff barriers*[31]

In 2004, Industria Camesa (Camesa) notified its acquisition of Grupo Primex (Primex). The relevant market included the production and marketing of polyvinyl chloride resin or PVC resin and the production and marketing of PVC compounds. While the PVC compounds market is very competitive as the geographical market is the NAFTA area, the Commission noted that this was not the case for PVC resin.

For the latter product, it determined the geographic dimension as national and noted that a compensatory duty on imports exists in this market and ranges between 12.5% and 34.6%; hence, imports only represent around 5.6% of apparent consumption. The duty was regarded as a barrier to entry since it limited competition in international markets. In addition, the Commission noted that PVC resin production requires high levels of investment and exhibits important economies of scale. According to Camesa, whose capacity is 75,000 tons per year, the cost of installing an industrial unit with capacity between 30,000 and 60,000 tons per year lies between $15 and $30 million dollars, and initial production time would be 1 year.

The installed capacity of the merged entity would reach between 58.4% and 68.9% of the industry of PVC resin in Mexico, a figure that would clearly hinder entrance of new competitors in the market. Furthermore, Camesa declared that vertical integration defines a firm's capacity to compete in this industry. Taking this into account, the Commission decided to condition the acquisition on the divestment of some of the assets used to produce PVC resin.

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30 File CNT-121-2002.

31 File CNT-123-2004.

5. Analyses of barriers to entry: regulated sectors[32] and regulatory burdens

Although Mexico has improved its regulatory framework, reforming public institutions and modifying legal and policy instruments, a number of weaknesses constrain competition and productivity growth. The 2004 OECD report noted that regulatory policy needs to adopt a "whole of government" perspective to fully reach its goals, undertaking reforms to increase opportunities for private investment and to improve economic competitiveness.[33] A key concern for the Mexico's competition authority is to ensure that competition policy becomes a core factor contributing to regulatory and trade policies, thus ensuring market access to all participants.

With an emphasis on the analysis undertaken when assessing barriers to entry, the cases presented in this section exemplify instances where the FCC's work focused on ensuring that public auctions and privatisation proceedings include competition provisions, as well as on minimising the possibility that any agent obtain market power or that existent market power can be effectively contested by the threat of entry. The cases also illustrate the Commission's advocacy work in issuing resolutions on the existence of market power or effective competition conditions, and in ensuring that legislation includes competition elements or, alternatively, that anticompetitive elements (including artificial barriers to entry) are removed from regulation.

5.1 Opinions regarding participation in privatisation proceedings and federal government auctions

In regulated sectors licensing procedures can act as barriers to entry by being too burdensome, or by generating distortions to the competition process, for example, by discriminating among operators. Other common barriers to entry arise when incumbents act strategically to take advantage of the complex regulatory schemes to delay entry, either by litigating or lobbying for additional regulation and standards that raise the costs of entry. Consequently, it has been the FCC's role to advocate that auction rules include competition and efficiency goals and that they do not favour incumbents.[34] The Commission has also sought to advocate for transparent and non-discriminatory procedures in the granting of licences.

5.1.1 Telecommunications

Telecommunications was the first infrastructure sector to be liberalised in Mexico, it preceded the FLEC and therefore missed important competition considerations in its design. The concession title granted the privatised telecom firm, Teléfonos de México, SA de CV (Telmex), a six-year exclusivity (monopoly) period for long distance telephony in order to increase the sales price of the firm and thus government revenues, to rebalance tariffs and to increase network deployment. Moreover, the exclusivity period granted to Telmex conferred it a first-mover advantage in telephony and increased barriers for new entrants who have been unable to gain critical mass to recover their investments. These measures have resulted in Mexico consistently being ranked among the most expensive OECD countries with the lowest penetration rates in telephony markets.

Because of the inherited market structure and regulatory design, sectoral and competition regulators face special challenges in trying to impose effective mechanisms that can control the incumbent's market power. In addition, Mexico's regulatory framework is not yet fully adapted to accommodate technological

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32 The term regulated sectors includes those markets which were originally supplied by vertically-integrated state monopolies.

33 OECD Reviews of Regulatory Reform, *Mexico, Progress in Implementing Regulatory Reform* (2004).

34 The FCC can only issue non binding opinions and can only assess auctions and auction participants when invited to do so.

convergence, thus hindering the possibilities to increase inter-network competition: regulatory frameworks and concession schemes remain segmented and treat services, such as broadcasting, data, and telephony, separately, according to the network involved. Moreover, operators have not yet been authorised to provide a full range of Information and Communications Technology (ICT) services.

5.1.2 Entry regulations.

Under the Federal Telecommunications Law (FTL) a concession is required to install, operate and exploit a wired or wireless public telecommunications network (PTN). Concessions must specify, among other elements, the services that the concession holder is authorised to provide, its term, rights, and obligations. Although the FTL does not restrict the services that may be provided through the networks nor condition the granting of a concession to business plans of interested parties, administrative regulations do. Bylaws also empower the Federal Telecommunications Commission (Cofetel) to assess the documentation and the investment projects presented by each potential entrant, and links types of services and networks with minimum investment requirements. As a result, the concession title may be used to regulate the network's expansion and to create opportunities for regulatory arbitrage.

5.1.3 Incumbents' objections to the granting of second concessions

In Mexico, Cable Television (CATV) markets face a high degree of concentration and low penetration. Only in 19, out of 324 areas where the service is available, are there two or more effective competitors so that incumbents, hold a *de facto* local monopoly in most markets. In addition, they have been lobbing and litigating to delay the entry of competing networks – in some cases, this delay lasts up to two years. As a result of judicial decisions, Cofetel has had to revoke new concessions and replace the proceedings. In new proceedings, Cofetel has sought the FCC's opinion on some of the objections raised by incumbents against the granting of new concessions.

The objections mostly relate to allegations of "ruinous competition" (predatory pricing) and a concern to protect their investments in expanding the coverage and capacity of their networks. In all cases, the FCC has decided that incumbents have not proven their allegations of potential damage to competition or of ruinous competition, nor have they proven that entrants would necessarily gain substantial power in the relevant market. On the contrary, the FCC has determined that new competitors would generate incentives for better services, conditions, and prices in favour of customers. Under current legislation, however, the FCC's opinion is non-binding and is only incorporated among the technical opinions that Cofetel must consider when deciding on the granting of concessions.

5.1.4 Spectrum allocation (December 2004)

In July, 2004 Cofetel called for an auction to allocate available spectrum for broadband Personal Communications Services (PCS).[35] The auction call required prospective bidders to obtain favourable opinion from the FCC. The spectrum being offered was divided into four 2x5 paired Mhz blocks in each of the 9 regions covering the national territory and one 2x15 paired Mhz block in two of these regions.[36] Licenses will be awarded for 20 years, renewable for a similar period after directly applying to Cofetel and without the need for FCC intervention.

The auction call imposed a 65 MHz spectrum cap on the combined cellular and PCS frequencies for a (new or incumbent) license holder. This cap takes into account the spectrum owned, leased or otherwise

[35] All licenses are "concrete", i.e. the precise spectrum bands associated with each license were identified before the auction.

[36] The 30 Mhz lots in these regions were left over from the 1997 auction.

exploited by the applicant, their affiliates and subsidiaries, and all shareholders (direct/indirect and major/minor). In October 2004, the FCC assessed 7 different economic agents: four incumbents and three entrants.[37] Prospective bidders revealed that intended spectrum acquisitions exceeded the available spectrum auctioned, in fact, only the demand of incumbents exceeded the amount of spectrum being auctioned, without surpassing the spectrum cap of 65 Mhz.

The Commission reasoned that since spectrum is a scarce resource, carriers with higher marginal valuations, that is incumbents, have incentives to deter the entry of new competitors and to limit the growth of smaller incumbents by hoarding spectrum. Incumbent carriers also have the deepest pockets, making it highly probable that their bids would win spectrum auctions. In addition, the FCC took into account that the market is highly concentrated as measured by subscribers and earnings, with H concentration indexes of 9,232 and 7,988 for pre- and post-paid markets, respectively. As a result, one of the FCC's chief concerns was that the auction would increase spectrum concentration, impede the entry of new carriers and diminish the prospects of long term competition among incumbents.

The FCC adopted as a specific goal, encouraging the entrance of new participants to the mobile telephony market. Accordingly, it determined that it was necessary to strengthen spectrum caps in the 1.9 Ghz auction to enhance participation so that the process would not lead to increased concentration of spectrum. On the 5 January 2005, it gave conditional clearance to prospective bidders to participate in the 1.9 Ghz auction by limiting any agent's acquisition of spectrum to no more than 35 Mhz at the 1.9 Ghz band in all regions.[38] Incumbents challenged the FCC decision in court and a definitive resolution is still pending.

5.1.5 Natural gas concessions and permits[39]

In March 2000, SEMPRA Energy requested the Commission's favourable opinion to obtain a transport permit for natural gas in the northern region of the state of Baja California. According to the Rulings of Natural Gas (RNG), with some exceptions,[40] transport and distribution permits in the same geographic area cannot belong to the same agent. At the time, the systems providing natural gas to the region were connected to Socal Gas and SDG&E, which are part of the SEMPRA group, in Southern California. As a result, even if the regional distributor was not vertically integrated in Mexico, the new permit effectively allowed the vertical integration of firms belonging to the SEMPRA group, established in California. In addition, a negative precedent had been established by Intratec's complaint, presented in a Texas District Court, against SEMPRA and El Paso alleging that they had entered into a collusive agreement whereby they allocated the market between themselves.

The Commission considered that in a market characterised by an absence of entrants, vertical integration together with SEMPRA's dominant position could create an important barrier to entry for potential competitors. In addition, gains in efficiency argued by SEMPRA did not compensate the potentially negative effects on competition. The Commission issued an unfavourable opinion on this matter. Following SEMPRA's appeal, the Commission determined that it would issue a favourable opinion subject to the total divestment of assets relating to natural gas distribution in the region.

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37 In fact, 9 carriers requested the FCC's favourable opinion to participate in this auction, but for the purposes of the applicants' assessment, persons associated across different companies were treated as the same economic agent.

38 The cap is restricted to the 1900 Mhz band because all agents that may strengthen their market position by adding spectrum in this auction have a similar bandwidth in the 850 Mhz.

39 Files AD-18-2000 and RA-40-2000.

40 Vertical integration is allowed only when economic efficiency is guaranteed.

5.1.6 Privatisation of AHISA[41]

In 2000 the FCC assessed participants in the privatisation proceeding for Aseguradora Hidalgo, SA (AHISA), the federal government's insurance company,[42] and the only company granted the faculty to provide collective life, accidents and sickness, and damages insurance policies to government employees through payroll deductions, which gives it the lowest costs in the industry. In the same terms, it also offered collective insurance products to government agencies, local governments and state-owned companies such as Pemex. The relevant markets involved in the transaction correspond to AHISA's operation: (a) life, accident and sickness insurance,[43] with mayor effects in collective insurance segment; and (b) management of pension funds.

In its economic analysis, the FCC determined that the auction would allocate the collective insurance contracts from federal employees in an exclusive manner to the auction winner for an indefinite period. Although vertical integration, the Commission did not deem that an exclusive provision of services to federal public employees would harm competition, a privately held company that maintained this exclusivity contract with government employees would allow any agent to obtain market power and the capacity to fix prices or restrict supply. Hence, in 2000 the FCC resolved to block the transaction by objecting to the participation of all auction applicants.

In 2001, the Federal Government proposed new auction rules that restricted the validity of AHISA's insurance policies to 2004. As in the previous proceeding, the FCC participated in reviewing the call and rules for the auction, as well as in reviewing prospective participants. In 2002, the FCC concluded that the changed auction rules addressed its previous concerns and issued a favourable opinion to auction participants MetLife, Inc/ MetLife International Holding (Metlife), Seguros Inbursa, SA/Fianzas Guardiana Inbursa, SA (Inbursa), Mapfre América Vida, SA (Mapfre), and Ausa Holding Company (Ausa). Metlife won the auction.

5.1.7 Restructuring, privatisation and anticompetitive conduct in the railroad sector

In the railroad sector, a lack of effectiveness in regulatory measures has turned disputes on interlinear traffic into a competition problem, since concession holders have adopted strategies aimed at barring access to their competitors from their essential facilities. The current Ruling Law for Railroad Services (LRSF) and its Regulations address access rights in a very broad manner and do not provide clear and objective rules that give certainty to market participants when defining rights of way or interconnection services. While the regulator has tried to reduce the problem through the drafting of norms or even the issuing of emergency norms, this has not reduced the uncertainty surrounding its broadly defined regulations regarding access rights and interconnection services. Instead, railroad operators have successfully challenged these norms in court and obtained suspensions because, the courts have reasoned, the LRSF does not contain clear criteria that allow the regulator to issue its resolutions. It is unlikely that a generalised regulatory problem such as this can be resolved through resolutions and sanctions by the FCC.

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41 File CNT-LI-22-99

42 AHISA was owned by the federal government (75%) and the state oil company Petroleos Mexicanos (25%).

43 In this market, the FCC identified three segments: individual, group and collective.

5.2 Determinations on market power or effective competition conditions

5.2.1 Airports[44]

The two opinions outlined here exhibit common elements which the Commission identified as barriers. In general, the Commission identified normative barriers establishing that only concession holders can be contracted to offer the service and granting a concession holder a preference in establishing a service in complementary airports without requiring that he/she participate in an auction process. A different set of barriers included sunk costs in the form of service-specific, specialised technical knowledge, which effectively limits entry by 'outsiders'. Finally, the FCC considered that the regulatory framework provides scant economic incentives for agents to establish new airports and effectively contest market power exhibited by existing airports. Background information for the two cases, as well as additional barriers assessed for the Commission's opinion are presented below.

5.2.2 Mexico City International Airport

In September 1999, the Ministry of Communications and Transport (SCT) requested an opinion from the FCC about the existence of competition conditions in the following services for Mexico City's International Airport (AICM): mechanical passenger boarding equipment, in the form of telescopic walkways or gateways, mobile gates and aerocars. In August 2000 the Commission resolved that there were no reasonable competition conditions in the provision of these services.

The relevant market was defined as the provision of airport services for mechanical passenger boarding equipment, which allow loading and unloading of passengers from airport terminals to aircraft, in three modalities: telescopic walkways or gateways, mobile gates and aerocars. The Commission did not regard these as substitutes, even if, on the supply side, substitution was technically feasible, because demand for them limited their possibilities of substitution due to, for example, airport operation rules, type of flight, or aircraft characteristics.

In addition to the common barriers outlined above, its analysis of barriers the Commission considered coordination effects as a barrier to entry, such as, the space and logistic problems that would arise if a new supplier were to participate in the relevant market. It also weighed the convenience, from the point of view of airport operations, that there exist a sole supplier of telescopic passageways as another barrier to entry. The Commission recommended that administrative requirements regulating airport operations be either eliminated or toned down, particularly with regards to seniority, frequency, and take off and landing allotments.

5.2.3 Grupo Aeroportuario del Centro Norte

In February 2000, the SCT and the Committee to Restructure the Airport System requested an opinion from the Commission about the existence of competition conditions in the supply of complementary services in the airports that make up Grupo Aeroportuario del Centro Norte, SA de CV (GACN). In August 2000, the Commission resolved that there were no reasonable competition conditions in the supply of these services, including the lease, use and rights of access to infrastructure that enable agents to offer complementary services in the airports that integrate the GACN.

The relevant market included each airport services, lease and use of infrastructure as well as the rights of access needed in order to supply complementary services. The geographic dimension was limited to the airports that incorporate the GACN. The Commission determined that concession holders belonging to the

44 Files AD-45-1999 and DC-01-2000.

GACN had substantial market power, based on an assessment of the following barriers to entry: the existence of excess capacity in GACN airports, and evidence that complementary services could only be purchased when entering into leasing contracts for the use of airport infrastructure with the corresponding concession holder.

5.2.4 Telmex[45]

In 1998, the Commission determined that Telmex possessed substantial market power in five telephony markets. We briefly describe each of these market as well as the barriers to entry assessed in each case, in accordance with article 13 of the FLEC:

1. Local service. Telmex's market share was almost 100%. The main barrier to entry consisted of the investments required to establish a local public network. Another important barrier were the large advertising investments required to establish a trademark. Although the Commission did not find explicit regulatory barriers, the lack of a specific regulatory framework for these services might was considered to significantly discourage entry into the market.

2. Access to local networks. Telmex's market share was almost 100%. An almost insurmountable barrier were the huge amounts of money required to duplicate Telmex's local wire network, which provides access to final users.

3. National long distance. Telmex's market share was over 70%. Barriers to entry included the very high economic and financial cost of building a network in addition to the time required to build it and to generate marketable products; this investment represents a sunk cost. Advertising expenses for new entrants were also identified as a barrier.

4. Intermediate long distance or inter-urban transport. Telmex's market share was 83%. Barriers to entry included high economic and financial cost of building an optic fibre network as well as the time required for building this network. The Commission considered, nevertheless, that this barrier to entry was likely to be overcome over the medium term.

5. International long distance. Telmex's market share was 74%. In its assessment of barriers to entry the FCC considered that to provide this service, concession holders required local and international interconnection services, and availability of a network (either owned or leased) that was connected with the local loop. In addition, regulatory barriers restrict entry to international ports, since only long distance service providers may request Cofetel's authorisation to operate international ports. Cofetel's rules further limited entry by requiring, among other things, that long distance concession holders prove that they have connected cities located in at least three states using their own infrastructure and that they have undertaken at least one interconnection agreement with a foreign operator, authorised by Cofetel.

In April 1998 Telmex appealed the FCC's decision which was later reaffirmed by the Plenum.[46] (RA-15-98). Telmex also opened an *amparo* action with the judiciary branch, and in May 2001, the First Collegiate Tribunal granted it, leading to a new FCC determination.[47] Two months later, Telmex appealed the Commission's decision and the Commission decided not to address this appeal. In April 2004, Telmex obtained another *amparo* and in July the Plenum reconfirmed its May 2001 decision.

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45 Files AD-41-97 and RA-36-2001.

46 File RA-15-98.

47 File AD-41-37.

As long as Telmex delays the validation of the Commission's determination, price and other regulation by Cofetel and SCT cannot be triggered under article 63 of the Federal Law of Telecommunications. This situation may be considered a barrier to entry, since a level playing field will not exist as entrants face an incumbent with significant market power.

5.3 Relevant opinions regarding normative barriers to entry

5.3.1 Rulings for restricted television and audio services

The Commission is preparing its opinion about a proposed reform to the Rulings of the Restricted Television and Audio Services (RRTAS). This reform intends to set certain technological, coverage and investment requirements to obtain a new concession to install, operate and use a public network which includes the audio and television services through cabled networks. Technological requirements create barriers to entry by setting the minimum capacity of the network at 750 MHz; a constraint that was not in place when current incumbents entered the market, as 90% of them are operating with capacities between 450 and 500 MHz. The proposed reform also states that any potential entrant must use "ultimate" technology, a terms that will require a discretional interpretation by the regulator. In terms of coverage, the proposal requires entrants to guarantee a network coverage of 50% of houses with electrical power in the area applied by the end of the first three years and 80% of them by the end of five years. Moreover, if the concession is granted the 30% of the network must be installed and in use during the following 180 days.

If approved, these rulings would protect incumbents in the market for cable services and telecommunications, while new entrants would face significant entry barriers.

5.3.2 Rulings barring competition in local markets

Tortillas

The Commission recently investigated three cases where municipal authorities and trade associations set minimum distances between businesses, in the municipality of Temixco, in the state of Morelos, and the municipalities of Salvador Alvarado and Angostura, in the state of Sinaloa. This conduct not only violates competition law, but has also been established as unconstitutional by the Supreme Court of Justice of the Nation (SCJN), since it is contrary to the individual right of freedom of work, contained in article 28, and interferes with free market access.

In Temixco,[48] the *Regulation of Mills and Tortillerías in the Municipality of Temixco, Morelos*, set minimum distance requirements as a condition for tortillería licenses to be issued by the municipal government. In November 2003, the Commission issued an opinion to Temixco's municipal president expressing the need to modify or eliminate articles from the regulation, as they obstructed free market access and unreasonably favoured established businesses. In Salvador Alvarado, Sinaloa,[49] the *Regulations for the Opening and Operation of Nixtamal Mills, Tortillerías and Similar Matters*, required that a new tortilla establishment observe a minimum distance of at least 400 metres from another similar establishment in the downtown area, and 500 metres in the rest of the municipality. For street selling of tortillas, licences were granted to the closest tortillería or according to the routes defined by the local tortillería association. In August 2004, the Commission issued an opinion to the municipality of Salvador Alvarado establishing the anticompetitive effects of this regulation, and urging them to prevent geographical market allocation. In Angostura, Sinaloa[50], the Commission found that the municipal

[48] File IO-12-2003.

[49] File IP-09-2004.

[50] File DE-04-2003.

government and the local Union had agreed not to authorise persons from other municipalities to sell their goods in the streets of La Angostura. As part of the agreement, the government only issued licenses to members of the Union. In February of 2004, the Commission issued an opinion to the government of La Angostura, advising it to cease actions that obstructed the competitive process and free market access.

Low-alcoholic content beverages

In June 2004, Industrias Vinícolas Pedro Domecq, SA de CV (Pedro Domecq) submitted a consultation with the FCC on the effects of a communication issued by the municipal president of Loreto, Zacatecas. The communication notified grocery stores authorised to sell low-alcoholic content beverages in closed containers, that the authorisation was limited to beer only. In addition, it warned them that verification visits would be carried out and that any infringement would result in sanctions.

Pedro Domecq stated that the acts of this municipal authority affected its production and commercialisation of *Caribe Cooler®* and *Spirit®*, whose alcoholic content was lower than that of beer. It also considered that the local authority's decision may have been the result of the market's longstanding tradition and a lack of awareness about the *Regulation for Sanitary Control of Products and Services* and of Mexican standard NMX-V-046-NORMEX-2002 on Alcoholic Beverages- Label, Classification Definitions and Terminology, which categorise beverages in terms of their alcoholic content. According to this classification, the low-alcoholic content category comprises beverages within the range of 2-6% alcohol per volume, not just beer.

In response to the consultation, the FCC's opinion was that the municipal authority's communication had the effect of hindering access to grocery stores and placing the providers of low-alcoholic beverages other than beer at a disadvantage. In its answer, the Commission also clarified that its opinion was limited to the effects of the communication and not its original object or intent. In December 2004, the FCC issued an opinion to this authority indicating that its procedure for granting licences for the sale of low-content alcoholic beverages contained features that affected the competitive process and market access, as it put economic agents that marketed low-content alcoholic beverages at a disadvantage relative to beer distributors. Pedro Domecq filed a complaint against the municipal president of Loreto, Zacatecas, which is still pending.

6. Final remarks

This document has presented a number of cases reviewed by the Federal Competition Commission. It illustrates the prospective view that the Commission takes when analysing barriers to entry in its reviews of mergers, auction participants and when issuing opinions on bills or changes to existing regulations. The cases also illustrate how the FCC assesses barriers in a retrospective manner in unilateral conduct (relative monopolistic practices) cases as well as in analysing existing regulations that unnecessarily hinder and even bar prospective entrants to markets.

In the case of regulated sectors, many of the cases illustrate some of the problems associated with the vertical approach adopted by sectoral regulations in Mexico. This approach has resulted in the adoption of a wide variety of policies implemented by a number of different agencies, causing regulatory vacuums and favouring a differentiated regulatory treatment for convergent substitute products and services. This situation is conducive to regulatory arbitrage and supports an increasingly litigious behaviour that constrains and raises the costs of entry.

Table: Summary of cases

TYPE OF CASE	PARTIES INVOLVED	TYPES OF BARRIERS ANALYSED
Unilateral conduct	Beer manufacturers, municipal governments	Exclusive arrangements
Unilateral conduct	Rimsa v. Roche	Intellectual property
Unilateral conduct	Landsteiner and Pihcsa v. Merck	Intellectual property
Unilateral conduct	FCC v. Pemex	Exclusive territories
Unilateral conduct	Gas Supremo v. Gas de Cuernavaca et al.	Raising rivals' costs
Merger	Cintra	Large investments, technical and service requirements, trademarks, commercial practices, regulations on route and slot allocations, and foreign investment limits
Merger	Bayer / Aventis	R&D and brands
Merger	Sanofi / Aventis	R&D and brands
Merger	SC Johnson / Bayer	R&D and brands
Merger	Camesa / Primex	Limitations in international markets and sunk costs
Merger	Bancomer, Aetna / Ixe (Afore XXI)	Normative
Merger	Televisa / Acir	Restrictions due to common practices (tie-ins)
Merger	Coca Cola / Cadbury Schweppes	Brands and distribution network
Concession	Cable Television	Legal license requirements
Concession	Spectrum Allocation	Rising rivals' costs (foreclosure to essential facilities)
Concession	SEMPRA Energy	Vertical integration with dominant position
Privatisation	AHISA	Indefinite exclusive contracts
Concession	Railroads	Access rights to essential facilities and interconnection services
Effective competition	Airports	Normative barriers, infrastructure restrictions and sunk costs
Market power determination	Telmex	High investments in infrastructure and advertising, and regulatory barriers
Opinion	RRTAS	Technological, coverage and investments requirements

TYPE OF CASE	PARTIES INVOLVED	TYPES OF BARRIERS ANALYSED
Opinion	Tortillas	Minimum distances
Opinion	Domecq	Over-regulation

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NETHERLANDS

1. Introduction

The Netherlands Competition authority (NMa) would like to offer some comments on the issue of (analyzing) barriers to entry in competition cases. What follows is not an all-encompassing analysis, but a discussion of a few essential aspects of the subject of barriers to entry and of how the NMa applies the concept in practice. We thus hope to contribute to the development of a more explicit framework for analysing (the effects of) entry barriers. We also hope to learn from the practice of other competition authorities.

Our comments are structured as follows. In the first section we discuss the relationship between the concepts of 'dominance' and 'barriers to entry'. In the second section we will focus on a definition of entry barriers from the point of view of competition policy. We will go on to argue that some barriers to entry may be of importance for competition, but are nonetheless out of reach of competition policy. Finally we illustrate the NMa's practice of analyzing entry barriers by briefly reviewing a number of merger and agreements cases.

The message we want to convey is that barriers to entry are a multi-faceted phenomenon. From the point of view of competition policy they must be regarded as relevant if they might sustain a dominant position: so they are essential in determining markets and establishing dominant positions and/or abuse. As is the case with determinations of market definition, dominant positions and abuse, barriers to entry are hard to define and often case specific. This implies, practically speaking, that 'rules of thumb' will be needed when determining the 'entry-deterring' or 'foreclosure' effects that entry-barriers may have.

A review of NMa practice in this respect has led us to conclude that the NMa does not (as yet) apply a clear definition of what constitutes a barrier to entry.

2. Dominance

The Netherlands Competition authority (NMa) takes it as given that the target of competition policy is the (long-term) protection of consumer welfare by protecting competition. Competition may be hampered or thwarted by market power,[1] which, while it may frustrate consumer interests, may benefit a specific firm or specific firms.

Market power comes in degrees. From both a competition policy and an economic point of view, market power may become a problem if it is 'significant'. Loosely speaking, market power is significant when it has the ability to harm the competitive process. Such market power is what we would call dominance or a dominant position.[2] On the other hand: a firm with (some) market power that cannot harm

1 The usual economic definition of market power is the ability to raise price above marginal cost.

2 Strictly speaking, dominance is a legal notion. We think that the concept of a dominant firm from an economic point of view is a firm that has a high degree of market power. If there is, for example, free entry into a market that is characterised by 'heterogeneous' products and many suppliers, each of the suppliers may have some market power with respect to its product in the sense that prices may be above marginal cost (for instance to cover 'fixed costs'), market power is not significant. This kind of market power is

the competitive process, is not dominant.[3] Competition policy then, has to be concerned about dominant positions.

Dominance may be created by the competitive process itself.[4] By superior competition, for instance, a firm may be, for the time being, the sole winner in the market, and be able to exploit this monopoly power.[5] Generally the competitive process will erode this position again. Unless of course the dominant firm is able to extend its dominant position by hampering the competitive process. Behaviour that allows the dominant firm to extend its dominant position in this way, such that ultimately consumers are harmed more or longer than otherwise would have been the case, amounts conceptually, in our view, to an abuse of dominance.[6]

Since dominance may create problems in the sense described, but since dominance is also intrinsic to the competitive process, competition policy should be careful in establishing dominance (or abuse) in order to prohibit mergers and certain behaviour or agreements. Mergers, agreements among firms and all sorts of behaviour may in fact be welfare-enhancing.

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therefore no concern for a competition authority. Hence, a dominant firm may, but need not harm the competitive process.

3 Conceptually, dominance is the amount of market power that enables the firm to influence the market outcome by unilaterally being able to determine the market price. Basically it means that output and (hence) price decisions are taken with little or no respect for direct competitors, potential competitors or consumers, in the sense that market demand is a given for the firm and can be exploited as such. Consumers may leave the market, but up to a point, the dominant firm is not restricted in its choice of price and output by these consumers; in a case of non-dominance it could not have permitted this loss of consumers. Of course this is just a sketchy presentation of dominance. While it is not possible here to expand upon the concept in depth we would like to note that even in a case where a firm has competitors it can still be dominant: it may still have (residual) demand, such that a profit-maximising price has an impact on the whole market. So, a dominant firm is able to raise (market) prices and restrict (market) output. Or, for that matter, reduce the quality or range of products, or innovation.

4 Dominance may also be created by mergers, hence the existence of merger control. In the case of cartels there is a useful distinction between 'hard-core' cartels and more general agreements. 'Hard-core' cartels in general have as an object to restrict competition, which basically implies the exploitation of dominance (as is in line with our description of dominance); hence they are forbidden 'per se'. More general agreements between undertakings may restrict competition but may also have benefits that are shared with consumers. Consumers will share in the benefits if the agreement does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned, which we may take to imply (for purposes of this paper): the absence of dominance (as outlined above).

5 By 'exploit' and 'exploitation' we will mean the benefits a dominant firm may realise for itself, without 'abusing' this position. This begs the question whether 'exploitation' by a dominant firm can be non-abusive. We think so. A firm that has become dominant by risky investments and superior efficiency may reap the benefits by charging higher prices than would have been possible without this position. The term 'exploitation' is therefore not meant to imply abusive behaviour.

6 Such behaviour needs to interfere with the competitive process, such that: (efficient) competitors are refused entry to or existence on the market, so that consumers will (ultimately) suffer, but without taking away any incentives to compete, invest or innovate. In the absence of such abusive behaviour, the firm will not and cannot harm the competitive process. It is important to realise that some behaviour may raise consumer welfare in the short run, just in order to harm consumers even more in the long run: 'predatory pricing for instance. Interfering with (monopoly)pricing decisions of a firm that has gained its position by competing in a superior way would be taking away a (dynamic) incentive and thereby frustrate the competitive process; making (large) profits is the engine of commerce, provided of course, that these (extra) profits are not the result of abusive behaviour as defined already.

This brings us to the main theme. Dominance must be related to barriers to entry, because abusive behaviour, wrongful mergers and welfare-reducing cartels are only worthwhile and possible if they will have as a result a position that enables the firm(s) to get more profits and/or profits for a longer time than otherwise would have been the result. This implies that where there are no entry-barriers, entrants would erode the dominant position, and hence anything that impedes this process of entry may constitute a barrier to entry. Related to this point is the question of timing: in practice there will almost always be some period in which a dominant firm may exploit its position before attracting entry. In our definition, and in practice, we will have to take account of this fact, and of the possibility that this 'exploitation period' may create social agitation and result in social and political pressure on the competition authority.[7]

The question is how to take account of these elements in a coherent and practical definition of entry-barriers.[8]

3. Antitrust barriers to entry

Relevant for competition policy is the question of how long it will take for prices (for instance) to go down after they have been raised by a dominant firm (for instance after a merger).[9] We agree with Schmalensee's focus on dynamics: 'Antitrust barriers to entry could then be defined as factors that elevate the post-merger price trajectory over time, either temporarily (by slowing entry) or permanently …'[10] This point of view is in accordance with ours in the sense that barriers to entry must be able to sustain a dominant position for longer than 'necessary'; i.e. there must be factors that elevate the price trajectory over time.

A definition, then, should be based on the following elements. For ease of exposition we will differentiate between mergers, cartels, and abuse of dominance. We will start with possible abuse by a dominant firm that was created by the competitive process itself. If this dominant position is exploited it will lead over time to entry that will erode this position. The factors that entrants have to overcome as well as the time it takes them to do so are fundamental to the question of entry barriers. If those factors were already part of the environment that created the dominant firm, entrants should theoretically be able to beat the dominant firm on equal terms. The time it takes to do so is inherent to the competitive process. If, on the other hand, the dominant firm behaves in such a way that entry is delayed, and this does not (ultimately) benefit consumers as compared to the situation where there is no such entry-delaying behaviour, we could say this behaviour is a barrier to entry, and (at the same time) it is also abusive.

7 An example is the debate in parliament with regard to the question how to regulate the Dutch cable-TV tariffs after the NMa made it clear it did not consider them to be abusive.

8 To date economic definitions (by focussing on 'long run profits')do not take into account the dynamic aspects of entry-barriers ('how long will it take to 'erode' high prices'). This implies that economic definitions are in a sense 'static'. Hence, antitrust barriers to entry may be a larger category than economic ones. See on this: P. McAfee, H. Mialon and M. Williams, *What is a barrier to entry?*, American Economic Review Papers and Proceedings, vol. 94, no. 2, 2004, May 2004, pp. 461-465. See also, in the same issue of the AEA P&P the articles by Carlton (p. 466) and Schmalensee (p. 471) on this. We will not discuss this issue because we think this goes beyond the scope of this paper.

9 McAfee e.a define antitrust barriers to entry as 'a cost that delays entry and thereby reduces social welfare relative to immediate but equally costly entry'. Carlton focuses on the dynamic aspects involved in the competitive process. It is not relevant to focus on a definition of entry barriers from the point of view whether or not long run 'excess profits' may be gained.

10 See note 8. Schmalensee only discusses barriers to entry in merger-cases.

A dominant position may also be created by for instance patents or other special rights. These are barriers to entry in the sense that they do not allow entry for as long as these rights are defined.[11] On the other hand, these rights may have been created for the purpose of exploitation. In that sense these are not entry barriers that need be of a concern to a competition authority, unless the firm tries to extend his exploitation beyond the duration of the rights, since then, of course, the dominant position is sustained for longer than necessary.[12]

Market circumstances are also relevant in the case of a merger. If a merger does not change the market structure such that entry is delayed, as compared to the situation where there was no merger, this merger should not be of concern to the competition authority. There is a special case though: a merger may not change entry possibilities as such, but entry may take quite a long time due to the nature of the investments. In such a case a merger may change the competitive structure in the sense that a dominant firm is established which may benefit for the time it takes for competitors to enter the market.[13] This may be a reason to forbid such a merger. If it is likely that the merger will lead to a delay in entry (as compared to the situation where there was no merger), then the competition authority should be concerned.

This is not to say that in every merger case, for instance, an analysis of 'entry barriers' is required. In mergers, a dominant buyer may be a reason to allow the merger to take place, regardless of the possible existence of 'entry barriers'.[14]

In the case of agreements, it is useful to distinguish between 'hard-core cartels' and 'non hard-core' agreements. Hard-core cartels, from a dominance point of view, imply 'collective dominance'.[15] By definition they change the market-structure such that the competitive process is thwarted. Hence, a position of collective dominance is established and exploited in the sense of higher profits and over a longer period than would have been the case in the absence of the cartel. Alternatively: these cartels elevate the price trajectory over time, even if this would be a very small period of time. A hard-core cartel is then an entry barrier in itself.[16]

11 Assuming that the exclusive rights do indeed lead to a dominant position (which does not need to be the case) and assuming there was no competition for the market, e.g. competition with respect to the acquisition of the exclusive rights.

12 It is also possible that the rights have not been conferred/acquired for the purpose of exploitation. Then it would either be necessary to regulate such a firm, or the competition authority should try to enforce for instance 'lower prices'.

13 Or increase their own capacities if they are already on the market.

14 One could say that since the merger will not be able to raise prices because of the existence of buyer power, there is no question of a dominant position being created, hence there is also no need to check on entry barriers.

15 We just want to focus on the question of entry-barriers, so we do not take the point of view that this is as such a generally accepted part of competition law. We assume that a hard-core cartel is effective.

16 Part of the hard-core agreements may be that potential 'entrants' will either be kept from the market or forced (bribed) to join the cartel. In the cartel case of the Dutch road construction-sector it happened that foreign firms tried to enter the Dutch market, but were unable to buy asphalt, which effectively foreclosed the market.

Agreements that do not qualify as 'hard-core' a priori, may turn out to have the effect of preventing, restricting or distorting competition, without creating benefits that are shared with consumers. These agreements then, are in effect the same as 'hard-core' cartels.[17]

There may well be 'barriers to entry' that are relevant for competition, but may not be addressed by the competition authority. An example is given by Sutton,[18] who distinguishes between exogenous and endogenous sunk costs.[19] Endogenous sunk cost are sunk costs that are realized as a result of a firm's decision. This decision may be taken unilaterally or as a consequence of competition. For example, a firm's decision on the amounts to spend on advertising will depend on the effect that this will have on sales, but may imply that competition between firms will lead to a competitive escalation in such expenditure. If the decision is taken unilaterally though, it may be that it is influenced by the entry-deterrent effect (foreclosure) these sunk costs may have. Put differently, if such expenditure imposes higher costs on entrants such that the firm, if dominant, can profit more or longer than it otherwise could, that expenditure counts as a barrier to entry.

From the point of view of the competition authority this would imply, for instance, that such expenditure should qualify as either an agreement or as abuse of a dominant position. So, although definitely relevant from the point of view of competition, endogenous sunk costs may or may not be relevant for a competition authority. The competition authority should consider the circumstances of the dynamic competitive process. As a consequence the competition authority may then have no possibilities to intervene in such a process and should not try to do so.[20]

So, it depends on the way dominance is created or used whether or not a competition authority is able to deal with it. It may therefore be helpful to distinguish between 'absolute' and 'strategic' entry-barriers.[21] Absolute barriers to entry are independent of behaviour and timing. Examples may be 'exclusive rights'. Strategic barriers are dependent on behaviour and timing, like 'first mover advantages' or 'predatory behaviour'.

As far as the NMa is concerned the competition authority should focus on the competitive issue at hand. That is: should a merger, an agreement or some specific behaviour be prohibited in order to improve competition? If the answer is affirmative, the investigation has to focus on the question what factors constitute entry-barriers. To be practical, the competition authority has to define over which period the entry-barriers may be overcome by some potential entrant and whether or not this is acceptable. If entry-barriers are strategic, they may give firms the possibility to exploit the market such that profits are higher and/or sustained longer than in the absence of that behaviour. These types of entry-barriers may then be condemned as abusive. The risk of creating such entry-barriers by agreement or merger should be the focus

17 If these agreements do have benefits that are shared with consumers, then it must still be the case that dominance is absent in the sense that competition is not eliminated in respect of a substantial part of the products in question.

18 J. Sutton, *Sunk costs and market structure*, MIT press, 1991

19 One element in the discussion of economic barriers to entry is that of 'sunk cost': see Schmalensee, op cit., on this.

20 Consumers might be hurt by endogenous sunk costs if these are the outcome of competition between firms. This cannot be prevented by the competition authority. If in the end dominance is the ultimate result (which need not be the case of course), then of course endogenous sunk costs may be barriers to entry. Note that in the context of 'barriers to entry', endogenous expenditure may be an abuse.

21 Compare Bishop and Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement,* London Sweet & Maxwell, p. 64.

of an art. 81 or a merger investigation. In the words of Schmalensee:[22] "What matters in this analysis is what would be required for an entrant to compete effectively, not the scale or absolute efficiency of incumbent firms".[23]

A last element we would like to discuss briefly, concerns the question of 'entry barriers' in the definition of dominance and in the establishment of 'abuse'. As said, there will in general be some delay in entry when a dominant firm is created. This in itself should not necessarily be a concern. Intuitively, therefore, entry barriers are mainly a concern from the point of view of abuse and, thus, the (delaying) effect they have on the possibilities for entrants to erode the exploitation-possibilities of dominant firms.

Summarizing, we think that theoretically and conceptually a dominant firm is a firm that is able to influence market prices, market output, quality of products and innovation for better or for worse with regard to consumer welfare. If it does so for the better, then no matter what, this should not be a concern to a competition authority. If it does so for the worse and entry is not delayed by this behaviour as such ('high pricing' for instance), then the issue becomes whether or not a competition authority is inclined to conclude such behaviour is 'abusive', but entry-barriers only define the timing of entry and are only relevant from that perspective. Finally, behaviour itself may delay entry, in which case the 'entry barrier' is possibly an abuse in and of itself.

As said beforehand, these are just couple of remarks that in our view are relevant to the discussion of entry-barriers. Many issues have not been discussed and a comprehensive model is lacking.

4. NMa's practice with respect to entry-barriers

The NMa evaluates entry barriers for the purposes of both market definition and effect evaluation. When examining the relevant market, attention is focused on the (sometimes limited) possibilities for supply substitution, whereas barriers faced by potential entrants are generally assessed in the context of effect evaluation (i.e. to what extent does or can potential entry discipline the dominant firm or merging parties).[24] Since our proposed definition of entry barriers from a competition policy perspective is conceptual, in order to apply it in practice the NMa uses certain rules of thumb regarding the assessment of possible entry barriers. We will touch upon a few cases to illustrate NMa practice with regard to the application of these rules of thumb on entry barriers.[25]

In merger cases, for example, entry barriers are loosely defined as the opposite of facilitated entry, i.e. entry barriers are in place where potential entrants can not enter "relatively easy and without having to incur high entry costs". Whether entry is "relatively easy" and entry costs are "high" is evaluated on a case-by-case basis. Where barriers to entry are approached in a more quantitative way, they are usually expressed in terms of time. In those cases, a rule of thumb is that investments that can be realised within 2-3 years do not constitute a barrier to entry, whereas investments that cannot be realised in that period do.[26]

22 Op. cit., p. 474.

23 Since also inefficient entrants may put a competitive restraint on a dominant firm, it is entry that is relevant, not necessarily 'efficient' entrants. Efficient entrants will ultimately be the most effective though.

24 The boundaries between supply substitution and potential entry are not always clear-cut, however. Rather, there is a sliding scale of competitive discipline that encompasses both in various gradations.

25 It may not always be possible to make scientific forecasts of or even educated guesses about the negative effects of 'barriers to entry' as conceptually defined.

26 For purposes of evaluating the possibilities of supply substitution (in the context of market definition), rather than potential entry, a period of one year is often considered.

The mentioned period of 2-3 years is related to the prospective testing in merger cases that applies to a similar period.

Measuring and comparing required investments in terms of financial value can provide insight into the relative size of a particular barrier, particularly within a sector. Comparing required investments in value terms across sectors should be undertaken with caution, however, as profit margins (and the associated ability to invest / borrow funds from capital markets) can differ considerably across sectors. Consequently, a required investment expressed in value terms appearing as a barrier to entry in one sector may not be considered a barrier to entry in another, more capital-intensive sector. To express entry barriers in terms of required time to realise necessary investments therefore is a preferred measurement method.

It sometimes happens that particular market features, which would count as a barrier to entry, are assessed differently in different cases. An example is the existence of long-term exclusive contracts, which was considered to be a serious entry barrier in the (merger) case of premium film rights, but was concluded not to have significant foreclosure effects in the (agreements) case of water supply.[27] The reason is that the assessment of such market features is related to the presence (or absence) of other, countervailing features that may play a role in these cases.

5. Merger cases

The NMa recently stated that there is room for competition between the suppliers of health care services in the context of the Exceptional Medical Expenses Act (AWBZ).[28] Since that statement, there has been an increasing number of merger notifications in this sector. Exceptional health care providers have to be contracted by the Health Administration Office that is responsible for the region they are located in. The fact that the possibilities to be contracted by other Health Administration Offices are limited is considered to hamper supply substitution and has led the NMa to conclude that exceptional health care markets are at most regional. The result of the mentioned limited contracting options is that entry into other regions is accomplished by consolidation rather than creation. Where exceptional health care providers located in neighbouring regions propose to merge, the NMa examines the extent to which they are each other's potential competitor (i.e. potential entrant into the region where the other party is located) based on the European Guidelines on the assessment of horizontal mergers[29].

In a recent case on 'pay television' the NMa evaluated the entry barriers that are in place in the market for acquiring premium film content. It was concluded that entry into this market is severely complicated due to the presence of long-term exclusive contracts between the major Hollywood film studios and a few large pay television operators, which is why, in most countries, there is only one significant supplier of premium (pay) television. However, as only one of the merging parties was a significant buyer of premium film content, competition in this market was not expected to be considerably affected as a result of the merger.

In a recent case on IT service provision, the NMa questioned various market parties about the investments required to enter the (possible) market for IT application services for (semi-)state agencies. It turned out that the specific IT knowledge required for entry into this market is limited. More important,

27 See below for a short summary of both these cases.

28 NMa, "Visiedocument AWBZ-zorgmarkten", The Hague, January 2004. The Exceptional Medical Expenses Act sees to the financing of both home care and health care services in elderly homes.

29 Guidelines on the of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03).

according to the questioned market parties, is building up a professional network with potential customers and suppliers, as well as having the capacity to compete with international suppliers. As market parties estimated the necessary investments could be realised within approximately 12 months, they were not considered a barrier to entry.

Finally, in an earlier case on lotteries, the NMa stated that competition from foreign (internet) lotteries was limited (and expected to remain limited), and concluded, therefore, that the geographical market in question was national in scope. In addition to the required license from the Dutch government, language differences, paying methods and the limited accessibility of many internet sites were considered barriers to entry from foreign (internet) lotteries.

6. Cases on agreements and abuse

The NMa has dealt with a couple of cases on abuse of a dominant position. The question of 'barriers to entry' in those cases remained implicit . In the case of SEP, for instance, it was established that SEP as the owner of the high-voltage electricity transportation network had a dominant position. This network was effectively considered to be a natural monopoly.

In the case of KLM, the largest Dutch airline company, it was established that KLM had a monopoly on the route from Amsterdam to Paramaribo, the capital of the former Dutch colony of Surinam. This monopoly could be seen as an absolute entry barrier, since only KLM was allowed to fly directly from Amsterdam to Paramaribo and vice versa. This arrangement was agreed upon by the Dutch and Surinam governments. There existed some alternative flights from, for instance, Brussels, or Paris to the Caribbean and South-American states but ticket prices on these alternative routes including extra flights from those destinations to Paramaribo were much higher and of course those flights were much more uncomfortable. Hence, these entry barriers enabled KLM, at least theoretically, to increase prices and keep them increased for much longer than in the absence of the exclusive rights.[30]

We would like to stress again that the exploitation of dominance is not necessarily (or need not be) a problem for the competition authority. Important is the timing of entry and whether or not entry may take some time because of, for instance, the nature of the investments involved.[31] A dominant firm will generally be able to exploit his position in the meantime. As stated before, this need not be a problem from the point of view of competition policy. For instance: the NMa did not consider cable-TV tariffs to be 'abusive', partly[32] because of the fact that competition was underway and would almost certainly be effective in the near-future.[33]

As far as cases concerning potentially anti-competitive agreements are concerned, the question of entry-barriers is generally less important. In the case of hard-core cartels there is no need to establish some sort of dominance, with the exception of cases with extremely low market-shares.[34] In the case of other, non-hard core agreements an appreciable effect has to be determined. Generally, whether or not an agreement is appreciable is defined in most cases by way of the market shares of the companies involved. If the agreement may lead to an appreciable negative effect, it may also be established that the agreement generates efficiencies or other advantages that are shared with consumers. So, basically, entry barriers are

30 It was found that prices were not excessive in this case, hence abuse was not established.

31 Besides there is the question whether or not the competition authority will be able to deal with the problem.

32 But not only: the conclusion was also based on a cost analysis.

33 At the same time there was considerable debate in parliament with regard to the question how to regulate these tariffs.

34 See our discussion above on agreements and dominance.

part of the determination of the likely negative effects of agreements. It may be that the agreement will as a consequence diminish competition, for instance by the cumulative effects of vertical agreements, like long-term contracts. Hence, the possibility of foreclosure may constitute the reason why an agreement is seen as a threat to competition.

