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By Alejandra Palacios Prieto & Rodrigo Alcázar Silva[1]

In Mexico, significant amendments to the Antitrust Law (Ley Federal de Competencia Económica, or "LFCE") entered into force at the end of 2025. Among other modifications, the reform expanded the scope of antitrust wrongdoing. Regarding abuse of dominance, it now punishes any unjustified limitation on other market participants' ability to compete, not only conducts that exclude or foreclose rivals, as previously stated. Additionally, the statute clarifies that collusive practices may be carried out not only by current competitors but also by potential competitors.

This last inclusion is understandable, as the primary check on a company's market power sometimes comes not from existing competition, but from the threat of entry. The mere possibility of entry can discipline dominant firms, helping to contain prices, improve quality, and drive innovation. In this regard, a dominant firm might try to prevent a potential competitor from entering the market if it perceives the threat of competition will be high. However, for an antitrust agency to identify who is truly a potential competitor is difficult to verify in practice.[2]

If the concept of a potential competitor is not clearly defined, it could be misused. As Hovenkamp notes, one extreme view is that the mere possibility of entry makes

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[2] Carlton, J. and Perloff, D. (2015). Modern Industrial Organization, Pearson, 4th Ed. Global Ed. p.684.

markets self-correcting, rendering antitrust laws unnecessary.[3] The opposite extreme warns that if competitive pressure from potential entrants is too difficult to assess, a static view of competition could lead to over-regulation.[4] Hovenkamp also links the analysis of potential competition to the definition of the relevant market. If firms in other markets can readily redirect production to a market with rising prices, the discipline from these potential entrants is a key competitive constraint. Again, a separate doctrine on potential competition would be unnecessary if a market definition is defined extremely broad, because potential competitors would always be included in said market definition.[5]

In the Mexican context, the LFCE does not provide a formal definition of a "potential competitor," nor have technical guidelines been developed for this concept. Instead, its meaning has been shaped gradually through applications across different areas of the law by the previous competition authority, COFECE.

I. Defining a Potential Competitor in Mexican Antitrust Regime

Although no statutory definition for "potential competitor" exists, the concept is crucial in several applications of Mexican antitrust law. For instance, in abuse of dominance cases, the analysis of substantial market power considers

[3] Hovenkamp, H. Potential Competition (January 15, 2024). U of Penn, Inst for Law & Econ Research Paper No. 23-36, Antitrust Law Journal (forthcoming) (2024), p.837. Available at: https://www.americanbar.org/content/dam/aba/publications/antitrust/journal/86/issue-3/potential-competition.pdf.

[4] This idea is also analyzed in Levin, F. (2024). Control de operaciones de concentración en Chile: Desafíos y respuestas de un régimen en sus inicios, p.94. Centro Competencia. Available at: https://centrocompetencia.com/wp-content/uploads/2025/03/Control-de-operaciones-de-concentracion-en-Chile-Desafios-y-respuestas-de-un-regimen-en-sus-incios.pdf.

[5] Carlton and Perlof, op.cit. 685.

the competitive pressure from potential entrants and the ease with which suppliers in adjacent markets could redirect their capacity.[6] This analysis also assesses a dominant firm's ability to unilaterally set prices, restrict supply, or exclude competitors by evaluating the probability, strength, and timing of entry by potential competitors.[7] The concept of substantial market power is also key in other antitrust procedures, such as market investigations and merger analysis.

In the case of mergers, Mexican antitrust law incorporates the concept of a potential competitor in several key ways. The law states that a merger is unlikely to harm competition if the acquirer is not involved in related markets and is not an existing or potential competitor of the target.[8] In practice, though not explicitly required by law, the merger analysis also evaluates whether, absent the transaction, the target would have likely entered or expanded into the relevant market, creating new competition. Finally, the assessment extends to ancillary restraints, such as non-compete clauses, which are scrutinized to ensure they are necessary and proportionate to protect the acquirer's investment.

However, despite the concept of a potential competitor is embedded in several antitrust procedures, there were no precedents establishing the elements to consider for its application until more recently.

