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COMPETITION COMMITTEE****Cancels & replaces the same document of 25 November 2019****Barriers to Exit – Summaries of contributions**

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This document reproduces summaries of contributions submitted for Item 8 of the 132nd Competition Committee meeting on 3-4 December 2019.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/barriers-to-exit.htm>

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Table of Contents

Summaries of contributions	3
Belgium*	4
BIAC	5
Colombia	6
Italy	7
Mexico	8
Russian Federation	9
Spain	10
Turkey	11
Ukraine	12

Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on Barriers to Exit (132nd Meeting of the Competition Committee on 3-4 December 2019). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

*Belgium**

The (previous) Belgian Competition Authority considered barriers to exit in a study published in 2012 comparing the prices of identical products in Belgium and the neighbouring countries: *Niveaux de prix dans les supermarchés*¹. The Authority examined the extent to which existing regulations could explain (part of) the significant price differences. The study concluded that regulatory constraints, mainly in labour law, made the costs of restructuring or exiting the market prohibitive for less competitive chains adversely affecting the competitive dynamics of the market.

¹ Published by the SPF Economy and accessible on the website of the BCA : https://www.abc-bma.be/sites/default/files/content/download/files/20120213-etude_niveaux_prix_supermarches.pdf.

BIAC

In order to augment the discussion on the topic “barriers to exit” as set out by the OECD Secretariat’s note, this paper highlights two key points: (1) entrepreneurial exit from markets should not be inhibited by regulatory barriers absent significant competition concerns; and (2) barriers to exit through regulatory action by competition agencies through enforcement action should also be considered.

First, there has been some discussion in the policy community about using competition law to forbid larger firms from acquiring small firms as a means of preventing the further growth and influence of large firms and the potential impact of large firms on consumers. A ban on integration, however, is in conflict with the well-accepted recognition of efficiencies. This is particularly true in the case of vertical integration. Further, regulatory history shows that bans on acquisitions can retard economic development.

Entrepreneurial exit is critical to a well-functioning entrepreneurial ecosystem, as the possibility of entrepreneurial exit via vertical merger is now the most usual form of liquidity event for founders and venture capitalists. A merger policy that would unduly restrict large tech firms from undertaking acquisitions would hurt incentives for innovation in the economy by chilling business formation in start-ups. Thus, a general inference that makes acquisitions, particularly in tech, more difficult to approve leads to direct contravention of antitrust’s role in promoting competition and innovation.

Second, competition law enforcement can at times raise barriers to exit. Less successful firms (often large ones themselves) should exit naturally but do not because they lobby for enforcement by antitrust agencies to larger and more efficient firms. When competition authorities bring cases that benefit competitors and not consumers, such cases may lead to an outcome that may negatively affect business opportunities for the dominant firm, prevent the exit of smaller firms, but have a negative net effect on (at least) total welfare. This risk may be present in several situations, for example where enforcers erroneously block a merger based on perceived anticompetitive effects. But it may also be present in enforcement based on perceived exclusionary conduct by a dominant firm.

In order to ensure that a competition agency’s enforcement actions against a dominant firm are not creating an artificial barrier to exit, an agency must carefully analyze the causation of the smaller firm’s failure and ensure that there is a direct causal link between the purported exclusionary conduct and the failure of the smaller firm.

Please click [here](#) to download the full paper.

Business at OECD lead drafter: John Taladay, Partner, Baker Botts LLP & Chair of *Business at OECD* Competition Committee

Colombia

Barriers to Exit pose a challenge to economic competition by applying a friction to the free movement of sub used assets from one economic sector to another.

In Colombia, the Competition Authority has considered that market competition structure, alongside the way a merger operation is presented, may become a barrier to exit. This has led this Superintendence, in some extreme cases, to make decisions that delay or forbid the exit of a company from the market. Such decisions imply to keep in the market agents looking to exit, in order to prevent the establishment or enhancement of high concentration levels.

Italy

This submission provides an overview of the experience of the Italian Competition Authority (the ICA or the Authority) in relation to barriers to exit. Although the analysis of barriers to exit has received less attention in competition analysis with respect to barriers to entry, the ICA believes that barriers to exit represent an important element in the competitive dynamics of markets and an area where competition policy intersects – and should be complemented by – other public policies in order to favor a rigorous application of competition law and ensure a competitive outcome of markets.