In the case of WBE for instance it was determined that long-term exclusive contracts between the Rotterdam drink water supplier and two large oil companies had no foreclosure effects. WBE has a legal monopoly for supplying drink water to inhabitants, including firms, in the region of Rotterdam. The contracts stipulated that WBE would supply drink water for a large number of years to both oil companies. These oil companies would use this water for industrial purposes. The NMa concluded that the long-term contracts would not lead to foreclosure. The oil companies had substitutes at their disposal when they negotiated with WBE and hence concluded a profitable low-price deal given the high quality of drink water as compared to the quality needed for industrial purposes. Besides the NMa considered the relevant market to include (on the supply side) water treatment plants. This market is large with respect to both the number of firms and geographically. Since in addition, the long-term contracts did not seem to have a cumulative effect, these contracts were allowed.[35]

7. Court cases

NMa cases can be appealed at first instance before the Rotterdam Court. A review of the relevant jurisprudence reveals that the Court generally does not explicitly discuss barriers to entry. Rather, it ignores the subject altogether, or implicitly assesses the existence of entry barriers in determining (the lack of) dominance and the associated possibility for dominant firms to act (at least to a certain extent) independently of their customers and competitors. An example is the decision of the Court in a regional newspaper case in 2000 (Wegener-VNU), in which it does not go into the NMa's arguments of high entry barriers, but instead judges that the market is wider than suggested by the NMa and the foreseen effects on quality and price are unlikely to become a reality due to the likelihood that national newspapers would exert a competitive discipline.

8. Conclusion

Barriers to entry are a multi-faceted phenomenon. From the point of view of competition policy they must be regarded as relevant if they might sustain a dominant position: so they are essential in determining markets and establishing dominant positions and/or abuse. As is the case with determinations of market definition, dominant positions and abuse, barriers to entry are hard to define and often case specific. We have tried to discuss what in our view are the most important aspects of barriers to entry. When market power is significant, i.e. when we speak of 'dominance', entry barriers become a topic of analysis for competition authorities from the point of view of 'timing': how long will it take for entry to occur? We briefly discussed this aspect of entry-barriers with respect to mergers, agreements and established dominant positions.

A review of the NMa practice with respect to the concept of entry barriers indicates that the NMa does not (yet) apply a clear definition of what constitutes a barrier to entry and uses rules of thumb in determining the effects of entry-barriers. Perhaps as a result, the Netherlands Court of First Instance generally does not explicitly refer to the existence or effects of barriers to entry, but assesses them rather implicitly in (dis)agreeing with certain market definitions or in evaluating the overall effects on competition resulting from the merger or agreement. A more explicit framework for analysing (the effects of) entry barriers, could help the NMa reap possible efficiency gains in handling merger and agreements cases. Learning from the practice of other competition authorities is of great importance in this respect.

[35] At the time, exemptions were still needed for agreements that might impair competition.

NEW ZEALAND

1. Introduction

This submission responds to an invitation to make a written contribution to the October Roundtable on Barriers to Entry. The paper describes New Zealand's experience with defining and assessing barriers to entry.

In New Zealand, the Commerce Act 1986 is the central piece of competition legislation. New Zealand's Commerce Commission ("the Commission") is responsible for the public enforcement of the Commerce Act.

2. The Definition of Barriers to Entry

The New Zealand courts have consistently followed the view that the level of market power a firm with substantial market share has depends very much upon the level of barriers to entry and expansion that apply to the market in question. Where barriers are low, market share is unlikely to translate into market power, because the firm will be constrained by the potential for entry; where barriers are high, the converse applies, with a diminished entry constraint allowing the exercise of market power. In *Magic Millions*, the High Court stated that "without barriers to entry dominance will seldom if ever be found."

In *Southern Cross*, the Court of Appeal defined an entry barrier as follows:

> "Anything is capable of being a barrier to entry or expansion if it amounts to a significant cost or limitation which a person has to face to enter a market or expand in the market and maintain that entry or expansion in the long run, being a cost or limitation that an established incumbent does not face. The height of the barrier is a function of the degree of the differential."

The Commission is bound by court judgments, and it has adopted a very similar definition in its *Mergers and Acquisitions Guidelines*: "a barrier to entry is best defined as anything that amounts to a cost or disadvantage that a business has to face to enter a market that an established incumbent does not face."

The Commission assesses the specific nature of the barriers in the defined market(s) based on the facts of each case. In evaluating the barriers to entry or expansion into a market, the Commission generally adopts a two-stage approach. It first considers the broader 'entry conditions' that apply—what it is that an aspiring entrant would have to do in order to enter, and to succeed in the conditions it might face when it does—and then evaluates which of those conditions constitute barriers to entry or expansion.

3. The Assessment of Barriers to Entry

The Court of Appeal in *Southern Cross* said that a barrier to entry or expansion is reflected in the extent to which an incumbent can, in the long-run, raise price above the competitive level without inducing potential competitors to enter and expand in the market. While this definition implies an approach to quantifying barriers, the Commission and courts have generally found them very difficult to quantify. This is especially so within the tight timeframes allowed for the assessment on applications for clearance of business acquisitions.

3.1 Quantitative Assessment

However, it is sometimes possible to gauge the height of entry barriers, at least partially. One example concerns the barriers to import competition, particularly for non-specialised, bulk products (e.g., cement). The sorts of barriers that are relevant to these products may include the following:

- the impact of international transport costs;
- the level of import tariffs or other barriers to supply, such as quotas or regulatory clearances;
- the presence of any licensing arrangements and the control of distribution rights;
- the importance to buyers of the availability of associated services;
- the consistency and timeliness of supply;
- the evidence of international price movements; and
- the impact of likely fluctuations in foreign exchange rates.

Clearly, the fob export price can be converted into the domestic currency equivalent using the exchange rate, and additional elements such as international transport costs and border tariffs can be added. The advantages of domestic over import supply can be assessed in terms of the price premium attaching to the local product.

Another possible case where partial quantification may be possible is where the identity of the entrant is known, and it has prepared a business plan that sets out the costs it expects to incur. Such a plan may have greater credibility if it were prepared prior to the competition matter at hand. It may then be possible to compare the costs of the entrant with those of the incumbent. For example, it may be possible to factor in the impact of scale on unit costs.

3.2 Qualitative Assessment

Short of quantification, the Commission and the courts have had to assess the height of barriers qualitatively. This has meant identifying the individual barriers, and their individual significance, and then applying judgment in assessing the height of the aggregate barrier. This may be informed by the recent experience of entry in the market. For example, if the market appears to be reasonably competitive, and yet entry has occurred, this may suggest that barriers are low. However, the converse may not necessarily apply – an absence of entry could reflect competitive pricing rather than high barriers.

4. Does the Concept of Entry Barriers Change from One Type of Competition Case to Another?

Section 3 of New Zealand's Commerce Act 1986 defines competition as meaning workable or effective competition, and states that for the purposes of the Act, "the effect on competition in a market shall be determined by reference to all factors that affect competition in that market ." There is no differentiation envisaged in - nor, on the other hand, precluded by - these words.

The Commission's evaluation of barriers to entry and expansion generally do not change depending upon the type of case being investigated. As a matter of principle, it is difficult to envisage why they should. Barrier analysis is an integral part of the assessment of potential competition, which in turn is part of the wider competition analysis. The assessment of whether a firm has a substantial degree of market power takes into account the same competition factors as are considered in determining whether a business acquisition would have the effect of substantially lessening competition. The focus in both cases is on the competition conditions in the markets in question.

Nonetheless, it is conceivable that market behaviour that might be regarded as a barrier in a merger case could be the subject of an investigation as a restrictive trade practice. For example, consider a market where the incumbents are engaging in exclusive dealing. This might be viewed as creating a barrier to entry when considering a merger between two of them, since an entrant might have to enter at two levels to succeed. But the behaviour itself could be the subject of an 'abuse of dominance' investigation if it were thought liable to hinder competition.

5. Duration of Entry Barriers

If other constraints are found to be wanting, so that potential competition is all that would prevent a finding of a substantial lessening of competition, then to alleviate competition concerns, entry must be feasible within a reasonable timeframe. The Commission considers that as a general rule, that time period should be two years from the point at which market power would be first exercised. However, the timeframe may need to be varied according to the particular circumstances, dynamics and characteristics of the market concerned.

In some markets where goods and services are supplied and purchased on a long-term contractual basis, buyers may not immediately be exposed to the detrimental effects stemming from a potential substantial lessening of competition. In such cases, the competition analysis, in a timing sense, begins with the point at which those contracts come up for renewal.

In the recent *Air New Zealand/Qantas v Commerce Commission* decision, the High Court determined that "whether conditions in a market which have the potential to prevent, impede or slow entry and expansion, are or are not barriers to entry or expansion, may be less important than whether or how they will affect the likelihood, extent and timeliness of entry . . ." The issue was whether the entry of a new low cost carrier (which had been prospective at the time of the Commission's decision) would be sufficient to constrain a proposed alliance between the two main carriers. It was common ground that in airline markets the evident of numerous studies showed that the threat of entry and actual entry both constrain pricing, but with the greater constraint being provided by the latter. Yet the court was unable to find any significant entry barriers, nor clarify why neither entry nor the threat of entry is often insufficient to constrain prices in airline markets. It suggested that because entry typically occurs on one or a few routes, not across an entire network, the competitive response is restricted to those routes on which entry occurs. This signals to the entrant the likely conditions of expansion while permitting the incumbent to maintain prices on other routes.

The court seemed to accept the Commission's argument that competition would be substantially lessened by the Alliance, at least in part because of the attenuated impact of the entry within a reasonable timeframe.

6. Is it Necessary to Agree on a Specific Definition of Entry Barriers?

Although the Commission typically assesses entry barriers as part of its competition analysis, it also—as part of its assessment of potential competition—applies the so-called "LET test". For market entry to be a sufficient constraint, entry of new participants in response to a price increase or other manifestation of market power must be Likely, sufficient in Extent and Timely. As noted above, the High Court in *Air New Zealand/Qantas v Commerce Commission* disagreed with the Commission's submissions that frequent flier schemes and incumbent response were significant entry barriers, yet it found that the new entry that had occurred since the Commission's decision was not a sufficient constraint to overturn the Commission's determination that the Alliance would result in a substantial lessening of competition. By implication, entry failed the LET test.

To elaborate briefly on the LET test using the Commission's *Mergers and Acquisitions Guidelines*, the mere possibility of entry is regarded as being an insufficient constraint on the exercise of market power, and would not alleviate concerns about a substantial lessening of competition. In order to be a constraint on market participants, entry must be likely. Also, the threat of entry must be at a level and spread of sales that is likely to cause market participants to react in a significant manner. Entry that might occur only at relatively low volumes, or in localised areas, is not likely to represent a sufficient constraint to alleviate concerns about a lessening of competition. Finally, the Commission considers that entry must be feasible within a reasonably short timeframe, considered to be two years, from the point at which market power is first exercised.

The Commission's standard approach to assessing potential competition is to consider barriers to entry and expansion, and to apply the LET test. The two elements are complementary. In the Commission's view, the consideration of barriers needs to be grounded in economic principles, but also informed by practical market realities.

7. New Zealand's Experience with Barriers to Entry

7.1 Categories of Entry Barriers

In its *Mergers and Acquisitions Guidelines*, the Commission classifies entry barriers into three main types: natural (or structural), regulatory (or legal) and strategic. The sorts of barriers envisaged in each category are given below.

Natural barriers arise from the nature of the technology, resources or inputs required to establish a business in a particular market. Potential natural barriers include:

- substantial economies of scale or scope in production;
- sunk costs stemming from investing in tangible assets, such as plant and equipment, and intangible assets, such as advertising and R&D;
- the higher costs of capital often associated with a new business lacking a track record;
- the presence of consumer switching costs;
- difficulties in accessing distribution channels, infrastructure, technology or raw materials; and
- the existence of any first mover advantage for the incumbent businesses that may make it difficult for new entrants to the market to gain market share.

Regulatory barriers arise from legislation or regulations that limit the number of market participants, or that may add to the costs of starting a business. Potential regulatory barriers include:

- entry licensing;
- quality standards imposed on entrants;

- environmental controls; and
- intellectual property rights.

Strategic barriers may arise from the established positions of incumbents, and their acting intentionally in such a way as to discourage prospective entrants. The incumbents might:

- invest in excess capacity;
- advertise heavily which raises customer loyalty, brand reputation and sunk costs;
- raise switching costs by, for example, offering volume discounts or offering long term contracts; and
- signal that entry would be responded to aggressively or in a predatory fashion.

Strategic barriers are perhaps more difficult to assess than other categories of entry barriers, because they involve the prospective reactions of incumbents to entry. This can be problematic because:

(a) predictions of future behaviour may be inherently speculative to a degree; and
(b) predictions can be susceptible to the argument that the response is merely a competitive one.

The Commission considers that an incumbent's "deep pockets" would be unlikely to be a barrier in its own right, but might be regarded as a barrier to entry in circumstances where it were allied with the business's propensity to engage in strategic entry deterrence.

7.2 Practical Experience

The Court of Appeal in *Telecom v Commerce Commission & Ors* found that the barriers to entry into the telecommunications market were substantial. These were attributable to: the large economies of scale and scope inherent in the incumbent's (Telecom's) fixed telephone network, which meant that was not economic to duplicate; the dependency of entrants upon that network; and their vulnerability to Telecom's ability to manipulate access terms and conditions to its advantage. This judgment predates the *Telecommunications Act 2001*, which introduced industry-specific regulation of the industry.

The types of barrier the Commission encounters most frequently probably include the following: large economies of scale in relation to market size (reflecting New Zealand's relatively small economy); entry requiring investment in significant sunk costs; access to the incumbent's 'bottleneck facilities'; the presence of natural barriers to imports (international freight costs, lack of overseas familiarity with New Zealand's small market); the cost and time delays in complying with environmental controls; and the likelihood of incumbent response (especially when associated with sunk costs, or first mover advantage).

Most types of barrier are difficult to measure in a quantitative sense, as indicated above. It is often difficult to determine which of the conditions of entry and expansion constitute barriers, although in cases where there is doubt the barriers are likely to be small or insignificant. The significant barriers are usually fairly evident. Another difficulty is the aggregation of the individual barriers. Whilst it is the aggregate barrier that is of most significance for assessing potential competition, it is difficult to estimate its height by aggregating disparate and non-quantified individual barriers. Further, some potential entrants might be better qualified than others, so that the barriers for them might be lower than for other firms.

NORWAY

The Norwegian Competition Authority (NCA) has traditionally defined barriers to entry as any impediment that will prevent new entrants to enter the relevant market. Barriers to entry do not need to be absolute to prevent established enterprises to exercise market power. Entry can occur on such unfavourable terms that the new entrant will not constitute an effective competitor. The NCA normally distinguishes between structural, strategic and public barriers to entry.

Structural barriers to entry are defined as barriers to entry which the incumbent can not control, i.e. exogenous entry barriers. Such entry barriers are a result of cost or demand condition in the relevant market.

Absolute cost advantages means that the total per unit cost is lower for the incumbent then the entrant at any production quantity. The NCA will only consider absolute cost advantages that are not due to higher efficiency for the incumbent firm. Examples of absolute cost advantages, which are not based on higher efficiency, are rights to raw material sources, location advantages and firm internal know-how.

The most important example of structural barriers to entry are sunk costs. This is investment in capital that is irreversible, and therefore lost if not used for the purpose they where meant for. Examples of sunk cost are marketing and investment in R&D. If an entrant has to sunk costs when entering a new market, then the incumbent will have a competitive advantage over the entrant. This is because the incumbent already has incurred the operational independent cost, while the entrant has to choose whether or not to incur these costs. The amount of risk involved in investing is therefore larger for entrant which is considering investing than for incumbent which has already invested. The lower risk exposure means that incumbent can sustain prices above costs of production without making new entry profitable.

Examples of barrier to entry, which are due to conditions on the demand side, can be a result of buyers lack sufficient information about the product variants of the entrant. The incumbent has an advantage because buyers are familiar with its products, and reluctant to try other variants.

Strategic barriers to entry can occur when the incumbent tries to increase the structural barriers to entry. Examples are overinvestment in production capacity (making an aggressive response to entry more likely), overinvestment in advertising (increasing information asymmetry on the demand side), or establishment of agreements which forecloses new entrant from access to vital sales outlets or supply sources. This, however, has to be examined from case to case. In some cases overinvestment in advertising can make entry easier as it tend to make the incumbent set a higher price.

Public barriers to entry can occur as a result of public regulation. Examples are public demand of standard qualification, capital, and licence and so on.

It is the NCA' view that competition authorities should use the same definition of barriers to entry independent of what type of case which are under investigation. This means, for example, that one should use the same definition in a merger case and in an abuse of dominance case. The reason for this is to ensure consistency in the economic analysis of different competition cases.

When measuring entry barriers the NCA would normally use a mix of quantitative assessment and qualitative judgment. The need for initial investment are often easy to quantify while other entry barriers like asymmetric information on the demand side, public regulation and so on are almost impossible to quantify and calls for a qualitative judgment.

The NCA would normally not try to estimate the expected duration of a barrier to entry. The impediment must of course persist long enough to have a market effect to be recognised as a barrier to entry. And equally, if entry would require a longer period to have significant market impact, this will be taken in to consideration as well.

In the grocery sector the NCA has pointed out that a shortage of suitable business premises can constitute a structural barrier to entry, and that the four big convenience chains' overinvestment in suitable business premises can constitute a strategic entry barrier. In addition, the NCA has pointed out that some municipals has established public barriers to entry by using the local building and construction plans to foreclosure foreign convenience chains from entering the Norwegian market.

When evaluating the merger between the finance groups DnB and Gjensidige NOR the NCA has pointed out the importance of distribution networks is a barrier to entry in the banking sector. To become a real competitor in the banking sector you have to have your own distribution network (or have an agreement with somebody who has one). To establish banking distribution network is a heavy investment. Access to a distribution network was therefore evaluated to be a major barrier to entry.

In the electricity power market the NCA has pointed out that the need for large initial investment and a heavily regulated market constitutes barriers to entry.

Barriers to entry are an important part of most cases handled by the NCA, alongside with factors like existing rivals possibility to expand their production and buyer power. The NCA is therefore of the opinion that it would be advantageous if one could find an agreement on a specific definition of entry barriers.

SPAIN

1. Introduction

Barriers to entry play a very important role in the assessment of antitrust cases of the Spanish Competition Authorities, but are specially taken into account in the field of merger control.

It is difficult to find a generally accepted definition of *barriers to entry*. The Spanish Competition Authorities do not follow strictly one of the mostly accepted definitions by Demsetz, Brozen, Bain or Stigler, but look at barriers to entry in a flexible and on a case by case basis.

Nevertheless, one can find a "description" of this concept in the Communication on the key elements for the assessment of economic concentration by the Spanish Servicio de Defensa de la Competencia, published by the Servicio in 2002. The Communication refers to barriers to entry as **"the obstacles which potential competitors face and which may influence their decision to enter the market to the extent of eliminating the discipline they may exercise on the incumbents".**

The general criteria to take into consideration to analyse entry barriers in merger control, are set up in this Communication. This is not the case in the field of antitrust practices, where there is not a paper clarifying these concepts and, thus, it is necessary to turn to the different case law.

2. Antitrust cases

In the field of **antitrust**, it is necessary to consider entry barriers specially when assessing abuse of dominance cases.

When defining the relevant market, it is considered that undertakings are under three main sources of pressure from the competition point of view: demand substituibility, supply substituibility and potential competition. Demand substituibility is considered the more effective and immediate means to condition the behaviour of a product supplier, especially with regard to prices field. Pressures derived from the supply substituibility and potential competition are considered as less immediate and thus are given less importance.

Concerning supply substituibility, the analysis is very careful, so that it will only take into account those potential competitors from which one can reasonably expect a quick and non higher costs entry in the product market. This analysis is not very frequently used, only when it is clearly proved that producers of other products have technical capacity to adapt their productive process to make the product in question in a short term and without big investments.

According to all of this, the investigation about whether a company has a dominant position in a market, is carried out by the Spanish Competition Authorities by assessing the structure and the conditions of competition in the market, and by considering that the existence of a dominant position in general results from the meeting/reunion of several factors that, isolated considered, would not be necessarily decisive.

Barriers to entry, along with the number and the strength of competitors, market shares, global turnover and prices are the relevant factors to assess the conditions of competition in the market. And as it is said before, it is essential in order to study the substituibility of the supply to take into account together with the real competitors also the potential competitors, these that are offering at present different product but may change to produce the reference product without big costs.

In Spain, until 1989 the market share was the key factor for determining the existence a dominant position. Since 1989 other factors are given a big value. This is inferred from the Spanish Competition Court (TDC)' Resolutions as *Tecnotron* (1992) and, especially, from the **Bacardí Resolution *(*1999).** In the latter, the TDC concluded that a very high market share does not necessarily determine a dominant position for that firm especially in a market with no entry barriers and being highly contestable. It is solely a factor which only along with others may endeavour such a dominant position.

Among other barriers to entry identified in different cases, the TDC has analysed the notoriety of a brand, high investments required for entering the market or the existence of exclusive distribution agreements. The later has been the case of **Airtel/Telefónica (1999);** in the TDC' Resolution it is said that "when an operator has a strong position in the market, the conclusion of exclusive agreements with respect to an important proportion of the purchases, is an unacceptable obstacle to the entry in a market". According to this, the Resolution declared proved the existence of a prohibited conduct of dominant position by Telefónica consisted of hampering Airtel the entry and settlement in the market, by means of the conclusion of exclusive distribution agreements with its wholesalers and their agents.

3. Merger control

In merger control, the Spanish Competition Service (SDC) makes an assessment of all notified cases. In merger operations that require an in-depth investigation, the Ministry of Economy and Finance sends the Spanish Competition Court (TDC) -an independent body- the filing, together with the SDC preliminary report about the case, for further investigation. After two months the TDC issues a non-binding report and the final decision is taken within one month time by the Council of Ministers. Whereas the TDC report does is non binding, the Council of Ministers must especially justify its decision if it does not follow the advice of the TDC.

In its Communication on the key elements for the assessment of economic concentration, the SDC highlights that the legislation and the practice of the of the Spanish Competition Authorities use as a substantive criterion if the merger may hinder the maintenance of effective competition in the market.

The practical application of this criterion required a detail analysis of a set of elements such as the potential competition and entry barriers.

The SDC' Communication, stresses that it only provides general criteria which are applied in a flexible manner by the competent bodies depending on the nature of the case examined. Aditionaly it specifies that it is based on the analysis conducted by the *Servicio de Defensa de la Competencia* and therefore does not refer to the reports issued by the *Tribunal de Defensa de la Competencia* nor obviously on the criteria followed by the Council of Ministers when deciding in this field.

In accordance with this, it is worth receiving firstly the principles applied by the SDC with respect barriers to entry and subsequently presenting the pratical experience of the TDC obtained through the exercise of its advisory role.

The **SDC** considers that the possibility of new competitors accessing the relevant market and their ability to discipline the behaviour of the incumbents are two of the main aspects taken into account when assessing the risk of hindering effective competition. The threat of entry may effectively limit the behaviour of incumbents, if it is probable, it may take place in the short term and has significant impact on competition.

In general, the analysis of potential competition takes into account the companies with greater probability of entering the market, those active in product or geographic markets which are close to the affected one, or those who are capable of adapting quickly and cheaply their production methods and have enough financial sources and access to the necessary production or technological resources. Recent of successful entries that have taken place in the market and their evolution is especially useful to determine the probability and sufficiency of future entries.

In any event, entry of new competitors will depend substantially on the assessment of entry barriers to the market; the obstacles which potential competitors face and which may influence their decision to enter the market to the extent of eliminating the discipline they may exercise on the incumbents. Entry barriers which must be considered in each specific case, an be classified onto two groups: legal and economic ones.

Legal barriers may arise from current legislation (i.e.: tariffs), sector regulations (i.e. market access conditions or assignment of essential facilities), or technical regulations which are mandatory in certain economic sectors or may arise from regulatory risk.

Economic barriers include, among others, the investments required to access and act in the market, the technology required to produce, the minimum efficient scale or the research and development or advertising requirements, since incumbents do not have to face these costs which may be of such scale that may deter any future entry.

Access to raw materials, other inputs and essential facilities, either of tangible or intangible nature may also be considered as entry barriers. In this context, special attention must be given to intellectual property rights.

Foreseeable access restrictions to demand arising from the distribution structure must also be considered, i.e., the existence of long-term contracts under exclusivity agreements, the need of having own wide distribution networks, imperfect information about demand available in the market or the importance of the physical location of demand.

Other possible economic barriers arise from sunk costs, i.e., those which may not be recovered when exiting the market. These costs may be generated, for instance, if in order to enter the market it is necessary to acquire certain tangible or intangible assets whose value may not be recovered when they are sold back in the event of exiting the market. Investments in machinery specially adapted to the production of certain type of goods, advertising expenses required to launch a new trademark or a differentiated product in the market, discount and promotion policies, set-up expenses or R+D costs constitute some examples of sunk costs.

Among recent cases, mentioned be made of **Disa/Shell Peninsular/Shell Atlántica (2004),** which consisted of the acquisition by Disa Corporación Petrolífera of the 100% of the capital of both Shell' companies concerning fuel retail on petrol stations in Spain. The SDC' report underlines the assessment of economic barriers (long-term exclusive agreements, vertical integration, other strategic barriers such as difficulties to build a replica of the existing distribution network..), of relevant importance in order to determine the competitive pressure that may exert potential competitors. This review was confirmed by the TDC in its in-depth investigation which proposed to clear the transaction subject to several conditions, between them, the limitation to increase the number of petrol station in the network of the relevant market.

In the case **Shell España/Cepsa (2005),** which entailed the creation a joint venture for the provision of into-plane services of fuel and lubricants for civil aviation in the Spanish airports, the SDC' report also stressed the relevance of legal barriers. This was also confirmed by the TDC in its in-depth investigation which finally proposed to clear the transaction subject to the compliance of several conditions.

Concerning the **TDC,** even if it bears in mind barriers to entry also in anticompetitive practices (as in the Bacardi case), as it is said before, barriers to entry are specially taken into account by the TDC in its merger control competence and they usually merit a separate chapter in the report about the operation.

The TDC tends to look at barriers to entry in a flexible and on a case by case basis. Thus the TDC does not follow strictly one of the mostly accepted definitions by Bain, Stigler. On the contrary, instead of following a narrow definition that could lead an investigation to conclude that there are no barriers to entry if just one of the conditions of that specific definition does not happen, the TDC tends to focus on a more practical and economic approach according to the sector, the regulation in the sector, the real entries and exits in the sector, the level of concentration, and it tries to foretell if an entry is quite possible to happen in the short-run.

This does not mean that the TDC does not follow contestable market theories. In fact, it takes into account also the potential entrants that may threaten incumbents. But the TDC tries to stick this approach to the particular circumstances of the sector in question.

The TDC tends to consider that barriers to entry are any obstacle, impediment or difficulty that encounters any firm to entry or exit a particular market.

The TDC does not examine barriers to entry as an isolated or independent issue. On the contrary the TDC tries to look at the whole picture in which barriers to entry play a very important role although they might not have an important significance on their own.

In some sectors under special circumstances (e.g. a previously public incumbent within a sector recently liberalised) the TDC tends to think that a barrier to entry might be anything that hinders entrance as in this specific case a second entrant might have a strong impact. In other circumstances the TDC might conclude that a barrier to entry exists if a firm needs to make an important investment even if the incumbent had to do that very same investment long before to enter in the market because that could had happen under different circumstances. In other sectors with a less concentrated market we might consider barriers to entry only if they really hamper competition and the TDC might tend to consider just if the threat of potential competitors is sufficient to impede the incumbent of the merging parties to assume the extra benefits of maintaining higher prices.

To summarise, one could probably define the TDC' assessment of barriers to entry as a sectoral approach more that a purely theoretical one.

Usually the TDC doesn't intend to measure barriers to entry.

A particular emphasis on barriers to entry is taken in sectors where the regulation is the main cause that hinders new entrance (as in Spain the retail distribution), new markets (ASDL…) and in sectors recently liberalised where there is an incumbent with a very strong position derived from the previous protection. In the latter, a second or third entrant may have a strong impact in promoting competition and consequently one can expect the incumbent making this entrance very difficult.

The TDC, as the SDC, also tends to classify barriers to entry onto two different groups:

- Legal or Administrative obstacles, derived from the legislation.

- *Economic barriers to entry*: including, among others, strong capital investments, economies of scale, sunk costs but also obstacles derived from the behaviour of the firms already established in the market, such as difficulties to the access to a strategic input or facility, investment in publicity and access to the distribution network.

As we have already mentioned the TDC does not consider them individually. Thus the existence of important economies of scale does not necessarily mean that the TDC would advise not to proceed to the merger in question. Moreover, efficiencies are also taken into account by the TDC.

With regards to barriers to entry, the following cases might be of interest:

- **Digital Platforms**: In this case the TDC assessed that there were important barriers to entry to the market of audiovisual contents (Soccer matches and premium films) but as efficiencies were also brought into consideration the TDC concluded that under certain conditions the net change in consumer welfare resulting from the merger could still be positive.

- **Carrefour/Promodés; Caprabo/Enaco; Leroy Merlin/Brico; Caprabo/Alcosto.** The Retail Commercial Distribution sector encounters in Spain very clear regulatory barriers to entry. Thus mergers in this sector have always taken into account this specific issue and the TDC has always assessed them. In order to open a "gran establecimiento comercial" in Spain a commercial license from the corresponding Autonomous Community is needed. But certain Autonomous Communities have a very restrictive legislation with the aim of protecting small commerce. In some cases the barrier to entry becomes an absolute stumbling-block that makes it impossible the entrance of potential competitors in the market and protects the local monopolies that have been previously installed. In all these cases barriers to entry played a central role in the TDC analyses.

- **Heineken/Cruz Campo; Arehucas/Artemi;** In markets where there is an important degree of product differentiation, advertisement might be considered a barrier to entry as new comers into the market would have to spend great amounts of money and time to make their new products attractive and to overcome the resistance to change of the consumers.

- **Abertis/Retevision;** In this case the TDC led a special attention to the access to infrastructures that could be essential to enter the market. Building a new network to transport and diffusion of the TV signal would be economically inviable. The TDC considered that although the regulatory framework imposes obligations of giving access to that infrastructure, a special care should be taken in order to guarantee the effective access to it. The TDC considered that the incumbent was in a better position as the new entrant would always encounter more difficulties in the negotiation of the access and would have to pay the fee for accessing to it.

SWITZERLAND

1. Introduction

The analysis of market entry barriers is an integral element of any competition analysis and can have an impact on both market definition and the assessment of potential competition. Unless the presence of strong actual competition rules out the possibility of any harm to consumers and thus renders the assessment of potential competition obsolete, the analysis of potential competition is relevant in any type of competition case (merger control, abuse of dominance and agreements).

This contribution describes the definition of entry barriers used by the Swiss Competition Commission (Comco) and explains how it has been applied in practice.

2. Definition of Entry Barriers used by the Swiss Competition Commission

The Comco follows a "pragmatic" approach to the assessment of market entry barriers. Any impediment to the market entry of potential competitors are considered as an entry barrier, regardless of whether the entry cost had also to be borne by incumbent firms or whether the entry cost appeared after the incumbents had entered the market. Hence, the definition of an entry barrier as applied by the Comco does not necessarily rely on an asymmetry between incumbent firms and potential entrants. Furthermore, the definition comprises regulatory, economic and strategic barriers to entry.

3. Types of Entry Barriers

Following the above definition of an entry barrier as any impediment to the entry of potential competitors, the Comco distinguishes in accordance with its internal guidelines the following basic types of entry barriers:

3.1 Absolute (cost-)advantages of incumbent firms

Market entry by potential competitors may be unlikely if incumbent firms benefit from absolute (cost-)advantages vis-à-vis potential entrants. There are many possible sources of advantages for incumbent firms such as exclusive access to crucial resources (e.g., raw materials, patents, exclusive facilities etc.) and regulations (e.g., legal requirements to establish a subsidiary within Switzerland, exclusive rights, local product standards, concessions, customs duties etc.). Absolute (cost-)advantages may also arise due to the "learning curve". In order to be able to produce efficiently, potential market entrants may have to acquire considerable experience and learning.

3.2 Product differentiation strategies

Another type of market entry barriers refers to product differentiation and customer loyalty. Market entrants may have to undertake considerable investments in marketing and promotion in order to convince loyal customers to change suppliers. This may be particularly relevant in markets for search and experience goods where reputation is important. Also, market entry may be difficult in presence of switching costs. Switching costs may be created by incumbent firms through rebate schemes, exclusive contracts or other measures which make it difficult for an entrant to acquire a significant customer base. Moreover, the first firm introducing a new product or service may have a first mover advantage, and for competitors it may be difficult to enter this new market.

3.3 Economies of scale

Economies of scale and scope may make it difficult for a potential competitor to enter the market. Economies of scale, for example, make it necessary to produce a high quantity of goods or services. This may render market entry more risky. In analysing the effects of scale economies on market entry, the likely reactions of incumbent firms have to be taken into consideration. Market entry may be more risky if incumbent firms cannot reduce output without incurring a loss due to high sunk costs. In this case, incumbent firms may react by lowering prices or take other measures to deter market entry.

Furthermore, economies of scale usually increase the capital required to enter a market. It may be difficult for an entrant to raise the capital necessary within a short period of time. Also, entering firms may have to pay higher interest rates on their capital compared to incumbent firms because of the higher risk.

3.3 Likely reactions of incumbent firms

In order to assess the risks of market entry, likely reactions of incumbent firms may also be relevant. The appraisal of likely reactions of incumbent firms requires knowledge of the development of demand and of the market phase. For instance, it seems more likely that with declining demand and excess capacities, incumbent firms would defend their market share at any cost.

With respect to the reaction of incumbent firms, the market structure may also be a relevant factor, because a high industry concentration facilitates the coordination of defensive measures. Also, if the potential entrant and incumbent firms compete in several markets (multi-market competition), there is the possibility of retaliation in other markets.

3.4 Market exit barriers (sunk costs)

The risk of market entry depends on the costs which must be borne if market entry is not successful (sunk costs). Such costs may arise in building up production and distribution capacities, in marketing, promotion etc.

4. Indicators of Entry Barriers

The assessment of potential competition typically does not necessarily involve the analysis and measurement of all types of entry barriers listed above. Rather, the analysis comprises an estimation of the overall likelihood of market entry, its scope and timing based on different indicators.

4.1 Past market entries

The history of past market entries may give some indications for the level of entry barriers present in a market. If, for example, there have been several successful market entries in the past years, entry barriers would not seem to be of relevance. The absence of market entries, however, does not necessarily imply the presence of high entry barriers. The absence of market entries may also be due to intensive competition between incumbent firms, such that entry does not seem attractive.

4.2 Persistent rents

Persistent and high rents may indicate the presence of high entry barriers, since high rents would normally attract new competitors.

4.3 Price differences

Price differences of a given good or service between different geographical markets may indicate the presence of entry barriers, because price differences would normally attract competitors from other areas.

4.4 Industry concentration

A high industry concentration may indicate the existence of entry barriers and may in itself constitute an impediment for market entry (see "likely reactions of incumbent firms").

Example: Bank Merger between UBS and SBV (1998)

The bank merger between UBS and SBV is a good illustration of how the Comco assesses market entry barriers, the likelihood of market entry and its timing.[1] Based on the analysis of actual competition, the merger raised concerns particularly in the market for commercial loans to small and medium-sized enterprises (SMEs). Therefore, the Comco analysed the likelihood of entry into this market after the merger.

In a first step, the Comco identified potential entrants into the market of loans to SMEs. Candidates for market entry were the cantonal and regional banks (by extending their activity to adjacent geographical markets), the Swiss Post, who was already offering certain financial services, foreign banks and leasing companies.

In a second step, the likelihood of market entry of those potential competitors who were able to enter the market within two or three years was analysed. Since the Swiss Post is not allowed to grant loans by law, market entry would have required a revision of the corresponding law. This, however, would not have been possible within two or three years.

The inquiry revealed that the cantonal and regional banks disposed of sufficient capital in order to significantly increase their credit volume within a short period of time. However, their activity was often limited mainly to their geographic area by law or company bylaws, even if the law did not clearly rule out the possibility of offering services in other areas.

Foreign banks were usually focusing their business on large companies and subsidiaries of firms of their home country. Moreover, there have been several unsuccessful attempts to enter the Swiss market. Large scale market entry of foreign banks was therefore not considered likely, even if there was the possibility that some foreign banks would try to offer their services in adjacent areas near the Swiss border.

Market entry of leasing companies did not seem likely neither, because they were already mainly controlled by the large Swiss banks.

The Comco concluded that only the cantonal and regional banks may be considered as potential market entrants.

In a third step, the Comco then analysed market entry barriers present in the market for SME-credits. The following elements were taken into consideration:

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1 UBS / SBV, RPW 1998/2, p. 278 ff.

A bank would usually have to enter the market as a universal bank, and not as a specialised institution only offering SME-credits. Even if a bank has sufficient capital to increase its credit volume in the short term, it would normally try to attract new deposits in the corresponding area. A bank would therefore assess its risks of entering a market as a universal bank.

Furthermore, experience shows that banking is characterised by the presence of switching costs. On the one hand, comparing prices is costly, particularly in the market for SME-credits where no uniform and public interest rates exist. On the other hand, customers normally demand a whole range of services within the same banking relationship. It is usually not possible to change the bank only for a loan. Often, the customer must also change his current account and deposits. Therefore, changing bank involves a significant cost for the customer which makes it difficult for a market entrant to attract clients.

For these reasons, the Comco concluded that large scale entry into the market for credits to SMEs is unlikely. Subsequently, the merger has only been allowed under conditions.

In 2004, the Comco reviewed the effects of the merger in those eight regional markets where competition concerns were raised. In three regional markets, entries of regional, cantonal and/or foreign banks of adjacent regions were observed. However, market shares of the entrants are still relatively modest. In the remaining five regions, no entries took place and the market conditions remained unchanged since the merger.

5. Appraisal of Entry Barriers

The analysis of market entry barriers may be relevant for market definition and/or the assessment of potential competition.

According to the concept of supply side substitution, the existence (or the absence) of market entry barriers may be important for the definition of the relevant product market. If a firm is able to adapt its output in the short run to supply goods or services of a given product market (previously defined according to the concept of demand substitution) without incurring significant costs and risk, it may be considered an actual competitor in that product market. Hence, production capacities of the firm will be considered as belonging to the relevant market.

In the retail merger between Migros and Globus, for instance, the Comco defined several product lines as relevant product markets.[2] Each product line consists of products, which may not be substitutable among each other (e.g., trousers and jackets both belong to the product line men's wear, even if they are not substitutable from the point of view of the customer). However, since retailer can easily adjust their assortment within a given product line, they may be considered as belonging to the same market.

The existence of market entry barriers may also have an impact on geographic market definition. If there are significant impediments to enter a given area, this area constitutes a geographic market.[3] For example, due to impediments to international trade, the relevant geographic market is in many cases confined to Switzerland.

2 Migros / Globus, RPW 1997/3, p. 364 ff.

3 Submission Betonsanierung am Hauptgebäude der Schweizerischen Landesbibliothek, RPW 2002/1, p. 130 ff.

Potential competition is another important issue where market entry barriers are relevant. Potential competition can force incumbent firms to behave efficiently and is equally important for the assessment of dominance, agreements and mergers. The Comco does consequently not make a difference in the appraisal of market entry barriers between these types of procedure.

Whether a given market entry barrier is to be considered within the analysis of market definition or within the analysis of potential competition depends on the characteristics of the case. Usually, the Comco considers the ability to rapidly adapt products and to market them without significant additional cost and risk within the definition of the market. In contrast, market entry which requires more time and involves some degree of risk firms will be considered under the premise of potential competition. According to the practice of the Comco, potential competition is considered to exist in case that market entry is likely as a reaction to an abuse or price increase, that market entry is expected to occur within two or three years and that the scale of market entry is expected to be sufficiently large to threat incumbent firms and to effectively alter market conditions.[4]

In the assessment of the merger between Coop and EPA, for example, the Comco considered market entry into retail distribution on a national level unlikely.[5] Several market entry barriers have been identified. On the one hand, retail distribution is characterised by the presence of significant scale economies. The construction of new retail outlets, on the other hand, requires building permits, which have to be obtained in lengthy and costly procedures. Finally, the fact that existing retail chains already occupy the most attractive locations, market saturation and characteristics of the Swiss market, such as language and habits, constitute a further impediment to market entry. Therefore, market entry by a foreign retail chain would probably only occur through the acquisition of an existing Swiss retail chain, as had already occurred in the past. In the meanwhile, a foreign retail chain withdrew from the Swiss market due to difficulties in expanding its activities and obtaining building permits for new locations. At the same time, however, two other foreign retail chains announced their plan to enter the Swiss market on a nationwide basis.

On the local level, however, market entry barriers seemed considerably lower. The procedure revealed that the establishment of a new store takes between a couple of months to a few years. The Comco concluded that on the local level, there is potential competition.

6. Conclusions

The Comco uses a "pragmatic" definition of market barriers: anything that has the effect of impeding market entry may be considered an entry barrier. This definition thus comes close to the concept of "antitrust barriers" as in McAfee et al. (2004).[6]

In practice, the Comco does not directly measure the level of market barriers in the first instance, but rather assesses whether timely market entry at a sufficient level is likely to avoid abuses of incumbent firms. This, however, may require a detailed analysis of entry barriers which exist on different levels in a given market.

4 Tamedia / 20 Minuten, RPW 2004/2, p. 583 ff.

5 Coop / EPA, RPW 2002/3, p. 505 ff.

6 McAfee, Preston, Hugo M. Mialon, Michael A. Williams, 2004: What is a Barrier to Entry? AEA Papers and Proceedings 94/2, 461ff.

TURKEY

1. Definition of Entry Barriers

Regarding definition of legal or administrative barrier to entry, Turkish Competition Board (the Board), in its *Turkcell*[1] decision, gives the following description: "*Any exclusive right allocated by a public authority to operate in a market constitutes a barrier for entrance in that market. Within this frame, the obligation to obtain a permission or a license, a concession or an operating license from an institution which enjoys a public authority in order to operate in the market constitutes a "legal or administrative barrier to entry" for the undertakings which desire to enter into the market.*" The decision cites that it is not possible for any actor to enter into the GSM services market unless there is a licence issued by the Ministry of Transportation[2], that is, there is a legal barrier for an actor's entry into the market. In the same decision, the Board defines sunk costs as "*All of the costs which could not be compensated in case that the entry into the market fails are the sunk costs.*" According to the decision; "*Costs under this scope vary according to the field in which the undertaking operated such as production, research and development, distribution and marketing*" and gives all production expenditures which are spent on factory and other production factors and which can not be compensated in case that the entry fails to be successful as examples before discussing whether there are sunk costs in the case in question.

In its Ice cream[3] decision, the Board gives another definition that is as follows: "The scope of barriers to entry, that mean that structural features of the relevant market comprise important difficulties for the undertakings to newly enter the market, is quite wide. The principal ones of barriers in question are legal barriers, highness of the investment cost, lowness of the profitability rate of the market, existence of intellectual and industrial property rights, technological superiority, product differentiation, economies of scale, financial power of the undertaking and operating policies."

In its Marshall Dye[4] decision, the Board provides the following definition: "Barriers to market entry express the case where structural features of the relevant market are not appropriate for undertakings to newly enter the market. The barriers in question can be listed as legal barriers, difficulties encountered in the provision of raw materials, necessity of an high investment cost, failure of the market to allow a profitable operation of a large number of undertakings as regards its structure, existence of intellectual and industrial property rights, technological superiority, differentiated products, economies of scale, vertical integration, financial power of the undertaking and operating policies."[5]

1. 20.7.2001, 01-35/347-95.

2 Upon the enactment of the Act No. 4673, the task of issuing certificate of authorization to the operators is undertaken by the Telecommunication Authority.

3 26.12.2002, 02-81/940-387.

4 23.10.2003, 03-69/834-364.

5 The definition and the examples are almost repeated in *Frito Lay (4.5.2004,* 04-32/377-95*)*. Moreover, they are also mentioned in another decision, *Efpa* (date 6.11.2003, 03-71/867-371) albeit in a truncated way.

Finally, the Board mentions in one of its Cement[6] decision that "In economics literature, the concept of barrier to market entry is defined as the cost of production that should be borne by the firm to newly enter the industry but not by the incumbent firm. In the European Union Law practice, many various factors that constitute a difficulty for the undertakings to newly enter the market such as the need for capital, vertical integration, excess capacity, product differentiation and industrial property rights are qualified as barriers to entry."

In the same decision, sunk cost is defined in the following: "Sunk cost expresses those among the costs assumed to be able to operate in a sector that, while exiting the sector, have the nature of being unable to be reconverted into money through the disposal of that asset or those among the expenditure made that have the nature of being unable to be recovered or used in another field of operation."

2. Experience with Entry Barriers

Experience of the Board with the entry barriers should be evaluated to see what types of market features are considered to be entry barriers.

Requirement for a significant amount of capital is considered to be deterrent for the firms to newly enter the market in *Cement* decision. The Board mentions that the European Commission evaluates need for high amount of capital as entry barrier without taking sunk costs into account. The deficiencies in capital markets are effective in capital need's constituting an entry barrier. Due to asymmetric information in capital markets, new firms with smaller balance sheets can only raise a loan with higher interest rates because they are seen more highly to go bankrupt. Any undertaking willing to enter the market by constructing a factory with a capacity of 1 million ton/year, that is regarded as optimal scale in the sector, will need USD 100 million. The relevant market of cement is of an oligopolistic structure with undertakings having large amount of capital and this situation produces an effect that increases the need for capital for firms to newly enter the market. The Board considers it obvious for firms to newly enter the market to have difficulty to find credit or to be in a position to endure high capital cost due to the existing problems in capital markets in Turkey. Therefore, the Board thinks that sunk costs and the need for capital constitute serious entry barriers in cement market.

Economies of scale have an important effect over fixed cost and cost of labour in cement sector because the main process is simple, the product is homogenous and technology is applicable by everyone. Therefore, the undertaking to newly enter the market has to invest in great amounts and produce at a great scale to be able to carry out price competition. It is accepted that optimal capacity is 1 million ton per year. The cement market that has had excess supply previously due to incentives granted faces great narrowing in demand after crises following one another and then the earthquake. Excess production in the sector that is saturated is tried to be decreased via export. The Board thinks it obvious that excess supply in a sector constitutes an entry barrier. Likelihood of new firms' entry into the market is low even in case of increase in demand due to excess capacity[7] and the existence of firms benefiting economies of scale.

Vertical integration is regarded as entry barrier in *Cement* decision. Cement is produced from clinker after some additives are put in. Cement is the main input for ready-mixed concrete. Due to these features of clinker, cement and ready-mixed concrete, the existence of firms with an integrated system that operate at production levels of each of these products is regarded as constituting entry barriers by the Board. Integrated firms that operate in all the markets of clinker, cement and ready-mixed concrete can not only produce trouble for independent cement or ready-mixed concrete producers that need them to obtain main

6 2.12.2004, 04-77/1108-277.

7 Capacity utilization rates of the 5 firms in the market for the last 7 years are taken into account in the decision. The rates for the final year are 56, 52, 77 and 51.

ingredients for production, but also are serious entry barriers. Any undertaking willing to enter any of the market of clinker, cement and ready-mixed concrete has to bear the hardships and disadvantages because there are producers that produce all the three products in the market. For instance, because a firm willing to enter ready-mixed concrete market will gain cost advantage if it produces clinker and cement, the requirement to realize similar integration to enter an integrated market can be said to be an important entry barrier.

The need for high technology and high investment cost in production activities, constant research and development activities are accepted as conditions that impact entry to the relevant markets of civilian helicopters, military helicopters, large commercial planes, business jets, maintenance and development of civilian planes, guided arms and guided arms systems and military transport planes (CN-235).[8] No need for advanced technical knowledge and specialization, low investment costs such as an average of USD 1 million for every 1000 tons of enamelled coil wire capacity, short time period necessary for investment such as ability to construct a facility of an average size less than a year and easiness to increase capacity are mentioned to discard existence of entry barriers in Bemka Joint Venture.[9] In this decision, the Board takes into account absence of actual or legal barriers that complicate imports and the international commercial connections of many users that can facilitate import if domestic prices rise. Because production does not require a large amount of capital, it has been decided that no barrier preventing entry to and exit the market existed in *Marshall Dye*.[10]

That the products has high technology is not regarded as creating barriers to entry in network sector in a Board decision regarding an acquisition in the relevant market of switches and routers.[11] The Board, in its decision, takes into account the factors that average growth rate is 30-40% in the network sector, the forecasts shows that the growth will continue increasingly, new entry is encouraged by the speedy growth, innovation in the sector is done mostly by small players of flexible structure concentrated on certain fields, the behaviours of customers[12] encourages new entry to the market, the buyers buy the products from different sellers, new undertakings are attracted into the sector and the new comers could find place in the market and new progress in recent years in information technology leads suppliers of telephone equipments to realize great investment for computer network technology via both research and development and acquisitions. Therefore, although the acquiring undertaking's market share would become 70,5% and CR4 would become 89,7% in the router market following the acquisition, the Board did not rule that competition would be significantly decreased in the market.