Notably, while the statute did not previously include the concept of a potential competitor for collusive agreements, in case IO-001-2021,[9] resolved on August 24, 2023, the COFECE Board applied it

[6] LFCE, article 58, section II.
[7] LFCE, article 59, section I.
[8] LFCE, article 92.
[9] The public version of the resolution is available here: https://resoluciones.antimonopolio.gob.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V361/1/5994684.pdf.

to sanction a collaboration agreement. In that matter, it held that a non-compete clause between two companies operating in the industrial gases' equipment market, which prevented individuals identified as potential competitors from entering the market, violated the law. The elements used to define a potential competitor were:

i. **Capacity and Experience:** The entity possessed the necessary technical and commercial capacity, experience, knowledge, and skills to operate in the market. Additionally, its articles of incorporation indicated its corporate purpose was related to the industrial gas equipment market.
ii. **Possibility and Intent to Enter:** The entity had a real possibility and demonstrated intent to enter the market in the short term (defined as one year), evidenced by concrete actions to begin operations and documentation showing these executives undertook investment, equipment acquisition, marketing, and supplier negotiations.
iii. **Perception by Market Participants:** Other economic agents perceived the entity's potential entry as a "real threat," recognizing its capacity and experience in the market (for example, pointing out that their prior professional experience enabled them to understand price and cost structures), as well as its possibility and intention to serve demand in the short term.

This is the first and only case to date that establishes a precedent for the criteria used to determine who qualifies as a potential competitor.

II. International Experience

The concept of a "potential competitor" has a long history in U.S. antitrust regime. For example,

in the 1967 *Procter & Gamble/Clorox* merger, the Supreme Court blocked the transaction because it considered Procter & Gamble a likely entrant into the liquid bleach market.[10] However, what does "likely" signify? In *United States v. Falstaff* (1973), the government's view of Falstaff as a "likely entrant" was not shared by the district court, which found no evidence of Falstaff's intent to enter the market. The Supreme Court ultimately focused on rivals' perceptions to make a final decision, concluding Falstaff was not perceived in the market as a potential entrant.[11] More recently, the 2023 Merger Guidelines provide clearer guidance on how to demonstrate that a firm is perceived as a potential entrant. The guidelines outline two type of evidence: objective evidence, such as feasible means of entry or internal plans showing intent to expand or reallocate resources, and subjective evidence from market participants — such as customers, suppliers, and distributors — indicating that they perceive the firm as a potential entrant.[12]

In the European Union, a firm is considered a "potential competitor" if, in the absence of an agreement, it could make the necessary investments to enter the market or adjust production in response to price increases by an incumbent. The European Commission considers several factors in its assessment: (i) the firm's intention and ability to enter in the short run and the existence of entry barriers; (ii) whether the firm has taken preparatory steps to enter; (iii) the existence of real and concrete entry possibilities; (iv) the market structure and the legal and economic context; and (v) the

[10] Carlton and Perloff, op.cit. p.684.
[11] *Id*.
[12] FTC Merger Guidelines 2023. Section 2.4.A.

perceptions of other undertakings in the market.[13]

This criterion has been applied not only in merger analysis but also in conduct cases, such as the sanctioning of collusive agreements involving pay-for-delay and non-compete clauses. For instance, in pay-for-delay cases like *Teva/Cephalon* and *Lundbeck/Merck*, evidence of "preparatory steps to entry" was central to establishing potential competition.[14] More recently, in the 2023 *AdC/EDP* case, the Court of Justice of the European Union analyzed a non-compete clause and clarified that: (i) subjective perceptions are useful but insufficient on their own, whereas a non-compete agreement is a strong indicator of perceived competition; (ii) the possibilities of market entry must be assessed at the time of the agreement, making subsequent activities irrelevant; and (iii) preparatory steps are not a prerequisite for establishing potential competition.[15]

Other jurisdictions, including the UK, Australia, and Chile, provide further examples within the merger context. In its 2021 Merger Assessment Guidelines, the Competition and Markets Authority (CMA) in the UK establishes that potential competition refers to