In particular, the ICA has often advocated for the need to combine effective competition with appropriate complementary public policies aimed at alleviating precisely the existence of barriers to exit. More specifically, the ICA's advocacy has often tackled the introduction, during liberalisation processes, of social clauses aimed at promoting the stability of employment. Labour related exit costs deriving from legislations aimed at protecting the rights of employees, when they constitute a large part of total costs, may prevent exit, negatively affect productivity and, in the medium run, even employment itself. Moreover, when those costs are transferred through regulatory measures to new entrants they may act as a barrier to entry.

With respect to its enforcement activity, notwithstanding the fact that a large part of the cartels challenged by the ICA were related to industry-wide crisis, this did not undermine the adoption of sanctions, considering these situations of distress only when appropriate. The ICA's approach has, indeed, always focused on the need for market mechanisms to act to allocate resources to their most efficient use even in situations of sectoral distress. Among others, the ICA has recently intervened in relation to two traditional cartel cases concerning basic industries, more specifically the cement and reinforcing bars for concrete ones. Consistently with the European case-law, the ICA considered, first of all, that the state of distress of a given sector is not sufficient to exclude the application of the Treaty on the Functioning of the European Union. However, after having recognized the situation of profound crisis of these sectors, it reduced sanctions accordingly.

The ICA, acknowledging that impediments to the competitive process cannot continue to act as improper welfare measures, concludes that it is important to design coherent public policies that introduce social protections that favour competition instead of protections from competition.

Mexico

This contribution provides an overview of the Federal Telecommunications Institute's (IFT) practice on the assessment of barriers to exit in both competition and sectorial law enforcement. It describes a special procedure included in the 2014 Federal Law of Economic Competition (LFCE) has the purpose to identify barriers to competition that could lessen the process of competition and, in that case, propose remedies. It refers to some provisions of the 2014 Telecommunications and Broadcasting Federal Law (LFTR) that aim to remove barriers to exit identified in the telecommunications and broadcasting sectors. Finally, it presents a summary of relevant cases where the IFT has analyzed barriers to exit.

Russian Federation

Barriers to exit are determined as factors that prevent a company from leaving the sector without significant losses. Usually barriers to exit are associated with significant costs in the industry, which make it impossible for a company to leave the industry without losses. Such barriers are mainly connected with structural characteristics of a particular type of economic activity, such as asset liquidity, possibility of manufacture diversification with existing equipment, technologies, sources of raw materials.

Barriers to exit play an important role as they increase the risk of economic activity in the industry, and therefore create additional barriers to entry on the market. If a company knows that it is impossible to leave the industry without losses (for example, the production of goods requires highly specialized equipment that would be difficult to implement in case of bankruptcy), this may affect its primary decision to enter this industry.

It is considered that the difficult exit of enterprises from the Russian market and high explicit and implicit costs connected with it hinder effective competition. High risk associated with the difficulty of exiting the market is a factor that discourages potential competitors from entering the industry.

Barriers to exit create a double effect for competition by restricting free exit from the market they facilitate either the long-term and good faith development of a financial organization by its owner, or unfavorable transfer of the organization with the risk of asset withdrawal.

Spain

Over the past decade, the most important concerns regarding barriers to exit the Competition Authorities have come across in Spain were probably linked to the restructuring and resolution of banks. There could be inefficient incumbents not being allowed to exit the market or not doing it in a timely and appropriate manner, as a result of a trade-off between competition policy and the preservation of financial stability. But the Spanish banking industry managed to carry out an intense consolidation process. The risks that such process entailed in terms of possible exit barriers or risks to competition have been largely offset by the parallel and complementary action of competition policy, financial assistance conditionality and financial regulation, both at EU and national level. In particular, financial regulation played an important role to deal with exit barriers, in a way that was not within the grasp of competition policy.

In other cases, the introduction of barriers to exit for customers (Making it more expensive to leave vertical integration (i.e. Medicine product cooperatives) or to switch to other suppliers (i.e. Medicine product cooperatives and online food delivery services)) plays as a barrier to entry for new competitors. So, competition authorities turned to offsetting remedies.