In its *BIRYAY*[13] decision regarding the market of newspaper and magazine distribution, economic barriers to market entry are listed as largeness of physical capacity and personnel for establishment of a distribution company, necessities for having a good organization, technical equipment and experience for distribution of many newspapers and magazines, initial investment costs and other processes and it is determined that those barriers allow only owners of great capital to enter the market.[14] In the market in question, entry to the market and ability to exist in the market require two elements of critical importance

8 18.4.2000, 00-14/135-67.

9 11.7.2002, 02-43/504-209.

10 23.10.2003, 03-69/834-364.

11 02.05.2000, 00-16/160-82

12 The customers want certain standard features in some active products such as hub, switch, router and the manufacturers manufacture according to those standards and this decreases the importance of patents and licences for market entry.

13 17.07.2000, 00-26/292-162.

14 These findings were repeated in another decision of the same year (14.12.2000, 00-49/529-291).

that are setting up sale points the number of which is sufficient enough to present the publications to the readers and feeding the sale points with publications in sufficient numbers and varieties. As a result, in this case, the Board regards a serious barrier to market entry the requirement to set up sale points in excess of ten thousand the existing ones of which are hard and economically irrational to substitute and the reason of this barrier to market entry is determined by the Board as the exclusive agreements with sale points concluded by the jointly dominant undertakings that prohibit rivals to use those sale points to sell their publications.

In *IGSAŞ Privatisation*[15] decision concerning nitrogenous fertilizers market and composite fertilizers market, the Board mentions that cost of a new production facility at a level of USD 300-400 million, instability as a result of openness to political impacts due to provision of input by the sector to agriculture complicate entry by foreign producers and new local producers. Moreover, operating as a supplier has become more complicated because the need of numerous farmers scattered all the regions of Turkey with limited buying power can be satisfied by a widespread distribution network. Without having a widespread distribution network, it is hard to keep efficiency in a limited region with small scale sales due to validity of economics of scale especially for transport of fertilizer through sea route (transport disadvantage can be overcome in case of transport through sea route at a scale of 20,000-30,000 thousand tons). Moreover, it is a necessity to provide the distributors a wide range of products because farmers tend to buy all their needs from a single sale point and this requires the suppliers to operate at large scales and complicates small scale establishments' remaining in the market against those that provide fertilizers of different variety to their distributors and constitutes barrier to entry.

It is necessary to obtain a licence to enter into GSM services market in Turkey. In Turkcell decision, the Board mentions that "Even if the existence of an undertaking which acquired the right to operate in GSM services market after obtaining concession from the state is permitted "legally", a certain period is required for that undertaking to "actually" enter into the market and have a considerable power in that particular market. The positions of the operators which are already existing in the market will be affected adversely proportional to the level of difficulty and length of the process within which the recent participants in the market will acquire efficiency. In other words, to the extent that it can be mentioned about the barriers which extend this process or make it difficult, the positions and powers of the existing operators in the market will be guaranteed, their possibility to engage in non-competitive behaviours will increase and it will be easy to talk about the existence of the dominant position." Then, the Board explains those barriers as sunk costs, the definition of which is given above, including infrastructure investment costs; marketing, sales and distribution expenditures; product dependency and network externalities; vertical integration.

Infrastructure investment costs in GSM services market most of which are sunk costs, according to the decision, constitute the biggest share of the expenditures of the undertakings and the main factor to regard them as sunk cost is one of the article in the licence contract that obligates transfer of the infrastructure to the State free of charge at the expiry of the license period. The greatness of infrastructure investment costs can extend the length of time for the existing operators to create demand for themselves and can create deterrent effect on many actors on the issue of entry.

Moreover, GSM operators have to develop the infrastructures continuously to perform the infrastructure obligations in the license contracts and increase the technical capacity in parallel to the increase in the number of subscribers and increase the variety of the services they provide. Furthermore, the operators are required to update their technologies frequently within the scope of the rapidly changing conditions and establish required connections with other technology markets. Competition through service variety and quality becomes more important as number of subscribers and operators increase and

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15 03.11.2000, 00-43/464-254.

competitive power declines if necessary technological investments are not made in time. Therefore, the decision concludes that size of infrastructure investments constitutes barrier for actual entry in the market.

As to marketing, sales and distribution expenditures, they include the establishment and operation of the distribution network, production management, market researches, direct marketing, advertisement and presentation costs the size of which can restrict the ability of new operators to efficiently present themselves in the market. The Board takes into account the following reasoning "*Since GSM technologies include high technology and are strange and complex for the user, the marketing of these services require high presentation expenditures for the operators. The fact that GSM services are sold together with the devices in practice brings together with it the obligation to undertake part of the advertisement expenditures which include the presentation of devices in campaigns arranged with the distributors. Advertisements published in printed and visual media and other expenditures related to marketing constitute a significant item in the costs of the existing operators*."

Regarding product dependency and network externalities, the Board provides that Turkcell, the dominant undertaking, can cause a differentiation in GSM services and create a brand dependency towards its services. Turkcell has acquired a loyal consumer mass because it began to the licensed period with many more subscribers, it continued its infrastructure works incessantly and efficiently, reached the necessary size of coverage area earlier than its rival, set up an efficient and exclusive distribution network and number portability that was not regulated by telecommunication legislation would constitute switching cost for the subscribers. Regarding network externalities[16], Turkcell has more subscribers than its competitors in the GSM services market and the consumers prefer Turkcell because it has the most widespread network in the market and they want to make use of the rate discounts applied within the network, another reason is that they hold the opinion that the communication between the same network will be more trouble-free, it is natural that the consumers' expectations are positive towards future size of the network and they find it safer to be a part of a large network and think that they will benefit from technical developments regarding services and infrastructure to a larger extent. As a result, product dependency cause more binding effects due to externalities and customers that has chosen Turkcell will be highly likely tied to his/her preference and lead other consumers with whom he/she interacts to make the same choice. The Board concludes that this makes entry in the market harder.

With respect to vertical integration, more efficient marketing and distribution opportunities in a particular market can enable an undertaking to have a certain cost advantage against other firms and this can delay the entry of competitors to the market. The Board says that this can delay actual (de facto) entry to the market of that undertaking's rivals and in this case entry barriers can be the case. The undertaking makes new entry difficult by restraining various marketing and distribution channels through making them dependent upon itself. Turkcell has a wide, efficient and a dependent distribution network and its methods including exclusivity, various support and loyalty programs causing brand dependency create cost increasing impacts for the competitors.

Finally, apart from those, *Turkcell* decision mentions group advantages as a sort of entry barriers. Turkcell's partners engage in operations in various markets including banking and financial services, media tourism, iron – steel, paper products, textile, commercial vehicle production and construction sectors and information technologies. It is stated that Turkcell has enlarged its activities through power of its partners and the companies in which it is a partner and made use of the synergy provided by largeness and

16 The definition for network externalities in the decision is as follows: "Network externalities mean the benefit gained by each consumer in the network market (cable – cable-free phone, fax, e-mail networks etc.) from the participation of other consumers in the market." Therefore, a person who wished to be a GSM subscriber in GSM services market will want to be a part of the GSM network, namely the widest network, which has the highest number of subscribers in order to maximize its benefits.

being widespread and strengthened its power. Absence of a group advantage similar to Turkcell for operators to newly enter the market can be evaluated as an entry barrier.

Turkcell has made an significant portion of distributors of mobile phones, who can not accept the risk of not working with Turkcell due to effect of network externalities caused by the market structure, not to work with competitor operators and the Board considers that this practice complicates the activities of the rival operator in the market and will create problems for all operators that plan to enter the market and cause them to be excluded from the market. Moreover, in addition to the distributors, Turkcell has caused the dealers (final sale points) of those distributors to work exclusively with itself either through agreements including exclusivity or in the absence of agreement with exclusivity clauses through other ways such as advertisement and signboard support that lead dealers (final sales points) to work only with Turkcell. As a result of such a distribution network, mobile phones of certain brand in these dealers (final sale points) could only be sold with Turkcell line and not with that of competing operators, the activities of competing operators becomes harder because mobile phone distributors and their dealers (final sale points) are forced to prefer working with Turkcell whose market share is quite high and this results in elimination of consumer's choice. Therefore, the Board regards that Turkcell's working on an exclusive basis with the dealers (final sale points) complicates the activities of the rival operator as well as competing parties' entry into the market.

There are some other decisions of the Board dealing with network of exclusive agreements the effects of which are worsened due to market externalities and that can be seen as barriers to market entry stemming from strategic behaviours of the undertakings.

One such a decision[17] deals with exclusive agreements in the market of credit cards that allow shopping in instalments. Benkar, the dominant undertaking, has a system including a card that allows consumers to shop and pay in instalments in member stores. This system is called as "web" by Benkar and it includes stores into its web by concluding exclusive agreements with them. According to the agreement, the store will not be a part of another system using a similar card and any store that wants to be a member has to terminate its membership to another similar system. Benkar's system has the widest store network and a high number of card holders and therefore it benefits from network externalities[18] to a great extent. The Board ruled that exclusivity employed by Benkar formed a serious barrier to entry in the market and it would be hard for the undertakings that would newly enter the market to find stores or store chains to be a part of their system. This, the Board says, will narrow the alternative of the undertakings to newly enter the market to be able to find members to include into their systems and plays a role to increase the structural entry barriers caused by the current situation of the market.

In *Yemek Sepeti,*[19] the Board examines the exclusive agreements between an undertaking (Yemek Sepeti) that provides an online platform bringing customers and many restaurants that have package service together. Consumers can order through web site of Yemek Sepeti and restaurants can receive the orders and then send the food to the consumer through their package service. Low cost of constructing web sites and consumers' cost of research and choice, tendency of innovation and speedy growth in e-commerce markets are factors that ease market entry to online package service market and therefore there are no significant entry barriers under normal conditions that affect competition negatively to a great extent. However, vertical agreements are one reason for entry barriers. Yemek Sepeti concludes

17 *Benkar*, 18.9.2001, 01-44/433-111.

18 The efficiency of the system depends on number of the consumers in the system and extensiveness of stores. It will be rational for the consumer to choose the card having the widest store network and for the store to choose the card having largest number of card holders.

19 20.9.2004, 04-60/869-206 .

agreements with restaurants and prohibits restaurants to receive orders through a website other than that of Yemek Sepeti. The restaurants that have agreements with Yemek Sepeti have certain advantages compared to other restaurants. They have consumer awareness and brand image, a package service, a certain food quality, a location where internet is widely used and a package service quality to be able to deliver the food hot. The Board has ruled that tying restaurants via such agreements not only established an important entry barrier for the potential internet sites to enter the market but also complicated the activities of the existing rival internet sites operating in the market. Network effects is seen as one of the factors that has strengthened prospective negative results of such exclusive agreements on the level of competition in the market. 50,000 users of Yemek Sepeti and branded restaurants strengthen its position. The consumer that will order over internet will prefer to be a member of the internet sites that have such restaurants as members and order through this site. The internet sites, members and transaction volume of which increase this way, will transfer more orders to member restaurants and increase its power on restaurants' side in parallel. The new entrants or the existing restaurants that operate in the market but can not work with branded restaurants will not be able to increase their members and transaction volumes in parallel because they can not work with branded restaurants and in turn they will be unsuccessful to convince restaurants to work with themselves because they can not increase their members. Although the agreements have no compensation clause if restaurants infringe the agreement by becoming members to other similar internet sites, this does not weaken the exclusivity clause due to network effects. If the restaurant infringes the agreement, Yemek Sepeti can terminate the agreement unilaterally and the restaurant will no longer get the orders from its web site. Having aware of this, the restaurant will wish to get as much order as it gets from Yemek Sepeti. However, it will be hard for a new entrant to include branded restaurants to its system and achieve the same size with that of Yemek Sepeti in the short term and therefore it will be meaningless for the restaurant to work with a new web site. Yemek Sepeti has included restaurants that constitute 13% of its turnover in İstanbul. It has concluded exclusive agreements with restaurants that constitute 50% of its turnover in the past, however they are no longer in force due to expiry of their duration. However, it wants to sign new agreements with all restaurants it works with including exclusivity clauses and it thinks that all restaurants have to work with one undertaking having such a web site. The Board considers that the system that depends on working with all restaurants on an exclusive basis will abolish competition in a significant part of the market when the market power of Yemek Sepeti, network effects caused by the structure of the market and entry barriers that will be caused by exclusive agreements are taken into account.

In *Efpa/Tuborg*[20], the Board, in the beer market characterised by excess capacity, legal prohibitions of advertisement on TV, radio and other public broadcasting instruments, unimportant level of imports, need for a well-known brand to be able to operate, prohibited exclusive agreements concluded between either one of the two beer producers whose total market share is around 99% and on trade (horeca channel) and off-trade sale points (retailers such as shops, and supermarkets where beer is sold in packaged form). The network of exclusive agreements forecloses around 47% of on trade market and around 20% of off-trade market in terms of volume and this has been regarded as complicating the activities of rival undertakings' entry into the market. Moreover, the Board prohibited the two undertaking to prevent retailers such as markets to put rival beers into the freezers that they provided to the retailers.

In various Board decisions concerning agreements between cigarette producers and sale points to put cigarette stands to the exclusion of those of rival cigarette producers, the Board has consistently opposed such agreements and required the undertakings to remove such clauses and enable the sale points to be able to put similar stands from rival producers. The Board, in one of its such decisions[21], considers that efficiency of new entrants and those already operating in the market with small market shares can be damaged as a result of agreements including stand exclusivity when merged with effects brought by a tight

20. 22.4.2005, 05-27/317-80.

21 *JTI*, 28.5.2002, 02-32/368-154.

oligopolistic market, such agreements, if allowed, will create important disadvantages for the existing firms with small market share and those undertakings to newly enter the market where advertisement is prohibited and such stands provide a rare sale point presentation for the undertakings. When the length of the agreements is taken into account, the undertakings to newly enter the market will find it difficult to put their stands to the sale points and the network effect of similar exclusive agreements will effect the competition in the market negatively. At the end, the Board regards such agreements having a nature that will be able to create barrier to market entry.[22]

Moreover, in *Frito Lay*, the Board has regarded practices by the dominant firm in salty snack market to apply exclusivity to the exclusion of rival products in sale points in a market where a dynamic costly distribution network (stands should be kept clean and regular by frequent visits) is required due to features of the products in question (products have a nature that go sour rapidly and that have short usage life of 3-4 months). The cost of establishing such a distribution network is regarded as entry barrier to the market. In this decision, promotional work that increases brand image and awareness are considered as creating barrier to entry. Moreover, that the market is dominated by an international firm with a strong financial position, entry requires high cost, the market has a quasi-duopoly nature are also considered as entry barriers. The turnover coming from sale points with small space have very significant place in the sales of the undertakings in the market and therefore they are very important for them. Their small space makes most of them to work only with one or two undertakings and this complicates the activities of potential rivals to have a place in the market. Therefore, practices of Frito Lay, the dominant firm in the market, to ensure exclusivity in the sale points are seen as producing drawbacks and creating entry barriers not only for the existing firms but also for the new entry. Such exclusivity is considered as artificial entry barriers in a market that already has various entry barriers.[23]

Brand image/awareness and advertisement expenditures, distribution systems and availability rates, portfolio power have been regarded as elements that can create entry barriers in some Board decisions. In *Ülker*[24], the Board considers that Ülker that has been operating in the market for 59 years has an important brand image for consumers. The Board takes into account research reports in which the consumers have been asked brands that they recall first and according to such reports the position of Ülker is on the fourth among top 10 in general and first with respect to biscuit, chocolate and chocolate products and confectionary. The Board considers that brand awareness and image of Ülker nationwide distinguish the undertaking owning this trademark from other small-scale undertakings and create a significant entry barrier for those to newly enter the market. The Board considers advertisements and promotions as one of the most important elements to establish brand image and awareness and to increase sales and believes that the undertakings such as Ülker that allocate a high share for advertisements and promotions in their budgets obtain significant advantage over the existing or potential rivals.[25] Brand image and brand loyalty has also been examined under the heading of entry barriers in *Coca Cola*[26]. The Board takes into account

22 The Board also opposed clauses that encourage the sale point to put only the stand of one of the cigarette producers because they could lead to actual exclusivity. See *PMSA*, 12.6.2003, 03-42/464-203.

23 The Board considers the proportion of the sale points where only products of Frito Lay is sold and thinks it high in a concentrated sector. However, the proportion is missing in decision due to confidentiality provisions of the Act on the Protection of Competition.

24 9.6.2003, 03-40/436-187.

25 In food sector, in terms of value of advertisements, Ülker Group is the first among those that place advertisements on TV with a rate of 16% as of October 2004. See *Ülker/ÖSM*, 2.6.2005, 05-38/487-116.

26 23.1.2004, 04-07/75-18.

the billion-dollar brand value of Coca Cola and Pepsi brands[27], high brand image of any product sold in the market with *The Coca-Cola Company* logo, reseller's view of Coca Cola as a must stock due to its high brand awareness and loyalty at international level that grants bargaining power in agreements with the retailers regarding terms of sale, place in the shelves and promotion places. The brand loyalty can direct a customer who cannot find it to go to another sale point. Moreover, in the same decision, advertisement expenditures are seen as one of the most efficient tools to trigger brand image.[28] The Board takes into account the total advertisement expenditures of the Coca Cola Turkey and the support to Coca Cola Turkey by the brand owner (the Coca Cola Company) which brings it to an advantageous position against local companies. As a result, Coca Cola Company and Pepsi have superiority over their local rivals in establishing brand image and loyalty that have determining effect in selling soft drinks. In *Coca Cola*, financial power of the brand owner is also examined under the heading of entry barrier.[29] Economic support obtained by bottlers from brand owners is taken into account by the Board and seen as an important element that brings the bottler to a strong position against the rivals.

However, brand power of a famous raki brand that is Yeni Rakı has not been regarded as a barrier to entry because the product in question is homogenous and therefore the brand power is not as strong as supposed and it is possible for any undertaking to gain a meaningful market share via efficient sale and marketing activity.[30]

In *Ülker*, developed distribution systems, like the one Ülker has, that provide important strategic advantage to existing firms against those to newly enter the market are seen among the signs showing market power. Ülker's products have high availability rates in almost every market. The differences in availability rates are signs showing important advantage related to entry into retail sale points. Most of the Ülker's products are accepted as "must stocks" and they are available in small scale sale points and only one or two of brands of other firms can be found in such sale points. Therefore, Ülker group's brand image and awareness, significant amount of advertisement expenditures caused by financial power, strong distribution systems and high availability rates[31] provide the undertaking with great advantages against both existing firms and potential rivals. Moreover, Ülker Group has obtained important advantages with its secondary trademark when the consumers opted for cheap products following the economic crisis. Ülker Group's wide portfolio in food sector distinguishes the Group from other undertakings. The Group's activities in many fields of food sector bring bargaining power against the buyers and results in benefiting from economies of scope. Such a portfolio power may give the undertaking the ability to opt for exclusionary practices and tying agreements when the size effect is taken into account. In *Coca Cola*, a wide and efficient distribution network enabling high rate of availability of the products, high cost of

27 In another decision, *Coca Cola/Efes Pilsen*, 19.10.2004, 04-66/951-229, the Board states that the undertakings willing to enter markets where there are undertakings with high brand value encounter significant entry barrier.

28 In *Coca Cola/Efes Pilsen*, the Board comes to the conclusion that existence of high advertisement expenditures has created barrier to market entry in the market for gaseous drinks.

29 In *Coca Cola/Efes Pilsen*, according to financial power criterion, an undertaking having financial power has the ability to decide and act more easily in the market due to its capital, equity assets and other financial resources it use and the ease to reach financial markets. The Board says that rivals cannot show the courage to enter a market easily where there is an undertaking having such a financial power. In *Ülker/ÖSM*, 2.6.2005, 05-38/487-116 financial power of Ülker is also cited under entry barriers.

30 Privatisation of TEKEL (TEKEL Alcoholic Beverages Industry and Trade Inc), 15.12.2003, 03-79/965-396.

31 Ülker's availability rates are %94 for biscuit, %81 for cake, %97 for chocolate, %73 for candy in March 2002 - March 2003. The biggest rival's rates are 85% for biscuit and 77% for cake. Availability rate shows how many of 100 retail sale points sell the relevant product.

setting up such a network that brings economies of scope and scale due to distribution of all product range within the same distribution network and the agreements including exclusivity clause with the small sale points and the prohibition to put rival products into the freezers[32] provided by Coca Cola Turkey are deemed to create serious barrier to market entry. In industrial ice cream market, requirement for a high-cost distribution system called as cold chain caused by nature of the product has been regarded as an important barrier to market entry.[33] Especially that the ownership of freezers in the sale points belongs to the producers makes it almost impossible for the firms to newly enter the industrial ice cream market without incurring significant cost. In *PMSA*, the Board says for an undertaking's entry to the cigarette market, it is necessary to establish an efficient distribution network. In a market where advertisement is prohibited, because it is necessary to establish a special distribution network rather than an ordinary one, cost of setting up a distribution network increases. Moreover, placing stands in the sale points with high sales volume is an important cost element for an undertaking to newly enter the market. In *Cement* decision, distribution system is also examined under entry barriers. Especially bagged cement is sold via a distribution system. The distribution system that requires distributors to buy all requirements from a single seller makes it necessary for new cement producers to set up a new distribution network. Moreover, consumers of cement are very scattered over a wide area and this increases the number of distributors to be set up.

In *Ülker*, portfolio power is defined to mean that total market power caused by trademark portfolio exceeds sum of market power of each component of the portfolio. Ülker group has a wide portfolio in terms of horizontal and vertical meaning. It operates in many markets such as margarine, dairy products, flour, starch and glucose, non-alcoholic drinks in addition to relevant markets. Ülker group can provide almost all products that a small shop wants to have. That some of the main raw materials that constitute products in the relevant markets (biscuit, cake and chocolate and confectionery) are obtained from companies within Ülker group enables the undertaking to benefit from economies of scope. Ülker group also has market power through deep portfolio and secondary trademarks. Portfolio power is also examined under the entry barriers in *Coca Cola* and seen to prevent the undertakings to enter the market and the existing ones to be present efficiently in the final sale points. The wide range of products enables the undertaking to arrange terms of sale in a way such as quota discounts applicable to whole of the portfolio that the customer can make high volume purchases.

According to *National Roaming*[34] decision, the requirement to obtain a license for entry to GSM services market, as the frequency band is a scarce resource, constitutes the legal barrier to entry; the large amounts of license fees and the large amounts of investment required for building GSM networks constitute the economic barriers to market entry. In the GSM infrastructure services market, two undertakings were operating, namely, Turkcell and Telsim, having reached 90 percent coverage area at that time. Two other undertakings (IS-TIM and Aycell), having recently obtained licenses and thus newly entering the GSM services market at that time, obviously had not entered the GSM infrastructure market, as they did not have networks covering the entire territory of Turkey at that time. A coverage sufficient to be able to compete in the GSM services market could not be achieved by IS-TIM at the time of the investigation due to geographical and topographical difficulties, legal restrictions, natural monopoly circumstances, formation of bottlenecks, need for public support for building the facilities, technological limitations, and economic limitations that could be grouped under the headings of technical difficulties, legal difficulties and economic difficulties and as a result it could not register subscribers and realize investments with revenues coming from these subscribers because Turkcell and Telsim already have

32 Number of freezers is taken into account in the decision, however the number is missing due to confidentiality reasons.

33 *Ice Cream*, 26.12.2002, 02-81/940-387.

34 9.6.2003, 03 - 40 / 432-186.

coverage of entire Turkey. Accordingly, the Board regarded that the infrastructures of Turkcell and Telsim as "essential facilities" until IS-TIM might achieve a sufficient coverage area. Therefore, the Board ruled that incumbent operators' (Turkcell and Telsim) setting access prices far above their costs resulting in an artificial rise in rival's costs created a serious barrier to entry of newly arriving operators IS-TIM and Aycell. Unfavourable impact of network externalities, including impact of negative economies of scale in consumption[35] plays important role in laying reasons to determine the existence of essential facilities.

In *Ice Cream*, very low level of ice cream consumption (1 lt per capita) in the last 5 years is seen as an important barrier to market entry. No entry of a firm that brings competitive pressure on the dominant firm in the last 5 years and the continuance of the high concentration level in the market where there exist a dominant undertaking[36] are seen as other elements constituting barrier to market entry in *Ice Cream.* Similarly, consumption at low levels, in other words limited demand, is regarded as entry barriers and as a result the market does not have a structure that is suitable for many undertakings to operate in *Frito Lay*[37]. That 96% of the market is shared by five undertakings one of which is dominant with a market share over 60% is regarded as a barrier to market entry by the Board in *Unilever's Acquisition of Best Foods*.[38]

Finally, among legal barriers to entry that the Board faced so far can be listed as legal monopoly for sale of coal in Ankara granted to an undertaking of Ankara municipality[39]; permission necessary to establish and operate intercity bus terminal[40]; legal prohibition on advertisement and promotion of cigarette and other tobacco products, legal requirement for the undertakings that will produce cigarettes to build an integrated new-technology facility with a certain capacity[41]; legal requirement for an undertaking planning to produce sugar to obtain quota.[42]

3. Evaluation and Conclusion

The TCA has been aware of the importance of dealing with barriers to entry since its establishment. This awareness has been based on two lines of thinking.

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35 Where the value that the consumer attributes to a product increases in proportion to the number of other customers using the same product, economies of scale in consumption, also referred to as network externalities, is said to exist. This effect emerges in a very direct way especially where the product serves to users' communicating or interacting with each other. Such is the state of affairs in networks of cable and mobile telephony and the value that a consumer attributes to the product increases as the number of people that he or she can reach by using the network increases.

36 The market share of the dominant firm is missing due to confidentiality reasons in the decision.

37 4.5.2004, 04-32/377-95.

38 16.11.2000, 00-45/475-260.

39 Belko, 6.4.2001, 01-17/150-39. In this decision the Board provides the following explanations: *"The theory of "contestable markets" that appears to be widely accepted recently suggests that market strength in the form of capacity for price manipulation would be out of the question in markets where there is little or no barriers to entry. This state of affairs is also valid for monopolistic markets where the barriers to entry are not significant in any way. The key point in all this is the degree of barriers to entry. Barriers to market entry could have legal and/or economic sources in the wider sense of those terms. The theory at the same time suggests that in the long run there would be no barriers to entry at all, economic or otherwise, except for legal restrictions. In that context, those markets where the barriers to entry are protected by means of licenses, patents, etc., are markets that are protected in the absolute sense."*

40 *İZOTAŞ,* 5.6.2001, 01-26/256-72.

41 PMSA, 12.6.2003, 03-42/464-203.

42 *Türk Şeker/Pan Tohum,* 1.4.2004, 04-23/250-54.

On the one hand, the TCA has used the analysis of whether entry barriers exist or not in order to decide for a dominant position. As known, this analysis is a crucial element in abuse of dominance decisions and therefore it is needed to have extreme care on correct analysis. In other words, the examination of entry barriers is the first step in the analysis of dominance cases. A reckless practice by the competition authorities might result in a misleading holding and decision. Thus, the practice of defining entry barriers in practical cases should be associated with certain accepted principles based on economics. When examined closely the practice of the TCA in this regard, it is possible to argue that the TCA has attached necessary care in analyzing entry barriers when deciding about an abuse of dominant position. The examination of above-mentioned decisions of the TCA clearly shows how the TCA is careful in analyzing the existence of barrier to entry in order to hold for a dominant position.

On the other hand, the TCA has considered the issue of how to minimize the entry barriers, which in particular result from the practices of undertakings. It should be accepted that dealing with barriers to entry is one of the most important duties for the competition authorities. Even it is possible to think that the fight against barriers to entry is as important as cartel prosecution task for competition agencies. This proposition has mainly become an important guiding principle for the TCA. The market openness is strongly advocated by competition agencies via fight against entry barriers. This market openness is important for levelling playing field for all players within the market. The TCA has attempted to eliminate the artificial barriers resulting from the practices of the undertakings in a significant number of cases.

In particular, the exclusivity practices either through written agreement or de facto actions, are of target entry barriers to be dealt with by the TCA. There are significant number of cases dealt with by the TCA in this context. The main philosophy behind all these decisions has been the strive for keeping the markets free from artificial entry barriers. In particular, the sui-generis circumstances of Turkey has dictated the TCA to attach importance on this strive. In this regard, maybe the most important feature of Turkey is associated with the fact that Turkey is a quite big country with geographic regions, which differ each other significantly in economic development terms. Thus, even this fact puts a significant hurdle for the firms to enter into the markets. This hurdle is further aggravated by the artificial barriers to entry created by the early comers of the market. In this regard, recently we witness the process of withdrawing the benefit of block exemption for the exclusivity clauses within the vertical agreements by the "Communiqué 2002/2 on Vertical Agreements". *Yemek Sepeti* was the first decision in this respect. This decision has been followed by *Frito Lay* and *Efpa/Tuborg* decisions. These decisions represent important developments within the process in which the TCA has fought against artificial entry barriers. Importantly, the process is going on and will cover other markets in which such exclusivity practices foreclose the markets for new entry.

With regard to legal entry barriers, the TCA has been aware of the fact that their existence should be associated with a certain justification. However, the TCA has also believed that the expected benefit from such legal barriers to entry should be proportionate to the harm resulting from lack of competition. In this regard, BELKO decision shows that the TCA believing that the legal privilege which is an entry barrier is abused and exploited by the relevant public undertaking, has requested the relevant public agency which had granted the privilege, to remove this entry barriers. In other words, the investigation showed that legal entry barrier was not needed to achieve the expected public benefit.

UNITED KINGDOM

1. Introductory remarks

The OFT and the Competition Commission welcome the opportunity to contribute to the discussion on this topic.

Entry barriers may be broadly defined as any feature of a market that gives incumbent firms an advantage over potential entrants, such that incumbents can persistently raise their prices above (or reduce their quality below) competitive levels without new firms entering the market.[1]

There is much settled ground in the analysis of barriers to entry. For example it is now widely agreed that economies of scale or capital requirements, of themselves, do not necessarily constitute a barrier to entry. Nevertheless it is equally well established that, where it is necessary to incur sunk costs in entering a market in which economies of scale are significant, the need to incur sunk costs can deter potential entrants. This applies irrespective of whether or not incumbents incurred such sunk costs. Moreover, since practical examples of markets where there are no sunk costs from entering are relatively rare, it will often be relevant to consider economies of scale when assessing the competitive constraint posed by potential entrants.

The assessment of entry barriers is not an end in itself. This response would like to emphasise that the key test of any definition of barriers to entry is whether it provides an effective framework for the assessment of likely competitive harm. Although there may be differences in the way that barriers to entry are defined, the underlying economic analysis should be consistent. An example of this is the need to consider both barriers to entry and barriers to expansion together.[2] It may be that there may be few barriers to small scale entry. However, in the presence of barriers to expansion, this may be insufficient to exert an effective competitive constraint and prevent consumer harm. For example, a Competition Commission (CC) report on a merger between two brewers noted that it was easy to start a micro-brewery or to import foreign beers on a small scale, but difficult to build a national brand due to the need for extensive sunk expenditure on marketing and advertising.[3]

While the underlying economic analysis of market features should not vary between cases and between types of cases the importance and weight attached to a particular barrier may well vary.

In assessing competitive harm it will usually be necessary both to consider the existing conditions in the market and to analyse the conduct in question in that context. Barriers to entry can be relevant for both elements of the analysis. First, in almost all competition cases an assessment of the conditions of entry is

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1 This is taken from the OFT's Merger Guidelines.

2 We observe that one of the frequently cited papers on strategic behaviour examined not only strategic behaviour that deterred entrants but also behaviour that sought to affect the scale of entry. D. Fudenberg and J. Tirole, 1984, 'The Fat-Cat Effect, the Puppy-Dog Ploy, and the Lean and Hungry Look' *American Economic Review*

3 *Interbrew SA and Bass PLC, A report on the acquisition by Interbrew SA of the brewing interests of Bass PLC*, HMSO, Cm 5014, January 2001.

necessary in order to carry out a full analysis of competitive constraints. Secondly, in some but not all cases, the conduct by a dominant firm, an agreement, or possibly a merger, may create or enhance entry barriers. In these cases the assessment of entry barriers is an essential part of the analysis of harm to competition.

For exploitation cases assessed under articles 81 or 82 the analysis of barriers to entry occurs independently of the story of competitive harm. The key question is whether the firm(s) can raise price above competitive levels without inducing entry. For merger cases the key question is whether, post merger, the conditions of entry are sufficient, when combined with other competitive constraints, to prevent a substantial lessening of competition relative to the pre merger situation.

For exclusion cases the alleged abusive behaviour will itself often be a part of the assessment of the conditions of entry and therefore the analysis is more complicated. For example it is often not possible to carry out the assessment of abuse and assessment of a dominant position independently. Instead the analysis must be integrated. This could potentially raise an interesting question for any competition authority that adopts an 'as-efficient' competitor test for assessing exclusionary abuses.[4] Suppose that a firm is engaging in behaviour which creates a barrier to entry only to firms *less* efficient than itself, but that an 'as efficient' competitor would be able to enter. Under the 'as efficient' competitor test, such behaviour would not be considered abusive. Could it also be argued that, so long as entry by an efficient competitor is possible, then this should also mitigate against a finding of dominance? Whatever the pros and cons of such an argument, the OFT will, in practice, typically take into account the competitive constraint imposed by firms regardless of their efficiency, when assessing barriers to entry (and dominance).

2. Responses to specific questions

1. The Definition of Entry Barriers. Over the years a variety of characteristics and conditions have been used and suggested as means of identifying barriers to entry. For example, some consider that only impediments that incumbent firms did not face when they entered the market should count as true entry barriers, whereas others argue that any impediment that has the effect of reducing competition constitutes an entry barrier. Describe the way(s) in which courts and competition agencies in your jurisdiction have defined barriers to entry, and their reasoning in doing so, using the context of cases and agency guidelines.

The UK competition authorities (CC and OFT) broadly define entry barriers as any feature of a market that gives incumbent firms an advantage over potential entrants, such that incumbents can persistently raise their prices above (or reduce their quality below) competitive levels without new firms entering the market.[5]

We have not found that this definition of entry barriers is a source of controversy. This definition appears fit for the purpose of helping competition authorities to assess potential adverse effects on competition.

[4] Under this test, the behaviour of a dominant firm will only be considered abusive if it would be likely to exclude, or deter entry by, firms that are 'as efficient' as the dominant firm itself. The rationale behind this test is broadly that if competition policy goes beyond this, and is used to protect inefficient competitors from the forces of competition, this is unlikely to be good for either competitiveness or customers over the long term.

[5] This is taken from OFT Merger Guidelines. OFT's general competition law guidelines (covering Competition Act 1998 and Articles 81 and 82) contain a similar definition as do the CC's guidelines for both merger and market investigations, although the latter cover barriers to both entry and expansion and refer to raising prices above cost rather than above competitive levels.

2. *Measuring/Assessing Entry Barriers. What are the best ways to go about measuring or assessing entry barriers? Given that there are at least some barriers to entry in virtually every industry, how can it be established that barriers in a particular market are "high"? In contrast, what methods do not work very well for measuring entry barriers? Is it possible to make an accurate quantitative assessment, or is it best to make only qualitative judgments?*

There are two main types of evidence that may be relevant in assessing the height of entry barriers:

- First, the characteristics of the market and the form of competition. Any overall assessment of the height of entry barriers based on observation of the characteristics of the market will typically be of a qualitative rather than quantitative nature.

- Second, the past history of entry/exit. Recent examples of successful entry to a market may be indicative of low barriers to entry. A lack of recent entry may also reflect a number of factors other than entry barriers—at least in theory low entry/exit may simply reflect that existing firms are efficient and actively competing.

We do not consider there is any simple quantitative method for measuring entry barriers. However in order for a potential entrant to exert a constraint it must have both the ability and the incentive to enter. For example in considering a proposed merger between magazine publishers the OFT found that while there were low barriers to entry there was also no apparent intention or inclination on the part of potential entrants to enter the market.[6]

Therefore when considering the prospects for entry it is important to check which potential entrants do indeed have the wherewithal to enter. Furthermore where practical it is a useful exercise to try to assess up the likely costs and benefits of entry for a potential entrant so that some weight can be attached to the likelihood of such entry.

Often when performing this assessment we find that the extent of barriers to entry can be firm specific. As a result the assessment of entry conditions will often consider the extent to which specific barriers affect particular potential entrants. For example, entry will be easier for some firms which already have a position in related markets. For example in a report on banking services to small and medium sized enterprises (SMEs), the CC identified three companies that were already substantial providers in the banking sector and hence might potentially generate significant new competition in the SME markets. However, the CC found barriers were such that little weight could be put on their prospects of entering or expanding within an acceptable timescale. [7] Similarly, in a merger involving two suppliers of road sweeping machines, the CC found that the acquiring firm (which had few UK sales) would, in the absence of the merger, have made significant efforts to relaunch in the UK. But the CC also found it faced higher barriers to UK expansion than many other actual and potential market participants and would not be expected to impose a significant competitive constraint on the acquired firm. Consequently, the CC found the merger did not lead to a substantial lessening of competition.[8]

6. Anticipated acquisition by Future PLC of Highbury House PLC http://www.oft.gov.uk/Business/Mergers+EA02/Decisions/Clearances+and+referrals/Future.htm

7 *The supply of banking services by clearing banks to small and medium sized enterprises*, HMSO, Cm 5319, March 2002.

8 *Bucher Industries AG / Johnston Sweepers Limited: A report on the acquisition by Bucher Industries AG of Johnston Sweepers Limited*, CC, September 2005.

3. *Does the concept of entry barriers change from one type of competition case to another? In other words, does your evaluation of entry barriers change in any ways that depend on the type of case you are investigating? For example, is your approach in a merger case different from what it would be in an abuse of dominance case? Why or why not? Would a particular market feature ever count as a BTE in one type of case but not in another? If so, please explain why and discuss examples.*

See the introductory remarks to this response.

4. *Duration of entry barriers. How can agencies estimate the expected duration of a barrier to entry? Furthermore, is there a minimum amount of time that an impediment must persist before it should be recognised as an entry barrier? If so, what is that length of time? Why? Again, does the minimum amount of time depend upon the type of case that is being investigated?*

In most cases the important question is how long would it take for entry to take effect in bringing about effective competition in the market. Of course in some cases, if entry and exit barriers are low enough, then the threat of entry may be sufficient to ensure effective competition in a market. In other cases, actual entry may be necessary to ensure effective competition in a market and the duration of the entry barrier will depend on the time that entry takes on a scale to impact sufficiently on the market. In a merger of two offshore helicopter companies serving oil companies in the North Sea, the CC considered that the markets offered scope for hit-and-run entry on a contract by contract basis.[9] In a subsequent report examining the conduct in the market post merger it was found that such entry did occur.[10] It is interesting to observe from this case that although barriers to entry were low, permitting entry in to the market, actual entry rather than just the threat of entry was necessary to ensure effective competition.

In merger cases where a loss of competition is identified in the market, the concern is whether entry would reverse the adverse effects within an acceptable timescale. The OFT (first stage) merger guidelines state that entry within less than two years will generally be timely, but this must be assessed on a case by case basis. The CC (second stage) merger guidelines do not identify a specific time period but in one recent case (concerning supermarkets), the CC found that the process of entry can often take two years or more and that this made it unlikely that entry can be expected to act to constrain or reverse any deterioration in price, quality, range or service in the affected areas within a reasonable time.[11] The relevant time period is however likely to depend on the circumstances of each case.

If entry can occur within a year and without significant investment, this may be treated as supply side substitution (rather than entry) and such potential capacity could be incorporated into the relevant market.

5. *Structural versus strategic barriers to entry. Does it matter for purposes of competition policy whether an entry barrier is structural (i.e., related to the characteristics of the industry itself) or strategic (i.e., related to the deliberate behaviour of the incumbents)? Why or why not?*

For purposes of competition policy, entry barriers may be defined as either structural or strategic. In practice, it can be difficult to make a distinction between the two. This is because in many cases the current structural characteristics of a market are, at least in part, determined by the past strategic behaviour of market participants. This applies in particular to such factors as advertising or capacity decisions, but can

9 *CHC Helicopter Corporation and Helicopter Services Group ASA: a report on the merger situation*, HMSO, Cm 4556, January 2000.

10 OFT767 *Ex Post Evaluation of Mergers* March 2005

11 *Somerfield plc / Wm Morrison Supermarkets plc: A report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc*, CC, September 2005

also apply, for example, to strategic patenting behaviour which may affect the technologies used in the market. This interconnection between structural and strategic barriers to entry can also be seen in certain merger cases where the structural change brought about the merger may enable strategic behaviour that would deter entry.

A merger may directly affect the conditions of entry and therefore lessen competition in a market. This could occur by eliminating an entity that provided an effective means of access to the market to other firms.[12] However a merger can also create the conditions under which the merged entity is able to act strategically in a way that can deter entry. It is an interesting question as to whether such cases should be treated equally. Arguably in one case the structural barrier may be an inevitable consequence of the merger whereas the strategic barrier only exists once the merged entity acts strategically. Therefore there is more uncertainty as to whether any likely harm would occur with a strategic barrier and less weight could be placed on it than on the structural barrier.

In many jurisdictions strategic behaviour aimed at deterring entry is subject to competition law (for example through Articles 81 and 82 EC). It is less frequent that the structural characteristics of a market that create barriers to entry can be addressed, other than through merger control. However, UK law does provide for such structural features of a market to be addressed through market investigations. For example in a report on banking services to small and medium sized enterprises (SMEs), the CC made a number of recommendations aimed at reducing barriers to entry and expansion: these included measures to improve switching between banks, to limit bundling and to improve information and transparency.[13]

6. *Is it necessary to agree on a specific definition of entry barriers? For purposes of enforcing competition laws, does it really matter what the correct definition of entry barriers is? Or is it reasonable simply to avoid conceptual arguments about them, and focus instead on the question of whether entry is likely in a given case, regardless of whether the relevant facts correspond to a particular definition of entry barriers?*

As argued above the priority is to provide an appropriate framework for the analysis of competitive constraints and likely competitive harm. Debates on the specific definition are only relevant if it is apparent that a definition is being applied in a way that leads to an erroneous assessment of the competitive conditions in a market.

7. *Experience with entry barriers. Which types of market features have you usually considered to be entry barriers and which types have you discarded? For example, if an incumbent has a relatively strong financial position ("deep pockets"), would you consider that to be something that necessarily makes entry more difficult? How about a particularly strong brand, or a large market share? Are network effects entry barriers? Furthermore, what specific types of entry barriers does your agency encounter most frequently? Which types have been the most difficult to identify and measure? Why?*

An incumbent's relatively strong financial position is not something that necessarily makes entry more difficult. However it is sometimes relevant to consider whether it is difficult for an entrant to raise capital; for instance, financiers might regard new entrants as particularly high risk because they do not have a proven track record.

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12 Other possible examples are given in OFT516 *Merger Substantive Assessment Guidance* para 4.25 and CC2 *Merger References* paras 3.53-3.55

13 *The supply of banking services by clearing banks to small and medium sized enterprises*, HMSO, Cm 5319, March 2002.

The OFT competition law guidelines note that network effects, just like economies of scale, may, in the absence of interconnection between networks, make new entry harder where the minimum viable scale (e.g. in terms of users of the network) is large in relation to the size of the market. The CC guidelines state that network effects may be a barrier to entry but the barrier is likely to be lower when demand is growing fast or innovation is rapid.

An interesting issue raised in the Ex Post Evaluation of Mergers report commissioned by the OFT, CC and DTI is the linkage between barriers to entry and buyer power.[14] Barriers to entry may be lowered when buyers are able to sponsor a new entrant or at least provide contracts that allow for the recovery, in full or in part, of the sunk costs of entry. For example, in considering a merger between two offshore helicopter operators serving oil companies in the North Sea, the CC concluded that oil companies could encourage new entry without undue difficulty and would do so if they felt that existing operators were charging too much or otherwise offering an unsatisfactory service, and hence that the buyer power of oil companies will be sufficient to prevent any reduction in competition arising from the merger.[15] Similarly in a merger involving manufacturers of couverture (industrial chocolate) the loss of a second source of supply, a concern highlighted by customers during the merger review process, precipitated entry to provide such a second source for buyers.

In some cases government regulations can create unnecessary barriers to entry. Competition advocacy in the form of recommendations on amendments to government regulation can therefore assist. In some cases both the cost of the barrier and the cost of lowering the barrier may be small but the benefits in enhanced competition may be large. An example of a potential barrier to entry that is often quoted in the academic literature and was the subject of a market study in the UK is taxi licensing.[16] In this case while the requirement to obtain a license could be considered a barrier to entry under some definitions it can also generate benefits in terms of health and safety considerations. However it is also true that simple numerical restrictions on the number of licenses that can be issued can harm competition by artificially restricting supply. The OFT found that abolition of such numerical restrictions would be relatively costless, except of course to the taxi drivers who lose the capitalised value of their rents.

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14 OFT767 *Ex Post Evaluation of Mergers* March 2005

15 *CHC Helicopter Corporation and Helicopter Services Group ASA: a report on the merger situation*, HMSO, Cm 4556, January 2000.

16 OFT676 *The regulation of licensed taxi and PHV services in the UK* November 2003

UNITED STATES

The central concern of US antitrust law is market power—"the ability to raise prices above those that would be charged in a competitive market."[1] Because market power in small degrees is ubiquitous, the leading treatise properly observed that: "Market power need not trouble the antitrust authorities unless it is both substantial in magnitude and durable."[2] US courts recognise that "even a very large market share does not establish market power" of any significance,[3] observing that "without barriers to entry into the market it would presumably be impossible to maintain supracompetitive prices for an extended time."[4]

1. Defining Barriers to Entry

In the first systematic economic study of entry, Joe Bain coined the term "barriers to entry," which he used to describe several specific aspects of market structure that could prevent entry.[5] Bain later generically defined a "barrier to entry" as "some source of disadvantage to potential entrants as compared with established firms."[6] In response to Bain's work, George Stigler suggested instead that: "A barrier to entry may be defined as a cost of producing (at some or every rate of output) which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry."[7] Stigler's main point was merely that "the language of economists has been lax."[8] He did not maintain that serious antitrust problems were impossible without "barriers to entry" as he defined the term; indeed, he elsewhere argued that mergers to monopoly early in the Twentieth Century had been both profitable and anticompetitive without any "barriers to entry" because the entry they attracted took significant time to

1 NCAA v. Board of Regents of the University of Oklahoma, 468 US 85, 109 n.38 (1984).

2 2A Phillip E. Areeda, Herbert Hovenkamp, and John L. Solow, Antitrust Law ¶ 501, at 90 (2d ed. 2002). *See also* Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 968 (10th Cir. 1990) ("market power, to be meaningful for antitrust purposes, must be durable"); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 885 F.2d 683, 696 n.21 (10th Cir. 1989) ("The durability of a firm's ability to charge supracompetitive prices" is "used to evaluate the degree of market power.").

3 Will v. Comprehensive Accounting Corp., 776 F.2d 665, 672 n.3 (7th Cir. 1985). *See also* Oahu Gas Service, Inc. v. Pacific Resources Inc., 838 F.2d 360, 366 (9th Cir. 1988); Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, 784 F.2d 1325, 1336 (7th Cir. 1986).

4 Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 US 574, 591 n.15 (1986).

5 Joe S. Bain, Barriers to New Competition (1956).

6 Joe S. Bain, Industrial Organization 239 (1959).

7 George J. Stigler, The Organization of Industry 67, 67 (1968).

8 *Id.*

occur.[9] Stigler's definition of "barriers to entry" probably is used by economists more often than Bain's definition, but Bain's is also used, and many other definitions have been proposed.[10]

Dennis Carlton's recent reaction to the long-running definition debate concludes:

> Barriers to entry, as identified by Bain, is a confusing concept. Barriers to entry as defined by Stigler is clear, but perhaps strange, because the words mean something other than what would naturally come to mind. In any case, the failure of the concept of barriers to entry to incorporate a time dimension means that it is a concept in need of embellishment in order to be useful in a practical problem or for antitrust or regulatory proceedings.[11]

Carlton explains that Stigler's definition is appropriate if the task is to identify conditions under which rates of return will persist at supracompetitive levels, but it is not appropriate if the task is to identify conditions giving rise to significant antitrust concerns.[12] In an antitrust case, Carlton argues that it is not useful to ask "whether an 'entry barrier' exists according to some definition," rather one should consider "how the industry will behave over the next several years."[13]

The leading US antitrust treatise explains that Stigler's definition "does not respond to the primary reason antitrust law concerns itself with entry barriers,"[14] and courts in the United States generally have articulated definitions more like Bain's.[15] The Tenth Circuit held that "[e]ntry barriers are particular characteristics of a market which impede entry by new firms into that market"[16] and that "[b]arriers to entry are market characteristics which make it difficult or time-consuming for new firms to enter a market."[17] Similarly, the D.C. Circuit held that "'Entry barriers' are factors (such as certain regulatory requirements) that prevent new rivals from timely responding to an increase in price above the competitive level"[18] and that "[a]ny market condition that makes entry more costly or time-consuming and thus reduces

9. *See* George J. Stigler, *Monopoly and Oligopoly by Merger*, 40 American Economic Review (Papers & Proceedings) 23 (1950).