From an advocacy point of view, the Spanish Competition Authority on its own initiative (i.e. Study on the liberalization of passenger transport services by rail 2019) or at the request of ministerial departments (i.e. Report on the Royal Decree Draft regulating the closure procedure of power generation facilities) has analyzed, among others, sunk costs-related and regulatory barriers to exit.

Turkey

The barriers to exit are not regulated under the Turkish competition legislation. To date, only in 2 of 14 market studies, which were conducted by TCA, barriers to exit were assessed. In these market studies, high investments which cannot be liquidated or used for other purposes and long duration of the contracts (concluded for 15-20 years) were considered as barriers to exit.

Barriers to exit were assessed mostly in abuse of dominance cases because it is regarded as a factor used to determine whether an undertaking is in a dominant position or not. In the some important cases, inventory costs, high entrance fee in order to operate in a market, equipment, which cannot be liquidated, was determined as a barrier to exit. In addition, in merger and acquisitions, barriers to entry and exit were evaluated generally together, and were treated as an indirect form of barriers to entry. In only one merger and acquisition case, vertical integration was determined as a barrier to exit.

In a nutshell, the types of exit barriers TCA has encountered can be stated as sunk costs (high investments specific to the market, due paid for entry to the market that cannot be liquidated, promotional expenses and equipment that cannot be used for any other purpose, investments in marketing network are considered as barriers to exit), vertical integrations, patents/licenses, government policies and state regulations. Among these exit barriers, sunk costs are the most common form of exit barriers. TCA proposed in its market studies that entry-exit barriers in these markets should be reduced by implementing regulations such as the abolition of various privileges and obligations in the development process, functional/structural separation, allowance for access by third parties and activation of transparency.

Ukraine

Despite the importance of the issue of barriers to exit from the market, there is a tangible shortage of information on this subject. The presence of such barriers may significantly reduce the competitiveness of the industry by creating barriers to exit for unprofitable undertakings and thus creating barriers for the new market entrants. The very existence of such barriers may harm the overall efficiency of the national economy's functioning.

The concept of "barriers to exit" is interconnected with the concept of "barriers to entry", as market participants always examine all the threats and obstacles to doing business on the market before entering it. Thus, the presence of these barriers may create obstacles to competition in the market and have a negative impact on economic growth. The main barriers to exit from the market in Ukraine are:

1. Regulatory environment.
2. Legislative regulation.
3. Costs associated with the staff remuneration.
4. Costs that can not be recovered (non-recoverable losses).
5. Existence of huge number of SOEs.
6. Legislatively regulated barriers to exit from the market.

The Antimonopoly Committee of Ukraine (in terms of enforcement and advocacy work) has predominantly studied the barriers to exit from the market on the State Aid notifications. Industries with significant share of State Aid include, for example, mining enterprises. In case when a mining company in Ukraine is subject to liquidation, reorganization or conservation (in cases provided for by the Code of Ukraine on Subsoil, the Mining Law of Ukraine and EU acquis), it is eligible for State Aid to this regard.

One of the most prominent examples of markets in Ukraine that is hard to exit from is mining. Unprofitable enterprises in the mining industry face significant costs for the termination of their activities, therefore, as a rule, a decision is made to remain in the market rather than to carry out the liquidation procedure. This significantly distorts competition in the market and does not lead to the effective functioning of the industry. That is why these enterprises require State Assistance, the expected result of which is to increase the efficiency of the coal industry by eliminating unprofitable state-owned coal-mining and coal-processing enterprises.

Only after having undergone all the environmental, technical and other impact assessments, having received approval of mining supervision, local and other interested State authorities, a mining enterprise may be liquidated.

Thus, the issue of evaluation of barriers to exit is important and relevant for the assessment of competition in the markets. The costs of unprofitable undertakings to exit the market are significant in most cases while the continuation of these enterprises' business activities does not usually create additional benefits for the economy. At the same time, the opportunity to receive State Aid related to the liquidation of a list of non-profitable yet socially important enterprises operating in industries with significant barriers to entry, lowers the barriers for the new market entrants.