10 Seven definitions are given by R. Preston McAfee, Hugo M. Mialon, and Michael A. Williams, *What Is a Barrier to Entry?*, 94 American Economic Review (Papers & Proceedings) 461, 461–62 (2004).

11 Dennis W. Carlton, *Why Barriers to Entry Are Barriers to Understanding*, 94 American Economic Review (Papers & Proceedings) 466, 469–70 (2004).

12 *Id.* at 467. In this regard Carlton also cites clarifications of Stigler's definition from Harold Demsetz, *Barriers to Entry*, 72 American Economic Review (1982).

13 Carlton, *supra* note 10, at 469.

14 *See* Areeda et al., *supra* note 2, ¶ 420c, at 63. Some FTC decisions adopted Stigler's definition but also recognised a second category of "impediments to entry." *See* In re Echlin Mfg. Co., 105 F.T.C. 410, 485–86 (1985); B.F. Goodrich Co., 110 F.T.C. 207, 297 (1988).

15 Without articulating its own definition, the Seventh Circuit has cited Stigler's definition. *See* Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1335 (7th Cir. 1986). It also has associated "barriers to entry" with cost advantages of incumbents. *See* Will v. Comprehensive Accounting Corp., 776 F.2d 665, 673 (7th Cir. 1985). This court, however, also has held that factors merely delaying entry are sufficient to create significant anticompetitive effects meriting condemnation under the antitrust laws. *See id.* at 672 n.3; FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (1989).

16 Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 968 (10th Cir. 1990).

17 Colorado Interstate Gas Co. v. Natural Gas Pipeline of America, 885 F.2d 683, 696 n.21 (10th Cir. 1989).

18 United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc).

the effectiveness of potential competition as a constraint on the pricing behaviour of the dominant firm should be considered a barrier to entry."[19] The Ninth Circuit has adopted a definition that explicitly incorporates both the Bain and Stigler definitions in the alternative: "Barriers to entry may be defined as either additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns."[20]

2. Differing Treatments of Entry in Different Antitrust Contexts

Cases under section 1 of the Sherman Act involve allegations of unreasonable restraints of trade. Applying the "per se rule," unreasonableness is established as a matter of law when competitors agree not to compete or agree to fix prices or restrict output.[21] Under the "rule of reason," which applies to most restraints, the application of Section 1 requires "an inquiry into market power and market structure designed to assess the . . . actual effect" of a restraint.[22] Establishing "market power is essential; without it, any case . . . collapses because consumers could not be injured."[23] The standard approach to demonstrating that a defendant possesses the requisite market power is to "(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) show that there are significant barriers to entry."[24] The third element is essential to address whether the rapid emergence of new competition would not prevent the challenged restraint from producing the consumer injury necessary to render it unreasonable.

Cases under section 2 of the Sherman Act involve allegations that the defendant engaged in exclusionary conduct threatening to create or maintain "monopoly power," which is distinguished from "market power" as a matter of degree.[25] This distinction makes the durability of market power a more

19 Southern Pacific Communications Co. v. AT&T, 740 F.2d 980, 1001 (D.C. Cir. 1984).

20 Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1427–28 (9th Cir. 1993) (internal quotations omitted). *See also* Western Parcel Express v. United Parcel Service of America, Inc., 190 F.3d 974, 975 (9th Cir. 1999); Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1439 (9th Cir. 1995).

21 *See* Palmer v. BRG of Georgia, Inc., 498 US 46 (1990); National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 468 US 85, 100 (1984).

22 Copperweld Corp. v. Independence Tube Corp., 467 US 752, 768 (1984). On occasion, unreasonableness may be demonstrated through direct evidence of its anticompetitive impact. *See* Eastman Kodak Co. v. Image Technical Services, Inc., 504 US 451, 477 (1992); FTC v. Indiana Federation of Dentists, 476 US 447, 460–61 (1986). And sometimes unreasonableness may be apparent to any "observer with even a rudimentary understanding of economics." California Dental Association v. FTC, 526 US 757, 770 (1999).

23 L.A.P.D., Inc. v. General Electric Corp., 132 F.3d 402, 405 (7th Cir. 1997).

24 Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995).

25 *See, e.g.*, Eastman Kodak Co. v. Image Technical Services, Inc., 504 US 451, 481 (1992) ("Monopoly power under § 2 requires, of course, something greater than market power under § 1."); Reazin v. Blue Cross and Blue Shield of Kansas, Inc., 899 F.2d 951, 967 (10th Cir. 1990) ("Market and monopoly power only differ in degree—monopoly power is commonly thought of as 'substantial' market power."); George A. Hay, *Single Firm Conduct*, 57 Antitrust Law Journal 75, 81 (1988) (suggesting that with "mere market power . . . supranormal profits will be quickly eroded by new entry" while monopoly power provides "significantly greater insulation from the long-run forces of entry").

important issue in Section 2 cases than it is in Section 1 cases,[26] and courts commonly dispose of Section 2 cases on entry-related grounds.[27] Their rationale is that "anticompetitive exclusionary practices would be unprofitable and presumably would not occur" because "entry would deny firms monopoly profits."[28]

Cases under section 7 of the Clayton Act involve allegations that a merger or acquisition has had, or would be likely to have, the effect of creating or enhancing market power. US courts have noted the possibility that entry can prevent or quickly reverse the anticompetitive effect of a merger,[29] and the *Horizontal Merger Guidelines* issued by the US enforcement agencies state that a "merger is not likely to create or enhance market power . . . if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels."[30]

In evaluating a proposed merger, the US enforcement agencies do not assess barriers to entry as an abstract matter, but rather ask whether entry attracted by the merger "would be timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects" of the merger, thereby causing "prices to fall to their premerger levels or lower."[31] The issue is not whether entry is difficult, but rather whether the opportunity for entry created by the merger would be likely to provide a profit incentive sufficient to attract entry on a scale that would prevent or quickly reverse the anticompetitive effects of the merger.

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26 *See, e.g.*, Western Parcel Express v. United Parcel Service of America, Inc., 190 F.3d 974, 975 (9th Cir. 1999) (to satisfy the monopoly power requirement of Section 2, the plaintiff must "show that there are significant barriers to entry"); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co., 885 F.2d 683, 695–96 (10th Cir. 1989) ("If the evidence demonstrates that a firm's ability to charge monopoly prices will necessarily be temporary, the firm will not possess the degree of market power required for the monopolisation offense.").

27 *See, e.g.*, American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc., 108 F.3d 1147, 1154 (9th Cir. 1997); Dial A Car, Inc. v. Transportation, Inc., 82 F.3d 484, 487–88 (D.C. Cir. 1996); Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1200–02 (3d Cir. 1995); Los Angeles Land Co. v. Brunswick Corp., 6 F.3d 1422, 1425–29 (9th Cir. 1993).

28 Areeda et al., *supra* note 2, ¶ 420, at 58.

29 *See* United States v. Phillipsburg National Bank & Trust Co., 399 US 350, 377 (1970) (Harlan, J., dissenting); FTC v. H.J. Heinz Co., 246 F.3d 708, 717 n.13 (D.C. Cir. 2001). Entry was the major factor cited by courts of appeals rejecting merger challenges by the US agencies. United States v. Baker Hughes Inc., 908 F.2d 981, 985–89 (D.C. Cir. 1990); United States v. Syufy Enterprises, 903 F.2d 659, 664–69 (9th Cir. 1990); United States v. Waste Management, Inc., 743 F.2d 976, 981–84 (2d Cir. 1984). These decisions occurred during a brief period in which courts were exceptionally receptive to defendants' entry arguments. *See* Richard Schmalensee, *Ease of Entry: Has the Concept Been Applied Too Readily?*, 56 Antitrust Law Journal 41 (1989).

30 US Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 3.0 (1992, revised 1997). On the approach to entry taken by the *Horizontal Merger Guidelines* and associated issues, see generally Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 Antitrust Law Journal 189 (2003).

31 *Horizontal Merger Guidelines* § 3.0. US courts also have adopted this framework. *See, e.g.*, United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1111 (N.D. Cal. 2004); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 55 (D.D.C. 1998); HTI Health Services, Inc. v. Quorum Health Group, Inc., 960 F. Supp. 1104, 1133 & n.27 (S.D. Miss. 1997).

The *Horizontal Merger Guidelines* indicate that entry generally is timely only if it would occur within two years,[32] and the US agencies have often found it so clear that entry would not be timely that it was unnecessary to consider the likelihood or sufficiency of entry. It is not unusual to find that more than two years would be required to just construct the facilities an entrant would need to begin production.[33] In addition, entry into some industries entails other time-consuming steps, such as product development and testing, which would substantially delay entry.

Entry considerations are quite similar outside the merger context, and a few US court decisions have adopted the framework of the *Horizontal Merger Guidelines* for evaluating entry in other types of antitrust cases.[34] The courts, however, have not focused specifically on what would constitute timely entry in cases not involving mergers. Because monopoly power under section 2 of the Sherman Act entails more than market power under section 1 of the Sherman Act, a longer time frame generally is appropriate in cases under section 2 than in cases under Section 1.

3. Entry in Merger Enforcement

The US enforcement agencies have considered entry issues in a large number of merger investigations. Consideration of a wide range of factors have led the agencies to conclude in many cases that sufficient entry was not likely to be attracted by a proposed merger. The factor most often found to be important was the extent of the unrecoverable investment required for entry, *i.e.*, the associated "sunk cost."[35] If the sunk cost associated with entry is too great in comparison with the likely returns, a merger will not attract entry.[36] The US agencies sometimes have found that sunk costs associated with constructing a manufacturing facility, developing a product, or gaining customer acceptance were so great that a merger would not attract entry even if there were no risk of outright failure and the loss of the entire entry investment. The US agencies expect entry to be attracted if potential entrants are likely to earn reasonable returns on their investments, even if the initial investment may be large. By the same token, a small initial investment could deter entry if the expected returns also were quite small.

More often, the US agencies have found a substantial risk of failure is a large part of what makes entry unattractive. That risk may be particularly great when customers are unwilling to purchase a product without a well-established record of satisfactory performance. This has been found to be the case when

32. *Horizontal Merger Guidelines* § 3.2. If it is clear that no anticompetitive effects could arise immediately after the merger (*e.g.*, because pre-merger prices are locked in through long-term contracts), the two years runs from whenever the anticompetitive effects could arise.

33 *See* John C. Hilke & Philip B. Nelson, *The Economics of Entry Lags: A Theoretical and Empirical Overview*, 61 Antitrust Law Journal 365, 379–84 (1993).

34 *See* Rebel Oil Co., Inc. v. Atlantic Richfield Co., 51 F.3d 1421, 1440 (9th Cir. 1995); United States v. Visa USA., Inc., 163 F. Supp. 2d 322, 342 (S.D.N.Y. 2001).

35 The central role of sunk costs in the analysis of entry was explained by William J. Baumol & Robert D. Willig, *Fixed Cost, Sunk Cost, Entry Barriers and the Sustainability of Monopoly*, 95 Quarterly Journal of Economics 405 (1981). On the role of sunk costs in the context of a particular model of competitive interaction, see Robert D. Willig, *Merger Analysis, Industrial Organization Theory, and Merger Guidelines*, 1991 Brookings Papers on Economic Activity, Microeconomics 281, 308–10.

36. In the context of standard models of unilateral effects, modest sunk costs commonly can be sufficient to prevent entry following anticompetitive mergers. *See* Gregory J. Werden & Luke M. Froeb, *The Entry-Inducing Effects of Horizontal Mergers: An Exploratory Analysis*, 46 Journal of Industrial Economics 525 (1998).

unsatisfactory performance imposes exceptionally high costs on the customer, for example, because the failure of that product to perform in a manufacturing process forces the shutdown of an entire production line. Although an entrant might find ways of demonstrating reliability, they may cost so much and take so long that they are not realistic alternatives.

The US agencies often have found that proposed mergers involving highly differentiated consumer products would not attract the entry of new brands. In a market populated by well-established brands, successful entry typically requires a substantial investment in advertising and promotional activity over a long period of time to build share and achieve widespread distribution through retail channels. Moreover, success is far from assured even when such investments are made.

The US agencies also have found that other factors prevented mergers from attracting entry. Entry in the telecommunications industry often requires a licence for use of the electromagnetic spectrum, and entry in the health care industry may require approval from a state government. The presence of patent or other intellectual property rights may or may not pose a significant entry obstacle. Patents commonly are important in high-tech industries, but the US agencies also have found that mergers in some low-tech industries would not attract entry because incumbents control patents essential to the production of competing products.[37]

The US agencies have found that a few mergers would not attract entry because potential entrants would be unable to obtain a source of supply for essential inputs. Most examples involve scarce natural resources, but similar problems may confront a potential entrant requiring a supply of a key part for a manufactured product.

The US agencies also have found in some cases that a merger would not attract entry because entrants would suffer significant cost disadvantages in competing with incumbents. This disadvantage tends to be most important when entrants would be unlikely to achieve the economies of scale and scope already achieved by incumbents. The US agencies have found such economies to be decisive in a few industries in which efficiency requires a high density in delivery or pick up operations with customers. Obtaining the required density may be especially difficult if incumbents have long-term contracts with many existing customers.

Finally, the US agencies have found in some cases that incumbents can thwart entry through strategic conduct. If entrants need to build up a critical mass of customers to achieve economies of scale, incumbents may be able to deny particular customers to an entrant by offering them preferential pricing. The agencies have found such strategies successful when an entrant would need to get the business of a limited number of identifiable customers (*e.g.*, the customers with expiring long-term supply contracts) or when it is easy to identify customers being solicited by an entrant (or those that agreed to do business with the entrant). Incumbents always can be expected to respond to entry, and one thing that sets this strategic conduct apart from the other responses is that incumbents are able to respond before entrants are able to generate any returns on their investments.[38]

As the foregoing makes clear, many different factors, individually or in combination, may prevent a merger from attracting entry. Nevertheless, the US enforcement agencies find in many cases that proposed

37 The US agencies do not find patents or other intellectual property rights to pose significant entry obstacles when competing products can be produced without infringing intellectual property rights or when necessary intellectual property rights are readily licensed at reasonable terms.

38 On the importance of timing, see Marius Schwartz & Robert J. Reynolds, *Contestable Markets: An Uprising in the Theory of Industry Structure: Comment*, 73 American Economic Review 488 (1983).

mergers would not lessen competition in large part because supracompetitive pricing would attract timely, likely, and sufficient entry. The main reason for such a finding most often is that sunk costs are quite low relative to potential rewards. Markets with growing demand also commonly are found to be conducive to entry. In some cases, the US agencies have found that large customers can avoid being harmed by post-merger price increases by actively sponsoring entry or vertically integrating themselves.[39]

In recent years, the US enforcement agencies have found that mergers involving very high market shares would not be anticompetitive because they would attract entry. For example, in its analysis of the 2002 acquisition of certain assets of Stagebill Media by Playbill Inc., the Department found that sunk costs of entry were trivial. In its analysis of the 2005 acquisition of Varco, Inc. by National Oilwell Inc., the Department found that large customers would effectively sponsor entry by committing to purchase from other companies that would expand their product lines or production capacity.

4. Entry in the *Microsoft* Case[40]

Microsoft's monopoly in PC operating systems was protected by the "applications barrier to entry," which, as explained by the court of appeals,

> stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. This "chicken-and-egg" situation ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems.[41]

The "applications" to which the court referred are things like word processors, spreadsheets, and games, which provide functionality to PC users. The trial court found that the "overwhelming majority of consumers will only use a PC operating system for which there already exists a large and varied set of high-quality, full-featured applications."[42] The court also found that "software developers generally write applications first, and often exclusively, for" Windows.[43] The reason is that "porting" an application written for one operating system to be run on another "is a costly process."[44]

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39 The US agencies also consider whether such customer reactions to a merger would prevent price increases only to some customers, leaving many other customers vulnerable.

40 United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 2000) (findings of fact), 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law), *affirmed in relevant part*, 253 F.3d 34 (D.C. Cir. 2001) (en banc). For a far more extensive treatment of entry in the case, see Gregory J. Werden, *Network Effects and Conditions of Entry: Lessons from the* Microsoft *Case*, 69 Antitrust Law Journal 87 (2001).

41 253 F.3d at 55, citing 84 F. Supp. 2d at 18–19.

42 84 F. Supp. 2d at 18.

43 *Id.*

44 *Id.* Applications access the services of an operating system though the "application programming interfaces" (APIs) an operating system provides. Different operating systems contain different APIs, so there is a cost to "porting" an application from one operating system to another. An applications developer ports a product to a particular operating system if doing so is expected to be profitable as the result of increased sales of the application plus any added financial incentives that may be offered by the owner of the operating system.

The confluence of the behaviour the court attributed to PC users and that the court attributed to applications developers generates "an intractable 'chicken-and-egg' problem."[45]

> Users do not want to invest in an operating system until it is clear that the system will support generations of applications that will meet their needs, and developers do not want to invest in writing or quickly porting applications for an operating system until it is clear that there will be a sizeable and stable market for it.[46]

The court elaborated the workings of the "applications barrier to entry" at great length,[47] describing the critical forces in terms of what economics has dubbed a "positive network effect."[48] The users of an operating system form a network, and individual users benefit as the number of users increases. The more users of an operating system there are, the more applications will be created for that operating system, and this also benefits users.

Network effects and "chicken-and-egg" problems are both common, but they typically are not the powerful forces they were found to be in *Microsoft*. Indeed, there are many examples of successful entry in the presence of network effects, even though it was necessary to overcome a "chicken-and-egg" problem.

5. Government-Imposed Barriers to Entry

Although US antitrust law most often involves enforcement against private actions, competition agencies must also consider the effects of government actions, such as government-imposed restrictions on entry.[49] A prime example is state certificate of need ("CON") laws, which prevent firms from entering certain areas of the health care market unless they can demonstrate to state authorities that there is an unmet need for their services. Applications for CONs are often opposed by incumbent providers, who have in some cases held off new entry in this way for decades.[50] DOJ and FTC have stated that CON

45 84 F. Supp. 2d at 18.

46 *Id.*

47 *Id.* at 18–24.

48 For non-technical discussions of the economics of networks, see Carl Shapiro & Hal R. Varian, Information Rules ch. 7 (1999); S.J. Liebowitz & Stephen E. Margolis, *Network Effects and Externalities*, *in* 2 The New Palgrave Dictionary of Economics and the Law 671 (Peter Newman, ed., 1998); Nicholas Economides, *The Economics of Networks*, 14 International Journal of Industrial Organization 673 (1996); Michael L. Katz & Carl Shapiro, *Systems Competition and Network Competition*, 8 Journal of Economic Perspectives 93 (1994).

49 Government-imposed restrictions on entry, such as license requirements, can be considered barriers to entry under the broader definition set forth by courts such as the D.C. and 9th Circuits. *See* nn.19–20 *supra.*

50 *See* US Department of Justice and Federal Trade Commission, Improving Health Care: A Dose of Competition ch. 8, p. 4 (July 2004), *available at* http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf. A number of antitrust suits have alleged that incumbent health care providers made misrepresentations in CON proceedings to the detriment of new entrants. Armstrong Surgical Center, Inc. v. Armstrong Country Memorial Hospital, 185 F.3d 154 (3rd Cir. 1999); Kottle v. Northwest Kidney Centers, 146 F.3d 1056 (9th Cir. 1998); St. Joseph's Hospital, Inc. v. Hospital Corp. of America, 690 F.2d 1240 (9th Cir. 1982).

programs can pose serious competitive concerns by shielding incumbent health care providers from new entrants that could provide higher quality services or innovative alternatives to costly treatments.[51]

In other cases, government may impose the same requirement on incumbents and new entrants, but the restraint operates very differently on the two groups and impedes entry by new-business-model, lower-cost firms in response to supracompetitive rates of return earned by incumbents. The US enforcement agencies have opposed many state proposals to expand the definition of the practice of law to include the supervision of real estate closings, a service which most states allow non-lawyers to compete with lawyers to perform.[52] Although these licensing requirements—which are costly and time consuming—are not borne solely by new entrants, these requirements prevent the entry of lower-cost lay service providers[53] who do not engage in other activities—like representing parties in court—for which professional training and licensure may be appropriately required.[54]

As one former agency head observed, "[R]egulatory success in attacking private restraints increases the efforts that firms will devote to seeking public restraints. . . . Public restraints solve the entry problem more efficiently. Rather than ceaselessly monitoring the marketplace for new rivals, a firm can simply rely on a public regime that, for example, provides only a few licenses."[55]

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51 Improving Health Care, *supra* note 50, ch. 8, p. 6 ("The Agencies believe that CON programs are generally not successful in containing health care costs and that they can pose anticompetitive risks. . . . .CON programs risk entrenching oligopolists and eroding consumer welfare.")

52 *See, e.g.,* Comments on Kansas Bar Association's Proposed Definition of the Practice of Law (Feb. 4, 2005), *available at* http:/www.usdoj.gov/atr/public/comments/207619.pdf; Comments on Draft Proposed Definition of the Practice of Law in Massachusetts (Dec. 16, 2004), *available at* http://www.usdoj.gov/atr/public/comments/206843.pdf; Brief Amici Curiae of the Federal Trade Commission and the United States of America, McMahon v. Advanced Title Services Co. of West Virginia, No. 31706 (Supreme Court of Appeals of the State of West Virginia May 25, 2004), *available at* http://www.ftc.gov/be/V040017.pdf.

53 In 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. Proponents of lay competition pointed to survey evidence suggesting that lay closings in Virginia cost on average more than $150 less than attorney closings. *See* letter from the US Department of Justice and the FTC to Supreme Court of Virginia (Jan. 3, 1997), *available at* http://www.usdoj.gov/atr/public/comments/3967.pdf; Letter from the US Department of Justice and the FTC to Virginia State Bar (Sept. 20, 1996), *available at* http:/www.usdoj.gov/atr/public/comments/0886.pdf.

54 This phenomenon occurs in many industries. For example, the FTC has also opposed professional licensing requirements for firms that simply sell contact lenses pursuant to a valid prescription, *see* Possible Barriers to E-commerce: Contact Lenses: a Report from the Staff of the Federal Trade Commission (Mar. 29, 2004), *available at* http:/www.ftc.gov/os/2004/03/040329clreportfinal.pdf, and for firms that sell caskets over the Internet, *see* Memorandum of Law of Amicus Curiae Federal Trade Commission, Powers v. Harris, No. CIV-01-445-F (W.D. Okla. Sept. 5, 2002), *available at* http://www.ftc.gov/os/2002/09/okamicus.pdf. In these cases, the new entrants did not perform services—such as eye exams or embalming—for which professional training and licensure may be justified for consumer protection reasons.

55 Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 University Of Chicago Law Review 165, 170 (2005).

6. Conclusion

As Professor Carlton argues, considerations of entry should not get bogged down in definitions; indeed, it may be best to avoid the term "barriers to entry." The issue properly framed is whether the facts of a particular case make it likely that entry would prevent the creation or enhancement of market or monopoly power that otherwise would follow from a merger of, or an agreement among, competitors, or from the improperly exclusionary conduct of a single firm. In addition, competition agencies should be cognisant that government-imposed restraints can also prevent competitive entry and reduce consumer welfare.

EUROPEAN COMMISSION

Entry is a source of competitive discipline on incumbents. It can upset traditional patterns of market conduct, dethrone dominant firms, introduce new technology and fresh approaches to product design and marketing. New entry often leads to more competitive prices to the benefit of consumers.

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

1. The definition of entry barriers

Joe Bain approached entry from a long-run perspective, arguing that the conditions of entry should be "evaluated roughly by the advantages of established sellers in an industry over potential entrants, these advantages being reflected in the extent to which established sellers can persistently raise their prices above a competitive level without attracting new firms to enter the industry"[1]. Bain stressed three factors that could prevent entry:

- *Economies of scale*: as an entrant must either enter at a suboptimal scale with a cost disadvantage, or at an efficient scale with a depressing effect on prices.

- *Product differentiation*: by allowing incumbents to charge higher prices than entrants and thus to sell profitably when potential entrants could not.

- *Absolute cost advantages*: by allowing incumbents to sell profitably at prices below the costs of potential entrants.

An alternative definition was proposed by George Stigler. He defines entry barriers "... as a cost of producing (at some or every rate of output). . . which must be borne by a firm which seeks to enter an industry but is not borne by firms already in the industry"[2]. This definition leads to a much shorter list of entry barriers:

- Economies of scale are not barriers to entry. If an entrant incurs a higher cost because it must produce at a lower level of output, the cost disadvantage is a consequence of overall demand being small relative to minimum efficiency scale.

- Product differentiation is a barrier to entry only if the costs of differentiation (design, advertising, etc.) are higher for a new firm than an existing firm.

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1 Joe S. Bain, Barriers to New Competition (1956).

2 George Stigler, The Organisation of Industry 113-22 (1968).

- Cost advantages arising from scarce factors of production, such as patents and natural resources are not entry barriers. Scarce factors generate "economic rents," i.e., returns in excess of those necessary to attract them away from other uses[3]. These rents should be properly understood as opportunity costs. Thus, owners of scarce factors have no cost advantage over entrants[4].

Interestingly both definitions strike at the heart of asymmetries that might favour an incumbent firm over a potential entrant. Yet Bain's definition is broader. It speaks generically of advantages of incumbents over potential entrants. In contrast, Stigler focuses on cost disadvantages of new entrants relative to incumbents. This is unnecessarily confining. Suppose an established firm could commit itself to producing the monopoly output, and this being the case, no other firm can enter at a profit. Entry would be excluded in this market, but it is difficult to see why the incumbent has a cost advantage over a new firm.

Additionally, Stigler's definition "*does not respond to the primary reason why competition law concerns itself with them*"[5]. Rather than focusing on whether "entry barriers" exist according to some definition, competition authorities should explain how the industry will behave over the next several years and how rapidly and to what extent entry could enhance competition. This means competition authorities should assess the likelihood of entry, not whether entry barriers are high or low in any given case. This implies that factors such as economies of scale, product differentiation or access to scarce resources may all be entry barriers if their presence implies entry will be unprofitable and thus unlikely. For example, in the presence of significant scale economies entrants may doubt their ability to win enough sales to justify entry, even at the high pre-entry prices, and if the scale of its entry is necessarily large it may fear that it will have a serious negative impact on prices. Both of these effects will deter entry if there are sunk costs and switching costs or brand loyalty deter some buyers to switch from the incumbent firm to the new entrant.

Entry is also affected by entry impediments, which delay the process of entry into a market without necessarily increasing the sunk costs of entry. Such delays offer temporary advantages to incumbents over entrants which competition authorities must take into account. Entry impediments may be important to allow a merger, for example, because they influence the amount of time that incumbents may exercise market power before entry occurs[6].

The Commission guidelines and case practice are closer to Bain's definition. For example, the Commission Guidelines on Vertical Restraints states that:

> "*Entry barriers are measured by the extent to which incumbent companies can increase their price above the competitive level and make supra-normal profits without attracting entry"(§126).*

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3 Demsetz, Harold, 1982. "Barriers to Entry," American Economic Review, American Economic Association, vol. 72(1), pages 47-57

4 An asset that is valued at opportunity cost may nonetheless constitute an absolute cost advantage barrier to entry if the value of the asset is specific to its owner, in which case the market value (which is its next best value in use) will understate its worth to the owner. For example, a patented technique may be more valuable to its owner because the patent is complementary to other activities of the firm.

5 Areeda, Hovenkamp, and Solow (1995) *Antitrust Law* [p. 61]

6 Good examples of entry impediments are licensing, certification, or product registration requirements that involve little or no actual costs but take significant amounts of time to satisfy. Other examples include the time required to obtain contracts (i.e., where the market's products are sold via long-term contracts) or to gain a market share large enough to significantly influence the behaviour of incumbents.

2. Firm conduct influences entry

Bain's definition is, however, inadequate in one important respect. It implicitly assumes all barriers are exogenous to market participants. It presumes that structure is largely determined by technological factors and there is a causative chain from structure (the level of concentration) to conduct (the degree of collusion) to performance (profitability). Since the early 80s, industrial economists emphasise the effect of conduct (i.e., strategic interaction) on industry structure. In brief, how firms compete partly determines how concentrated industries will be.

What is important for entry decisions is the nature of competition post-entry. The number of firms is typically determined by a decision to enter based on profitability. The Horizontal Merger Guidelines whilst also adopting a definition of entry barriers close to Bain's, reflects the view that entry barriers are relevant not because they allow an incumbent to enjoy excess profits but because they reduce the profitability of entry, thus reducing the degree of effective competition in the market:

> "*Potential entrants may encounter barriers to entry which determine entry risks and costs and thus have an impact on the profitability of entry. Barriers to entry are specific features of the market, which give incumbent firms advantages over potential competitors".(§70)*

Post-entry profitability is critically affected by two factors, the intensity of competition post-entry, as reflected for example in price levels, and the extent to which entry costs are sunk.

Post-entry price: Entry occurs up to the point at which the profits of the last entrant cover the entry costs incurred. But a tough competitive regime post-entry leads entrants to anticipate lower prices, reducing the profitability of entry thus making it less attractive.

Sunk costs: High fixed entry costs can deter entry, even if the expenditures were previously borne by incumbents[7]. This might occur if fixed entry costs are also sunk, i.e. investments that cannot be recovered upon exit and hence serve to commit a firm or firms to staying in the market. Sunk costs interact with post-entry competition to create a first-mover or incumbency advantage, even in the absence of strategic pre-emptive behaviour. For some ranges of fixed cost, entry that would be profitable if incumbents' costs were not sunk and post-entry competition was not vigorous may be rendered unprofitable.

Several sunk costs are themselves not exogenous. John Sutton observes that advertising and R&D, for example, can both be thought as sunk costs incurred with a view to enhancing consumers' willingness to pay for the firm's product[8]. Since advertising and R&D are choice variables to the firms their levels are determined endogenously, as part of the specification of the industry equilibrium. Under these

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7 The categories of fixed expenditures highlighted by Bain -- including the product design and advertising expenditures that often underlie product differentiation and the up-front costs of developing a large production facility -- often are irreversible to a significant extent. That is, much of the brand reputation and product development costs may not be transferable to another product were the first product not to succeed, and the plant and equipment used to produce a new product may have no other use, so would merely be sold as scrap in the event of exit. If so, the presence of these fixed (and sunk) expenditures may deter entry, as Bain supposed. But if the same fixed expenditures would not be sunk, entry would not be deterred, as those following Stigler suggested.

8 Sutton (1991) *Sunk Cost and Market Structure*, MIT Press

circumstances an increase in demand may not lead to more entry. Rather a competitive escalation in investments raises the equilibrium level of sunk costs incurred by incumbent firms[9].

If sunk costs are endogenous, a first-entrant can monopolise the market by setting a value of investment so high that no latter firm will find it profitable to enter. Even if a second firm is not pre-empted, the size disparity with the first will remain as demand increases.

This last point is more general. All sunk costs create an important asymmetry between incumbents and potential entrants. Once costs are sunk, they are no longer a portion of the opportunity costs of production. Thus, sunk costs allow an incumbent firm to commit to respond aggressively to new entry. For example, building a plant with a large capacity in advance of others may be a way to make a credible commitment to produce large outputs, and this investment may advantage the firm making the investment[10].

3. Categorisation of entry barriers

As discussed above, the Horizontal Merger Guidelines adopt a definition of entry barriers that reflects advantages of incumbents over entrants but places the focus on assessing whether such disadvantages in terms of higher costs or risks makes entry unprofitable. Consistent with this approach entry barriers are categorised as follows (§71):

1. legal advantages that encompass situations where regulatory barriers limit the number of market participants;

2. technical advantages that may result, for example, from preferential access to essential facilities, natural resources, innovation and R&D, or from the existence of economies of scale and scope;

3. entry barriers may also result from (a) established position of the incumbent firms (e.g. experience or reputation) or (b) strategic behaviour intended to reduce the profitability of entry (e.g. "*where the incumbents have already committed to building large excess capacity*").

The Horizontal Merger Guidelines also point out that a merger can increase the risk of strategic entry deterrence and examples are given in §36. For instance*, "the merged entity may have such a degree of control, or influence over, the supply of inputs or distribution possibilities that expansion or entry by rival firms may be more costly"*. It should be noted that the Horizontal Merger Guidelines deals only with horizontal mergers. Non-horizontal mergers raise such foreclosure concerns more directly.

There can be various types of strategic behaviour that advantage one firm over another such as, for example: (i) investments to lower the incumbent's costs relative to those of potential entrants (capacity, patents, R&D, take or pay contracts with input suppliers, learning-by-doing, etc.), (ii) investments to alter the cost structure of rivals (take or pay contracts, sleeping patents, monopolisation of inputs, vertical control, etc.), and (iii) investments to favourably alter demand conditions (advertising, brand proliferation,

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9 A lower bound exists to the equilibrium level of concentration in the industry, no matter how large the market becomes. This lower bound is higher the more responsive is demand to a firm's increase in R&D or advertising. Sutton (ibid) shows that this result holds over an extremely wide class of oligopoly models.

10 For a model where an incumbents invests in capacity to deter entry see Dixit, A. (1981) *The role of investment in entry deterrence*, Economic Journal, vol. 90, pp. 95-106. Other possible commitment mechanisms include switching costs, product differentiation or pricing practices such as "take or pay" requirements.

long-term contracts with buyers, etc.). In all of these examples commitment is essential, and hence the importance of sunk costs.

Note that most strategic behaviour involves sacrifice by incumbents in order to inflict losses on entrants. Thus strategic behaviour is never a barrier to entry according to any definition that is inspired from Stigler's. Yet, what really matters in antitrust and merger cases is not whether entry barriers are high or low. Instead, the emphasis is on whether actual entry will take place, when and to what degree.

4. Role of entry considerations in practice

The role of entry can be best illustrated with respect to merger control. This is also the policy area where the Commission has published a more elaborate analytical framework[11]. In mergers entry considerations are of relevance at different stages of the analysis:

1. When delineating the relevant market
2. When assessing the relevant comparison to determine the effects of the merger
3. When assessing the competitive effects of the merger:

   a. Uncommitted expansion and product repositioning
   b. Merger-induced and committed entry
   c. A merger involving a potential entrant can harm consumers
   d. A merger that increases the risk of strategic entry deterrence can harm consumers

4.1 Entry considerations when defining markets

Immediate and costless entry may render unprofitable a small but permanent increase in price thus leading to broader markets or undermining the relevance of market shares as indicative of market power. The relevant market is typically defined as the set of all substitute products and regions that represent a significant competitive constraint on the products of interest. The Commission’s Notice on definition of the relevant market (the Notice)[12] identifies three main sources of competitive constraints: demand substitution, supply-side substitution and potential competition. Of these three, only the first two are taken into account at the market definition stage.

The Notice attributes a prominent role to demand substitutability in the definition of the relevant product market. This comprises products that are interchangeable from the viewpoint of consumers. Yet, there are cases where a strict demand analysis would produce unreasonable results. The obvious example is one in which demand substitution only would lead to define separate markets for size 40 shoes and for size 42 shoes. According to the Notice, supply-side substitution may also be taken into account if suppliers are able “*to switch production to the relevant products and market them in the short term.”*[13]

11 As described in the Commission’s Horizontal Merger Guidelines. The Guidelines on Horizontal Agreements and the Guidelines on Vertical Restraints both follow similar principles as regards entry but predate the Horizontal Merger Guidelines and are somewhat less detailed.

12 European Commission, “Commission Notice on the definition of the relevant market for the purposes of Community competition law,” *Official Journal,* C 372, December 1997, (“Commission Notice”).

13 Commission Notice § 20.

Supply-side substitutes include firms which are currently producing other products, but which have all the assets needed to produce, market and distribute the relevant products, as well as those new entrants that are able to move into the relevant market rapidly and without incurring significant sunk costs of entry and exit[14].

As to potential competition, the Notice states that "it is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry."[15]

Supply-side substitution and potential entry can be distinguished along two dimensions. First supply-side substitution responds promptly to price increases, while potential entrants may take longer than a year or so to commence supplying the market with their products. Secondly, supply-side substitution involves entry at a low cost and without incurring in irreversible investment. In contrast, potential entry refers to entry at a substantial sunk cost. For example, product repositioning may require fundamental changes in the nature of the product or it may mean the establishment of a new brand or the modification of an existing brand through changes in advertising and marketing strategy[16].

According to the Notice, supply-side substitution translates into market aggregation, that is, a broadening of market boundaries to include a larger group of products or geographical area. However, the Notice warns that aggregation makes sense only when production substitution among a group of products is found to be technologically feasible and economically viable for most, if not all, firms selling one or more of those products. To illustrate this point, suppose that products A and B are not interchangeable from a demand viewpoint. Suppose further that some, but not a majority, of manufacturers of product B can readily switch production to manufacture product A. If, as a result, the markets for products A and B were aggregated, the market shares of the manufacturers of product A would be clearly underestimated. This is because by aggregating these two markets, the output of all manufacturers of product B would be taken into consideration for the calculation of market shares, thus ignoring that only some producers of B could switch to produce A[17]. For similar reasons market aggregation is not meaningful when suppliers have the ability and incentive to switch only part of their production capacity from B to A.

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14 The European Court of Justice clearly established the importance of incorporating supply-side substitutability considerations at the market definition stage in *Continental Can*. The Court rejected the definition held by the Commission in this case because the Commission had failed to consider substitutes on the supply-side.14 The Court reaffirmed its position on this issue in later cases (such as, for example, in *Michelin*14). The Commission's *Notice* took account of the Court's opinion on this matter and explicitly introduced consideration of supply-side substitutability as part of its approach to market definition.

15 Commission Notice §24

16 The US Merger Guidelines distinguish between "uncommitted" and "committed" entry. The EU Notice does not make this distinction explicitly but it is sometimes used in decisions. The concept of uncommitted entry generalises the idea of supply substitution. Uncommitted entry is hit-and-run. Uncommitted entrants are firms that can enter quickly, and with little sunken expenditure. They can take advantage of any short-run profit opportunities that anticompetitive behavior by incumbent firms might offer, and get out rapidly and cheaply if those opportunities disappear. Committed entrants, in contrast expect to stay, because to abandon the market would mean walking away from a substantial sunk investment. Thus, committed entrants must consider what competition will look like after they enter in deciding whether it is profitable for them to enter in the first place.

17 Of course, if the markets for products A and B were not aggregated, but in addition no account would be taken of the (limited) supply-side substitution possibilities, the market shares of the manufacturers of product A would be overestimated.

Note also, a “de novo” entrant, even if can enter quickly and at little sunk cost will not be included in the list of active market suppliers and assigned market shares. Hit-and-run entry, or where supply-side substitution is partial or not nearly universal are all taken into account only at the competitive assessment stage.

In other jurisdictions, notably the US the concept of an uncommitted entrant generalises the idea of "supply-side substitution". Uncommitted entry includes traditional production substitutors and hit-and-run entrants. Uncommitted entrants are treated as market participants because they constrain current industry pricing. Once these firms are identified, they are assigned market shares based upon the capacity they can profitably devote to the relevant market were price to increase by a SSNIP.

Because uncommitted entrants are assigned market shares, their competitive significance is taken into account in the first instance through their effect on market concentration. This approach has the advantage that market shares do not overestimate the existence of market power. This can be useful in those cases where market share thresholds are, implicitly or explicitly, applied (e.g. in phase I merger cases when the decision to move to phase II is being considered) or where certain specified behaviour (for example, the adoption of vertical restraints) is prohibited depending exclusively on market share criteria.

But adjusting market shares to account for uncommitted entry creates difficulties of its own. It is potentially time consuming to perform calculations called for by "uncommitted entry" analysis such as (i) extent of an uncommitted entrant's sunk costs, (ii) the likelihood that consumers will purchase the uncommitted entrant's product, and (iii) the profitability of alternative uses of the uncommitted entrant's assets in different markets. It is for this reason the Commission reserves the analysis of non-universal and partial “uncommitted entry” to the competitive assessment stage.

4.2 Identifying the counterfactual

In assessing the competitive effects of a merger, the Commission acknowledges that the conditions of competition are likely to evolve over time irrespective of the merger. In general, it is necessary to identify the most likely competitive environment that would prevail in the absence of the merger and compare it with the scenario that results if the merger is authorised. The Horizontal Merger Guidelines state that:

> “In most cases the competitive conditions existing at the time of the merger constitute the relevant comparison for evaluating the effects of a merger. However, in some circumstances, the Commission may take into account future changes to the market that can reasonably be predicted. It may, in particular, take account of the likely entry or exit of firms if the merger did not take place when considering what constitutes the relevant comparison.” (§9)

The condition that “future changes must be reasonably predicted” implies in general identifying the firms that are expected to enter or exit the market in the absence of the merger. This calls for an assessment of the entry or exit barriers that such individual firms face. In fact the Guidelines also state “*that current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion*”.(§15)

If entry is likely and imminent but integration allows the merged entity to deter entry, but not otherwise, such “entry deterrence” can be said to be anti-competitive and merger-specific. Conversely, let entry be likely irrespective of the merger. Then future prices are expected to be lower than current prices. A merger between direct competitors may lead to higher prices than expected (even if still below pre-merger levels). But then future entry may not count as offsetting such anti-competitive effect unless the merger induces more entry than expected in its absence.

4.3 Uncommitted expansion and product repositioning

As explained above the Commission reserves the analysis of "uncommitted entry" to the competitive assessment stage. However, this does not imply that the market shares in the relevant market are taken at face value:

> "the Commission interprets market shares in the light of likely market conditions, for instance, if the market is highly dynamic in character and if the market structure is unstable due to innovation or growth".(§15)

Immediate and costless entry through product repositioning and capacity expansion is fully considered at the competitive assessment stage. For instance concerns with non-coordinated effects are lessened if consumers have the ability to switch suppliers without costs or if competitors are not capacity constrained.

Many scholars believe that the mere anticipation of entry will induce incumbents to lower their prices toward more competitive levels, and thus that entry need not necessarily occur to have an effect on market performance. A benchmark in this respect has been established by Baumol et al who have applied the label "perfectly contestable" to markets in which incumbent firms and potential entrants share the same technology and potential competitors can enter and exit without capital loss during the time taken by incumbent firms to change prices[18]. There would be no need in such cases to conduct a detailed investigation of possible coordinated or non-coordinated effects.

However, contestability theory and its empirical relevance are open to question. A key assumption is the absence of barriers to entry of any kind. Yet reversible entry without costs, by itself, is insufficient to produce the results of long-run equilibrium in a perfectly contestable market. Capital must move with little risk of loss into and out of an industry over a period of time that is short compared to the time required for existing firms to respond with competitive price changes. Thus entrants must make decisions on the assumption that price will not change after entry, or it must be possible for entrants to negotiate contracts, before entry, that insulate them from post-entry responses by incumbents. Furthermore, incumbents must believe that an entrant could capture the entire market with a slight price cut, which implies that products cannot be differentiated.

If these assumptions are satisfied, a firm can base its entry decision on current prices, and 'hit and run' can be a rational entry strategy that will police the pricing decisions of incumbent firms. These

18 William J. Baumol, John C. Panzar & Robert D. Willig, *Contestable Markets and the Theory of Industry Structure* (1982). Formally these authors define a 'perfectly contestable market' as a market in which a necessary condition for an equilibrium outcome is that no firm can enter taking prices as given and earn strictly positive profits using the same technology as existing firms. In a perfectly competitive market, entrants can and will enter to take advantage of even transient profit opportunities at current prices. This behaviour is most reasonable when the costs of entry are completely reversible so that there are no capital losses in the event of exit. If these conditions are satisfied, a perfectly contestable market mirrors a competitive environment in which entry and exit are frictionless and barriers to entry and exit are non-existent. The assumption of identical costs insures that whenever incumbents can make profits, so can entrants, and, therefore, if a perfectly competitive market equilibrium exists, firms cannot sustain prices in excess of average cost.

assumptions are likely to fail in markets subject to antitrust scrutiny, if not almost everywhere in the economy. It is unlikely that entry into any industry is perfectly reversible; so any entry attempt will probably entail some risk of capital loss if the firm should subsequently exit the industry. The central question is whether contestability theory makes useful predictions about markets that are close to being perfectly contestable. Stiglitz[19], among others, has argued that even if the sunk costs of entry are vanishingly small, the possibility of prompt, aggressive pricing by established firms can make entry unattractive and, by deterring 'hit and run' entry, permit existing firms to price at non-competitive levels.

4.4 Merger-induced entry

By reducing competition, a merger may increase the expected profitability of entry to overcome existing entry costs. Such merger-induced entry would tend mitigate the anti-competitive effects of the merger, in part or in full, thus allowing the merger to be authorised without or with lesser remedies, respectively.

In mergers raising fears of post-merger coordination, easy entry may be a factor which acts to deter collusion, or to ensure that the collusive price levels which emerge are lower than they might otherwise have been.

Non-coordinated effects often focus on the intensity of the mutual competitive constraints, which the merging firms are able to eliminate because of the merger and the incentive that this provides to raise prices. By restricting output or raising prices following an anticompetitive merger, incumbents increase the amount an entrant would earn and create an opportunity for entry.

Greg Werden and Luke Froeb question the need to assess merger-induced entry[20]. They rely on merger simulations to argue that in the absence of efficiency gains, future entry renders otherwise profitable Bertrand mergers unprofitable for the merging firms. Cournot mergers are normally unprofitable even without entry, and entry makes them much more unprofitable. To the extent these models are relevant, firms proposing to merge must expect to achieve significant efficiency gains or expect not to induce entry. Thus, entry collapses into efficiency considerations: if a proposed (and, hence, privately profitable) merger does not generate significant efficiency gains, it also cannot be expected to induce entry. Therefore, in many merger cases entry may have no role whatsoever[21].

However, the opposite is also true. If entry is easy then a privately profitable merger, must create efficiencies. Indeed, it will often be easier for a competition authority to assess the easy of entry than to rely on the merging parties to determine scope and significance of claimed efficiencies. Willig[22] argues

19 Stiglitz [1987] *Technological change, Sunk costs and competition* Brrokings Papers on Economic Activity 3, 883-937

20 Gregory J. Werden & Luke M. Froeb, The Entry-Inducing Effects of Horizontal Mergers: An Exploratory Analysis, 46 J Indus. Econ. 525 (1998)

21 Spector, David M., "Horizontal Mergers, Entry and Efficiency Defences" (May 2001). MIT Dept. of Economics Working Paper No. 01-18 [reference missing] in a complementary paper shows in the context of Cournot market that a merger may still be profitable while inducing entry, but this can happen only if post-entry price remains above the pre-merger level. This is because a merger may induce entry by a small, high-cost firm which finds it profitable to enter now that price has risen. If this firm’s output is small enough (because of its high costs), its entry does not bring price back to its pre-merger level and does not necessarily make the merger unprofitable. Thus merger-induced entry, while compatible with profitable mergers will not be sufficient to restore prices to pre-merger levels, thus harming consumers.

22. Willig, *Merger Analysis, Industrial Organisation Theory, and Merger Guidelines*, 1991 Brookings Papers on Econ. Activity (Microeconomics) 281, 310-11

along this line. Ease of entry should lessen concerns over an otherwise anti-competitive merger, not because anti-competitive unilateral price rises will be deterred by fear of entry, but because easy entry will deter anti-competitive mergers from taking place.

In any event it is not enough that the merger creates an incentive for entry. Merger-induced entry must be "*likely, timely, and sufficient to deter or defeat any potential anti-competitive effects of the merger"(§68).* Potential competition is relevant to merger analysis only insofar as it will deter or counteract the competitive problem the merger would otherwise create.

4.5 Likelihood

Entry likelihood analysis asks whether an entry plan would be profitable to carry out in the post-merger environment:

> For entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents.(§69)

Economies of scale can act as a barrier to entry, particularly if such economies are tied to sunk cost investments:

> Entry is thus less likely if it would only be economically viable on a large scale, thereby resulting in significantly depressed price levels […] Furthermore, high risk and costs of failed entry may make entry less likely. The costs of failed entry will be higher, the higher is the level of sunk cost associated with entry. (§69)

Entry can be profitable at the pre-merger price in the post-entry economic environment even if it was not profitable at the same price in the pre-entry merger environment; this change in incentives is the focus of likelihood analysis. If the merger has the feared anticompetitive effect, industry output will decline, thereby creating additional potential sales for an entrant beyond what had previously been available. The result is to make entry more attractive than it had previously been. In short, the change in market structure resulting from the acquisition creates a gap in sales, raising the revenue potential for an entrant and softening the competitive environment facing the prospective new competitor.

Historical evidence on entry must be analysed with care to ensure that it is probative. First, evidence of no significant entry can mean the market is competitive since large-scale entry does not happen because it is unattractive, since price is down around cost. Conversely the fact that entry has occurred in the past does not imply there are no barriers to entry or that entry is necessarily easy. In general, a clear signal of low barriers is provided only by effective, viable entry that takes a nontrivial market share.

4.6 Sufficiency

This element is stated separately to highlight the possibility that even rapid and profitable entry might not be sufficient "*to deter or defeat any potential anti-competitive effects of the merger".*

New entry will successfully solve a competitive problem resulting from merger only if it returns the market price to the pre-merger level or below. The new entrant cares only about the long-run price likely to prevail. Accordingly, new entry is relevant to merger analysis only if it would be profitable in the post-merger economic environment assuming that the entrant would receive no more than the pre-merger price.

4.7 Timeliness

As regards timeliness what matters is how fast entry erodes any price increase caused by a merger, and not whether it eventually does so. Impediments to entry are most relevant in this respect. The longer it would take for entry to be effectively accomplished, regardless of its ultimate profitability, the longer the time would be that the parties to an anticompetitive merger could profit before experiencing the negative impact of the entrants' arrival in the market; the longer consumers would be vulnerable to elevated prices; and the less likely potential entry would deter an anticompetitive merger.

4.8 Elimination of potential entry

According to the Horizontal Merger Guidelines two conditions are necessary for a merger with a potential competitor to have significant anti-competitive effect:

1. The potential competitor is a likely and significant entrant and would grow into an effective competitive force.
2. There must not be a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger

Both criteria are more difficult to prove than it may appear. First, empirical evidence suggests that whereas entry appears to be easy in many markets post-entry market penetration and, indeed, survival is not. Second, to meet the second condition it must be shown that the merging potential entrant had some advantage over other entrants allowing it to enter earlier or at greater scale, or to compete more aggressively post-merger. But this may not always be obvious and if entry was profitable pre-merger if will continue to attract new entrants.

4.9 Increased ability and incentive to engage in strategic entry deterrence

Certain mergers (in particular of a vertical or conglomerate nature) can lead to exclusionary effects by changing the ability and/or incentives of the merged entity to raise strategically barriers to entry. Such conduct is particularly problematic if entry could be reasonably anticipated but will be deterred. But even if no new entry was probable in the absence of the merger such exclusionary conduct is likely to reduce the ability of existing rivals to compete, thus allowing the merged entity to exercise increased market power. Moreover strategic entry deterrence reinforces any possible horizontal effects of the merger by ensuring that merger-induced entry is not possible. This possibility is directly recognised in the Horizontal Merger Guidelines:

> "Some proposed mergers would, if allowed to proceed, significantly impede effective competition by leaving the merged firm in a position where it would have the ability and incentive to make the expansion of smaller firms and potential competitors more difficult or otherwise restrict the ability of rival firms to compete". (§36)

5. Final remarks

Clearly, ease of entry in a market must receive an important weight when evaluating the possible anticompetitive effects of a given conduct. However, ease of entry is not a sufficient condition for allowing conduct substantially restricting competition among existing firms: given the limits of contestability theory and the often long time taken for entering a market, potential competition is not a perfect substitute for competition among incumbent firms.

Entry barriers traditionally play a role in assessing the existence of a dominant position pre-merger or whether such position can be inferred when the combined market shares of the merged entity are high. The

EC Merger Regulation that entered into force in May 2004 places the emphasis on whether the merger significantly impedes effective competition not whether the merger creates or strengthens dominance, although the latter is seen as a sufficient condition for the former.

Under this modified substantive standard the goal is to assess whether entry would in fact take place and thus offset the anti-competitive effects of the merger. The Horizontal Merger Guidelines follow this approach and states that "*entry analysis constitutes an important element of the overall competitive assessment*".

BRAZIL (SEAE)

This paper presents a brief summary of the analytical framework adopted in Brazil with respect to barriers to entry and a few selected cases to illustrate its application.

The Brazilian Guidelines opted for a definition of barrier to entry that involves several factors to assess if entry is “probable,” “timely,” and “sufficient.” On the whole, the Brazilian Guidelines follow the mainstream guidelines applied in many international jurisdictions.

The following factors representing barriers to entry are considered in the Brazilian Guidelines:

(a) sunk costs;
(b) legal or regulatory barriers;
(c) resources belonging exclusively to incumbent firms;

(d) economies of scale and/or of scope;
(e) level of integration of the production chain;
(f) loyalty of consumers to established brands; and
(g) threat of reaction by established competitors.

As a practical reference, new firms entering a market in the previous 5 years may be used as evidence for conditions of entry, as long as there is indication that the past occurrence is still representative of the conditions of entry at the moment in which the analysis takes place.

For the analysis of conditions for entry, SEAE and SDE take into account the conditions that a hypothetical firm, similar to potential entering firms, that wishes to enter into a market might encounter. It is not necessary to identify an actual firm intending to enter the market.

Probable. SEAE and SDE consider entry probable when it is economically profitable at pre-merger prices and when a potential entrant can credibly commits to these prices. Commitment is not credible when the minimum increment of supply offered by an entrant is large enough to cause a reduction in market prices. In other words, entry is probable when the minimum viable scale is smaller than the sale opportunities in the market at pre-merger prices.

Timely. SEAE and SDE, generally, consider a two-year reference period as acceptable for entry. All the necessary steps for entry into a market, such as planning, product design, market studies, obtaining licenses and permissions, constructions and operation of plants, promotion and distribution of products, are included in this period. This period can vary depending on the characteristic of the involved markets. For example, in high technology markets, this reference period can be shortened.

Sufficient. Entry is considered sufficient when potential entrants can adequately exploit sale opportunities at the Minimum Viable Scale. Sale opportunities are market shares that are potentially available to entering firms. Minimum Viable Scale is the lowest level of annual sales that a potentially entering firm must obtain so that its capital is adequately remunerated. The adequate remuneration of capital is equivalent to the return that the volume of resources committed to the entry could attain if invested in the financial markets, adjusting to the risk of the sector in which the firm wishes to enter. The committed capital to the entry corresponds to the total expenditures a firm must incur in order to set itself up in the market, complete a production cycle and obtain the conditions to sell its product. The identification of sale opportunities must include: restriction of production derived from the exercise of market power by incumbent firms; reduction of supply by incumbent firms as reaction to entry; ability of entering firms to appropriate part of the market of incumbent firms; and ability of entrants to capture a significant share of market growth.

Besides entry, other factors may determine if there are sufficient conditions for market power to be exercised unilaterally by a firm, or by a group of firms jointly. Typically, SEAE and SDE will also analyse:

a) Imports;
b) Effectiveness of rivalry; and
c) Other factors that favour coordination of decision.

In the Brazilian antitrust experience, one of the most recurrent barrier to entry is related to access to distribution channels. In many cases, access to the distribution channel is key to a successful entry, due to the large extension of the Brazilian territory. Had the entrants to build up their own distribution channels, many entries would not be viable, since they would require large up front investment. Regulatory legislation is a also a major factor in making entry of new competitors difficult, specially in regulated industries.

Box 1. **PepsiCo and CBB (AC 08012.000212/2002-30)**

This transaction consisted on licensing the brands related to the Gatorade product by PepsiCo to CBB, so that the latter could commercialise and distribute them exclusively in Brazil. SEAE considered, for the purpose of analysis of the effect of the operation, "isotonic drinks" ("isotonic" or “isotonics” for short) the relevant product market. The adopted geographic dimension was the Brazilian market. The firm CBB already commercialised the product “Marathon” in the relevant market (“isotonic drinks”), whose market share, before the operation, was 17.42%. The market share of the PepsiCo (“Gatorade”), before the operation, was 75.8%. Thus, after the operation, CBB´s market share was 93.7%.

After the analysis of entry, SEAE verified that the main barriers to entry were:

(i) consumer loyalty since the Gatorade brand was synonymous of the very category of “isotonic”. In the other words, when the consumers decided to buy an “isotonic drink”, their immediately associated the Gatorade brand;

(ii) distribution of the products since they need to reach multiple channels as bars, restaurants, fitness centers, clubs, parks etc. The investment to reach such channels would be very high for an incoming firm, unless the company already possessed access to a distribution system. In accordance with market research information, there were, in the year of 2000, 736.000 points of sales that could sell isotonics, excluding the North Region of the country and supermarket and grocery stores.

SEAE concluded that the final price of the products was high compared with other substitutes, little variety of packings and impossibility of constant investments in the development of new brands due to the low consumption of “isotonic” in Brazil in comparison to other countries of Latin America. Thus, there was evidence that the entry was not “probable, timely, and sufficient”.

Other variables were analysed: effectiveness of the rivalry and economic efficiencies. After the analysis of these conditions, SEAE concluded that the existence of conditions for the entry of new players in the Brazilian market of “isotonics” had not been demonstrated, nor effective rivalry between CBB and other participants in the market, as well as the existence of economic efficiencies of the transaction capable of compensating the loss of economic welfare on the part of the consumer.

In August 2004, CADE determined the approval of the transaction, with the restriction of sale of the "Marathon" brand to a competitor.

Box 1. Box 2. **The Ambev Case (nº 08012.005846/99-12)**

This transaction consisted of a merger between Brahma and Antartica to form a new firm, Ambev. The merging parties controlled approximately 50% and 25%, respectively, of the national sales of beer.

The main barriers to entry analysed were:

(i) the system of distribution to reach multiple channels, such as bars, restaurants, fitness centers, clubs, parks etc, besides the more traditional supermarkets and grocery stores. The constitution of distribution channels (as investments in trucks, warehouses, system of logistic, identification of the dispersed points of venda for the territory, maintenance of supply of packings, access the deliverers, etc) that are still more significant for the foreign companies who do not know the Brazilian market;

(ii) it was considered that entry into beer production on a large scale, at the national level, was difficult. Brazil is of course a very large country, requiring the establishment of multiple production facilities to serve the different regions of the country. It was expensive to establish a successful brand, and most of those costs are sunk;

(iii) the investments in marketing and advertising. SEAE analysed for this specific factor the high investiments made by Schincariol, a competitor. The market share of Schincariol increased considerably only after it adopted a very aggressive and expensive advertising strategy; and

(iv) the existence of exclusivity contracts between the producers and retailers. Such contracts, with average duration approaching 5 years, to guarantee the monopoly of a particular brand for the deliverer in one determined area (terrotorial restriction).

After analysis the effectiveness of rivalry, SEAE concluded that the rivalry from the Kaiser and Schincariol brands would not be enough for it to become economically uninteresting to increase prices of one of the AmBev brands in the bottled beer market. This result was different in the case of the aluminium can beer market, where there was evidence that the Kaiser brand was an effective rival. However, the participation of the segment aluminium can beer in the beer industry is relatively small. SEAE also analysed the economic efficiencies and recommended the approval the merger with restriction.

CADE approved the merger with the following restrictions: 1. AmBev had to divest the "Bavaria" brand, a lesser brand owned by Antarctica. It had to offer for sale to the purchaser of the brand five breweries, each located in a different region of the country. And it had to provide for the purchaser access to the Brahma distribution system for a period of four years, with an option for an additional two years; 2. AmBev had to offer access to its distribution system to five regional brewers; 3. AmBev could not close any of its production facilities for a period of four years without first offering them for sale; 4. AmBev had to provide a program of retraining and relocation for workers who were displaced by the closing of production facilities for a period of four years; and 5. AmBev was prohibited from imposing exclusivity requirements on retail points of sale.

Analysis beer market since the merger has verified that Ambey's market share has fallen and that the participation of Schincariol and other regional breweries had increased.

Box 3. **Agco e Kone (08012.007603/2003-66)**

In September 2003, AGCO, a US-based and worldwide designer, manufacturer and distributor of agricultural equipment, acquired the business of Valtra Corporation, a Finnish company owned by Kone Corporation. Valtra is a global tractor and off-road engine manufacturer with market leadership positions in the Nordic region of Europe and Latin America.

Examining the probabilities of exercising market power, SDE and SEAE identified the following barriers:

(i) technological barriers to entry related to product differentiation, since a potential entrant would have difficulties in getting the technical knowledge required to design and develop a line of products with performance and quality comparable to those of the established products;

(ii) production process of the involved products was based on complex plants and specific skills which could only be acquired through experience which generates absolute cost advantages to the incumbent firms;

(iii) presence of economies of scale, which implied high unit transportation cost for an entrant initiating its operations. The incoming firm had to conquer significant market share quickly so as to make its operations viable and influence the dynamics of prices;

(iv) necessity to build up distribution channels and technical assistance network at the national level raised the entry cost, most of it sunk;

(v) high investments in marketing and advertising.

Thus, SEAE and SDE concluded the entry was unlikely. However, the Secretariats also took into account the fact that John Deere had already started the construction of a new plant in Brazil, and that this multinational and Chase-New Holland already undertook large investments in technological innovation and adopted aggressive marketing strategies. There was also the fact that estimates on the cost of investment to for a new model by Agrale, an already established competitor that had a smaller model line-up, indicated that it would have enough incentives to challenge AGCO on tractor sizes it did not yet manufacture. SEAE and SDE concluded that there was significant market rivalry.

On the other hand, the Secretariats evaluated that even if these arguments were not enough to justify the approval of the deal, it should also be concerned about the costs of blocking it. The main consequence of not allowing the transaction to go through would be the disappearance of the brand Valtra in Brazil, given that KONE had already sold all its assets worldwide related to the production of tractors, and therefore was highly unlikely to consider remaining solely in the Brazilian market. And in this scenario, supposing that the brand Valtra were eliminated from the market with the likely reduction of approximately 15.000 units of the total tractors available to the Brazilian consumers, there would be greater conditions for the producers to appropriate a significant share from the consumers' surplus.

In April 2005, CADE analysed the transaction and decided that, despite the barriers to entry, rivalry among existing competitors was effective in this relevant market, approving the merger, without restrictions.

BRAZIL (CADE)

1. General discussion of the concept

1.1 Introduction

This paper complements the submission of SEAE (one of the investigative bodies) and presents the Tribunal point of view.

The concept and application of barriers to enter continues to be one of the most controversial issues in competition discussion. Nevertheless it plays a crucial role in virtually every kind of case that does not involve a per se offence, as stated in the invitation letter to submissions.

On the study named "A Framework for the Design and Implementation of Competition Law and Policy", OECD states:

> "Discussion of barriers to entry is complicated by disagreements over a correct definition". In this context, the report refers to Viscussi et al ( ): "the concept of barriers to entry lacks clarity and one is never sure what to do with it…. The most unfortunate part is that some economists and antitrust lawyers throw the term 'entry barriers' around like there is one accepted and meaningful definition when there is not"[1].

Brazilian experience expresses this still opened issue. The concept of barriers to entry has had different definitions and applications by the Brazilian competition legal system as presented in the Horizontal Merger Guidelines of 2001 and in the Resolution 20 of 1999 (regarding conduct). This paper will bring some of the difficulties faced by the Brazilian Competition System in the application of the concept and some ex-post evaluation of this application. We start discussing the two basic definitions provided by Joe Bain and George Stigler and their application to antitrust issues, and how these two definitions are presented (?) in the Brazilian experience. Then, some examples are brought to illustrate those conceptual and practical issues and, specially, how the concept is applied by the investigative bodies, as presented by SEAE , and how it is used on the judgment of the case, our main focus here.

Conceptual and Practical Discussion

The discussion raised in the literature is basically polarized between two definitions, one from Bain (1956), who defines a barrier to enter as anything that allows incumbent to earn abnormal profits without attract any entrant[2]. For Joe S. Bain (1968, p. 252) the conditions of entry are

1. OECD, 2003:102, 119.

2 As mentioned by Schmalensee (2004:2), it is important to distinguish between Bain's definition of entry barriers and his analysis of their determinants. His definition may be useful even though much of his analysis has been superseded by later work.)

> "the extent to which, in the long run, established firms can elevate their selling prices above the minimal average costs of production and distribution without inducing potential entrants to enter the industry."

If established firms are efficient, and if rent-sharing and rent-seeking are unimportant, this implies the persistence of excess economic profit.

The second definition comes from Stigler (1968), for whom a barrier to enter is a cost supported by an entrant that is not incurred by incumbents. In practice, this two concepts result in different conclusions about what is a barrier to enter, as for example, scale economies and capital requirements being considered an entry barrier according to Bain, but not according to Stigler.

OECD clarifies that:

> "(...) both the Stigler and Bain definitions contribute to the antitrust treatment of barriers. With Bain, the focus is on what stops entry from eroding monopoly profits. Stigler's approach, however, gives us a better idea about where to look for barriers that will block entry – that is, to look for asymmetries between firms".[3]

For antitrust purposes, what matters is the ability of potential entrants to undo an actual or potential reduction in the intensity of competition due to mergers, abuse of dominance or monopolization strategies. The problem is how to quantify and evaluate the existing barriers and the Bain definition poses this question directly.

Carlton mentioned that:

> "[A]although there is undoubtedly disagreement among economists as to what constitutes a barrier to entry, that disagreement does not always lead to great misunderstanding among economists as to the predictions of industry outcomes[4]. By that I mean that economists are much better at figuring out the market equilibrium than agreeing on and applying definitions. But definitions and their application can have enormous effects if they are used, as here, as a tool of analysis in antitrust cases and in regulatory proceedings. Then, disagreement over whether a barrier exists or not can matter in terms of the outcome of an antitrust trial or regulatory proceeding, even if there may not be disagreement among economists about a market's equilibrium." (2004: 1).

If there are so many disagreements on a definition, but economists have a relative agreement on the results, i.e., on which is going to be the market's equilibrium, then it must have something different in the process of analysis that takes into account specifically the concept of barriers to enter (antitrust analysis) and a general economic analysis.

Carlton suggests that the problem is that most of industrial organization works ignore market dynamics, in particular, adjustment costs, and industrial organization economists are used to think only in

3 OECD, 2003:221.

4 McAfee et al (2004), in a recent paper, discussed the different definitions of an entry barrier adopted throughout literature and, besides Bain and Stigler, they appointed Ferguson (1974), Fisher (1979), von Weizsacker (1980), Gilbert (1989) and Carlton & Perloff (1994) as the five other principal proposed definitions on barriers to enter. The authors show that each one of these definitions has a flavor of a bainian or a stiglerian definition and we can conclude that, in the essence, any of them have one of the two inspirations, with slight differences attempting to better clarify the flaws or qualify the arguments found in Bain or Stigler definitions

terms of short and long run, which are good pedagogical tools, but that is not so useful in terms to attain practical antitrust and regulatory objectives. The author argues that:

> "trying to use "barriers to enter" to cover both timing in reaching a new equilibrium and long run excess return is confusing" (2004:5) and proposes that "rather than focusing on whether an "entry barrier" exists according to some definition, analysts should explain how the industry will behave over the next several years" (2004:6).

The argument of market dynamics is a really important matter that for sure must be taken into account when someone is analyzing an antitrust case. Nevertheless, as it can be seen, the quibbles over the definition of barriers to enter in antitrust analysis are more related to objectives established by policy makers than a really innermost difference about what is a barrier to enter.

In this sense, Schmalensee (2004) argues that the difference between the objectives of competition policy (clearly consumer welfare in United States) and the objectives of economists in general (social welfare) lead that Bain's definition of a barrier to enter is a more useful one. If consumer welfare (or consumer's surplus as it is interpreted) is the objective of the competition policy and if, in this sense, Bain's definition is the tool through how we can attain this objective, we still have one problem remaining, related exactly with what Schmalensee have mentioned in his paper: how to answer the question posed by this definition:

> "[(…), what matters is the ability of potential entrants to undo an actual or potential reduction in the intensity of competition. The key question is usually quantitative: to be useful in merger analysis, for instance, a measure of the height of antitrust entry barriers should be inversely related to the extent to which entry can be expected to thwart attempts by the merged firm to exercise market power. The Bain definition poses this question directly (though it does not tell one how to answer it), but the Stigler definition does not." (2004: 4)

It should be observed, as emphasized by McAfee et al (2004) that the literature tries to make a classification and not a closed definition about barriers to enter. As a classification, they established more a way of thinking about entry barriers, with its definitions about economic and antitrust barriers and primary and ancillary barriers, than a unique definition that must be used every time.

2. The Concept's Application: How BCPS Defines it

2.1 BCPS´s Definition of Barriers to Enter

The Brazilian Antitrust Law establishes consumer welfare as the standard to be accomplished by competition defence, as per article 1 that defines the object of the Law[5]:

5. Article 54 reinforces the consumer welfare standard chose by Law when defines the criteria under which a merger should be approved:

"Article 54. - Any acts that may limit or otherwise restrain free competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.

Paragraph 1. - CADE may authorize any acts referred to in the main section of this article, provided that they meet the following requirements:

I. - they shall be cumulatively or alternatively intended to: (a) increase productivity; (b) improve the quality of a product or service; or (c) cause an increased efficiency, as well as foster the technological or economic development;

> "CHAPTER I. - OBJECT
>
> Article 1. - This Law sets out rules on prevention and repression of violations of the economic order, guided by constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power.
>
> Sole Paragraph - Society at large is entrusted with the legal rights protected herein".

The concept of barriers to entry have different definitions and applications by the Brazilian competition legal system: on mergers, on definition of relevant market step and assessment of probability of exercise of market power, and on the evaluation of the conditions and rationality involved in the analyzed behaviour on conduct investigations.

The Glossary attached to the Guideline for Economic Analysis of Horizontal Mergers issued by Secretariat of Economic Monitoring of Ministry of Finance (SEAE) and Secretariat of Economic Law of Ministry of Justice (SDE)[6], herein denominated "Guidelines", defines barriers to entry as "*any elements of the market that creates a disadvantage to a competitor with relation to the existing players*". Although the Guideline was issued by the investigative bodies, CADE, on its judgment, follows the Guidelines, as well. Emphasizing the asymmetry between incumbents and entrants, the Guideline adopts the Stigler perspective.

However, the same Guideline lists some examples to be considered as a barrier that reveals the underlining bainian approach: (a) sunk costs; (b) legal or regulatory barriers; (c) resources exclusively available to established firms; (d) economies of scale and/or scope; (e) degree of interaction in the production chain; (f) consumers' loyalty to existing brands; and (g) threatened reaction of established competitors, as mentioned in the SEAE paper.

With respect to conducts, Resolution CADE nr. 20, of June 09, 1999, which is considered as a guideline for violations analysis, tries to clarify[7] the concept::

> "In view of the existing entry restrictions, an antitrust analyst must evaluate the probability of firms outside the relevant market entering such market quickly enough and with an output rate sufficiently high to compete with established firms. Sometimes Stigler's approach is useful, according to which barriers to entry would lie in asymmetries between established firms and potential entrants. The entry barrier would be the costs which must be borne by the entrant, but not by the established firm (…)." However, the Resolution does not end the debate and list as examples of barriers the list proposed by Bain, including economies of scale.

According to the cited Resolution, the assessment of barriers is based on the probability of the potential players that are outside of the defined relevant market to enter and start working in a way sufficiently fast and with a quantity sufficiently high to contest the existing firms - a definition fully consistent with Bain's approach.

What can be noticed from the law and other ordinances above exposed is that, although the Law established a standard to be followed, the ordinances that regulate the analysis adopt a practical solution, using both interpretations in a case-by-case application. At the end of the day the main question to be answer is if, in a merger case, potential entrants are capable to timely contest any post-merger abusive

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II. - the resulting benefits shall be ratably allocated among their participants, on the one part, and consumers or end-users, on the other;"

6 Jointly Bill SEAE/SDE nº 50, of August 1, 2001.

7 On item 2.3.4 of Attachment II. B.

strategy adopted by the merging firms and, in a conduct case, if the abuse of dominance is made an empty strategy by entrants, preventing incumbent's strategies to harm consumers.

2.2 The Concept Applied

2.2.1 Merger: the Kolynos-Colgate case[8]

The Kolynos-Colgate case was considered one of the leading merger cases of BCPS, due to some changes observed on relevant market definition and the antitrust analysis at that time. The merger referred to the acquisition of American Home Products Corporation, controller of Kolynos do Brasil S/A by Colgate –Palmolive Company, which would create a concentration of 80% in one of the markets affected by the operation: the toothpaste market

The issue of entry barriers. The merger was approved by CADE with restrictions – which will be commented later – based on the argument that trademark created a huge entry barrier. The definition of the term used in this case was the Bain definition, as per the reporting-commissioner vote:

> "the existence of barriers to entry is demonstrated by the existence of extraordinary profits in a market where the position of the incumbents is not threatened by the entry of new players."

The commissioner concluded that the simultaneous control of the two main brand names, and specially the leader 'Kolynos', constituted the most significant barrier to entry and the source of market power of the petitioners. Based on this, CADE approved the operation with the following alternative conditions, to be chosen by the parties: (i) suspend, for 4 years, the use of 'Kolynos' brand name; or (ii) to license, for 20 years, the use of 'Kolynos' brand name to some player with participation under 20% of the market or an entrant; or (iii) to sell 'Kolynos' trademark. With one of these restrictions, parties should also allow the licensor or the buyer part of its production instalments.

The Acquirer Company chose the first alternative and suspended Kolynos trademark in the toothpaste market and launched a new brand name Sorriso.

The HHI declined from approximately 5600 in 1997 to 4600 in 2001, when the restriction finished. No important entry occurred, but increased competition resulted from the growth of the competition fringe mainly composed by big multinational firms such as Smithkline-Beechman (Aquafresh) and Unilever (Close-up e Signal), which raised their market shares from 26,2% to 33,6% in the same period (Mattos, 2003:65).

When the restriction finished, Colgate decided not to reintroduce the Kolynos brand name into the toothpaste market. Instead, it reinforced the values and signals that make consumers relate Kolynos and Sorriso products.

The leading company keeps on being Colgate and the Kolynos brand name is still the top of mind among consumers after 5 years out of the toothpaste shelves. The most important reason for this intriguing result is the incapacity of CADE to properly monitor the company strategy. When Colgate launched the new brand name product, a TV campaign showed the two products (Sorriso and Kolynos) emphasizing that "Kolynos is now Sorriso". Moreover Colgate kept the same colours and design of the packaging and the same kind of advertising and values. These strategies demonstrated that CADE correctly considered the trademark as barrier to entry.

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8 Merger n° 08012.0027/95.

A recent consumer survey showed that, Sorriso, Kolynos and Colgate share 84% of consumer awareness According to the marketing company responsible for the consumer survey, Kolynos is a good example of the brand name strength based on a complex chain of actions that embodies values related to the brand name, as freshness, innovation, etc.

The merger analysis was successful in identifying the importance of the trademark as an entry barrier, even though the remedy was not sufficient to change the market conditions regarding both barriers to entry and barriers to growth.

2.2.2 Conduct: the Shopping Iguatemi case[9]

The process refers to imposition of a exclusivity clause by Shopping Iguatemi, one of the biggest shopping centres in the city of São Paulo on its Stores Lease Agreements, which forbids the lessee to have its store in other shopping centres, Shopping Jardim Sul, Shopping Morumbi and Shopping Eldorado, by imposing a fine of the double of monthly payment and 1% of the gross revenues of the store.

The analysis of barriers was decisive on the case. The reporting commissioner on this case expressly used the Stigler´s definition, as defined in Resolution 20, stating that this definition would better fit the case due to the characteristics of the market, such as price above marginal costs, product differentiation and the non-existence of asymmetries on the differentiation costs between the incumbents and the entrants. In this sense, the commissioner explains the use of Stigler´s concepts in this vote:

> "Product differentiations are able to make prices higher than marginal costs. However, this characteristic, itself, is not capable to block other shopping to enter in the market, especially because there are plenty of market segments in the regional market of shopping centres that could be explored by an entrant. In this case, more than identified factors that impede price reduction, it is necessary to found out what is impeding other shopping centres to enter in this market."

Three barriers were identified: (i) shortage of lease spaces in the city of São Paulo; (ii) the average term to build a shopping centre is three years[10]; and (iii) Shopping Iguatemi would have the advantage to be the first shopping to invest in the concept of product differentiation[11] and, due to this factor, it was created a competitive advantage.

Although the reporting-commissioner was inspired by Stigler, as permitted by Resolution CADE nr. 20, he brought some elements derived from the Bain definition, which is also established by the Conduct Guideline.

Based on these elements, CADE understood that there were significantly difficulties in entering in this market and specifically that the exclusivity clause restrained the transaction options between supplier and clients, what created a market foreclosure. Base on this motive, CADE condemned the administrator and the owner of Shopping Iguatemi to pay a fine of 1% of its gross revenues, among other accessory penalties, due to violation of competition conditions.

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9 Administrative Process no. 08012.009991/1998-82

10 It is important to note that the time consider reasonable to entry is 2 years, according to SDE/SEAE Guideline.

11 The differentiation is based on the environment created by shopping and its capacity to attract a mix of stores. Without access to specific stores to compose the tenant differentiation, competitors cannot create such a tenant and, as a consequence there is no way to compete with reputation of Shopping Iguatemi. For this reason, the blocking to the stores can be considered as an artificial barrier created by the Iguatemi.

The commissioner's decision reasoning was based on the presence of asymmetries between the incumbents and entrants. However the persistence of economic profit, seemed to be the decisive factor to guide the condemnation of the defendant, and the exclusivity required by the Shopping Centre was the strategy that allowed the persistent economic profits.

Irrespective of the merit of the decisions, both cases illustrate different approaches to address entry barriers.

3. Difficulties of measuring and evaluating entry barriers

The merger analysis *ex-post* allows CADE to reconsider some criteria adopted by the investigative bodies, by checking what really happened to the post-merger situation. For some markets, such as retailing, there has been a systematic overvaluation of the barriers to entry. Two merger cases illustrate the difficulties faced by the SEAE and SDE to correctly assess barriers to entry in supermarket merger cases.

The case CBD-Peralta supermarket chains was one of these cases. CBD is better known as Pão de Açúcar, a supermarket chain that alternates the leadership in the Brazilian Supermarket industry with Carrefour. Peralta was a medium size supermarket chain, although among the 20 largest. The merger was submitted to review in 1999.

Based on the calculation of Minimum Efficient Scale, SEAE found out that the entry was difficult on four towns. In these towns, the markets were characterized as highly concentrated, by the non-existence of effective competitors and small opportunities of sales, what could make the entry more difficult. SEAE recommended the approval of the operation with restrictions on the mentioned towns.

However, since the beginning of the operation (February, 1999) until January 2005, when the process arrived at CADE, the reporting commissioner understood that, after so many years, it would be appropriate to check what have really happened in the market. CADE found out that there were a number of entries into the mentioned towns, except for Cubatão.

In September 2005, CADE approved the merger without restrictions based on the entry of competitors and in Cubatao, where no entry has occurred the effective rivalry was strong enough to reduce the CBD market-share.

In another case (Bompreço Ahold - Petipreço), the reporting-commissioner identified an expressive increase of market share of the petitioners in the city of Lauro de Freitas. SEAE understood that the existing rivalry was not enough to deter a possible exercise of market power by the parties and that entry was considered timely and possible, but not sufficient, based on the comparison between the MES and the size of the relevant market.

On July, 2004, CADE approved the operation with the restriction to sell one of the stores in the mentioned town. On September, 2004 a big supermarket was opened in the middle way between the two stores of the merging parties (one of them was the object of the restriction imposed by CADE). Due to this entry, parties petitioned to CADE to reconsider its decision and on August, 2005 CADE approved the operation without restriction and cancelled the obligation imposed previously to the parties to sell one of its stores.

Other examples in this same activity have clearly shown that the Brazilian Competition System has overestimated the barriers to entry in the retail markets.

4. Conclusions

The Brazilian Antitrust Law and the ordinances that regulate law reflect the debate that is present in the literature and in other jurisdictions. On the definition of barriers to entry both Stigler and Bain present definitions and applications that can be used in the antitrust case analysis. However, it seems that Bain´s definition is preponderant, especially when considering that the Brazilian Law chooses the consumer welfare as a standard for antitrust analysis.

46. For Developing Countries, evaluation and quantification of barriers to entry are challenging due to the need of considering market growth, segmentation and new consumers. Moreover, many industries such as food and retailing are characterized by an important fringe of small and medium firms, many of them being multinational companies. This is the case of tooth past market and supermarkets as well. As could be noticed, the growth of competitive fringe can be as important as new entry to contest the market power exercise of the leading firms. Besides barrier to entry, it should be considered the barriers to growth.

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CHINESE TAIPEI

1. The Definition of Entry Barriers

Over the years a variety of characteristics and conditions have been used and suggested as means of identifying barriers to entry. For example, some consider that only impediments that incumbent firms did not face when they entered the market should count as true entry barriers, whereas others argue that any impediment that has the effect of reducing competition constitutes an entry barrier. Describe the way(s) in which courts and competition agencies in your jurisdiction have defined barriers to entry, and their reasoning in doing so, using the context of cases and agency guidelines.

1.1 Relevant definitions of entry barriers in the Act

The Fair Trade Commission implements its competition policy based on the Fair Trade Act. While the Act itself does not consist of any articles that deal precisely with a market with barriers to entry, the concepts of "barriers to entry" are implied by the Act in two respects. The first is related to the identification of the particular market applied to a firm that has abused its dominance. The second implication of barriers to entry in the Act is concerned with the assessment of merger notifications.

1.2 Abuse of dominance

According to Article 5-1(i) and Article 5-1(ii) of the Fair Trade Act, an enterprise shall not be deemed a monopolistic enterprise as defined in the preceding article if none of the following circumstances exists:

1. the market share of the enterprise in a relevant market reaches one-half of the market;

2. the combined market share of two enterprises in a relevant market reaches two-thirds of the market; and

3. the combined market share of three enterprises in a relevant market reaches three-fourths of the market.

Under any of the circumstances set forth in the preceding paragraph, where the market share of any individual enterprise does not reach one-tenth of the relevant market or where the enterprise's total sales in the preceding fiscal year are less than one billion New Taiwan Dollars, which is approximately equivalent to US$30,303 thousand in September 2005, such enterprise shall not be deemed to be a monopolistic enterprise.

However, based on Article 5-1(iii), an enterprise exempted from being deemed to be a monopolistic enterprise by any of Article 5-1(i) and Article 5-1(ii) of the Fair Trade Act may still be deemed to be a monopolistic enterprise by the Commission if the establishment of such enterprise or any of the goods or services supplied by such enterprise to a relevant market are subject to legal or technological restraints; or if there exists any other circumstance under which the supply and demand of the market are affected and the ability of others to compete is impeded.

It means that any legal or technological restraints, or any existing circumstances under which an enterprise can be obstructed from entering the market, could be considered as barriers to entry. The incumbent firms in the market could be deemed to be monopolistic enterprises, and this without having to even calculate their market share.

In addition to that, according to Article 3 of the Enforcement Rules of the Fair Trade Act, to determine whether an enterprise constitutes a monopoly as referred to in Article 5 of the Law, the following factors shall be taken into consideration:

1. The market share of the particular enterprise in a particular market;

2. The possibility of the enterprise substituting the existing goods or services in a particular market amidst changes in a particular market, giving regard to considerations of time and place;

3. The ability of the enterprise to influence prices in a particular market;

4. Whether other enterprises face formidable difficulties in entering a particular market;

5. The import and export status of the goods or services of the enterprise.

As Article 3 (iv) of the Enforcement Rules of the Fair Trade Act stipulates, whether there are difficulties for potential competitors to enter the market will be one of the major considerations in evaluating whether an existing enterprise constitutes a monopoly.

1.3 Case of technology applied as an entry barrier

Taking the case of Philips, Sony, and Taiyo Yuden pooling and jointly licensing their CD-R patents in violation of the Fair Trade Act as an example, it was found that several CD-R manufacturers filed a complaint with the Commission in 1999, alleging that Koninkijke Philips Electronics, N.V. of Holland ("Philips"), Sony Corporation of Japan ("Sony") and Taiyo Yuden Co., Ltd. of Japan ("Taiyo Yuden"), collectively referred to as the "licensors", pooled their CD-R patents in a package and jointly licensed the patent pool to the domestic CD-R technology market which constituted a breach of the Fair Trade Law.

Given that Philips, Sony and Taiyo Yuden formulated standard specifications for manufacturing CD-R technology and between them owned all of the essential patents in the CD-R technology market, there was no room for other potential enterprises to develop a different standard of specification for manufacturing CD-R technology or to provide competitive products that could replace the CD-R technology. At present, it cannot be denied that all global CD-R manufacturers are required to follow the unified standard specifications prepared by Philips. Therefore, Philips, Sony and Taiyo Yuden have obtained a monopoly position in the CD-R technology market by jointly licensing the patent pool, thus enabling them to exclude competition in the CD-R technology market. The technology for manufacturing CD-R disks in this case was considered to be a barrier to entry in the CD-R technology market and the licensors were deemed to be enterprises with monopolistic market power.

Other than determining what constitutes firms with dominant power in a market with high barriers to entry, the assessment of merger notifications is also related to the issue of barriers to entry.

1.4 Review of pre-merger notifications

A merger complies with any of the merger types specified in Article 6(1) of the Fair Trade Act; and it satisfies the threshold for merger notification, as identified in Article 11(1)(iii) of the Act. The merging parties are responsible for filing the relevant documentation for satisfying Article 8 of the Enforcement Rules to the Fair Trade Act prior to the merger. The Commission accepts and begins to process the notification.

The documents of the merging parties required by the Commission to be filed include the statements regarding the market related to the merger and its entry barriers. The information related to the barriers to entry that needs to be filed consists of the following:

1. The lowest estimated amount of capital required to establish a firm;

2. Legal constraints that may deter potential competitors from entering the related markets;

3. The owners of patents and items required to manufacture related products;

4. The owners of intellectual property and items required to manufacture related products;

5. Raw material resources;

6. Taxes and tariffs, and other non-tariff barriers to the import and export markets;

7. The ratio of fixed costs to the costs of goods sold;

8. The market share of the merging parties after the merger, the exchange of technologies by the merging parties both before and after the merger, the effects of the trading relationship between the merging parties and other related trading counterparts after the merger and other related information.

By viewing the filing documents, the barriers to entry might be defined as impediments that have the effects of reducing competition, such as high capacity and sink costs, legal constraints including taxes, intangible assets such as technologies and intellectual property.

The analysis of barriers to entry is also applied to the merger notification assessment. After reviewing the notified merger case, the Commission will decide whether to object to the notification based on Article 12 of the Fair Trade Act. If the overall economic benefit of the merger outweighs the disadvantages resulting from the restraints on competition that it would cause, the Commission may not prohibit any such merger filed.

Based on the assessments of past cases, the major factors to be taken into account in relation to a “disadvantageous form of competition restraint” are as follows:

1. whether or not the merger creates a monopoly;

2. whether or not the merger imposes entry barriers;

3. an increase in the concentration ratio;

4. a decrease in the number of competitors;

5. a change the degree of product differentiation; and

6. market openness.

However, since the related markets for each merger case are different, the Commission has not precisely defined what kinds of barriers imposed by the merging parties will be deemed to be a "disadvantageous form of competition restraint".

2. Measuring/Assessing Entry Barriers

What are the best ways to go about measuring or assessing entry barriers? Given that there are at least some barriers to entry in virtually every industry, how can it be established that barriers in a particular market are "high"? In contrast, what methods do not work very well for measuring entry barriers? Is it possible to make an accurate quantitative assessment, or is it best to make only qualitative judgments?

The "high" concentration ratio of the market or the "high" market share of the enterprises might imply that the incumbents have the ability to deter entry. However, there is no accurate quantitative assessment for measuring entry barriers in each different market under the regulations of the Fair Trade Act.

The ways of measuring entry barriers mostly involving qualitative assessments include economies of scale, absolute cost advantages, capital advantages, product differentiation and legal constraints. The Commission typically measures entry barriers as follows:

1. Economies of scale: an industry, such as petroleum refineries, steel manufacturing, and utilities industry, with high production capacity that investing large amounts of sink costs could be deemed to be a market with entry barriers.

2. Legal constraints: in spite of the taxes and tariffs levied by the government to exclude foreign competition, legal constraints in some specific sectors such as cable television will increase the difficulties faced by potential competitors in such markets.

3. Intangible assets: the creation and innovation in certain technologies and other related intellectual properties might impede competition.

4. Product differentiation: the rate of entry is higher when product differentiation is low. The existing firms in the market might introduce new product varieties to fill all product niches as a possible strategy for deterring entry.

5. Network effects.

3. Does the concept of entry barriers change from one type of competition case to another?

In other words, does your evaluation of entry barriers change in any ways that depend on the type of case you are investigating? For example, is your approach in a merger case different from what it would be in an abuse of dominance case? Why or why not? Would a particular market feature ever count as a BTE in one type of case but not in another? If so, please explain why and discuss examples.

In Chinese Taipei, the evaluation of entry barriers does not change to any significant degree in different types of cases.

4. Duration of entry barriers

How can agencies estimate the expected duration of a barrier to entry? Furthermore, is there a minimum amount of time that an impediment must persist before it should be recognised as an entry barrier? If so, what is that length of time? Why? Again, does the minimum amount of time depend upon the type of case that is being investigated?

A description of the liberalisation process of the petroleum-related products market portrays the duration of entry barriers. This is provided in the following:

Exhibit Showing the Stages of Market Liberalisation

No.	Date	Contents of Deregulation	Types of BTE
1.	Jun. 1996	Market opened up to refineries with minimum capacities	Legal restraints on the establishment of firms
2.	Jan. 1999	Market opened to traders	Legal restraints on imports and exports
3.	Oct. 2001	Promulgation of the Petroleum Management Law	Legal restraints on the minimum required capacity for building a firm
4.	Jan. 2002	Completion of issuing related administration rules for enforcing the Petroleum Management Law	Removal of all legal restraints
5.	Apr. 2002	Market opened up to retailers to choose their suppliers freely thus allowing the new suppliers to develop their sales channels	Duration of BTE: encouraging the incumbent firms to allow the transitional contract with their retailers to be extended at least 55 working days

4.1 Process of liberalisation

The petroleum-related products industry was highly regulated by the Ministry of Economic Affairs ("MOEA") until June 1996 when it was opened up to applications for the establishment of new petroleum refineries and the privately owned petroleum refining company Formosa Petrochemical Corporation ("FPCC") was authorised to enter the market. Before June 1996, there was only one state-owned company, the Chinese Petroleum Corporation ("CPC") that produced and sold petrochemicals, diesel, petroleum gasoline and other related petroleum products in the petroleum-related products market.

The petroleum gasoline market has been opened to imports and exports since January 1999 with 4 traders. After the promulgation of the Petroleum Management Law in October 2001, by removing the restrictions on establishing a petroleum refinery with a minimum capacity of 15,000,000 liters daily, the petroleum-related products market was free to be entered by any potential competitors.

4.2 Issues regarding competition to complete the liberalisation

However, since CPC has monopolised the petroleum-related products market for a long time and has signed long-term supply contracts with owners of gasoline stations, the accessibility for potential suppliers in the retail market without the termination of the supply contracts between incumbent refineries and gasoline stations is out of the question. Therefore, the Commission decided to hold a public hearing right after the promulgation of the Petroleum Management Law in order to discuss the "Issues Related to the Right of Gasoline Stations to Terminate Contracts After the Promulgation of the Petroleum Management Law and the Applicability of the Fair Trade Act."

4.3 The hearing reached the following conclusions

The petroleum-related products market had not been liberalised after the promulgation of the Petroleum Management Law until the Energy Commission of the MOEA established the related enforcement laws, guidelines and regulatory notes on January 1, 2002.

The original transitional contract only allowed the retailers to decide whether to terminate the contract with the original suppliers within 2 months starting from January 1, 2002. However, most of the retailers preferred to extend the transitional period to 6 months or even longer as opposed to 2 months. CPC and FPCC were to consider allowing an extension of the final deadline for gasoline stations to exercise the right to terminate contracts with their suppliers so as to meet the need for gasoline stations to freely choose among different suppliers.

As a reasonable timeframe after the related competent government agencies finished developing the related laws and guidelines. Potential suppliers required at least 55 working days to prepare for their business operations. Otherwise, it would have been impossible for the new entrants to carry out related preparations and to begin providing petroleum-related products by March 1, 2002.

4.4 Ruling decision

After consulting with the retailers, potential competitors and other competent government agencies, the Commission decided the duration of the entry barriers was 55 working days, which was approximately equal to 3 months. The Commission then decided that the incumbent firms, CPC and FPCC, would be required to provide transitional contracts to their retailers, with at least a 3-month grace period beginning on January 1, 2002 for the termination of their contract so that new petroleum product supplier would be able to begin supplying petroleum products to the market.

The purpose behind requiring existing petroleum product suppliers to provide transitional contracts was to prevent those suppliers from improperly cutting off the supply of petroleum products to retailers and deterring the new entrants. Furthermore, with the adoption of the Commission's plan that was aimed at preventing gasoline stations from terminating contracts without a reasonable transitional period being provided by the incumbent suppliers, the full liberalisation of the petroleum-related products market could thus be completed.

5. Structural versus strategic barriers to entry

Does it matter for purposes of competition policy whether an entry barrier is structural (*i.e.* related to the characteristics of the industry itself) or strategic (*i.e.* related to the deliberate behaviour of the incumbents)? Why or why not?

It does matter for purposes of competition policy if an entry barrier is strategic. While the barriers are structural, the Commission could develop regulatory reforms or advocate decreasing the structural entry barriers as legal restraints. Furthermore, if any merger were to impose barriers to entering the market, and thus result in the disadvantages from the restraints to competition outweighing the overall economic benefits, the Commission could object to the merger.

However, for the strategic entry barriers based on increasing the market share or concentration ratio to monopolise the market and to deter new entrants, the Commission could initiate an investigation.

A concerted action case of two major karaoke parlour enterprises that involved assigning a new music audiovisual video supplier to exclude the original trading counterparts from the video market constitutes an example describing the considerations of the Commission to deal with the case involving strategic entry barriers.

5.1 Case Selection

The Commission received a complaint regarding Cashbox Party world Co., Ltd. ("Cashbox KTV") and Holiday Co., Ltd. ("Holiday KTV"), who would assign Young Sound Multimedia Co. ("Young Sound") as their sole and exclusive licensed supplier of music audiovisual videos for played at the two said major karaoke parlours, thus excluding the incumbents MDS Multimedia Corp. ("MDS") and Meihua Multimedia Technology Co., Ltd. ("Meihua") to license and arrange the music videos. Furthermore, any suppliers that wished to distribute their products in the two said KTV parlours had to cooperate with Young Sound.

Cashbox KTV and Holiday KTV were two major domestic karaoke parlour chain stores and totally occupied 41% of the KTV market. In terms of the amount of karaoke videotape licensing from such tape distributors as MDS, Meihua or Young Sound to KTV parlours, the two companies had reached a 60% market share. Being the sole licensor of the said two KTV parlours instead of MDS, Meihua and other related karaoke videotape licensors, Young Sound easily shared 60% of the videotape market on account of the concerted decision of the 2 major KTV parlours so as to exclude the incumbent firms out of the market and deter new entrants from coming in.

The consensus decision of the 2 major KTV parlours affected the competition in the videotape market by successfully increasing the market concentration as strategic entry barriers for new entrants to enter the related markets. The Commission thereby ordered Holiday KTV and Cashbox KTV to immediately cease such unlawful conduct, and imposed a fine of NT$2,500,000 on each company.

6. Is it necessary to agree on a specific definition of entry barriers?

For purposes of enforcing competition laws, does it really matter what the correct definition of entry barriers is? Or is it reasonable simply to avoid conceptual arguments about them, and focus instead on the question of whether entry is likely in a given case, regardless of whether the relevant facts correspond to a particular definition of entry barriers?

In order to leave the agency space to determine the scope of the market, it is not necessary to agree on a specific definition of entry barriers.

7. Experience with entry barriers

Which types of market features have you usually considered to be entry barriers and which types have you discarded? For example, if an incumbent has a relatively strong financial position ("deep pockets"), would you consider that to be something that necessarily makes entry more difficult? How about a particularly strong brand, or a large market share? Are network effects entry barriers? Furthermore, what specific types of entry barriers does your agency encounter most frequently? Which types have been the most difficult to identify and measure? Why?

As mentioned in question 2, the Commission usually considers economies of scale, legal constraints, intangible assets and product differentiation to be entry barriers. Although there are some studies that also regard strong brands and advertisements as entry barriers, it is very difficult for the Commission to determine them due to the scarcity of related cases.

In addition to the types of entry barriers described above, the Commission considers network effects to be entry barriers, too.

7.1 Case Selection

To cite one example, one case is related to the cargo clearance information transmission network market. The Ministry of Finance established the Cargo Clearance Automation Division in 1990 to put the Electronic Data Interchange (EDI) standard in place to facilitate the cargo clearance procedures. The Division was reformed into a company that became known as Tradevan Information Services, Co. ("Tradevan") in 1996 and it subsequently monopolised the cargo clearance information transmission network market. Without any legal restraints in the form of barriers to entering the market, the profits of the incumbent firm attracted a new entrant Universal EC Inc ("Universal") into the market as a horizontal competitor. Tradevan's trading counterparts included nearly 3,000 major cargo transportation enterprises. On the other hand, the trading counterparts of Universal were mostly customs brokers with small economies of scale.

However, Tradevan rejected Universal's request to access Tradevan's network. Apart from this, Tradevan refused to provide Universal with the EDI standard, refused to interconnect with most of Universal's services, set access fees high enough to prevent market entry, unreasonably disconnected the interconnection from time to time, and deployed an unlawful fidelity discount scheme, etc. The Commission of the view that the ways in which Tradevan was deterring the new entrant to the market were in violation of the regulation of the Act.

The services of the cargo clearance information transmission network have to be simultaneously accessed by custom officials, custom brokers, cargo transportation enterprises, and financial institutions so as to achieve the network effects. Thus, the users of the cargo clearance information transmission network have a tendency to participate in the network on a larger scale and with numerous customers. The incumbent firms in the market with the network effect relatively speaking have the first mover advantage compared with the new entrants. The network effect results in the users lacking the interest to alter the original network suppliers and this becomes a barrier for new entrants in this case.

LITHUANIA

1. The Definition and Assessment of Entry Barriers

The Competition Council assigns to the term of barriers to entry a crucial role mostly in cases involving abuse of dominance and analysing the likely competitive effects of mergers. The concept of barriers to entry received the most thorough and explicit treatment in "Explanations of the Competition Council concerning definition of the dominant position"[1]. According to the Law on Competition of the Republic of Lithuania[2] a dominant position

> means the position of one or more undertakings in the relevant market directly facing no competition or enabling it to make unilateral decisive influence in such relevant market by effectively restricting competition. Unless proved otherwise, the undertaking with the market share of not less than 40% shall be considered to have a dominant position in the relevant market. Unless proved otherwise, each of a group of three or a smaller number of undertakings with the largest shares of the relevant market, jointly holding 70% or more of the relevant market shall be considered to enjoy a dominant position.

Although the law establishes that a firm having at least 40% market share will be presumed to hold a dominant position, however, the aforementioned Explanations explicitly state that presumption can be refuted by considering other relevant aspects. The most important among them is the distribution and stability of market shares and the likely changes in the market structure. The latter are determined mostly by the entry possibilities that depend on the barriers to entry. Therefore according to the Explanations

> when there is evidence that barriers to entry are low, then raised prices will encourage the entry of new market participants, and that means that potential competition will not allow exercising unilateral decisive influence on the relevant market.

The Competition Council views the barriers to entry as belonging to the three broad categories: absolute advantages, strategic advantages, and exclusionary behaviour. The first category encompasses factors that allow incumbents to enjoy privileged position created by the regulation limiting access to the market, e.g. licensing rules. On the other hand, an incumbent might derive an absolute cost advantage from owning an essential facility or important patents that allow an exclusive use of crucial technology. The second category includes factors that make entry strategy riskier. In this case sunk costs play a prominent role. The presence of substantial sunk costs makes the Competition Council think that the potential entrant will face a significant risk when deciding whether to enter and therefore the entry might be unlikely. The asymmetry of information concerning production costs might play a similar role. The first two categories consist of factors that might be taken as given by an incumbent, however the last category relates to incumbent's behaviour. One of the ways by to exclude other competitors is by using vertical restrains. An incumbent might be able to prevent the entry by foreclosing access to related markets. This could take a form of vertical restraints on distribution channels or vertical integration upstream.

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1 Resolution No.52 of the Competition Council, 17 May 2000. (Official Gazette, 2000, No. 24-363.)

2 Article 3.11, Law on Competition, 23 March 1999, No VIII-1099, Vilnius. (As amended by 15 April 2004 No. IX-2126.)

From what has been said before, the conclusion can be made that the Competition Council thinks that any impediment that has the effect of reducing competition (preventing entry) constitutes an entry barrier. Therefore the Competition Council implicitly prefers the definition closer to the reasoning of Joe S. Bain[3] rather than George J. Stigler[4].

In our view for the purposes of enforcing competition law we should focus on the most important question of whether entry is likely in a case under investigation. Although it might be desirable to avoid all conceptual arguments about what constitutes the correct definition of entry barriers but it is hardly possible. As long as free entry is defined by the absence of barriers we will need to define an entry barrier.

So far the Competition Council has made only the qualitative assessment of the presence of entry barriers. Such an assessment used to be quite sufficient in cases when the most important barriers to entry were government regulation, e.g. licensing or import restrictions.

1.1 Duration and Nature of Entry Barriers

According to the mainstream economic theory excessive profits are eliminated in the long run in the absence of significant barriers to entry. Textbook distinction between the short run and the long run is typically based on the very possibility of entry and does not involve time dimension. Nevertheless, when trying to focus on the most important factors that could impede entry it is meaningful to assign a minimum amount of time that an impediment must persist before it should be recognised as an entry barrier. Such an assignment will be always arbitrary to some extent; however, a period of at least two years seems to be reasonable.

In our view the only difference the nature of entry barrier makes to the competition policy purposes is because of the need to choose the right policy instruments. When a barrier to entry is related to the deliberate behaviour of the incumbents then the preference should be given to antitrust law. On the other hand, when a barrier to entry is purely structural (*i.e.* related to the characteristics of the industry itself), then preference might be given to a sectoral regulation instead of antitrust law. A natural monopoly could be a good example of such a case.

1.2 Experience with Entry Barriers

The legacy of a recent transition period from the centrally planned to a market economy has influenced the experience of the Competition Council dealing with the types of market features that were considered to be entry barriers. Quite often we have to take into account such government regulation as licensing rules for certain economic activities and/or import restrictions. The following several cases serve as characteristic examples.

For example, on 17 December 1999, the Competition Council started investigation concerning actions of the local oil refinery *AB Mazeikiu nafta*. The product markets consisted of petrol and diesel fuels. The geographic market covered the entire territory of Lithuania and was defined as a national market. The two major factors that determined the geographical market definition were large costs that a firm had to pay for a license allowing to import oil products and 15% tariff imposed by the national government on imported oil products.

In the beginning of 1999 *AB Mazeikių nafta* concluded a petrol and diesel fuel sale-purchase agreements with the companies that were able to import oil products into Lithuania. The agreements

3 Bain , Joe S. *Barriers to new competition*, Harvard University Press, 1956.

4 Stigler, George, J. *The organization of industry*, University of Chicago Press, 1968.

contained a *no compete* clause, since the buyer explicitly agreed neither to import nor purchase imported oil products except in cases where *AB Mazeikių nafta* had no possibility to supply such products. In return the buyer was rewarded with the 6% quantity discount (rebate). *AB Mazeikiu nafta* had a goal to neutralize or at least to mitigate a threat that the other parties to the aforementioned agreements were able to pose. The Competition Council found this to be an attempt to create additional barriers to entry by the means of exclusionary behaviour.

The next case relates to what was earlier referred to as an entry barrier created by the ownership of essential facility. In 2000, the Competition Council received complaints from several Internet service providers (ISPs) that *AB Lietuvos telekomas* started to install filters that restricted available frequency of leased analogue lines. At that time *AB Lietuvos telekomas* had numerous lease agreements of analogue lines with independent operators that were using the leased lines mostly for data transmission services including the Internet access services. The filters substantially reduced available bandwidth and made the lines unsuitable for high-speed data transmission. A local analogue line is easily converted into digital subscriber line by connecting DSL modems to its ends. Complaining ISPs used to upgrade leased analogue lines with the help of such technology. On the other hand, *AB Lietuvos telekomas* began to offer DSL lines by itself and had to compete with existing independent ISPs. The incumbent telecom operator being the owner of analogue lines enjoyed an absolute advantage and decided to avoid competition by degrading quality of a leased product. The Competition Council found this to be an attempt to abuse a dominant position.

The last example describes a merger case when the Competition Council had to assess the relative importance of different barriers to entry. In 2004 one of the largest local producers of strong alcoholic beverages and wines *AB Alita* applied for permission to acquire a local competitor *AB Anyksciu vynas*. At that time the industry of alcoholic beverages was shaped by the legacy of recently abolished state monopoly on production of strong alcoholic beverages. There were only four local producers in the market. The intended merger provoked hostile reaction from competitors and the Competition Council received complaints that the merged company will be able to bundle a large range of products and thereby will be able to create barriers to entry and/or expansion for other competitors. After the extensive consideration the Competition Council decided that the most important factors that were going to change the structure of the industry were the abolishment of state monopoly on production and the imminent liberalisation of trade after the EU enlargement on 1 May 2004. In other words, the incumbents were expected to lose an absolute advantage they used to enjoy. The events that followed confirmed the judgement of the Competition Council. In a year the general level of prices of strong alcoholic beverages significantly decreased (especially in the premium quality segment), the market share of the merged company also decreased, however, the total production of strong alcoholic beverages in Lithuania increased by 15%.

BIAC

BIAC appreciates the opportunity to submit the perspective of the business community on the issue of barriers to entry. Given the nature of BIAC's activities, we would like to focus our attention on practical aspects that bear a direct effect on the business community rather than on the more theoretical analysis of barriers-to-entry doctrine.[1]

1. Introduction

At the outset, BIAC would like to draw the pragmatic boundaries of the discussion in noting that barriers to entry, namely, legal or other obstacles that constrict the entry of a new firm into a market, do not necessarily raise antitrust concerns. BIAC commends the Secretariat in noting that the precise, technical definition of barriers to entry is less important than confirming that the practical question is whether, when and to what extent entry or expansion is likely to occur in the relevant market.[2] BIAC also agrees that the term "barriers to entry" should not automatically carry a negative connotation.[3]

Similarly, BIAC agrees that just because some vertical arrangements, *e.g.* exclusive dealing contracts, may raise entry barriers, that does not necessarily mean that their net effects on consumer welfare are negative[4] and would go further in observing that such vertical arrangements usually do not raise entry barriers to the point where they have a significant adverse effect on competition.[5]

The most important observation of the Secretariat may well be that "Entry analysis . . . should not be conducted until after an assessment of the level of competition that would likely exist without entry."[6] Entry barriers are most often relevant to the competitive analysis in two specific antitrust contexts.[7] The

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1 For a review of the economic and legal literature on "barriers to entry," *see*, Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 Wis. L. Rev. 1035, 1038-1043 (2004); and Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines* (2002), *available at* http://www.usdoj.gov/atr/hmerger/11252.htm. For a review of US case law on "barriers to entry," *see*, Gregory J. Werden, *Network Effects and Conditions to Entry: Lessons from the Microsoft Case*, 69 Antitrust L.J. 87, 102-108 (2001). For US analysis of entry-barriers in merger contexts, *see*, David Scheffman, Malcolm Coate & Louis Silvia, *Twenty Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective*, 71 Antitrust L.J. 277, 301-304 (2003).

2 OECD, Roundtable on Barriers to Entry, Background Note by the Secretariat, http://www.oecd.org/competition.

3 *Id.* footnote 6.

4 *Id.* ¶ 30(7).

5 *See, e.g.*, *Canada v. Canada Pipe* (2005), 40 C.P.R. (4th) 453.

6 OECD, *supra* note 2, ¶7.

7 BIAC acknowledges that barriers to entry may also be relevant under the cartel laws of certain countries that impose a "rule of reason" analysis for these cases. For instance, the conspiracy provisions in section 45 of the *Competition Act* (Canada) require an analysis of whether a conspiracy lessens or prevents competition "unduly", which in turn requires an assessment of market power and any barriers to entry in the market.

first of these contexts is merger review, where the evaluation of concentration issues, related to whether a proposed merger raises antitrust concern, takes barriers to entry into account as one of the relevant considerations.[8] The second context is the evaluation of market power in non-merger cases, such as monopolization (or abuse of a dominant position) cases, where the ease and speed of entry by potential new market players may affect the assessment of an existing player's market power and the effects of that player's entry or potential for entry on competition in a relevant market. In these cases too, ease-of-entry is only one of many considerations taken into account once a probability of competitive harm is established. Within these two specific contexts, barriers-to-entry are often specifically considered in defining the relevant geographical market in which proposed mergers or other challenged conduct take place.[9]

2. General Observations on Barriers to Entry

The report of the Secretariat highlights the key considerations of analysing barriers to entry. Indeed, the report offers a great deal of substantive analysis with which BIAC agrees entirely. We would add, however, a few additional considerations.

First, the existing functioning of the market needs to be understood. There may be instances where even though there are a small number of competitors in the market; the market is functioning in an effectively competitive manner, and equally there may be instances where there are a large number of suppliers in a market and the market is not functioning effectively. The principal focus should be on the intensity of competition within a market.

Consideration of the likelihood of entry, which is the core of the entire barrier to entry equation, must be evaluated in view of the best information available. Although entry should be considered in light of objective standards, this analysis should not occur in a vacuum. Best evidence would include the forward looking business plans of other actual or potential competitors in the market and their actual strategies. The absence of specific evidence regarding planned entry should not rule the analysis when economic conditions suggest that entry will be rational. However, specific plans by an entrant should be heeded, even if the agency deems such entry irrational. In other words, deference should be given to those entities preparing to put their money on the line. In this regard the authorities should adopt a proactive approach toward the understanding of the market and should organise their resources to monitor markets where competition problems are likely to occur. An *ad hoc* approach may be found to be both unduly resource intensive and unlikely to be able to deal with the complexity of issues that arise once a significant competitive harm has already occurred.

In considering the timeframe within which entry must occur, BIAC agrees that a two-year timeframe is a practical starting point as a general matter. In the context of a specific case, a more relevant approach may be to consider both the delay that may accompany entry within a particular market, as well as the likely durability of entry and overall impact on competition once it occurs. In some industries the time frame should be shorter or longer and consideration should be given to the characteristics of the market. For instance, if entry entails a substantial sunk cost investment in a large increment of capacity, such entry is likely to have a profound and durable impact on competition with significant benefits to consumers. In such a case, an entry timeframe of more than two years, assuming such entry is likely, may be appropriate.

The strategic barriers to entry identified by the Secretariat raise some issues of concern. First, both impediments to entry and efficiencies may arise as a function of the relative efficiency of the market or the market participants that are already in the market. In principle, traditional anti-trust would often applaud

8 *See*, *e.g.,* Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1 (hereinafter The EC Merger Regulation) at Art. 2 § 1 (b).

9 *See id.* Art. 9 § 7.

efficient organisations that exploit economies of scale, scope or externalities despite the fact that these factors, if fully played-out, may lead to the evolution of barriers to entry and, conceivably, market dominance. The risks attendant to interfering with such factors through action by regulatory authorities is very much in question. Substantial economic study would be required to support regulatory action, particularly where productive efficiency and innovation remain in development. In these situations, agency action may lead to substantial impacts on short- and medium-term consumer welfare.

BIAC also notes that a barriers to entry analysis should address not only whether sufficient entry is likely to occur but should also inquire as to whether the threat of entry has kept or will keep prices at competitive levels. If barriers to entry are low, incumbents may price at competitive levels in order to deter entry, in which case the absence of entry (or limited entry) in the past is not necessarily indicative of any significant barriers to entry into the market.

3. Barriers to entry are not absolute in their substantive scope or in duration

The long and still ongoing debate over the definition of barriers to entry[10] is a useful reminder of the fact that the term "barrier to entry" is not an absolute term with unalterable meaning. In the US, for example, the US Federal Trade Commission (FTC) acknowledged the existence of an **impediment to entry**. An impediment to entry has been defined as any condition that necessarily delays entry into a market for a significant period of time and, thus, allows market power to be exercised in the interim.[11]

The definition of such an "impediment to entry" category reveals that a "barrier to entry" is not an absolute market condition that can be identified. Rather, a "barrier to entry" is a relative term whose competitive significance is very much dependent upon the surrounding circumstances. For example, this circumstance may arise in an industry characterized by rapid R&D progress, where entry barriers may not be as difficult to surpass as in a mature or declining industry that is not characterized by similar developments.[12] Post-entry survival rate may also be telling as to the durability of barriers to entry. For example, if entry appears easy but a large number of companies that tried to enter the market in the past have exited the business soon thereafter, there may be an effective entry problem that is not being detected by the traditional theoretical tools. At the same time, it may also be a sign that the market already possesses sufficient capacity and cannot bear the cost of additional capital.

The absolute level of capital costs required to enter or expand in a market should not in itself be considered a significant barrier or impediment to entry. If it is difficult to raise capital to enter a business, that likely reflects lenders' concerns about some other risk of entry. Otherwise, it is difficult to see why

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10 *See, e.g.*, R. Preston McAfee, Hugo M. Mialon & Michael A. Williams, *What Is a Barrier to Entry?* 94 Am. Econ. Rev. 461 (2004), *available at* http://userwww.service.emory.edu/~hmialon/B2E.pdf.

11 *See*, *Echlin Manufacturing Co. and Borg-Warner, Corp*, No. 9157, 105 F.T.C. 410, 486 (June 28, 1985). This entry analysis was followed later by the Commission in B.F. Goodrich Co., Diamond Shamrock Chemicals Co. and Diamond Shamrock Plastics Corp., No. 9159, 110 F.T.C. 207, 297 (Mar. 15, 1988) ("Impediments to entry that do not rise to the level of absolute barriers to entry may nevertheless permit the exercise of market power for substantial periods of time."). In recent years, the Commission may have changed its entry analysis, but only very slightly; *Coca Cola Bottling Co. of the Southwest*, No. 9215, 118 F.T.C. 452, 617-18 (Aug. 31, 1994) ("Entry barriers include any condition that necessarily delays entry into a market for a significant period of time and thus allows market power to be exercised in the interim. We have pointed out that barriers or impediments need not be absolute; rather, they are assessed in terms of the amount of time required for a motivated outsider to effect entry.") (internal quotations and citations omitted).

12 BIAC notes, however, that Canada's *Merger Enforcement Guidelines (2004)* list among the possible factors that can deter entry "high levels of investment in research and development."

capital would not flow to profitable entry opportunities. Moreover, there are real difficulties in the assessment of sunk costs as well as examining the differences between sunk costs, as an economic concept, and fixed costs which may be both an accounting and an economic concept. Thus, an undue focus on total capital requirements or total sunk costs may not be warranted.

In sum, a "barrier to entry" should not be taken as a closed absolute definition but rather as a phenomenon that is affected by competitive circumstances over the course of time. Furthermore, the existence of a "barrier to entry" should not be an all-or-nothing finding but rather should be placed somewhere along the continuum between free-entry and impossible-entry. In the end, a flexible analysis will allow for better antitrust enforcement.

4. Government imposed barriers to entry

4.1 Trade regulatory barriers

The exponential growth of international trade, through which our world is slowly becoming one global trading community, may further eliminate traditional barriers to entry. Technological advancements, such as the Internet which is characterized by limited cost of entry, along with strong normative frameworks, like those of the World Trade Organization (WTO) and numerous bilateral treaties or multilateral free trade zones, make it much easier for market players to enter foreign markets than has been the case in previous decades.[13] Businesses today are keenly aware that, in addition to their traditional domestic competitors, potential international entrants are also continuously watching the market, prepared to enter at any stage in which they deem such entry to be profitable.

Antitrust literature has developed these concepts before, recognizing that firms who are monitoring the profit potential of a market have either an ongoing or a prospective impact on the market, as such companies could one day enter the marketplace with more efficient or innovative products thus, consequently, enhancing competition.[14] Today's reality, in which entry into many foreign markets is becoming easier, dramatically increases the numbers of such potential entrants. This trend suggests that an entry analysis that has been conducted in a market even with the past few years should frequently be reconsidered, since the once well-defined borders of "relevant geographic markets" become blurred over time. Therefore, competition authorities should consider evolving evidence of declining barriers to international competition.

This requires consideration of the degree of freedom with which goods within a particular market may move through international trade. Inhibitions on the free flow of goods in international commerce are frequently the result of legislative or other governmentally-imposed restrictions to the free flow of trade. The classic means for such inhibitions are domestic import tariffs and quotas. There are, however, other examples of domestic legislation which may compromise free trade such as, for example, US domestic legislation related to labeling requirements in the textile industry, adopted in line with the North American Free Trade Agreement (NAFTA) which has been blamed as harmful to trade and, thus, to entry and free

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13 This does not mean that free trade and competition are necessarily identical, but there is a significant correlation and intersection between the two. For an analysis of this point, *see*, Final Report, International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (2000), Chapter 5: Where Trade and Competition Intersect, *available at* http://www.usdoj.gov/atr/icpac/chapter5.htm.

14 *See*, Bush & Massa, *supra* note 1, and the literature by Bailey, Baumol, Panzar and Willig, *infra* note 17, for a review of the literature and legal background of the potential competition and the closely-related contestable markets doctrines.

competition.[15] To the extent possible, competition authorities should not only to remain aware of such inhibitions to trade, and take account of such inhibitions in weighing likely entry in a particular case, but should also seek to participate in the process through which a government evaluates the net benefits or detriments of restrictive trade policies.

4.2 Direct legislative and regulatory barriers

Entry to a market can be, and often is, impeded by various forms of government action. Courts have recognized that government-imposed entry restrictions can frequently form "barriers to entry."[16] Such regulatory barriers to entry may be problematic from two perspectives.

First, BIAC generally shares the views of the contestability theory, under which barriers to entry should be minimized since "[i]mpediments to entry and exit, not concentration…may be the primary source of interference with the workings of the invisible hand" of the market.[17] It is, therefore, important that antitrust enforcement agencies acknowledge these potential anti-competitive effects and be alert to attempts by other regulatory agencies, either at a federal or local level, to erect regulatory entry barriers at the cost of competition.

Second, incumbent market players may abuse such legislative and regulatory barriers to entry.[18] One example of such abuse was presented with respect to "certificates of convenience and need" (CONs). CONs are generally required by public service commissions for potential market entrants who would like to construct facilities and/or begin offering public utility services (such as water, gas, telephone, etc.) to the public. The procedures associated with CON requirements may provide a variety of opportunities for incumbents to delay entry or raise entrants' costs by tactics such as filing objections to applications, invoking rights to "public" hearings, challenging the sufficiency of information provided by applicants, forcing applicants to provide confidential business information that incumbents can then misuse, and similar techniques.

4.3 Barriers imposed by professional regulatory boards

Another example of problematic regulatory barriers is presented by the abuse of industry-dominated regulatory boards for constricting competition. This, for example, was the case in the FTC Complaint in *South Carolina Dentists*[19] where a legislative board established to supervise the practice of dentistry

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15 *See*, Joshua A. Escoto, *Technical Barriers to Trade Under NAFTA: Harmonizing Textile Labeling*, 7 Ann. Surv. Int'l & Comp. L. 63 (2001).

16 *See, e.g.*, *United States v. Citizens & S. Nat'l Bank*, 422 US 86, 118 n.30 (1975) ("The banking business is riddled with state and federal regulatory barriers to entry."); *United States v. Marine Bancorporation*, 418 US 602, 629 (1974) (criticizing the government for failing "to accord full weight to the extensive federal and state regulatory barriers to entry into commercial banking"); and *Hoover v. Ronwin*, 466 US 558, 597 (1984) (Stevens, J., dissenting) (a bar exam constitutes "a significant barrier to entry into the profession").

17 Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 Yale J. on Reg. 111, 111 (1984). For the a doctrinal layout of the contestable theory, *see*, William J. Baumol, John C. Panzar & Robert D. Willig, Contestable Markets and the Theory of Industry Structure (1988); and William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 Am. Econ. Rev. 1 (1982).

18 *See*, Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 Antitrust L.J. 975, 990-992 (2005), which highlight the two examples that follow in the text.

19 Complaint, South Carolina State Board of Dentistry, No. 9311 (Sept. 12, 2003), *available at* http://www.ftc.gov/os/2003/09/socodentistcomp.pdf.

unlawfully restricted competition by adopting a regulation that restricted the ability of dental hygienists to deliver certain preventive care to children in South Carolina schools. The board regulation, whose cost was effectively zero to the dentists (because the State would have borne the costs of its enforcement), raised a significant barrier to entry to oral hygienists – complete exclusion – that would have been difficult and expensive to overturn by litigation.[20]

The above considerations reveal two ways in which regulatory barriers may harm competition. First, by distorting the organic landscape upon which a healthy competitive process develops, and second, by serving as an instrument that market incumbents may use, often lawfully, for excluding or deterring competition. Antitrust enforcement agencies must remain vigilant for such regulatory barriers, take action to the extent possible to remove harmful barriers when they are identified, and seek to prevent the abuse of such barriers by incumbent market players. This can be achieved, for example, through the development of rules or doctrines designed to achieve an appropriate level of antitrust scrutiny in regulated industries and by offering submissions to legislators to identify the sometimes-hidden hazards of legislative initiatives.

5. Barriers to entry in dynamic high-tech markets

As high-tech markets continue to play an ever-growing role in today's economy, we choose two issues for discussion in this context: 1) the questionable relevance of static market barrier analysis in dynamic markets; and 2) the fact that dynamic markets are often characterized by unique technological barriers to entry.

5.1 Static barriers to entry analysis in dynamic markets

The antitrust concept of a barrier to entry envelops certain assumptions, which includes an assumption that there is a well-defined relevant product market whose boundaries remain considerably static. However, antitrust literature in recent years has acknowledged that today's markets frequently are characterized by rapid technological development. In such circumstances, an industry, its products and new technologies may evolve so fast that products are constantly reinvented, and, thus, the borders of the "relevant market" recognized by antitrust analysis keep shifting.[21] This tendency of dynamic markets' borders to shift suggests that the relevance of a traditional "barriers to entry" analysis in such contexts may be compromised.

One example of such a scenario may be observed in the US FTC's *Dell* case.[22] While the FTC decision in *Dell* did not explicitly involve a challenge based on "barriers to entry," the complaint was based on Dell's alleged wrongful acquisition of market power through abuse of standard-setting processes, which led it to hold a patent covering a certain industry standard. The implicit underlying assumption of the decision is that holding a patent over an industry standard creates an entry barrier to which the patentee is the exclusive gatekeeper. However, historical perspective demonstrates that such barriers may not be sufficiently durable to create competitive harm as the advancement of technology may render them obsolete soon thereafter.

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20 *Id*. at 5.

21 *See, e.g.*, Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 11-12 (2001).

22 *See*, Consent Agreement with Analysis to Aid Public Comment, Dell Computer Corp., No. 931-0097, 60 Fed. Reg. 57,870 (Nov. 22, 1995); and Decision and Order, In the Matter of Dell Computer Corp., No. 931-0097, 121 F.T.C. 616 (May 20, 1996). For a summary of this matter, *see*, Press Release, Federal Trade Commission, For Your Information (June 17, 1996), *available at* http://www.ftc.gov/opa/1996/06/dell2.htm.

In the Dell case, the industry standard over which Dell came to hold exclusionary power was adopted in 1992 and was known as the VL (computer) Bus. A year later, in 1993, Intel invented an alternative Bus called the PCI bus (Peripheral Component Interconnect) which replaced Dell's VL Bus as the common bus in the computer industry. In other words, in that case, the fast changing market reality caused what seemed to be an effective entry barrier, obtained thanks to abusive conduct, to become far less relevant soon thereafter as the technology in that industry moved on.

Another way to look at the same phenomenon is by recognizing, as noted earlier, that in many cases the intensity of R&D activity in high-tech markets facilitates entry.[23] In other words, even to an extent that entry barriers are present in these industries, substantial R&D may allow potential entrants to overcome them. Moreover, it bears mention that the efforts by a company to reap monopoly profits in a market may in fact reduce barriers to entry by increasing the potential benefits available to an entrant.

The FTC's Unocal[24] case provides another interesting example of a "barriers to entry" analysis in a standard-setting context. In this 2003 case, the Commission filed a complaint alleging that Unocal had illegally acquired monopoly power in the technology market for producing certain low-emission gasoline which the California Air Resources Board (CARB) mandated be sold and used in California for up to eight months of the year. The complaint alleged that Unocal misrepresented to CARB and other private industry groups that certain gasoline information was non-proprietary and in the public domain, while at the same time pursuing patents that would enable it to charge substantial royalties if the information were used. Based upon these misrepresentations, CARB adopted reformulated gasoline standards which substantially overlapped with Unocal's patent rights. If Unocal were to enforce these patent rights, companies producing this particular low-emission gasoline would be required to pay over $500 million in royalties, a cost which ultimately would be passed along to the consumer. The Commission sought to have Unocal cease and desist from all efforts to assert these patents against those manufacturing, selling, distributing, or otherwise using motor gasoline to be sold in California. Unocal (and Chevron Corp. due to its proposed merger with Unocal) agreed to this relief on July 27, 2005.

Note however that the facts of the *Unocal* decision may be distinguished from those of the *Dell* decision. First, the circumstances suggest that Unocal's conduct may have been more overtly deceptive than that of Dell. Second, it may have been more difficult and time-consuming to change an industry standard or develop an alternative technology in the gasoline market that is not as fast-paced as the high-tech industry. Finally, in the Unocal case there was a regulatory requirement mandating the use of this standard, while the Dell case merely involved a voluntary industry standard. Indeed, the Unocal fact pattern may demonstrate how a regulatory-imposed barrier to entry can prove more pernicious than a commercially-imposed one.

The importance of accounting for technological change in competition analysis also is illustrated by the recent decision of the Canadian Competition Bureau not to challenge the acquisition by Rogers Wireless Communications Inc. of the mobile wireless telephone business of Microcell Telecommunications Inc. In its published remarks, the Competition Bureau noted that "change and innovation had an important impact on the Bureau's conclusions" and that technological dynamism in the

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23 *See*, John R. Baldwin & Paul K. Gorecki, The Dynamics of Industrial Competition: A North American Perspective 368-373 (1998).

24 *See*, Complaint, In the Matter of Union Oil Co. of California, No. 9305, 2003 F.T.C. LEXIS 30 (F.T.C. Mar. 4, 2003); and Decision and Order, In the Matter of Union Oil Co. of California, No. 9305, 2005 F.T.C. LEXIS 116 (F.T.C. July 27, 2005). For a summary of this matter, *see*, Press Release, Federal Trade Commission, Dual Consent Orders Resolve Competitive Concerns About Chevron's $18 Billion Purchase of Unocal, FTC's 2003 Complaint Against Unocal (June 10, 2005), *available at* http://www.ftc.gov/opa/2005/06/chevronunocal.htm.

wireless communications market would "continue to play an important, positive role in the future evolution of competition". In determining that the wireless market would continue to be competitive post-merger, the Bureau noted among other things that "advances in broadcast distribution and telecommunications are now providing new delivery mechanisms, allowing for greater convergence between these traditionally separate market segments".[25] Thus, technological change in this industry reduced barriers to entry between different types of telecommunications suppliers. Recognition of industry change and innovation in competitive effects analysis is to be encouraged as part of a practical and fact-specific approach to assessing barriers to entry and market power.

5.2 Organic barriers to entry in Technology Markets

Despite their dynamic and fast changing nature which seems ideal for the development of a robust competition process, high-tech markets often suffer from organic technological barriers to entry, namely, barriers emanating from the nature of the products rather than from any specific conduct of market participants. A common example for such barriers is known as network effects or network externalities, a term which refers to markets in which “the utility that a user derives from consumption of the good increases with the number of other agents consuming the [same] good”.[26]

These organic barriers such as network externalities are, of course, legitimate phenomena in themselves. Nonetheless, they may assist companies in carrying out abusive conduct which may raise antitrust concerns. Perhaps the most well-known example of such abusive conduct that took advantage of a technological barrier to entry was presented in the US *Microsoft* antitrust case. The *Microsoft* case raised a problem of an “applications barrier to entry,” which stemmed from the fact that software applications written to Microsoft’s Windows platform could not run on other operating systems, and, thus, other operating systems could not effectively compete against Microsoft unless they could offer PC users a wide array of applications.[27] In other words, the technological barrier to entry in Microsoft was a result of an interoperability problem, as the wide variety of existing software applications have been written exclusively to a Microsoft-Windows platform and, thus, could not work with competing platforms. Such interoperability barriers are not uncommon in the software industry in general.

In the European Commission Microsoft case, the EC acknowledged similar issues in finding that applications barriers to entry existed in both the client PC operating system and work group server operating system markets.[28] The allegedly abusive conduct targeted by the EC took advantage of these barriers to achieve claimed anticompetitive effects.

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25 Competition Bureau, Technical Backgrounder, "Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc." (Apr. 12, 2005) *available at* http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=257&lg=e.

26 Michael L. Katz & Carl Shapiro, *Network Externalities, Competition and Compatibility*, 75 Am. Econ. Rev. 424, 424 (1985).

27 For a summary of the *Microsoft* case, *see*, Overview, Plaintiffs' Joint Proposed Findings Of Fact, United States v. Microsoft, No. 98-1232 (Sept. 10, 1999), *available at* http://www.usdoj.gov/atr/cases/f2600/2613overview.pdf.

28 Commission Decision relating to a proceeding under Article 82 of the EC Treaty, Commission of the European Communities, Case COMP/C-3/37.792 Microsoft (Mar. 24, 2004), ¶¶ 459, 471 and 525. For a summary of the EC *Microsoft* case, *see*, Press Release, Commission of the European Communities, Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine (Mar. 24, 2004), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/382&format=PDF&aged=1&language=EN&guiLanguage=en.

Examples of abusive conduct which takes advantage of technological barriers to entry[29] demonstrate how antitrust agencies on both sides of the Atlantic are realizing that, despite their dynamic nature, high-tech markets may at times be highly susceptible to entry barriers that assist market players in constricting competition. In some cases rapid or unforeseen technological advancements may still overcome such problems.

6. Intellectual property rights and entry barriers

Intellectual property rights (IPRs) may, in certain cases, give rise to structural entry barriers.[30] These barriers, however, are sometimes overestimated or misconstrued and frequently become the target of undeserved enforcement action. IPR-created barriers are merely statutorily granted rights to exclude others from certain property, similar to any property right. A decision to refuse to allow another entity to access a legitimate IPR, therefore, should not be seen either as an abuse of dominance or the unreasonable erection of an entry barrier. IPRs, even those that create barriers to entry, should be accepted as legitimate rights, in line with the recognition afforded under the binding principles of the WTO TRIPS agreement. While the breadth of the IPR protection may well determine the ease or difficulty of entry into a market,[31] the exercise of a valid IPR to exclude entry should not give rise to concern by antitrust enforcement agencies. At the same time, striking the proper balance in maximizing consumer welfare requires the proper exercise of discretion in ***granting*** such rights by the specialized patent and trademark offices and intellectual property courts. Indeed, using the competition laws to remedy imprudently granted IPRs will necessarily result in perverse results and will threaten the integrity of both the competition authorities and the relevant IPR authorities. Competition authorities, therefore, should exercise their advocacy powers to ensure that IPR authorities use proper discretion in determining when to grant IPRs.

A distinction should be drawn between legitimate IPRs that create structural barriers to entry and the abuse of IPRs for the creation of a strategic exclusionary barriers to entry. In the latter case, antitrust policy may have some leeway to evaluate and intervene in order to stop such abusive scenarios, as intellectual property laws may not extend antitrust immunity beyond the legitimate exercise of an IPR. However, in evaluating such cases, antitrust analysis must be applied cautiously so as not to effectively undermine the validity of the IPR itself or the protections guaranteed by the WTO's TRIPS standards.

7. Summary

The BIAC applauds the OECD's focus on the analysis of barriers to entry and suggests that:

a. Competition agencies should consider the substantial harm that can be created by direct and indirect government regulation which creates the opportunity for structural or strategic barriers to entry.

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29 We intentionally refer to the term "barriers to entry" here rather than "network effects" since the two terms are not identical. In markets characterized by network effects, "the utility that a user derives from consumption of a good increases with the number of other agents consuming the [same] good." Michael L. Katz & Carl Shapiro, *Network Externalities, Competition and Compatibility*, 75 Am. Econ. Rev. 424, 424 (1985). Thus, even though markets with network effects may display barriers to entry, the substantive definition of these two market phenomena is different.

30 *See, generally*, Robert J. Hoerner, *The Antitrust Significance of a Patent's Exclusionary Power*, 60 Antitrust L.J. 867 (1991-92).

31 *See, generally*, Nancy T. Gallini & Michael J. Trebilcock, *Intellectual Property Rights and Competition Policy – A Framework for the Analysis of Economic and Legal Issues*, *in* Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy 17 (Robert D. Anderson & Nancy T. Gallini Eds. 1998).

b. Barriers to entry should not be viewed as absolute or fixed and, therefore, should always be considered in light of the specific, evolving market circumstances.[32]

c. The application of a barrier-to-entry analysis in dynamic high-tech markets must be recognized as complex and, in evaluating the optimal outcome on consumer welfare, may require that a balance to be struck between considerations of short-term competitive harm and long-term market development in a dynamic industry.

d. Globalization, which eases entry into foreign markets, should be promoted to reduce barriers to entry and enhance consumer welfare. Domestic legislative barriers may inhibit such a desirable effect.

e. IPRs may erect legitimate structural entry barriers and should not be presumptively suspect. Analysis of the abuse of IPRs for the strategic creation of barriers to entry should be undertaken, while giving deference to the legitimate proprietary nature of IPRs and their assurance of international protection.

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32 In the words of Robert Pitofsky, former Chairman of the FTC, "In the end, the question of whether market power is durable or ephemeral is fact specific and needs to be addressed on a market by market and product by product basis." Robert Pitofsky, Chairman, US Federal Trade Commission, "Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy," Prepared Remarks Before the Antitrust, Technology and Intellectual Property Conference, Berkeley, California, (Mar. 2, 2001), *available at* http://www.ftc.gov/speeches/pitofsky/ipf301.htm.

SUMMARY OF DISCUSSION

Competition Committee Chairman Frédéric Jenny began by making some general observations based on the delegates' written contributions. Many contributions suggest that there is no precise definition of barriers to entry either in the applicable national laws or in the guidelines of the competition authorities. A few competition authorities think that it could be useful to better define barriers to entry, but the vast majority indicates that authorities are quite happy to leave the term undefined. A couple of contributions actually suggest that there would be drawbacks in trying to be too precise with a definition.

The concept of barriers to entry that is used in dominance cases and merger cases tends to be the same. With regard to measuring barriers to entry, most contributions suggest that the agencies make only a qualitative assessment. A few suggest that whenever possible they try to combine a quantitative assessment of the technical barriers with a qualitative assessment of the strategic barriers because it would be very difficult to try to quantify the latter.

The most problematic part of the contributions has to do with strategic or "behavioural" barriers to entry. In some of the contributions, it seems that the factors that allow firms to have large market shares in differentiated good industries are precisely the factors that are considered to establish the existence of barriers to entry. In other cases, however, it seems that the factors that foster vigorous competition are exactly the factors that point towards the existence of barriers to entry, so it is not obvious in the contributions that one can independently assess the level of competition, the existence of barriers to entry and the level of concentration.

The Chairman suggested that the Committee consider four main issues: the definition of barriers to entry; the factors that are considered when assessing barriers to entry (the objective is not to compile a precise list of all the factors, but just to discuss some of the ones mentioned in the contributions); the measurement of barriers to entry; and what strategic barriers to entry are and how they can be assessed.

1. The Definition of Barriers to Entry

The Chairman noted that the majority of countries believe that a general, imprecise definition is fine or that no definition at all is even better. There are, however, exceptions and sometimes the exception is not attributable to the competition authority, but rather to a court that has imposed a definition, as in New Zealand. The Chairman asked the New Zealand delegation to explain whether the Commerce Commission's LET test (which asks whether entry is likely, sufficient in extent, and timely) is somewhat different from the Stiglerian definition adopted by the Court of Appeal in the *Southern Cross* case.

A delegate from New Zealand replied that while the Court did adopt a definition that looks similar to Stigler's, there is an important difference. The Court's definition focuses on a cost or limitation that an established incumbent does not face. The word "does" is important because it indicates the present tense. In other words, the Court did not take the view that just because an incumbent once faced (and overcame) an obstacle it can't be a barrier. So New Zealand is similar to certain other jurisdictions in that a wide list of possible barriers are considered, including those that arise from natural barriers such as substantial economies of scale or sunk costs, as well as regulatory barriers like entry licensing and strategic barriers such as excess capacity.

The delegate added that the Commission would not want to be seen as acting contrary to the Court of Appeal, and that indeed it does not do so. The Commission uses a two-stage process: first it identifies any possible barriers to entry and expansion and then it looks at whether those barriers will actually delay or prevent entry or expansion. *Southern Cross* and subsequent decisions show that the Court has found – as the Commission urged it to find – that the second part of that test may be even more important than the first part. The Commission has no disagreement with the rulings of the Court in this respect and therefore it has not adjusted its merger and acquisition guidelines, nor has it adjusted the approach it takes in merger analysis.

Finally, the delegate stated that it has proven to be very helpful to have a precise definition of entry barriers in New Zealand because certain lower courts decisions would be a problem if the Court of Appeal had not adopted a clear definition that the Commission now follows.

The Chairman then turned to another country that has a precise definition and is happy with it: the UK. The UK's submission notes that entry barriers may be defined as "any feature of the market that gives incumbent firms an advantage over potential entrants such that the incumbents can persistently raise their price above (or reduce their quality below) competitive levels without new firms entering the market." The contribution adds: "It is now widely agreed that economies of scale or capital requirements, of themselves, do not necessarily constitute a barrier to entry." The Chairman stated that this idea may not be so widely agreed upon in the rest of the world. He asked the UK delegation to explain why it is happy with its definition of barriers to entry, why it finds the definition useful, how it relates to the classical definition of barriers to entry, and in particular what one means by "an advantage."

A delegate from the UK responded that, with respect to agreement on economies of scale, there has been a change in the economic consensus since the time when Bain's definition of barriers to entry had identified economies of scale as a barrier. The insight of contestability theory was that if the necessary conditions for hit and run entry apply, then economies of scale might not constitute an entry barrier. Certainly the mere fact that a large investment is required for entry does not necessarily immunize the incumbent from the threat of entry where there are many firms in a position to make such large investments. Of course, the conditions required for hit and run entry are quite stringent and there are many situations where hit and run entry is not possible – in particular where sunk costs are required, where there is customer inertia, or there are switching costs. The point of that statement in the UK contribution was thus merely to point out that the analysis of barriers to entry should not necessarily focus on economies of scale, but on how they might interact with sunk costs and switching costs.

The delegate added that the OFT's definition consciously echoes Bain's, which focused on the constraints that entry poses on the exercise of market power. In that context, it's not usual to focus the entry analysis on the advantage of incumbents, but instead entry analysis is part of the analysis of competition in general. For example, in mergers the main question is not the specific identification of barriers to entry, but rather the question of whether entry conditions are sufficient to outweigh any expected lessening of competition associated with the merger. Because the focus is not really on the definition itself but is on the economic analysis of the competition problem at hand, OFT has not perceived that the definition has been problematic.

The Chairman then observed that the contribution from Finland seems to be somewhat sceptical of the usefulness of a precise definition of barriers to entry. Nevertheless, there is a fairly precise description of barriers to entry in the merger guidelines in Finland. Furthermore, the contribution states that it is sufficient that barriers to entry delay and constrict entry within the timeframe that is considered to be significant for the functioning of competition. Thus there is not a 2-year test, like we find in other countries, but a time frame that depends on the circumstances in each case. The Chairman asked how one knows whether it is 5 years or 2 years in any given case.

A delegate from Finland replied that the purpose of describing barriers to entry in the merger guidelines is to give some examples of market features and incumbent firm behaviour that the Finnish competition authority takes into account. This increases the predictability of the FCA's analysis. The focus of the FCA's analysis is on market effects. He added that in the Finnish merger analysis, potential competition can act as a competitive constraint if entry is expected to take place in the foreseeable future. In most cases this timeframe is 2 years. However, the timeframe is market-specific so it could be shorter or longer, depending on the nature of the barriers and the nature of the market.

The Chairman then noted that the contribution from Hungary states that any impediment that has the effect of reducing competition constitutes a barrier to entry. It also states that the lack of a precise definition in Hungary has not been a problem so far for the Competition Authority. In fact, the contribution suggests that it might be dangerous to have a specific list of barriers to entry since "sometimes the GVH faces circumstances which do influence market entry or performance but which do not form part of normal market conditions." The contribution suggests that this was the case in a matter concerning mosquito extermination services and a barrier that defied conventional definitions. The Chairman asked for a fuller description of the case. Hungary's contribution also states that there is no precise measurement of barriers to entry in Hungary, but that there are sectors "where it is axiomatic that entry costs are high." The Chairman asked the Hungarian delegation to explain how to find sectors where it is axiomatic that barriers to entry are high.

A delegate from Hungary replied that the mosquito extermination case in fact was a bid-rigging case and that no final conclusions were drawn on barriers to entry. It was a public procurement case submitted by municipalities that had invited tenders from undertakings to provide mosquito extermination services. The price of the service was not so important because the municipalities considered that it does not really matter how much money you saved on the service if you still have mosquitoes. What counted was the reputation and experience of the undertaking. On the other hand, the conditions for the evaluation of the tenders also included some very subjective elements, such as the level of the bidders' professionalism. But the Competition Authority considered that the municipalities lacked the capability to assess the professional level of undertakings that submitted tenders. So there was a semi-illegal relationship between certain undertakings and municipalities because those undertakings which had a good relationship with municipal officials could influence the municipalities. This was a kind of barrier to entry.

Regarding the other question, the delegate said that the GVH makes no calculations or comparisons of costs with the potential profit level available after entry. There are, however, two situations in which the GVH qualitatively considers barriers to entry to be high. One is when it is generally considered that a huge amount of sunk costs is necessary to enter the market, such as the market for fixed telephone service. The other occurs when no such presumptions are present, so barriers to entry are analysed more in depth but certain impressively high cost elements can be identified. Such was the case in the coffee market, where wholesalers faced a huge cost of entry relating to advertising a new brand. Even in the latter case, however, no calculations were made and the high level of the entry barrier remained to be based on impressions.

The Chairman, having addressed contributions from some countries that are happy to have a definition and from others that do not think it is a problem not to have a definition, turned to a third category: countries that do not have a precise definition but wish they did. The contribution from the Netherlands, for example, suggests that there is a need to better delineate the concept of barriers to entry. The Chairman asked the delegation from the Netherlands why it believes that it has been problematic not to have a definition of barriers to entry.

A delegate from the Netherlands answered that the Netherlands does not yet apply a clear and consistent definition of entry barriers, but only uses rules of thumb in determining the effects of barriers to entry. As a result, the Court of First Instance has not made any direct references to the existence or effects of entry barriers. The Court has preferred to assess certain cases rather implicitly, agreeing or disagreeing with market definitions or evaluating overall effects on competition resulting from a merger or an agreement. This method of assessment by the Court was somewhat of a nuisance in a case involving the merger of regional newspapers in 2000. The Court did not address the government's arguments about high entry barriers, but instead it decided that the market was wider than suggested and that the foreseen effects on quality and price were unlikely because national newspapers would probably exert competitive discipline. The Court was overruled on appeal, but its decision was still a nuisance.

The delegate added that in a broader sense the competition authority has not been hampered by the lack of a definition of entry barriers. All the same, it would be preferable to focus more explicitly on them. This does not mean that the Netherlands Competition Authority has neglected barriers to entry. They are evaluated for the purposes of both market definition and effect evaluation, and whether entry is relatively easy or entry costs are high is an issue that is evaluated on a case by case basis.

2. Technical Conditions that Affect Entry

The Chairman then turned to a discussion of the precise factors that are taken into account when determining whether barriers to entry exist. He noted that article 13 of Mexico's competition law requires the Mexican Competition Authority to assess barriers to entry when determining a company's market power and that article 11 contains a precise list of elements that can be construed as entry barriers. He asked the delegation from Mexico to provide a sense of what those elements are. The Chairman also noted that Mexico's contribution states that in the Coca-Cola Cadbury Schweppes merger case, the Competition Authority concluded that "Coca-Cola's remarkable ability to advertise its brands and its wide distribution network constituted barriers to entry." The Chairman asked whether that means that if there is a successful firm with a large market share in a differentiated good industry, then by definition there are barriers to entry.

A delegate from Mexico replied that the list of possible barriers to entry under article 11 includes capital requirements, relative efficiency of financial markets, adjustment costs, sunk costs, fixed costs such as advertising and investments in brands and trademarks, certain marketing and business practices such as exclusive arrangements, regulations, and the use of intellectual and industrial property as barriers to entry. The list is not necessarily a straitjacket that prevents any analysis of the subject, so other barriers to entry could be defined. It is useful, however, to have such a list of elements because they give greater judicial certainty to companies.

With respect to the Coca-Cola Cadbury case, the delegate added that Mexico's contribution does not mean to imply that superior economic performance alone can constitute a barrier to entry. Rather, Coca-Cola's wide distribution network and power to advertise its brands are elements that were considered when assessing entry. The Commission determined that these elements contributed to deterring entry because they imply that substantial monetary outlays are required. In fact, the Commission confirmed this view in 2 recent cases where Coca-Cola and its distributors were fined a total of close to 70 million USD for exclusive arrangements. Coca-Cola's marketing investment strategies, as well as its wide distribution network, were held to be barriers to entry by the Commission.

The Chairman commented that Spain's contribution emphasizes flexibility in the analysis of barriers to entry. He noted that Spain does not follow any particular definition, but that it proceeds on a case by case basis. In its discussion of the Servicio de Defensa de la Competencia's approach, the contribution states: "economic barriers include, among others, the investments required to access and act in the market, the technology required to produce, the minimum efficient scale or the research and development or advertising requirements, since incumbents do not have to face these costs which may be of such scale that they may deter any future entry." When it describes the practice of the Tribunal de Defensa de la Competencia, the contribution states: "the TDC tends to consider that barriers to entry are any obstacle, impediment or difficulty that encounters any firm to enter or exit a particular market." The Chairman then asked the Spanish delegation, first, what is meant by the statement that incumbents do not have to face the investment required to produce at minimum scale, and second, whether there is a slight difference of approach between the Servicio and the Tribunal.

A delegate from Spain answered by acknowledging that the contribution might have mixed 2 different concepts in the sense that the reference to minimum efficient scale was intended to address economies of scale and, under certain circumstances, the existence of a natural monopoly structure where only one efficient firm can exist and thus there are no incentives for an efficient operator to enter.

With respect to the second question, the delegate noted that the Servicio and the Tribunal have a similar approach in that they both use a flexible, case by case approach. Both institutions are very comfortable with not having a closed definition of barriers to entry. Furthermore, although both institutions pay attention to economic barriers to entry, they also focus on legal barriers because the public sector can play a very relevant role in enacting entry barriers. There is an opportunity here for agencies to advocate changes that would reduce legal barriers. The Tribunal goes even further in recommending changes to regulations in certain markets.

The Chairman agreed that governments obviously create barrier to entry and that Competition Authorities feel that it is their duty to either engage in advocacy or to point out in cases that those government-created barriers are inefficient and conducive to decreasing competition. He then turned to the US, noting that when evaluating a proposed merger, the US enforcement agencies do not assess barriers to entry as an abstract matter but rather ask a very concrete question: whether entry attracted by the merger would be "timely, likely and sufficient in its magnitude, character and scope to deter or counteract the competitive effects" of the merger, thereby causing "prices to fall to their premerger levels or lower." The Chairman first asked how one measures those elements. The US contribution states that "[t]he U.S. agencies sometimes have found that sunk costs associated with constructing a manufacturing facility, developing a product, or gaining customer acceptance were so great that a merger would not attract entry even if there were no risks of outright failure and the loss of the entire entry investment." The Chairman pointed out that this statement seems to be in conflict with the traditional theory of sunk costs, where it is taken for granted that one of the reasons sunk costs lead to barriers to entry is that there is some risk of failure. He then asked the US delegation to explain how it came to its conclusion. Finally, he asked for an elaboration of the US contribution's discussion of network effects and "the egg and chicken problem" in the context of entry barrier analysis.

A delegate from the US responded that time did not permit him to give much detail about how the US agencies assess the timeliness, likelihood and sufficiency of entry. He noted that information on this subject can be found in the US contribution and in the forthcoming merger guidelines commentary to be issued by the Department of Justice and the Federal Trade Commission. With respect to the third question, the delegate stated that network effects arise from complementarities in demand, *i.e.*, when one consumer's demand depends on how many other consumers use the product. These complementarities are fairly common but often are not very strong. For example, in the automobile market, the need for repair and service creates a network effect: the more people there are who have the same car you do, the more repair facilities there will be, the more repairmen will know how to fix your car and the more available parts there will be. This effect is not trivial. It is an entry barrier, but many carmakers overcome it. In the US and elsewhere, there have been many successful entries in the automobile industry over the last quarter century.

The delegate continued, noting that the sentence quoted by the Chairman refers to the absence of a risk of outright failure, but it does not say that there is no risk of any kind. There is always risk associated with entry because the payoff is uncertain. To understand how sunk costs work, it is useful to think about the situation in which the pay-off is certain. The fact remains that the sunk costs may be so high in relation to the pay-off that entry makes no sense. If entry succeeds, that merely means that the entrant earns enough to cover its ongoing operating costs; it does not mean that the sunk costs are recovered. Minimally successful entry loses all of the sunk costs. If sunk costs are exceptionally large, then it may be difficult to succeed to the degree necessary to earn a competitive return on the entire investment in entry. For example the market simply may not be large enough to generate the sales that it would take to have a good prospect of achieving a competitive return.

Another delegate from the US stated that there are markets where the risk of not recovering sunk costs is relatively low, yet if those costs are substantial they can still be a significant barrier or impediment to entry. An entrant may reasonably expect to recover its sunk costs, but the expected profits may be so low compared to the size of the sunk costs that entry is unattractive in comparison to other investment opportunities. The delegate added that the broader issue raised by the question is whether mechanically applying definitions of barriers to entry is really the right way to do the analysis, and he suggested that it is not. The ultimate objective of entry analysis is to determine whether new entry or expansion by existing entrants is likely to prevent or deter the exercise of market power in a reasonable period of time. The analysis usually has to be done with a very fact-specific examination of the market, and that calls for gathering information through formal and informal meetings with the most likely entrants and putting the facts together.

Next, the Chairman addressed Canada's contribution, focusing on an excerpt from the Competition Tribunal's decision in the *Laidlaw* case: "While commencing a business may in some cases be easy, new entrants may find it difficult to survive for a variety of reasons, including strategic behaviour of incumbents." The Chairman stated that the implication seems to be that one should determine not only whether a firm would enter an industry, but whether it would survive, as well. That suggests a willingness to assume that some firms would be likely to enter an industry even though they had little or no chance of survival. It is not clear why they would do that, though. The Chairman therefore asked whether there really are two tests.

A delegate from Canada explained that *Laidlaw* was an abuse of dominance case in which the product market was commercial waste collection. Laidlaw had purchased a number of competitors and signed several long term contracts. When the Tribunal said that it may be easy to commence a business, it was really commenting on the nature of the business in that case and how one would simply have to buy a truck and some containers. There was no need for technical training. But then the Tribunal went on to say that a number of barriers existed that decreased the likelihood of entry. In particular, there was a need to acquire a sufficient customer base but Laidlaw's long term contracts made that difficult. So the point is that one cannot simply do a superficial analysis of the business and conclude that it looks fairly easy to get into. One must go further and consider what is happening in the marketplace, the strategic behaviour of the competitors, and whether there are other things that would discourage entry.

The Chairman then moved on to Lithuania, whose contribution included a case involving a former state-owned enterprise and claims about barriers to entry arising from its ability to bundle a number of products. The company was a producer of strong alcoholic beverages and wines and wished to acquire a local competitor. Rivals complained that if it had such a large range of products then they would be unable to expand and potential new rivals would be unable to enter. The Council decided that because of trade liberalisation as a result of the EU enlargement, the market was open enough and it permitted the merger. The Chairman noted that there are 2 possible levels of analysis: whether there are legal barriers that are impassable and if there are none, whether it is still likely that the market is going to be competitive. It is not obvious what criteria were used by the Council in its analysis. The Chairman asked the Lithuanian delegation to explain why the Council was so confident that competition would set in and that there would not be a barrier due to the strategic bundling of this former state-owned enterprise.

A delegate from Lithuania first pointed out that the acquiring company did not have a monopoly in the relevant market, although until 2003 it was one of 4 state-owned enterprises that were granted special rights to produce strong alcoholic beverages. The acquiring firm's main competitor complained about the merged firm's ability to bundle products and offer discounts and rebates to distributors and thereby create barriers to entry or expansion. The Competition Council focused on the advantages that all local producers had enjoyed. Lithuania had already abolished the restriction that limited strong alcohol production to only 4 companies. The Council was able to consider the experience of other Baltic states that had gone through the liberalisation process a bit earlier. In Estonia and Latvia, successful entry was followed by a substantial decline in incumbents' market shares. Furthermore, Lithuania was going to become a part of the EU single market within a few more months. This was supposed to eliminate the need for lengthy customs procedures and clearances. Therefore, local producers were expected to lose an advantage against foreign producers. Post-merger events confirmed that the Council was right to pay more attention to the latter factors. In the year after the merger, prices of strong alcoholic beverages declined, prices of imported products decreased even more, the market share of the merged company also decreased, new products appeared, and the total production of strong alcoholic beverages in Lithuania increased by 15%.

3. Measuring Entry Barriers

The Chairman then drew the Committee's attention to Turkey's contribution, noting that it raises a common question: what do we mean by "high" barriers to entry? The contribution states with respect to the *Cement* case that any undertaking willing to enter the market by constructing a factory with a capacity of 1 million tons per year, which is regarded as the optimal scale, would need USD 100 million, and that the Board considered it obvious that new entrants will have difficulty finding credit for such an investment due to problems in Turkey's capital markets. So the Chairman asked where the limit is, and what the basis for such an assessment is.

The Chairman also referred to the Turkcell case, noting that Turkcell belongs to a diversified group with partners in various markets. An issue in the case was whether belonging to such a group in itself creates a barrier to entry in the telecom sector. The Chairman asked the Turkish delegation to explain why diversification is in itself a barrier to entry.

A delegate from Turkey stated that in the *Cement* case, the Competition Board had to take macroeconomic conditions into account when it was considering what kind of magnitude of investment was necessary to enter this market and whether this would be a prohibitive amount. The effects of the deep financial crisis of 2001 in Turkey were taken into account.

As for Turkcell, it happens to be the dominant incumbent operator in the GSM mobile telephone services market in Turkey. Of course there is more than one barrier to entry in this market. First, there is the physical barrier to entry that only 5 GSM operators can function in the market because of spectrum conditions. This physical situation has been translated into a legal barrier, as sector-specific regulators may provide a license to operate. The license has to be won by bidding competitively and the magnitude of the winning bid may have to be as high as 2.3 billion USD. Moreover, as the dominant operator in the GSM mobile phone services market, Turkcell effectively manipulates a third kind of barrier to entry, namely network externalities. The new entrants Telecom Italia Mobile and Avcell were effectively marginalised and forced to merge because Turkcell very effectively manipulated its large network and raised the cost of entering the GSM market. Fourthly we come to the conditions mentioned by the Chairman. A group of companies that owns Turkcell also owns the largest private sector internet service provider in Turkey as well as 2 TV stations, radios, newspapers and 2 banks. The market power it gathers from this type of organisation is huge and Turkcell sometimes manipulates this market power to hinder or raise the costs of new entrants. In sum, activities of the group of companies owning Turkcell in sectors like telecommunications, media, information technologies, the concept of convergence in this context in the sense that these sectors use the same technologies in an increasing manner, the marketing of GSM services by the banks in the same group of companies, and the synergy attained all consolidate the market power of Turkcell and this state of affairs creates entry barriers for new entrants that do not have group advantages to the same degree.

The Chairman then moved on to Korea, whose contribution discusses a merger case involving 2 piano makers. It was determined that entry by a domestic competitor was effectively impossible because it required an investment of at least 5 million USD and because the incumbent firms were moving their production facilities to lower-cost countries. The Chairman commented that Korea's contribution states that entry barriers are not defined under the Korean law but that the guidelines for reviewing abuse of dominance give a quasi-statutory definition of the conditions that must be met for easy entry. The Chairman asked whether this list of conditions is useful in light of previous comments that one should not have too precise a definition because the analysis should be done case by case. He also asked whether the list allows one to screen out entry that would not have any impact on the market and to declare that there are still barriers to entry.

A delegate from Korea responded that the KFTC has 9 examples of criteria for entry barriers in the merger guidelines and abuse of dominance guidelines. The 9 criteria include the presence of institutional barriers to entry, the minimum capital required, conditions of location, distribution network, etc. The more criteria the market conditions meet and the greater they are, the higher entry barriers are considered to be. The KFTC does filter out small entrants that are too insignificant to affect market prices. The KFTC will not allow a merger to proceed if likely entrants are not significant enough to counterbalance any restraint on competition from the merger.

Next, the delegate noted that there was a typographical error with respect to the 5 million USD figure, and that it should have been 50 million USD. In this case more than 50 million USD was required for new entrants to establish production facilities, and this barrier was considered large enough to block entry. The KFTC considered not only that costs had increased but also that the domestic demand for pianos had stagnated for many years. Therefore, the incumbents' profit was decreasing and the KFTC decided that such conditions were not attractive enough to induce entry in the domestic piano market.

The Chairman then considered the contribution from Ireland. He remarked that the test used by the Irish Competition Authority is whether entry is going to be timely, profitable, and sufficient. When making this analysis, the ICA looks at 2 types of evidence: the past history of entry in the industry and factors that could explain the observed pattern of entry. The Chairman then requested a more detailed explanation of the *Uniphar-Ammado* case, in which the ICA allowed a merger in the market for wholesale pharmaceutical products even though barriers to entry were high.

A delegate from Ireland replied that the wholesale pharmaceutical distribution market is very highly regulated in Ireland. There were 3 national companies plus a fourth in the largest market in the country – Dublin – and it was that company that was being acquired. Because the ICA did find high barriers to entry, it conducted a detailed examination of whether removing the 4th player from would affect prices in the Dublin market or nationally. Two particular factors were considered. First, the distribution network is extremely important and it would be fairly difficult for a new entrant to overcome loyalty and reputational effects. Second, there is a need for highly automated, efficient distribution systems.

The ICA concluded that the acquired company market lacked the efficient distribution capability of the other players and that it was clearly operating at a competitive disadvantage. In addition, an econometric pricing study by the ICA showed that the competition being provided by the acquired company in the Dublin market did not result in lower prices or better service than in any other parts of the country. The ICA was therefore fairly comfortable in concluding that, despite the high barriers to entry, there was not going to be any anticompetitive effect in the market post-merger. This case illustrates that the examination of barriers to entry in itself is not determinative, but that it should be juxtaposed against the competitive effects being observed in the markets.

Next, the Chairman noted that while a large number of countries consider the history of entry in a given industry, there is a great deal of controversy over the interpretation of the results. The UK's contribution, for example, states that "recent examples of successful entry to a market may be indicative of low barriers to entry." On the other hand, the EU's contribution posits that "the fact that entry has occurred in the past does not imply that there are no barriers to entry or that entry is necessarily easy." Furthermore, although the Conseil de la Concurrence considers recent examples of entry in its evaluation of barriers to entry, its contribution notes that doing so "shows all the ambiguity raised by the analysis of this type of barrier and illustrates the difficulty, even the impossibility, of applying analytical criteria." The Chairman then pointed out that in a case involving the acquisition of Atos Investissement by Experian Holding France, the Conseil specified that "the absence of recent entry in the market is not, in the absence of objective elements indicating the existence of barriers to entry, likely to show only that entry is impossible insofar as the absence of entry can have many other causes." He asked the French delegation how one can draw any conclusions by looking at prior entry or the absence of entry. He also asked what additional elements must be taken into account in order to make a determination about the presence or absence of barriers to entry.

A delegate from France acknowledged that it is tempting to say that conclusions about the existence and quantification of entry barriers can be checked by looking at the recent historical record and reasoning that if entry occurred then there are no insurmountable barriers, and if no entry occurred then this proves that there are barriers that dissuade companies from penetrating the market. France's contribution expresses ambivalence toward this approach and illustrates the risks it involves. It is necessary to have a case by case, empirical approach, the delegate said. One should not conclude that there are barriers to entry just because there have not been any recent instances of entry. That reasoning appears dangerous, he stated, because there can be many other reasons for the lack of entry, such as that the market may be declining (or may be very competitive) and thus offers weak prospects for profitability.

The Chairman added that an interesting aspect of this discussion is that, if there has been entry then this may be an indication that barriers to entry are not so high, but if there hasn't been entry then this does not indicate anything because other factors might explain this. But one of the factors France referred to is the fact that there may have been no entry because the market is not very profitable. The US in its earlier answer, however, indicated that a lack of profitability might in itself be a barrier to entry. This is also suggested in the EU contribution and it will therefore be revisited later in the discussion.

4. Assessing Strategic Barriers to Entry

The Chairman then turned to strategic barriers to entry, noting that this is probably the most controversial of the topics to be discussed. He commented that the Japanese contribution is interesting because it reviews the many guidelines that deal with barriers to entry in Japan. In all of them, which are reviewed in the Japanese contribution, there is some indication of what "barrier to entry" means in the context of those guidelines. The Chairman asked the Japanese delegation to describe a case in which pachinko manufacturers used their intellectual property to create barriers to new commerce. He also noted that under certain Japanese guidelines, unduly restrictive rules governing the conditions for joining trade associations are considered to be barriers to entry and asked the delegation to explain the rationale for that policy.

A delegate from Japan first wished to emphasize that pachinko is a gambling game, and that whether one is lucky at it or not depends partly on the physical condition of the pachinko machine. In the pachinko case, the JFTC found that conduct by the pachinko game machine trade association violated Section 3 of the Antimonopoly Act, which prohibits private monopolisation that substantially restricts competition by excluding or controlling the business activities of other companies. The delegate also noted that the government has established some standards for pachinko machines. Furthermore, the trade association has historically owned or managed the patents on pachinko machines that are essential for meeting the government's standards. In other words, without a license from that trade association it is quite difficult – actually impossible – to manufacture legal pachinko machines.

At the time this case was investigated, the delegate continued, almost all the existing pachinko machine manufacturers, which were the members of the trade association, obtained licenses from the trade association. In that particular situation, the trade association's behaviour of refusing to grant licenses to third parties who are not members of the trade association prevented them from entering the market. This conduct impeded new entry and allowed members of the association to maintain their monopoly in the pachinko manufacturing market. The delegate remarked that this case does not directly relate to the question about why difficulty in joining trade associations can be considered a barrier in some circumstances. The guidelines state that if it is practically impossible to do business without getting into a trade association, then restrictions in joining a trade association would constitute a problem under the antimonopoly law.

The Chairman then turned to Germany's contribution, which discusses strategic barriers to entry in the context of long term contracts. The Bundeskartellamt is trying to reduce entry barriers created by long term contracts between the gas transmission industry and gas distributors. The Chairman asked the delegation from Germany to explain why this is necessary, particularly in view of the fact that there are at least 15 transmission companies in the market. One might assume that with such a large number of companies, there would be competitive bidding whenever a contract was coming to an end. The Chairman also asked whether it is possible that a justification for those long term contracts is that they allow distributors to have a lower price than if they had shorter contracts. Thus, is there a possibility that shortening the terms of the contracts will increase the prices for end users?

A delegate from Germany stressed the importance of energy for the competitiveness of the economy as a whole, and noted that if there is no competition then from the Bundeskartellamt's point of view the prices are higher than they should be. These long term gas contracts often last up to 20 years and in most cases 100% of the requirements of the distribution companies are met by the contracts. Most of the contracts do not expire within the next few years and the transmission companies tend to prolong the contracts long before the expiry date; if that takes place then there is no chance to introduce competition in the area. The question is why the transmission companies are able to prolong these contracts, and the answer is that the distribution companies cannot change suppliers easily. Network access rights and tariffs hinder switching. What makes it even worse, the delegate added, is that these companies are vertically integrated and they can cross-subsidise.

Referring to the Chairman's second question, the delegate stated that we should first ask ourselves why the transmission companies defend the instrument of long term contracts and why the distribution companies want to get rid of them. It may be the case that a transmission company grants more favourable prices for longer contract periods. However, it must be noted that the current price level is based on a foreclosed market and according to economic experience the price level is thus unusually high. This is illustrated by the example of distributors that have switched from long term contracts with established gas transmission companies to more favourable supply opportunities that involve shorter contract periods. Other purchasers are likely to follow their example once they are free to do so. What is important is to give the distribution companies the freedom to build their own portfolios of short, medium and long term contracts.

Next, the Chairman mentioned the discussion of over-investment in advertising in Norway's contribution. There is probably not much disagreement about the fact that over-investment in advertising to increase information asymmetry is probably a source of difficulty for entrants. The underlying question is whether "regular" investment in advertising is not also a barrier to entry. The Chairman asked the delegation from Norway for its views on the general concept of barriers to entry in Norwegian law and on investment in advertising in general.

A delegate from Norway replied that regular investment in production capacity and in advertising is certainly a possible basis for barriers to entry, especially when the investments are sunk. The contribution's reference to over-investment meant "in addition to" regular investment. In other words, over-investment in production capacity and in advertising can be used by the incumbent as a strategic barrier to entry because it makes an aggressive response to entry more likely. This has occurred in the airline industry in Norway, where the incumbent has used over-investment in production capacity to increase barriers to entry. Furthermore, over-investment in advertising has been used in the grocery market sector to increase barriers to entry, especially for foreign grocery chains that are trying to enter the Norwegian market. With respect to the contribution's expression of regret about not having an agreement on a clear definition, the delegate said, the reason for this is that such a definition would facilitate a more unified assessment of barriers to entry.

The Chairman asked a follow up question: Although one can define over-investment in capacity fairly easily, how does one define over-investment in advertising?

The delegate from Norway acknowledged that this is a difficult question. But when one observes a huge increase in advertising when a foreign grocery chain is coming, that is reason to believe that this is above-normal investment in advertising.

The Chairman proceeded to Chinese Taipei's contribution, which describes a case in which 2 major karaoke parlour enterprises chose a new music audio/video supplier and excluded the original supplier. He asked why the competition authorities concluded that changing suppliers was a strategic barrier to entry.

A delegate from Chinese Taipei first clarified the market structure, explaining that companies that produce musical tapes like EMI and Sony are at the upstream level; audio cassettes providers, who obtain licenses from the upstream producers and then add features like captions and video backgrounds, are at the midstream level; and karaoke parlours occupy the downstream level. This case relates to the midstream and downstream levels. At the downstream level there were 2 major karaoke parlours and the Fair Trade Commission imposed fines on them. The intriguing aspect of this case is that the FTC defined the market as the midstream level cassette providers. It did so because the respondents were operating in the downstream market. Together, those 2 major downstream operators set up a joint venture company that services major operators in the midstream level. Because these 2 karaoke parlours collectively pay about 60% of all the license fees in the whole market, they were actually trying to impose exclusionary effects on the midstream level by creating a joint venture at that level. In other words, because the purchasing power for the downstream operators is so dominant, this kind of arrangement creates not only an exclusionary effect to the existing incumbent audiocassette providers but also to potential new entrants. Therefore, instead of going after the midstream level joint venture, the FTC decided to go after the downstream controlling operators.

The Chairman then referred to the *Colgate* case discussed in Brazil's contribution. The Brazilian authorities imposed certain conditions before allowing a merger involving differentiated goods (branded toothpastes), having found that brand names were a barrier to entry. He asked the delegation from Brazil to report on whether the remedy was adequate.

A delegate from Brazil stated that the merger combined the 4th and 2nd leading companies in Brazil's toothpaste market. Simultaneous control of the 2 main brand names and especially the leading brand Kolynos constituted the most significant barrier to entry and was a source of non-transitory power for the merging companies. CADE approved the merger with some restrictions in 1997, but it allowed the restrictions to be chosen by the companies from among the following options: i) suspend for 4 years the use of the Kolynos brand name; ii) license the Kolynos brand name for 20 years to some player having less than 20% of the market; or iii) sell the Kolynos trademark with one of the restrictions being that the parties should also allow the licensor part of its production facilities. Colgate chose the first option and then launched a new brand, Soriso. During the 4 year suspension the HHI declined from approximately 5600 in 1997 to 4600 in 2001 and real prices decreased slightly, so at first it seemed that the right thing was done. The increased competition resulted from the growth of the competitive fringe, mainly composed of big multinational firms that raised their market shares from around 26% to around 34%. No important entry has occurred so far, however. Furthermore, when the restriction finished, Colgate decided not to reintroduce the Kolynos brand name in the toothpaste market, but to reinforce the signals that make consumers relate Kolynos with the Soriso products. The leading company is still Colgate, and Kolynos, the suspended brand name, is still at the top of consumers' minds even after 5 years of being off the toothpaste shelves.

The delegate suggested several reasons for this intriguing result. First, the Kolynos brand name was not required to be suspended for all related products, such as dental floss and mouthwash, so Kolynos-labelled products were still on store shelves. Second, when Colgate launched the new brand Soriso, its TV campaign emphasised that Kolynos is now Soriso. Moreover, Colgate kept the same colours, packaging, and the same kind of advertising that were used for Kolynos. This strategy transferred all the differentiating barriers from Kolynos to Soriso. So the merger analysis was successful in identifying the importance of the trademark as an entry barrier, but the remedy and mainly its enforcement was not sufficient to change the market conditions regarding both barriers to entry and barriers to growth. Therefore, the lesson we can take from this is that monitoring and enforcing a remedy is as important as the remedy itself. In addition, structural solutions such as selling the brand names or other assets are much easier to implement because the cost of monitoring is much lower and much more effective.

Next, the Chairman turned to the EU's contribution, which states that Bain's definition of entry barriers is inadequate because it implicitly assumes that all barriers are exogenous to market participants, whereas what is important for the entry decision is post entry profitability. Post entry profitability is particularly affected by 2 factors: the intensity of post entry competition and the extent to which entry costs are sunk. The contribution adds that a tough post-entry competitive environment leads entrants to anticipate lower prices, reducing the expected profitability of entry and thus making it less attractive. The Chairman proposed that one of the questions raised by those statements is whether a merger that confers a large market share on the merging parties and increases their efficiency should be considered to increase both concentration and barriers to entry because entrants can expect tougher competition after the merger. If that is so, he asked, then isn't there a risk that pro-competitive or pro-efficient mergers will be prohibited while mergers that do not improve the efficiency of merging firms and are therefore less likely to lead to more competitive conditions post-entry will be more easily allowed?

A delegate from the EU began by pointing out that the EU's general view is similar to that of a number of other jurisdictions: looking in an isolated way at entry barriers is not the objective. The objective is rather to use the analysis of entry barriers in relation to the tests that are applied in the overall assessment of competition. In merger cases, we look at entry barriers not just to define markets but to analyse a situation that could be anticompetitive unless there is timely and likely entry that is sufficient to solve the problem. Equally, regarding unilateral conduct, the EU agrees with what the US, for example, said about the applications barriers to entry in the Microsoft case with respect to the operating system. But looking at that issue of a barrier to entry in the Microsoft case is only one element because it simply supports the fact that there is a dominant position in the operating system market. The allegation that must be addressed is whether Microsoft is therefore able to abuse its position through another anticompetitive effect. Therefore, the delegate said, a very comprehensive, fact-based investigation is needed. One cannot simply assume on the basis of a history of entry or lack of it that there is or is not going to be entry in the future. One must know why firms were entering or not entering. The distinction between endogenous and exogenous in the EU's contribution corresponds to technical and regulatory factors on the exogenous side and to strategic factors on the endogenous side. Getting rid of technical and regulatory barriers could certainly facilitate entry, but it doesn't necessarily mean that entry will actually occur because of the endogenous strategic elements that might work against it.

The delegate added that it would be rare in a high growth, high technology industry for the Commission to be pleading against competition in research and development expenditure. Even in industries that require stepwise capacity increases, it is quite normal and legitimate for there to be increases in capacity in excess of current demand because of the nature of the investment process. Thus, during certain periods, there may be a disincentive for a new entrant to come in due to this endogenous feature of what may be a pro-competitive market. But then one can move along the spectrum of endogenous factors towards issues like product differentiation through advertising and other strategies that arguably could be called abuses, such as tying and bundling or fidelity rebates which might be tantamount to barriers to entry created by the companies themselves. If there is a tough competitive regime post-entry, that presumably means that the merged companies are profiting from the merger to develop efficiencies but for some reason or other without entry they are not tempted to increase prices. If they are tempted to increase prices and they are also developing efficiencies, one must nevertheless assess whether in the medium term, at least, the efficiencies are counterbalanced by the merger's potential to strengthen market power unduly. So if there is tough, low-priced post-entry competition, one can argue that means higher barriers to entry, but in the general competition assessment one would say this is a pro-competitive merger. If that's not the situation and profitability is expected to rise due to the foreclosure that the merger might produce, then one would expect that the incentives for new entrants would increase and therefore the assessment of the likelihood of entry becomes a very important factor. On the whole, then, authorities need to look at how the market works and how firms are developing their strategies, not simply at the exogenous technical or regulatory barriers.

The Chairman expressed regret that there was not time for an extended discussion, but he clarified that his hypothesis was that the merging firm's efficiency increases but that it does not increase its prices, either. Instead, the firm will just get larger profit margins. Furthermore, no one enters because anyone who does would expect tougher competition once they enter. But this scenario will have to wait for another forum.

Finally, the Chairman addressed Switzerland's contribution, noting that it discusses a case that involves a combination of many types of entry barriers: regulations, switching costs, technical barriers, and strategic barriers. He invited the Swiss delegation to present the *UBS* case.

A delegate from Switzerland explained that the UBS case involved the combination of 2 of the 3 largest banks that existed in Switzerland nearly 10 years ago. The Swiss Competition Commission found no serious problems in the international and national markets, but there were problems at the cantonal level regarding commercial loans for small and medium sized companies. The Commission found that switching costs and legal obstacles were present in the market. Switching costs arose because when a customer wanted to change banks he generally had to change banks for all his products and not only for one, which increased the cost of carrying out the change. The legal obstacles were even more important.

In fact, even the existing cantonal banks could not enter other cantonal markets, or could do so in only a very limited way. So foreign banks and cantonal banks could not be relied upon to counter the merging banks' market power. The Commission therefore imposed certain restrictions for periods of up to seven years.

Furthermore, the delegate commented, the temporal element remains the same from case to case in the Commission's approach: entry must be possible within 2 to approximately 3 years, and that it is something that is relatively concrete. The Commission's treatment of legal obstacles was close to an entry barrier analysis in the more technical sense of the term rather than just being a description of the market. The delegate also mentioned a new case involving a market – dairy production – in which legal barriers to entry are important but diminish. The level of concentration affects significant parts of the market but it would not pose a problem if the barriers, which concern the way agriculture is protected in Switzerland, were to decrease and even disappear in the long term. The question is whether and when that will happen. Thus the Commission has the problem of analysing the probability that a barrier to entry based on a law will be abolished.

5. General Discussion

A delegate from BIAC favoured the approach in the EEC and US merger guidelines of looking at whether entry would be timely, likely, and sufficient to deter the exercise of market power. He noted that actual entry is not required because potential entry can also deter the exercise of market power. The delegate also stated that, from the standpoint of the business community, the absolute costs of entry are not particularly relevant. What matters is the expected return on investment and that entails a risk/reward analysis. The delegate also expressed approval of recent, pro-active efforts by some enforcement agencies to advocate the elimination or reduction of unnecessary barriers to entry created by legislation and regulation.

A delegate from the Czech Republic spoke about a recent case that is very similar to the gas distribution case in Germany. In fact, the gas distribution and transmission system in the Czech Republic was sold to a German company 7 years ago and now, with the opening of the market, there are very serious problems. The main one is that in the regulated market, prices have increased by 17% this year while in the free market they have increased about 30 to 40%. The main difficulty is that there are barrier to entry for new competitors. In particular, the contracts are "take or pay" contracts. The government is trying to open the market by putting access to underground storage for gas on the market, but prices for that storage are under the market prices so it is practically impossible to push the owners of the underground storage gas systems to give enough capacity to competitors.

The Chairman then made a few remarks. He observed that there has been a very clear and broad movement from assessing barriers to entry in the Bain tradition, *i.e.*, identifying factors that could meet Bain's definition of entry barriers, to a more process-oriented evaluation in which the issue is not so much the factors that could be qualified as barriers to entry but is much more about whether entry is likely, timely, and sufficient. One of the good reasons to move in that direction is the finding that the factors that have traditionally been associated with barriers to entry may not be finely tuned enough to be useful in all circumstances. We have heard quite a bit about specific barriers to entry and specific cases that did not fit any of the categories that normally come to mind.

Apart from the fine tuning, a second aspect is economic relevance and though it seems to be a general trend, some countries have been more advanced than others in evolving ways to take that into account. The Chairman noted that not much was said about the extent to which agencies' analyses are predictable and what the criteria are that lead them to assess that in a particular case entry is likely, timely, or sufficient. A fair amount of time was spent making the point that some of the most obvious tools, such as past history of entry or exit, may not be entirely sufficient so there is a need for additional considerations. Whether very predictable instruments are used in drawing conclusions about entry is something the Chairman found to be still open to question.

COMPTE RENDU DE LA DISCUSSION

Le Président du Comité de la concurrence, Frédéric Jenny, commence par faire quelques observations d'ordre général en s'appuyant sur les contributions écrites des délégués. Bon nombre d'entre elles laissent entendre que les lois nationales en vigueur ou les lignes directrices des autorités de concurrence ne comportent pas de définition précise des barrières à l'entrée. Quelques autorités chargées de la concurrence pensent qu'il pourrait être utile de mieux définir les barrières à l'entrée, mais la grande majorité d'entre elles se satisfont parfaitement de cette absence de définition du terme. Quelques contributions prétendent même qu'il y aurait des inconvénients à tenter une définition trop précise.

Le concept de barrières à l'entrée qui est utilisé dans les affaires d'abus de position dominante et les affaires de fusion semble être le même. En ce qui concerne la mesure des barrières à l'entrée, la plupart des contributions font état d'une évaluation qualitative seulement. Quelques organismes déclarent que chaque fois que c'est possible, ils s'efforcent de combiner une évaluation quantitative des barrières techniques avec une évaluation qualitative des barrières stratégiques, étant donné qu'il serait très difficile d'essayer de quantifier ces dernières.

La partie la plus problématique des contributions concerne les barrières stratégiques ou "comportementales" à l'entrée. Dans certains cas, il semble que les facteurs qui permettent aux firmes d'avoir de grandes parts de marché dans des industries de produits différenciés sont précisément ceux qui sont considérés comme établissant l'existence de barrières à l'entrée. Dans d'autres cas, cependant, il semble que les facteurs favorables à une concurrence vigoureuse sont justement ceux qui dénotent l'existence de barrières à l'entrée, de sorte que d'après les contributions, il n'est pas évident de pouvoir apprécier de façon indépendante le niveau de concurrence, l'existence de barrières à l'entrée et le niveau de concentration.

Le Président suggère que le Comité examine quatre questions principales : la définition des barrières à l'entrée, les facteurs pris en compte dans l'évaluation des barrières à l'entrée (l'objectif n'est pas de dresser une liste précise de tous les facteurs, mais simplement d'en examiner quelques uns parmi ceux qui sont mentionnés dans les contributions), la mesure des barrières à l'entrée, et en quoi consistent les barrières stratégiques à l'entrée et comment on peut les évaluer.

1. La définition des barrières à l'entrée

Le Président note que la majorité des pays considère qu'une définition générale, imprécise, est suffisante ou qu'il est même préférable de n'avoir aucune définition. Il y a toutefois des exceptions, et parfois l'exception n'est pas imputable à l'autorité de concurrence, mais à un tribunal qui a imposé une définition, comme en Nouvelle-Zélande. Le Président demande à la délégation de Nouvelle-Zélande d'expliquer en quoi le test de la Commission du commerce (qui cherche à savoir si l'entrée est probable, d'envergure suffisante et opportune) est légèrement différent de la définition stiglerienne adoptée par la Cour d'appel dans l'affaire *Southern Cross*.

Un délégué de la **Nouvelle-Zélande** répond que si la Cour a effectivement retenu une définition qui ressemble à celle de Stigler, elle s'en distingue par un élément important. La définition de la Cour est centrée sur un coût ou une limite qu'une entreprise en place n'a pas à assumer. Le verbe est au présent, ce qui a son importance. Autrement dit, la Cour n'a pas retenu le point de vue selon lequel ce n'est pas parce qu'une entreprise en place s'est trouvée confrontée une fois à un obstacle (et l'a d'ailleurs surmonté) que ce n'est pas une barrière. Comme certaines autres juridictions, la Nouvelle-Zélande prend en compte une longue liste de barrières possibles, y compris celles qui résultent de barrières naturelles telles que d'importantes économies d'échelle ou des coûts irrécupérables importants, ainsi que des barrières réglementaires, telles les autorisations d'entrée, et des barrières stratégiques, telles les capacités excédentaires.

Le délégué ajoute que la Commission ne voudrait pas donner l'impression qu'elle agit contrairement à la Cour d'appel, ce que d'ailleurs elle ne fait pas. La Commission procède en deux étapes : d'abord elle identifie toutes les barrières possibles à l'entrée et à l'expansion, puis elle regarde si ces barrières vont effectivement retarder ou empêcher une entrée ou une expansion. *Southern Cross* et des décisions ultérieures montrent que la Cour a jugé – comme la Commission la pressait de le faire – que la deuxième partie de ce test est peut-être même plus importante que la première. La Commission n'est pas en désaccord avec les règlements de la Cour à cet égard et n'a donc pas ajusté ses lignes directrices concernant les fusions et acquisitions, pas plus qu'elle n'a modifié son approche en ce qui concerne son analyse des fusions.

Finalement, il s'est révélé extrêmement utile, précise le délégué, d'avoir une définition précise des barrières à l'entrée en Nouvelle-Zélande, parce que certaines décisions de tribunaux de rang inférieur poseraient problème si la Cour d'appel n'avait pas adopté une définition claire que la Commission suit maintenant.

Le Président se tourne ensuite vers un autre pays qui a une définition précise et s'en trouve très bien : le Royaume-Uni. On lit dans la contribution du RU que les barrières à l'entrée peuvent être définies comme "toute caractéristique du marché qui donne aux firmes en place un tel avantage sur des entrants potentiels que les entreprises en place peuvent de manière persistante faire passer leurs prix au dessus des niveaux de la concurrence (et leur qualité en dessous) sans que de nouvelles firmes pénètrent sur le marché." La contribution se poursuit ainsi : "Il est maintenant largement admis que les économies d'échelle ou les ratios de fonds propres, en eux-mêmes, ne constituent pas nécessairement une barrière à l'entrée." De l'avis du Président, cette idée n'est peut-être pas si largement admise dans le reste du monde. Il demande à la délégation du RU d'expliquer en quoi elle est parfaitement satisfaite de sa définition des barrières à l'entrée, pourquoi elle trouve cette définition utile, comment cette définition se rattache à la définition classique des barrières à l'entrée, et en particulier ce qu'on entend par un "avantage".

Un délégué du RU répond que, par rapport à l'accord sur les économies d'échelle, il y a eu un changement dans le consensus économique depuis l'époque où la définition de Bain des barrières à l'entrée avait identifié les économies d'échelle comme étant une barrière. La grande idée de la théorie de la contestabilité était que si les conditions nécessaires d'un raid éclair (hit & run) existent, alors les économies d'échelle peuvent ne pas constituer une barrière à l'entrée. Certes, le simple fait qu'un important investissement soit nécessaire pour entrer n'immunise pas nécessairement l'entreprise en place contre la menace d'entrée lorsque de nombreuses firmes sont en mesure d'effectuer de tels investissements. Bien sûr, les conditions requises pour une action éclair sont tout à fait strictes et il existe de nombreuses situations dans lesquelles une telle opération n'est pas possible – en particulier lorsque des coûts irrécupérables sont nécessaires, lorsque l'on constate l'inertie des consommateurs ou lorsqu'il y a des coûts de transfert. Cette partie de la contribution du RU a simplement pour but de bien montrer que l'analyse des barrières à l'entrée ne doit pas être axée nécessairement sur les économies d'échelle, mais sur la façon dont elles peuvent interagir avec les coûts irrécupérables et les coûts de transfert.

Le délégué ajoute que la définition de l'OFT fait écho à celle de Bain qui était centrée sur les contraintes qu'impose l'entrée à l'exercice d'un pouvoir de marché. Dans ce contexte, il n'est pas habituel de centrer l'analyse d'entrée sur l'avantage des entreprises en place ; l'analyse d'entrée fait plutôt partie de l'analyse de la concurrence en général. Par exemple, dans les fusions, la principale question n'est pas d'identifier précisément les barrières à l'entrée, mais plutôt de savoir si les conditions d'entrée sont suffisantes pour compenser tout amoindrissement prévu de la concurrence suite à la fusion. Parce que l'accent n'est pas vraiment mis sur la définition elle même, mais sur l'analyse économique du problème de concurrence qui se pose, l'OFT n'a pas perçu que la définition posait des problèmes.

Le Président fait observer ensuite que dans sa contribution la Finlande semble quelque peu sceptique au sujet de l'utilité d'une définition précise des barrières à l'entrée. Néanmoins, on trouve une description assez précise de ces barrières dans les lignes directrices de la Finlande sur les fusions. En outre, la contribution indique qu'il suffit que des barrières retardent l'entrée ou la restreignent au cadre temporel qui est considéré comme étant pertinent pour le bon fonctionnement de la concurrence. Il n'y a donc pas de test de 2 ans, comme dans d'autres pays, mais un cadre temporel qui dépend des circonstances de chaque cas d'espèce. Le Président demande comment l'on sait si, dans tel cas, ce sera 5 ans ou 2 ans.

Un délégué de la Finlande répond que le but de la description des barrières à l'entrée dans les lignes directrices sur les fusions est de donner quelques exemples de caractéristiques du marché et de comportement des firmes en place que les autorités finnoises de la concurrence prennent en compte. Cela augmente la prévisibilité de l'analyse de la FCA qui est centrée sur les effets observés sur le marché. Il ajoute que dans l'analyse finnoise des fusions, la concurrence potentielle peut agir comme une contrainte si l'entrée doit avoir lieu dans un avenir prévisible. Dans la plupart des cas, le délai est de 2 ans. Cependant, ce délai dépend du marché, de sorte qu'il peut être plus court ou plus long, selon la nature des barrières et la nature du marché.

Le Président note ensuite que dans sa contribution la Hongrie indique que tout obstacle qui a pour effet de réduire la concurrence constitue une barrière à l'entrée. Elle nous dit aussi que le manque de définition précise n'a pas été un problème jusqu'ici pour l'autorité de concurrence hongroise. En fait, la contribution suggère qu'il pourrait être dangereux d'avoir une liste précise des barrières à l'entrée, car "parfois la GVH se trouve en présence de conditions qui influencent effectivement l'entrée sur le marché ou les performances, mais qui ne font pas partie des conditions normales de marché." La contribution suggère que tel a été le cas dans une affaire concernant les services de démoustication et une barrière qui défiait les définitions habituelles. Le Président demande une description plus complète de cette affaire. La contribution de la Hongrie déclare aussi qu'il n'y a pas de mesure précise des barrières à l'entrée en Hongrie, mais qu'il y a des secteurs "où il est évident que les coûts d'entrée sont élevés." Le Président demande à la délégation hongroise d'expliquer comment on trouve des secteurs où il est évident que les barrières à l'entrée sont élevées.

Un délégué de la Hongrie répond qu'en réalité l'affaire de la démoustication était une affaire de collusion des soumissionnaires et qu'on n'en a tiré aucune conclusion définitive sur les barrières à l'entrée. C'était une affaire de marchés publics, soumise par des communes qui avaient invité des entreprises à soumettre des offres de services de démoustication. Le prix du service n'était pas tellement important, car les municipalités considéraient que peu importait le montant économisé sur le service si l'on avait toujours des moustiques. Ce qui comptait, c'était la réputation et l'expérience du prestataire de service. Mais les conditions d'évaluation des offres comprenaient aussi quelques éléments très subjectifs, tels que le niveau de professionnalisme des soumissionnaires. Toutefois, l'autorité de concurrence a considéré que les municipalités n'avaient pas la capacité d'évaluer le niveau de professionnalisme des entreprises ayant soumissionné. Il y avait donc une relation semi illégale entre certaines entreprises et certaines municipalités, parce que les entreprises qui avaient de bonnes relations avec des fonctionnaires municipaux pouvaient influencer les municipalités. C'était donc une forme de barrière à l'entrée.

Concernant l'autre question, le délégué déclare que la GVH ne fait ni calcul, ni comparaison de coûts avec le niveau de profit potentiel disponible après entrée. Il y a toutefois deux situations dans lesquelles la GVH estime sur un plan qualitatif que les barrières à l'entrée sont élevées. La première se produit lorsqu'un montant extrêmement élevé de coûts irrécupérables est nécessaire pour pénétrer sur un marché, tel le marché des services de téléphonie fixe. La seconde s'observe en l'absence de telles présomptions, de sorte que les barrières à l'entrée sont analysées de façon plus approfondie, mais on peut repérer certains éléments de coût se situant à des niveaux impressionnants. Ce fut le cas du marché du café où les grossistes ont été confrontés à un coût d'entrée extrêmement élevé par rapport à la publicité pour une nouvelle marque. Cependant, même dans ce dernier cas, aucun calcul n'a été effectué et le haut niveau de barrière à l'entrée est resté fondé sur des impressions.

Le Président, ayant parlé des contributions de certains pays qui sont satisfaits d'avoir une définition, et d'autres qui pensent que ce n'est pas un problème de ne pas en avoir, passe à une troisième catégorie de pays : ceux qui n'ont pas de définition précise mais souhaiteraient en avoir une. La contribution des Pays-Bas, par exemple, suggère qu'il est nécessaire de mieux délimiter le concept de barrières à l'entrée. Le Président demande à la délégation des Pays-Bas pourquoi, à son avis, cela a été problématique de ne pas avoir de définition des barrières à l'entrée.

Un délégué des Pays-Bas répond que son pays n'applique pas encore de définition claire et cohérente des barrières à l'entrée, déterminant au jugé les effets des barrières à l'entrée. De sorte que le Tribunal de première instance n'a fait aucune référence directe à l'existence ou aux effets de barrières à l'entrée, préférant évaluer certaines affaires plutôt implicitement, se déclarant d'accord ou pas d'accord avec des définitions du marché ou évaluant les effets globaux sur la concurrence d'une fusion ou d'un accord. Cette méthode d'évaluation par le tribunal était plutôt gênante dans une affaire concernant la fusion de journaux régionaux en 2000. Le tribunal n'a pas traité les arguments du gouvernement au sujet des barrières à l'entrée élevées, mais a décidé par contre que le marché était plus large que suggéré, et que les effets prévus sur la qualité et le prix étaient improbables parce que les journaux nationaux feraient probablement respecter la discipline de la concurrence. La décision du tribunal a été rejetée en appel, mais elle reste gênante.

Le délégué ajoute que dans une acception plus large l'autorité de concurrence n'a pas été gênée par le manque de définition des barrières à l'entrée. Néanmoins, il serait préférable de se centrer plus explicitement sur elles. Cela ne veut pas dire que l'autorité de concurrence néerlandaise a négligé les barrières à l'entrée. Elles sont évaluées dans le double but de définir le marché et d'évaluer leurs effets ; et à la question de savoir si l'entrée est relativement facile ou si les coûts d'entrée sont élevés, il est répondu cas par cas.

2. Conditions techniques ayant une incidence sur l'entrée

Le Président passe ensuite à l'examen des facteurs précis qui sont pris en compte pour déterminer si des barrières à l'entrée existent. Il note que l'article 13 de la Loi mexicaine sur la concurrence impose à l'autorité de concurrence de ce pays d'évaluer les barrières à l'entrée lorsqu'elle détermine le pouvoir de marché d'une société, et que l'article 11 contient une liste précise d'éléments qui peuvent être interprétés comme des barrières à l'entrée. Il demande à la délégation du Mexique de l'éclairer sur la signification de ces éléments. Le Président note également par rapport à la contribution du Mexique que dans l'affaire de fusion Coca-Cola Cadbury Schweppes, l'autorité de concurrence a conclu que "les énormes moyens dont dispose Coca-Cola pour faire la publicité de ses marques et son vaste réseau de distribution constituaient des barrières à l'entrée." Le Président demande si cela signifie que lorsqu'on a une entreprise florissante disposant d'une grosse part de marché dans une industrie de produits différenciés, il y a par définition des barrières à l'entrée.

Un délégué du Mexique répond que la liste des barrières éventuelles à l'entrée en vertu de l'article 11 comprend les normes de fonds propres, l'efficience relative des marchés financiers, les coûts d'ajustement, les coûts irrécupérables, les coûts fixes tels que la publicité et les investissements dans des marques, certaines pratiques commerciales, tels les accords d'exclusivité, les réglementations et l'utilisation des droits de propriété intellectuelle et industrielle comme barrières à l'entrée. La liste n'est pas nécessairement si limitative qu'elle empêche toute analyse du sujet, de sorte qu'on pourrait définir d'autres barrières à l'entrée. Il est utile, toutefois, d'avoir une telle liste, car ces éléments donnent aux entreprises une plus grande confiance dans la justice.

Par rapport à l'affaire Coca-Cola Cadbury, le délégué ajoute que la contribution du Mexique ne signifie pas qu'il faut en conclure que des performances économiques de haut niveau constituent à elles seules une barrière à l'entrée. Par contre, le vaste réseau de distribution de Coca-Cola et son pouvoir publicitaire de marque sont des éléments qui ont été pris en compte lors de l'évaluation d'entrée. La Commission a déterminé que ces éléments contribuaient à empêcher l'entrée parce qu'ils impliquent qu'il faudra débourser beaucoup d'argent. En fait, la Commission a confirmé son avis dans 2 affaires récentes où Coca-Cola et ses distributeurs se sont vus infliger au total une amende de près de 70 millions de dollars pour accords d'exclusivité. Les stratégies d'investissement marketing de Coca-Cola, ainsi que son vaste réseau de distribution, ont été considérés comme des barrières à l'entrée par la Commission.

Le Président fait observer que la contribution de l'Espagne insiste sur la flexibilité dans l'analyse des barrières à l'entrée. Il note que l'Espagne ne suit pas une définition particulière, mais procède au coup par coup. Dans l'examen de l'approche utilisée par le Servicio de Defensa de la Competencia, on peut lire : "les barrières économiques comprennent, entre autres, les investissements nécessaires pour accéder au marché et agir sur lui, la technologie requise pour produire, l'échelle minimum efficace ou la recherche et développement ou les obligations de publicité, étant donné que les entreprises en place n'ont pas à assumer ces coûts qui peuvent être d'une telle ampleur qu'ils risquent de décourager toute entrée future." Dans sa description de la pratique du Tribunal de Defensa de la Competencia, la contribution note : "le TDC a tendance à considérer que les barrières à l'entrée sont tout obstacle, empêchement ou difficulté que rencontre une firme quelconque à l'entrée ou à la sortie d'un marché particulier." Le Président demande ensuite à la délégation espagnole, d'abord ce que signifie l'affirmation selon laquelle les entreprises en place n'ont pas à assumer l'investissement nécessaire pour produire à une échelle minimum, et deuxièmement s'il y a une différence d'approche, si minime soit-elle, entre le Servicio et le Tribunal.

Le délégué de l'Espagne qui répond reconnaît que la contribution a peut-être mêlé 2 concepts différents en ce sens que la référence à une échelle minimum efficace visait les économies d'échelle et, dans certaines circonstances, l'existence d'une structure de monopole naturel où une seule firme efficiente peut exister, de sorte qu'un opérateur efficient n'est nullement incité à entrer.

Par rapport à la deuxième question, le délégué note que le Servicio et le Tribunal ont une approche similaire en ce qu'ils utilisent tous deux une approche flexible, au cas par cas. Les deux institutions se passent très bien de définition fermée des barrières à l'entrée. Qui plus est, bien que les deux institutions fassent attention aux barrières économiques à l'entrée, elles surveillent aussi les barrières juridiques parce que le secteur public peut jouer un rôle très important en adoptant des réglementations qui constituent des barrières à l'entrée. Il y a là une occasion pour les autorités de plaider en faveur de changements qui réduiraient les barrières juridiques. Le Tribunal va même plus loin en recommandant des changements de réglementation sur certains marchés.

Le Président admet que les pouvoirs publics, de toute évidence, créent des barrières à l'entrée et que les autorités de concurrence estiment qu'il est de leur devoir de plaider ou de faire ressortir dans des procès que les barrières crées par les autorités publiques sont inefficaces et conduisent à un amoindrissement de la concurrence. Il se tourne ensuite vers les Etats-Unis, notant que lorsqu'ils évaluent un projet de fusion, les autorités américaines chargées de faire respecter la loi n'évaluent pas les barrières à l'entrée comme une chose abstraite, mais plutôt comme une question très concrète : est-ce que l'entrée attirée par la fusion sera "opportune, probable est suffisante dans son ampleur, son caractère et sa portée pour empêcher ou contrecarrer les effets sur la concurrence" de la fusion, entraînant par là "une baisse des prix revenant à leurs niveaux d'avant la fusion ou plus bas." Le Président demande d'abord comment se mesurent ces éléments. On peut lire dans la contribution américaine que "les autorités américaines ont trouvé parfois que les coûts irrécupérables associés à la construction d'une usine de fabrication, au développement d'un produit ou aux efforts déployés pour se faire accepter par le client sont si élevés qu'une fusion n'attirerait pas d'entrée, même s'il n'y avait aucun risque de faillite pure et simple, ni de perte de la totalité de l'investissement à l'entrée." Le Président souligne que cette déclaration semble contredire la théorie traditionnelle des coûts irrécupérables où l'on tient pour acquis que l'une des raisons pour lesquelles les coûts irrécupérables conduisent à des barrières à l'entrée est qu'il y a des risques d'échec. Il demande ensuite à la délégation américaine d'expliquer comment elle est parvenue à cette conclusion. Enfin, il demande que l'on poursuive la discussion engagée par la contribution des Etats-Unis sur les effets de réseau et sur le "problème de l'oeuf et de la poule" dans le contexte de l'analyse des barrières à l'entrée.

Un délégué des Etats-Unis répond que le temps imparti ne lui permet pas de donner beaucoup de détails sur la façon dont les autorités américaines évaluent le moment opportun, la probabilité et le caractère suffisant d'une entrée. Il fait remarquer qu'on peut trouver des informations sur ce sujet dans la contribution elle-même et dans le commentaire sur les lignes directrices relatives aux fusions que va bientôt faire paraître le Ministère de la justice et la Federal Trade Commission. En ce qui concerne la troisième question, le délégué déclare que les effets de réseau viennent de complémentarités de la demande, c'est-à-dire d'une situation dans laquelle la demande d'un consommateur dépend du nombre d'autres consommateurs qui utilisent le produit. Ces complémentarités sont assez courantes, mais souvent elles ne sont pas très fortes. Par exemple, sur le marché de l'automobile, le besoin de réparation et de service crée un effet de réseau : plus il y a de personnes qui ont la même voiture que vous, plus il y aura d'ateliers de réparation, plus il y aura de réparateurs sachant comment résoudre votre problème, et plus il y aura de pièces détachées disponibles. Cet effet n'est pas si futile qu'on le croit. C'est une barrière à l'entrée, mais beaucoup de constructeurs automobiles la surmontent. Aux Etats-Unis et ailleurs, on a vu beaucoup d'entrées réussies dans l'industrie automobile au cours du dernier quart de siècle.

Le délégué poursuit, notant que la phrase relevée par le Président fait référence à l'absence de faillite pure et simple, mais elle ne dit pas qu'il n'y a aucun risque d'aucune sorte. Il y a toujours un risque associé à l'entrée, parce que le résultat final est incertain. Pour comprendre comment fonctionnent les coûts irrécupérables, il est utile de penser à la situation dans laquelle le résultat final est certain. Il n'en demeure pas moins que les coûts irrécupérables peuvent être si élevés par rapport au résultat final que l'entrée n'a pas de sens. Si l'entrée réussit, cela signifie simplement que l'entrant gagne suffisamment pour couvrir ses coûts d'exploitation courants ; cela ne veut pas dire que les coûts irrécupérables sont recouvrés. Un succès minimal correspond à la perte de la totalité des coûts irrécupérables. Si les coûts irrécupérables sont d'un montant exceptionnellement élevé, alors il peut être difficile de réussir au point nécessaire pour obtenir un retour compétitif sur l'ensemble de l'investissement à l'entrée. Par exemple, le marché peut tout simplement ne pas être assez grand pour générer le volume des ventes qui serait nécessaire pour avoir de bonnes chances de réaliser un rendement concurrentiel.

Un autre délégué des Etats-Unis explique qu'il y a des marchés où le risque de ne pas recouvrer les coûts irrécupérables est relativement faible, mais si ces coûts sont importants, ils peuvent quand même constituer une barrière ou un obstacle important à l'entrée. Un entrant peut raisonnablement s'attendre à récupérer ses coûts, mais les profits escomptés peuvent être si faibles comparés à la taille des coûts irrécupérables que l'entrée ne présente aucun attrait par rapport à d'autres investissements possibles. Le délégué ajoute que la question plus large ainsi posée est de savoir si l'application mécanique des définitions des barrières à l'entrée est réellement le bon moyen de procéder pour effectuer l'analyse ; à son avis, ce n'est pas le cas. L'objectif ultime de l'analyse d'entrée est de déterminer si une nouvelle entrée ou l'expansion d'entrants déjà en place a des chances d'empêcher ou d'éviter l'exercice d'un pouvoir de marché dans un délai raisonnable. Habituellement, l'analyse doit comporter un examen factuel très précis du marché, ce qui exige de rassembler des informations au moyen de réunions formelles et informelles avec les entrants les plus probables, et de mettre ensemble tous les éléments factuels.

Le Président passe ensuite à la contribution du Canada, insistant sur un extrait de la décision du Tribunal de la concurrence dans l'affaire *Laidlaw* : "Si le démarrage d'une activité est facile dans certains cas, de nouveaux entrants peuvent trouver qu'il est difficile de survivre pour diverses raisons, notamment le comportement stratégique des entreprises en place." Selon le Président, cela semble impliquer qu'il faudrait déterminer non seulement si une firme va entrer dans une branche, mais aussi si elle va survivre. Ce qui laisserait supposer que certaines firmes auraient des chances d'entrer dans un secteur, même si elles n'ont aucune chance ou très peu de chances de survie. Ce qui n'est pas clair, toutefois, c'est pourquoi elles le font. Le Président demande donc s'il y a vraiment deux tests qui sont effectués.

Un délégué du Canada explique que l'affaire *Laidlaw* était un abus de position dominante dans lequel le marché de produits était la collecte de déchets en tant qu'activité commerciale. Laidlaw avait racheté un certain nombre de concurrents et signé plusieurs contrats à long terme. Lorsque le Tribunal a dit qu'il pouvait être facile de démarrer une activité commerciale, il faisait en fait un commentaire sur la nature de l'activité qui, dans ce cas, exigeait seulement l'achat d'un camion et de quelques conteneurs. Une formation technique n'était pas nécessaire. Mais ensuite, le Tribunal a poursuivi en disant que de nombreuses barrières existaient, qui diminuaient la probabilité d'entrée. En particulier, il fallait acquérir une clientèle suffisante ; or, les contrats à long terme de Laidlaw rendaient cela difficile. L'argument ici est donc qu'on ne peut pas se contenter de faire une analyse superficielle de l'activité et conclure qu'il semble assez facile d'y entrer. Il faut aller plus loin et voir ce qui se passe sur le marché, le comportement stratégique des concurrents et s'il existe d'autres éléments qui décourageraient l'entrée.

Le Président passe ensuite à la Lituanie dont la contribution évoque une affaire impliquant une ancienne entreprise d'Etat et des plaintes au sujet de barrières à l'entrée découlant de sa capacité à grouper un certain nombre de produits. La société produisait des vins et spiritueux et souhaitait acquérir un concurrent local. Des rivaux ont protesté que si elle avait une aussi large gamme de produits, ils seraient dans l'incapacité de s'étendre et l'entrée de nouveaux concurrents potentiels serait impossible. Le Conseil a décidé qu'en raison de la libéralisation des échanges suite à l'élargissement de l'UE, le marché était suffisamment ouvert, et il a autorisé la fusion. Le Président note qu'il y a 2 niveaux possibles d'analyse : est-ce qu'il y a des barrières juridiques infranchissables ? Et s'il n'y en a pas, est-il encore probable que le marché sera concurrentiel ? On ne sait pas exactement quels critères le Conseil a utilisés dans son analyse. Le Président demande à la délégation lituanienne d'expliquer pourquoi le Conseil était si confiant, si sûr que la concurrence s'établirait et qu'il n'y aurait pas de barrière due à la stratégie de vente groupée de cette ancienne entreprise d'Etat.

Un délégué de la Lituanie souligne tout d'abord que la société absorbante n'avait pas de monopole sur le marché en question, bien que jusqu'en 2003 elle fît partie des 4 entreprises d'Etat auxquelles avaient été octroyés des droits spéciaux pour produire des alcools forts. Le principal concurrent de la société acquérante se plaignait de la capacité de la firme issue de la fusion de grouper ses produits et d'offrir des remises et ristournes aux distributeurs, créant ainsi des barrières à l'entrée ou à l'expansion. Le Conseil de la concurrence s'est concentré sur les avantages dont tous les producteurs locaux avaient profité. La Lituanie avait déjà aboli la restriction qui limitait la production de spiritueux à 4 sociétés seulement. Le Conseil pouvait prendre en compte l'expérience d'autres Etats baltes qui étaient passés par le processus de libéralisation un peu plus tôt. En Estonie et Lettonie, une entrée réussie fut suivie par un déclin substantiel des parts de marché des entreprises en place. En outre, la Lituanie allait dans quelques mois faire partie du marché unique européen, ce qui était supposé éliminer de longues formalités douanières. On s'attendait par conséquent à ce que les producteurs locaux perdent un avantage par rapport aux producteurs étrangers. Les événements qui se sont produits après la fusion ont confirmé que le Conseil avait raison d'accorder plus d'attention aux derniers facteurs. Dans l'année qui a suivi la fusion, les prix des spiritueux ont baissé, les prix des produits importés ont diminué encore plus, la part de marché de la société issue de la fusion a aussi diminué, de nouveaux produits sont apparus et la production totale de spiritueux en Lituanie a augmenté de 15%.

3. Mesure des barrières à l'entrée

Le Président attire ensuite l'attention du Comité sur la contribution de la Turquie, notant qu'elle soulève une question que tous se posent : qu'entendons-nous par barrières "élevées" à l'entrée ? La contribution expose l'affaire *Cement :* toute entreprise qui souhaiterait entrer sur le marché du ciment en construisant une usine d'une capacité de 1 million de tonnes par an, ce qui est considéré comme l'échelle optimale, aurait besoin de USD 100 millions. Le Conseil a considéré qu'à l'évidence de nouveaux entrants auraient des difficultés à trouver du crédit pour un tel investissement en raison des problèmes que connaît le marché financier de la Turquie. Aussi le Président demande où se situe la limite et sur quelle base repose une telle évaluation.

Le Président fait aussi référence à l'affaire Turkcell, notant que Turkcell appartient à un groupe diversifié ayant des partenaires sur divers marchés. Une question qui s'est posée dans cette affaire est de savoir si le fait d'appartenir à un tel groupe crée une barrière à l'entrée dans le secteur des télécommunications. Le Président demande à la délégation turque d'expliquer pourquoi la diversification est en soi une barrière à l'entrée.

Un délégué de la Turquie déclare que dans l'affaire *Cement*, le Conseil de la concurrence a dû tenir compte des conditions macro-économiques lorsqu'il a examiné l'ordre de grandeur de l'investissement qui était nécessaire pour entrer sur ce marché et qu'il s'est demandé si ce serait un montant prohibitif. Les effets de la profonde crise financière qu'a connue la Turquie en 2001 ont été pris en compte.

Quant à Turkcell, il se trouve que c'est l'opérateur dominant sur le marché des services de téléphonie mobile GSM en Turquie. Bien sûr il y a bien plus d'une barrière à l'entrée sur ce marché. Tout d'abord, il y a la barrière matérielle, à savoir que seuls 5 opérateurs GSM peuvent fonctionner sur ce marché à cause des conditions de spectre. Cette situation concrète s'est traduite par une barrière juridique, car les autorités qui réglementent le secteur sont autorisées à fournir une licence d'exploitation. La licence ne peut être accordée qu'après un appel d'offres hautement compétitif, le montant de la soumission gagnante pouvant atteindre 2.3 milliards de dollars EU. De plus, en tant qu'opérateur dominant sur le marché des services de téléphonie mobile GSM, Turkcell intervient effectivement sur un troisième type de barrière à l'entrée, à savoir des externalités de réseau. Les nouveaux entrants, Telecom Italia Mobile et Avcell ont été effectivement marginalisés et forcés de fusionner parce que Turkcell a manipulé très efficacement son vaste réseau et augmenté le coût d'entrée sur le marché GSM. Quatrièmement, nous en venons aux conditions mentionnées par le Président. Le groupe de sociétés qui possède Turkcell possède aussi le plus gros fournisseur de services Internet du secteur privé en Turquie, ainsi que 2 stations de télévision, des radios, des journaux et 2 banques. La puissance de marché obtenue de ce type d'organisation est énorme et Turkcell utilise parfois cette puissance pour entraver l'entrée ou augmenter les coûts pour les nouveaux entrants. Au total, les activités du groupe de sociétés qui possède Turkcell dans des secteurs tels que les télécommunications, les médias, les technologies de l'information ; le concept de convergence dans ce contexte au sens où ces secteurs utilisent de plus en plus les mêmes technologies ; la commercialisation des services GSM par les banques dans le même groupe de sociétés ; et la synergie obtenue, tout cela consolide la puissance de marché de Turkcell et cet état de choses crée des barrières à l'entrée pour de nouveaux entrants qui ne bénéficient pas d'avantages de groupe au même degré.

Le Président passe ensuite à la Corée dont la contribution examine une affaire de fusion impliquant 2 fabricants de pianos. L'entrée d'un concurrent domestique était en fait impossible parce qu'elle nécessitait un investissement d'au moins USD 5 millions et parce que les firmes en place transféraient leurs unités de production dans des pays à plus bas coûts. Le Président fait observer que selon la contribution en question, la loi coréenne ne définit pas les barrières à l'entrée, mais les lignes directrices concernant l'abus de position dominante donnent une définition quasi-statutaire des conditions qui doivent être réunies pour que l'entrée soit facile. Le Président demande si cette liste de conditions est utile compte tenu des observations précédentes selon lesquelles on ne devrait pas avoir une définition trop précise parce que l'analyse devrait être faite cas par cas. Il demande également si la liste permet d'éliminer les entrées qui n'auraient pas d'impact sur le marché et de déclarer qu'il y a encore des barrières à l'entrée.

Un délégué de la Corée répond que la KFTC peut donner 9 exemples de critères concernant les barrières à l'entrée dans les lignes directrices sur les fusions, d'une part, et sur l'abus de position dominante, d'autre part. Ces 9 critères incluent la présence de barrières institutionnelles à l'entrée, les normes de fonds propres, la situation géographique, le réseau de distribution, etc. Plus les conditions de marché satisfont à un grand nombre de critères et plus ces critères sont importants, plus les barrières à l'entrée sont jugées élevées. En effet, la KFTC ne tient pas compte des petits entrants qui sont trop peu importants pour avoir une incidence sur les prix du marché. La KFTC n'autorisera pas la réalisation d'une fusion si les entrants probables ne sont pas suffisamment importants pour s'opposer à toute restriction de la concurrence résultant de la fusion.

Ensuite, le délégué note qu'il y a une erreur typographique en ce qui concerne le chiffre de 5 millions de dollars et qu'il faut lire 50 millions. Dans cette affaire, il fallait plus de USD 50 millions pour que de nouveaux entrants créent des installations de production, et cette barrière a été considérée comme suffisamment haute pour bloquer l'entrée. La KFTC a considéré non seulement que les coûts avaient augmenté, mais aussi que la demande domestique de pianos était stagnante depuis de nombreuses années. Par conséquent, les bénéfices de l'entreprise en place étaient en baisse et la KFTC a décidé que de telles conditions n'étaient pas suffisamment attrayantes pour inciter à entrer sur le marché coréen des pianos.

Le Président examine ensuite la contribution de l'Irlande. Il remarque que le test utilisé par l'autorité irlandaise de la concurrence vise à savoir si l'entrée va être opportune, rentable et suffisante. Lorsqu'elle fait cette analyse, l'ICA examine 2 types de preuves : l'historique des entrées dans la branche et les facteurs qui pourraient expliquer la structure observée des entrées. Le Président demande ensuite une explication plus détaillée de l'affaire *Uniphar-Ammado* dans laquelle l'ICA a autorisé une fusion sur le marché de gros des produits pharmaceutiques bien que les barrières à l'entrée fussent élevées.

Un délégué de l'Irlande répond que le marché de la distribution en gros des produits pharmaceutiques est extrêmement réglementé en Irlande. Il existe 3 sociétés nationales, plus une quatrième sur le plus grand marché du pays – Dublin – et c'est cette dernière société qui était la cible de l'acquisition. Parce que l'ICA n'a pas trouvé de barrières élevées à l'entrée, elle a recherché lors d'un examen détaillé si le fait de supprimer le 4ème acteur influerait sur les prix du marché à Dublin ou au plan national. Deux facteurs particuliers ont été pris en compte. Premièrement, le réseau de distribution est extrêmement important et il serait assez difficile pour un nouvel entrant de surmonter les effets de loyauté et de réputation. Deuxièmement, il faut que les systèmes de distribution soient extrêmement automatisés et efficients.

L'ICA a conclu que le marché de la société acquise ne disposait pas d'une capacité de distribution aussi efficiente que les autres acteurs et qu'il subissait à l'évidence un désavantage concurrentiel. En outre, une étude économétrique des prix effectuée par l'ICA a montré que la concurrence apportée sur le marché de Dublin par la société acquise ne se traduisait pas par des prix plus bas, ni par un meilleur service que dans les autres parties du pays. L'ICA était donc assez fondée à conclure que, malgré les barrières élevées à l'entrée, il n'y aurait aucun effet anticoncurrentiel sur le marché après la fusion. Cette affaire montre bien que l'examen des barrières à l'entrée n'est pas déterminant en soi, mais qu'il doit toujours être associé et comparé aux effets sur la concurrence observés sur les marchés.

Le Président fait ensuite remarquer que si un grand nombre de pays tiennent compte de l'historique des entrées dans une branche donnée, l'interprétation qu'ils font des résultats est très controversée. On lit par exemple dans la contribution du RU que "des exemples récents d'entrée réussie sur un marché peuvent être le signe de faibles barrières à l'entrée". En revanche, on peut lire dans la contribution de l'UE : "le fait que des entrées aient eu lieu dans le passé n'implique pas qu'il n'y ait pas de barrières à l'entrée ou que l'entrée soit nécessairement facile." En outre, bien que le Conseil de la Concurrence considère des exemples récents d'entrée dans son évaluation des barrières à l'entrée, il note dans sa contribution que "cela montre toute l'ambiguïté soulevée par l'analyse de ce type de barrière et illustre la difficulté, voire même l'impossibilité, d'appliquer des critères analytiques." Le Président souligne ensuite que dans une affaire impliquant l'acquisition de Atos Investissement par Experian Holding France, le Conseil a précisé que "l'absence d'entrée récente sur le marché, en l'absence d'éléments objectifs indiquant l'existence de barrières à l'entrée, a peu de chances de montrer seulement que l'entrée est impossible, dans la mesure où l'absence d'entrée peut avoir de nombreuses autres causes." Il demande à la délégation française comment l'on peut tirer des conclusions au vu des entrées précédentes ou de l'absence d'entrée. Il demande aussi quels éléments supplémentaires doivent être pris en compte pour se faire une idée de la présence ou de l'absence de barrières à l'entrée.

Un délégué de la France reconnaît qu'il est tentant de dire que les conclusions sur l'existence et la quantification des barrières à l'entrée peuvent être vérifiées à la lumière de l'histoire récente et en raisonnant de la façon suivante : si l'entrée s'est produite, c'est qu'il n'y a pas de barrières insurmontables ; et si aucune entrée n'a eu lieu, on a la preuve que des barrières dissuadent les sociétés de pénétrer sur le marché. La contribution de la France exprime une ambivalence à l'égard de cette approche et illustre les risques qu'elle comporte. De l'avis du délégué, il est nécessaire d'avoir une approche empirique au cas par cas. On ne devrait pas conclure qu'il y a des barrières à l'entrée simplement parce qu'on n'a pas d'exemple récent d'entrée. Ce raisonnement semble dangereux, dit-il, car il peut y avoir de nombreuses autres raisons à l'absence d'entrée : le marché peut être en déclin (ou très concurrentiel) et donc offrir de faibles perspectives de rentabilité.

Le Président ajoute qu'un aspect intéressant de cette discussion est que s'il y a eu entrée, c'est peut-être une indication que les barrières à l'entrée ne sont pas si élevées que ça ; mais s'il n'y a pas eu d'entrée, cela n'indique rien du tout, car on peut trouver d'autres explications. Mais l'un des facteurs auxquels se réfère la France est le fait qu'il peut très bien n'y avoir eu aucune entrée parce que le marché n'est pas très rentable. Les Etats-Unis, dans leur précédente réponse, indiquaient toutefois qu'un défaut de rentabilité pouvait être en soi une barrière à l'entrée. C'est aussi suggéré dans la contribution de l'UE et nous reviendrons donc sur cette question ultérieurement dans la discussion.

4. Evaluation des barrières stratégiques à l'entrée

Le Président aborde ensuite les barrières stratégiques à l'entrée, notant que c'est probablement le point à examiner le plus controversé. Selon lui, la contribution japonaise est intéressante, car elle passe en revue les nombreuses lignes directrices qui traitent des barrières à l'entrée au Japon. Toutes les lignes directrices évoquées dans la contribution japonaise contiennent une indication de ce que signifie "barrière à l'entrée" dans le contexte de ces lignes directrices. Le Président demande à la délégation japonaise de décrire une affaire dans laquelle les fabricants de pachinko ont utilisé leurs droits de propriété intellectuelle pour créer des barrières au nouveau commerce. Il note également que selon certaines lignes directrices japonaises, des règles indûment restrictives régissant les conditions d'adhésion à des associations professionnelles sont considérées comme des barrières à l'entrée, et demande à la délégation d'expliquer les raisons justifiant cette politique.

Un délégué du Japon souhaite souligner tout d'abord que le pachinko est un jeu d'argent et que la chance que l'on a dépend partiellement de l'état physique de la machine. Dans le cas du pachinko, la JFTC a estimé que la conduite de l'association des vendeurs de ces machines à sous contrevenait à l'article 3 de la loi antimonopole qui interdit une monopolisation privée restreignant considérablement la concurrence en excluant ou en contrôlant les activités commerciales d'autres sociétés. Le délégué note aussi que les pouvoirs publics ont fixé quelques normes pour les machines de pachinko. En outre, l'association professionnelle possède ou gère depuis toujours les brevets des machines de pachinko qui sont essentiels pour satisfaire aux normes gouvernementales. En d'autres termes, sans licence octroyée par cette association professionnelle, il est assez difficile – en fait impossible – de fabriquer des machines légales pour le jeu de pachinko.

Au moment où cette affaire a été instruite, poursuit le délégué, presque tous les fabricants en place de machines de pachinko qui étaient membres de l'association professionnelle ont obtenu les licences en question. Dans cette situation particulière, le comportement de l'association professionnelle consistant à refuser l'octroi de licences à des tiers non membres de l'association les a empêchés d'entrer sur le marché. Cette conduite a fait obstacle aux nouvelles entrées et a permis aux membres de l'association de maintenir leur monopole sur le marché de la fabrication des machines de pachinko. Le délégué fait remarquer que cette affaire n'est pas directement liée à la question de savoir pourquoi la difficulté d'adhérer à des associations professionnelles peut être considérée comme une barrière dans certaines circonstances. Les lignes directrices précisent que s'il est pratiquement impossible d'exercer son activité sans faire partie d'une association professionnelle, alors les restrictions limitant l'adhésion à une telle association posent peut-être un problème d'après la loi antimonopole.

Le Président passe à la contribution de l'Allemagne qui examine les barrières stratégiques à l'entrée dans le contexte des contrats à long terme. Le Bundeskartellamt s'efforce de réduire les barrières à l'entrée créées par des contrats à long terme passés entre le secteur de la transmission du gaz et les distributeurs de gaz. Le Président demande à la délégation de l'Allemagne d'expliquer pourquoi c'est nécessaire, compte tenu notamment du fait qu'on compte au moins 15 sociétés de transmission sur le marché. On pourrait supposer qu'avec un si grand nombre de sociétés, on aurait des appels d'offres concurrentes chaque fois qu'un contrat arrive à son terme. Le Président demande aussi s'il est possible que ces contrats à long terme se justifient par le fait qu'ils permettent aux distributeurs d'avoir un prix plus bas que s'ils avaient des contrats plus courts. Ainsi, est-il possible qu'un raccourcissement des contrats augmente les prix pour les utilisateurs finals ?

Un délégué de l'Allemagne souligne l'importance de l'énergie pour la compétitivité de l'économie dans son ensemble et note que s'il n'y a pas de concurrence, alors du point de vue du Bundeskartellamt, les prix sont plus élevés qu'ils ne devraient l'être. Souvent, ces contrats à long terme pour le gaz ont une durée pouvant aller jusqu'à 20 ans et, dans la plupart des cas, 100% des besoins des sociétés de distribution sont satisfaits avec les contrats. La plupart des contrats n'expirent pas dans les quelques années qui viennent et les sociétés de transmission ont tendance à prolonger les contrats bien avant la date d'expiration ; si cela arrive, alors il n'y a aucune chance d'introduire la concurrence dans ce domaine. La question est de savoir pourquoi les sociétés de transmission peuvent prolonger ces contrats ; et la réponse est la suivante : parce que le sociétés de distribution ne peuvent pas changer de fournisseurs facilement. Les droits d'accès au réseau et les droits de douane empêchent les changements. Le pire, ajoute le délégué, c'est que ces sociétés sont intégrées verticalement et qu'elles peuvent s'accorder des subventions indirectes.

Par rapport à la deuxième question du Président, le délégué déclare que nous devrions d'abord nous demander pourquoi les sociétés de transmission défendent l'instrument des contrats à long terme et pourquoi les sociétés de distribution veulent s'en débarrasser. Admettons qu'une société de transmission accorde des prix plus favorables pour des périodes contractuelles plus longues. Cependant, il faut remarquer que le niveau de prix actuel est basé sur un marché fermé, et l'on sait par expérience que le niveau de prix est anormalement élevé. Ceci est illustré par l'exemple des distributeurs qui ont échangé leurs contrats à long terme avec des sociétés établies de transmission de gaz contre des possibilités d'approvisionnement plus favorables sur des périodes contractuelles plus courtes. D'autres acheteurs vont probablement suivre leur exemple dès qu'ils seront libres de le faire. Ce qui est important, c'est de donner aux sociétés de distribution la liberté de constituer leurs propres portefeuilles de contrats à court, moyen et long terme.

Le Président mentionne ensuite la discussion sur le surinvestissement dans la publicité évoqué dans la contribution de la Norvège. On est probablement assez d'accord sur le fait que le surinvestissement dans la publicité pour accroître l'asymétrie d'information risque d'être une source de difficulté pour les entrants. La question sous-jacente est de savoir si un investissement "normal" en publicité n'est pas aussi une barrière à l'entrée. Le Président demande à la délégation de la Norvège son point de vue sur le concept général des barrières à l'entrée dans la législation norvégienne et sur l'investissement dans la publicité en général.

Un délégué de la Norvège répond qu'un investissement normal en capacités de production et en publicité est certainement une base possible sur laquelle peuvent être érigées des barrières à l'entrée, surtout lorsque l'investissement est irrécupérable. La contribution fait référence à un surinvestissement qui signifie "en plus de" l'investissement ordinaire. Autrement dit, le surinvestissement en capacités de production et en publicité peut être utilisé par l'entreprise en place comme une barrière stratégique à l'entrée parce qu'elle rend plus probable une réaction agressive à l'entrée. Cela s'est produit dans la branche du transport aérien en Norvège, lorsque l'entreprise en place a utilisé un surinvestissement en capacités de production pour accroître les barrières à l'entrée. Par ailleurs, le surinvestissement dans la publicité a été utilisé dans le secteur de l'épicerie pour accroître les barrières à l'entrée, ce qui visait surtout les chaînes d'épicerie étrangères qui tentent de pénétrer sur le marché norvégien. Par rapport au regret exprimé dans la contribution de ne pas avoir d'accord sur une définition claire, le délégué déclare qu'une telle définition faciliterait une évaluation plus unifiée des barrières à l'entrée.

Le Président pose une question complémentaire : alors qu'on peut définir assez facilement le surinvestissement en capacités, comment définit-on le surinvestissement dans la publicité ?

Le délégué de la Norvège reconnaît que c'est une question difficile. Mais quand on observe une augmentation considérable de la publicité lorsque arrive une chaîne d'épicerie étrangère, on a quelque raison de croire qu'il s'agit d'un investissement en publicité supérieur à la normale.

Le Président passe à la contribution du Taipei chinois qui décrit une affaire dans laquelle 2 grands gestionnaires de salles de karaoké ont choisi un nouveau fournisseur audio/vidéo pour la musique et exclu le fournisseur initial. Il demande pourquoi les autorités de concurrence ont conclu qu'un changement de fournisseur était une barrière stratégique à l'entrée.

Un délégué du Taipei chinois expose tout d'abord la structure du marché, précisant que les sociétés qui produisent les bandes de musique enregistrée, telles que EMI et Sony, constituent le niveau en amont ; les fournisseurs de cassettes audio, qui obtiennent des licences des producteurs en amont, puis ajoutent des caractéristiques telles que les légendes et les fonds vidéo, constituent le niveau intermédiaire ; et les salles de karaoké occupent le niveau en aval. Cette affaire concerne les niveaux intermédiaire et en aval. Au dernier niveau (en aval), il y avait 2 grandes salles de karaoké et la Fair Trade Commission leur avait infligé des amendes. Curieusement, dans cette affaire, la FTC avait défini le marché comme étant le niveau intermédiaire des fournisseurs de cassettes. Elle en a décidé ainsi parce que les défendeurs opèrent sur le marché en aval. Ensemble, ces deux grands opérateurs en aval ont créé une co-entreprise qui dessert les grands opérateurs du niveau intermédiaire. Etant donné que ces 2 salles de karaoké paient collectivement environ 60% des droits de licence de l'ensemble du marché, elles ont essayé d'imposer des effets d'exclusion au niveau intermédiaire en créant une co-entreprise à ce niveau. Autrement dit, parce que la puissance d'achat des opérateurs en aval est largement dominante, ce type d'arrangement crée un effet d'exclusion non seulement pour les fournisseurs en place de cassettes audio, mais aussi pour les nouveaux entrants potentiels. C'est pourquoi, au lieu de s'en prendre à la co-entreprise de niveau intermédiaire, la FTC a décidé de poursuivre les opérateurs en aval, puisque ce sont eux qui ont le contrôle.

Le Président fait ensuite référence à l'affaire *Colgate* examinée dans la contribution du Brésil. Les autorités brésiliennes ont imposé certaines conditions avant d'autoriser une fusion impliquant des biens différenciés (pâtes dentifrices de marque), estimant que les noms de marque étaient une barrière à l'entrée. Le Président demande à la délégation du Brésil d'expliquer pourquoi le remède était adéquat.

Un délégué du Brésil précise que la fusion rassemblait les 4ème et 2ème plus grandes sociétés du marché brésilien des pâtes dentifrices. Un contrôle simultané des 2 marques principales, notamment de la marque leader Kolynos, constituait la barrière à l'entrée la plus importante et était source de pouvoir durablement pour les sociétés fusionnantes. La CADE a approuvé la fusion avec quelques restrictions en 1997, mais elle a autorisé les sociétés à choisir les restrictions parmi les options suivantes : i) suspendre pendant 4 ans l'utilisation de la marque Kolynos ; ii) concéder en licence la marque Kolynos pendant 20 ans à un acteur possédant moins de 20% du marché ; ou iii) vendre la marque Kolynos avec une restriction : que les parties laissent au cédant certaines de ses installations de production. Colgate a choisi la première option, puis a lancé une nouvelle marque, Soriso. Durant les 4 années de suspension, le HHI est revenu d'environ 5600 en 1997 à 4600 en 2001 et les prix ont légèrement diminué en termes réels, de sorte qu'à première vue il semblait que la solution adoptée était la bonne. La concurrence accrue est venue de la croissance d'une frange composée principalement de grandes firmes multinationales qui ont porté leurs parts de marché de 26% à 34% environ. Aucune entrée importante n'a eu lieu toutefois jusqu'à présent. En outre, lorsque la restriction est arrivée à son terme, Colgate a décidé de ne pas réintroduire la marque Kolynos sur le marché des pâtes dentifrice, mais de renforcer les signaux associant Kolynos aux produits Soriso dans l'esprit des consommateurs. La société leader est toujours Colgate, et Kolynos, la marque suspendue, vient toujours en tête des choix des consommateurs, même après avoir été retirée des étagères de pâte dentifrice pendant 5 ans.

Le délégué voit plusieurs raisons à ce résultat étonnant. Premièrement, la marque Kolynos n'était pas obligée d'être suspendue pour tous les produits associés, tels que le fil dentaire et le bain de bouche, de sorte que des produits étiquetés Kolynos étaient encore sur les rayonnages des magasins. Deuxièmement, lorsque Colgate a lancé la nouvelle marque Soriso, sa campagne télévisée a souligné que Kolynos était maintenant Soriso. De plus, Colgate a gardé les mêmes couleurs, le même packaging et le même type de publicité qu'elle utilisait pour Kolynos. Cette stratégie a transféré toutes les barrières différenciatrices de Kolynos à Soriso. Ainsi l'analyse de la fusion a bien identifié l'importance de la marque comme barrière à l'entrée, mais le remède, et surtout son application, n'a pas suffi à modifier les conditions de marché concernant à la fois les barrières à l'entrée et les obstacles à la croissance. C'est pourquoi la leçon que nous pouvons tirer de cette affaire est que le suivi et l'administration du remède sont aussi importants que le remède lui-même. En outre, des solutions structurelles, telles que la vente de marques ou d'autres actifs, sont beaucoup plus faciles à mettre en oeuvre parce que le coût du suivi est beaucoup plus bas, et elles sont aussi beaucoup plus efficaces.

Le Président passe ensuite à la contribution de l'UE qui déclare que la définition de Bain des barrières à l'entrée n'est pas adéquate, car elle suppose implicitement que toutes les barrières sont exogènes aux participants du marché, alors que ce qui est important dans la décision d'entrée, c'est la rentabilité après entrée. Cette rentabilité est influencée particulièrement par 2 facteurs : l'intensité de la concurrence après entrée, et la proportion des coûts d'entrée qui sont irrécupérables. La contribution ajoute qu'un environnement d'âpre concurrence après l'entrée amène les entrants à anticiper des prix plus bas, ce qui réduit la rentabilité attendue et rend ainsi l'entrée moins attrayante. Le Président pense qu'une des questions que posent ces déclarations est de savoir si une fusion qui confère une grande part de marché aux parties fusionnantes et augmente leur efficience doit être considérée comme augmentant à la fois la concentration et les barrières à l'entrée parce que les entrants peuvent s'attendre à un durcissement de la concurrence après la fusion. Si c'est le cas, n'y a-t-il pas alors un risque que des fusions favorisant la concurrence ou les gains d'efficience soient interdites, alors que des fusions qui n'améliorent pas l'efficience des firmes fusionnantes et ont donc moins de chances de déboucher sur des conditions plus concurrentielles après l'entrée seraient plus facilement autorisées ?

Un délégué de l'UE commence par souligner que l'opinion générale de l'UE est la même que celle de nombreuses autres juridictions : l'objectif n'est pas d'examiner les barrières à l'entrée de manière isolée. L'objectif est plutôt d'utiliser l'analyse des barrières à l'entrée en relation avec les tests qui sont appliqués dans l'évaluation globale de la concurrence. Dans les affaires de fusion, nous examinons les barrières à l'entrée pas seulement pour définir des marchés, mais pour analyser une situation qui pourrait être anticoncurrentielle s'il n'y avait pas en temps opportun des entrées probables et d'une ampleur suffisante pour résoudre le problème. De la même façon, en ce qui concerne le comportement unilatéral, l'UE est d'accord avec ce qu'ont dit les Etats-Unis, par exemple, au sujet des barrières à l'entrée dans l'affaire Microsoft par rapport au système d'exploitation. Mais l'examen de cette question de barrière à l'entrée dans l'affaire Microsoft n'est qu'un élément à l'appui du fait qu'il y a une position dominante sur le marché des systèmes d'exploitation. Ce qu'il faut aborder, c'est la question de savoir si Microsoft peut abuser de sa position par un autre effet anticoncurrentiel. Par conséquent, déclare le délégué, il faut faire une enquête très complète s'appuyant sur des faits. On ne peut se contenter de supposer, sur la base d'un historique des entrées ou d'une absence d'entrée, qu'il va y avoir ou ne pas y avoir d'entrée à l'avenir. Il faut savoir pourquoi des firmes sont entrées ou ont renoncé à entrer. La distinction entre facteurs endogènes et exogènes dans la contribution de l'UE correspond à des facteurs techniques et réglementaires du côté exogène et à des facteurs stratégiques du côté endogène. L'élimination de barrières techniques et réglementaires pourrait certainement faciliter l'entrée, mais cela ne signifie pas nécessairement qu'une entrée se produirait effectivement, à cause raison des éléments stratégiques endogènes qui pourraient oeuvrer contre cette entrée.

Le délégué ajoute qu'il serait exceptionnel que dans une branche à forte croissance, de haute technologie, la Commission plaide contre la concurrence dans les dépenses de recherche et développement. Même dans des branches qui exigent des augmentations de capacité progressives, il est tout à fait normal et légitime que des augmentations de capacité dépassent la demande actuelle en raison de la nature du processus d'investissement. C'est ainsi qu'à certains moments un nouvel entrant peut être dissuadé d'entrer en raison de cette caractéristique endogène que peut constituer un marché pro-concurrentiel. Mais alors on peut se déplacer sur l'échelle des facteurs endogènes vers des questions telles que la différenciation de produits au moyen de la publicité et d'autres stratégies que certains pourraient qualifier d'abus, comme les ventes liées et groupées ou les remises de fidélité qui pourraient être l'équivalent de barrières à l'entrée créées par les sociétés elles-mêmes. Après l'entrée, s'il y a un régime de concurrence acharnée, cela signifie probablement que les sociétés fusionnées profitent de la fusion pour dégager des gains d'efficience mais, pour une raison ou pour une autre, sans entrée elles ne sont pas tentées d'augmenter les prix. Si elles sont tentées d'augmenter les prix et qu'elles réalisent aussi des gains d'efficience, on doit néanmoins évaluer si, à moyen terme du moins, ces gains seront contrebalancés par le potentiel qu'a une fusion de renforcer indûment une puissance de marché. De sorte qu'après l'entrée, s'il y a une concurrence acharnée avec des prix bas, on peut penser qu'il y a des barrières à l'entrée plus élevées, mais dans l'évaluation globale de la concurrence, on dira qu'il s'agit d'une fusion pro-concurrentielle. Si ce n'est pas le cas et que l'on s'attend à ce que la rentabilité augmente en raison de la forclusion que la fusion risque d'entraîner, alors on s'attendra à ce que les incitations augmentent pour de nouveaux entrants, et l'évaluation de la probabilité d'entrée devient donc un facteur très important. Dans l'ensemble, les autorités doivent donc regarder comment le marché fonctionne et comment les firmes développent leurs stratégies, et ne pas se contenter d'examiner les barrières techniques ou réglementaires exogènes.

Le Président regrette qu'il n'y ait pas davantage de temps pour poursuivre la discussion, mais son hypothèse est bien que l'entreprise fusionnante accroît son efficience, mais qu'elle n'augmente pas ses prix pour autant. En fait, la firme aura seulement des marges bénéficiaires plus grandes. Et personne n'entre parce que tout nouvel entrant s'attendrait à voir s'aiguiser la concurrence une fois entré. Mais il faudra attendre une autre occasion pour dérouler ce scénario.

Pour finir, le Président aborde la contribution de la Suisse, précisant qu'elle traite d'un cas qui implique une combinaison de nombreux types de barrières à l'entrée : réglementations, coûts de transfert, barrières techniques et barrières stratégiques. Il invite la délégation suisse à présenter l'affaire *UBS*.

Un délégué de la Suisse explique que l'affaire UBS concerne 2 des 3 plus grandes banques qui existaient en Suisse il y a une dizaine d'années. La Commission suisse de la concurrence n'a eu connaissance d'aucun problème sérieux sur les marchés international et national, mais il y avait des problèmes à l'échelon cantonal au sujet de crédits commerciaux à des petites et moyennes entreprises. La Commission a découvert que des coûts de transfert et des obstacles juridiques étaient présents sur le marché. Les coûts de transfert étaient apparus parce que, lorsqu'un client voulait changer de banque, il devait généralement le faire pour tous ses produits, pas seulement pour un, ce qui augmentait le coût du changement. Les obstacles juridiques étaient encore plus importants. En réalité, même les banques cantonales existantes ne pouvaient pénétrer sur d'autres marchés cantonaux, ou ne pouvaient le faire que de façon très limitée. On ne pouvait donc pas compter sur les banques étrangères, ni sur les banques cantonales pour contrer la puissance de marché des banques fusionnantes. La Commission a donc imposé certaines restrictions pour des durées allant jusqu'à sept ans.

Par ailleurs, précise le délégué, l'élément temporel demeure le même d'une affaire à l'autre dans l'approche de la Commission : l'entrée doit être possible dans un délai d'environ 2 à 3 ans, et c'est quelque chose qui est relativement concret. La façon dont la Commission a traité les obstacles juridiques est proche d'une analyse de barrière à l'entrée au sens technique du terme ; ce n'était pas une simple description du marché. Le délégué mentionne aussi une nouvelle affaire concernant un marché – la production de produits laitiers – où les barrières juridiques à l'entrée sont importantes, mais diminuent. Le niveau de concentration touche des parties importantes du marché, mais cela ne poserait pas de problème si les barrières, qui concernent la façon dont l'agriculture est protégée en Suisse, devaient diminuer et même disparaître à long terme. La question est de savoir si et quand cela arrivera. Ainsi, la Commission a pour tâche d'analyser la probabilité qu'une barrière à l'entrée fondée sur une loi soit abolie.

5. Discussion générale

Un délégué du BIAC est favorable à l'approche des lignes directrices européennes et américaines qui regardent si l'entrée serait opportune, probable et suffisante pour empêcher l'exercice d'un pouvoir de marché. Il fait remarquer que l'entrée n'a pas besoin d'être effective puisqu'une entrée potentielle peut aussi avoir un effet dissuasif sur l'exercice d'un tel pouvoir. Le délégué indique aussi que, du point de vue des milieux d'affaires, les coûts d'entrée en valeur absolue ne sont pas tellement pertinents. Ce qui importe, c'est le retour sur investissement attendu, et cela implique une analyse risque/rémunération. Le délégué déclare aussi qu'il approuve les efforts récents déployés par certaines autorités chargées de faire respecter la loi, préconisant l'élimination ou la réduction de barrières à l'entrée non nécessaires qui ont été érigées par la législation et la réglementation.

Un délégué de la République tchèque parle d'une affaire récente qui ressemble beaucoup à celle de la distribution de gaz en Allemagne. En fait, le système de distribution et de transmission du gaz en République tchèque a été vendu il y a 7 ans à une société allemande et maintenant, avec l'ouverture du marché, de graves problèmes se posent. Le premier est que sur le marché réglementé, les prix ont augmenté de 17% cette année, tandis que sur le marché libre la hausse est d'environ 30 à 40%. La principale difficulté est qu'il y a des barrières à l'entrée auxquelles se heurtent de nouveaux concurrents, en particulier les contrats, qui sont des contrats d'achat ferme. Les pouvoirs publics essaient d'ouvrir le marché en autorisant l'accès au stockage souterrain de gaz, mais les prix de ce gaz stocké sont inférieurs aux prix du marché, de sorte qu'il est pratiquement impossible d'inciter les propriétaires des systèmes de stockage souterrain de gaz à allouer suffisamment de capacités aux concurrents.

Le Président fait ensuite quelques remarques. Il observe qu'il y a eu très clairement un passage assez général de l'évaluation des barrières à l'entrée dans la tradition de Bain consistant à identifier les facteurs qui pourraient correspondre à la définition de Bain des barrières à l'entrée, à une évaluation davantage orientée-processus, dans laquelle le problème n'est pas tant les facteurs qui pourraient être qualifiés de barrières à l'entrée, mais plutôt la question de savoir si l'entrée est probable, opportune et suffisante. Une bonne raison d'aller dans cette direction est la découverte que les facteurs qui ont été traditionnellement associés aux barrières à l'entrée ne sont peut-être pas assez finement réglés pour être utiles en toutes circonstances. Nous avons beaucoup entendu parler de barrières spécifiques à l'entrée et de cas précis qui n'entraient dans aucune des catégories qui viennent normalement à l'esprit.

Mis à part le réglage fin, un deuxième aspect concerne la pertinence économique, et bien qu'il semble que ce soit une tendance générale, certains pays sont plus avancés que d'autres dans leur façon évolutive de prendre cet aspect en compte. Le Président note qu'on n'a guère abordé le degré de prévisibilité des analyses des autorités, ni le type de critères qui les a conduites à évaluer que dans tel cas particulier l'entrée est probable, opportune ou suffisante. On a passé pas mal de temps à constater que certains des outils les plus évidents, tel l'historique des entrées/sorties, ne sont peut-être pas tout à fait suffisants et qu'il faut y ajouter des considérations supplémentaires. Est-ce que des instruments très prévisibles sont utilisés pour tirer des conclusions sur l'entrée ? C'est une question qui reste encore ouverte.