[13] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements. Section 1.2.1.16

[14] A) ECJ, Judgment of the Court Teva/Cephalon, section 53, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62019CJ0198.
B) ECJ, Judgment of the Court, GlaxoSmithKline and others, section 43, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=222887&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=20119924.
C) ECJ, Judgement of the Court, Lundbeck/Merck, section 57, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=239291&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=20123071

[15] ECJ, Judgement of the Court AdP/EDP, section *The third to seventh and ninth questions, concerning the concept of 'potential competition',* available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=279121&pageIndex=0&doclang=E.N&mode=lst&dir=&occ=first&part=1&cid=3529720.

competitive interactions in which a firm has the potential to enter a market or expand to compete.[16] The CMA assess whether a firm would have entered the market, by considering well-developed entry plans or significant preparatory steps, a history of entering related markets, or incumbents' anticipatory actions of competitors possible entry.[17]

The 2025 Australian Merger Assessment Guidelines adopt a similar approach to the UK, adding that evidence of financial incentives or advantages that make entry attractive may also support a finding of entry more likely.[18] The Chilean National Economic Prosecutor's Office (FNE), in its 2022 Merger Guidelines, establishes that assessing a potential competitor's pressure requires analyzing the likelihood of entry, market positioning, projected scale, and product closeness to other products.[19] Cases such as *Oxxo/OKM*, *Uber/Cornershop*, *Warner Media/Discovery*, and *OnNet/Entel* were decisive in shaping these criteria.

Finally, the OECD (2021) identifies three key concepts for assessing potential competition: (i) the relevance of entry barriers; (ii) the likelihood and competitive strength of a potential entrant; and (iii) the timeframe within which the entry may occur.[20]

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[16] CMA, Merger assessmet guidelines, pp.40 y 41. Available at: https://assets.publishing.service.gov.uk/media/61f952dd8fa8f5388690df76/MAGs_for_publication_2021_--_.pdf.

[17] CMA, op.cit., pp.41 y 42.

[18] ACCC, Merger assessment guidelines 2025, pp.33-35. Available at: https://www.accc.gov.au/system/files/merger-control-regime-assessment-guidelines.pdf.

[19] FNE, Guía para el Análisis de Operaciones de Concentración Horizontales 2022. Available at: https://www.fne.gob.cl/wp-content/uploads/2022/05/20220531.-Guia-para-el-Analisis-de-Operaciones-de-Concentracion-Horizontales-version-final-en-castellano.pdf.

[20] OECD (2021). The Concept of Potential Competition, p.13. Available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/10/the-concept-of-potential-competition_f6ac3141/82caa437-en.pdf.

III. What to Expect Going Forward?

Although the concept of a "potential competitor" was already embedded in Mexican law, its explicit inclusion as a possible party to collusion is a significant development. This change confirms that such conduct is sanctionable and formally adopts the criterion from COFECE's non-compete case, where the Board debated whether agreements with potential competitors were covered by the LFCE.

The Mexican approach to defining a "potential competitor" in its only available formal precedent resembles that of other jurisdictions, by placing weight on a combination of objective elements (capacity, experience, and feasible means of entry), evidence of intent and possibility of entry within a defined time frame, and subjective market perceptions regarding whether the firm represents a credible competitive threat. However, with only one precedent at hand and with the law now explicitly sanctioning such collusion, further clarity is crucial to prevent misuse of this concept.

The recent legal modifications mandating the issuance of secondary regulations (and, eventually, guidelines) present an opportunity for further clarification. Shared elements among the jurisdictions covered here are:

- **Ability and Capacity to Enter:** All jurisdictions look for the technical, operational, and commercial capability to enter or expand. The EU frames this as the ability to make necessary investments or adjust production; Australia explicitly looks to financial incentives or advantages to show profitable entry; Chile uniquely foregrounds projected scale and product closeness to ensure the entrant would discipline the incumbent; and the OECD highlights the role

of entry barriers as a filter on realistic ability.

- **Likelihood of Entry:** Each regime requires a credible prospect of timely entry that can constrain incumbents, not just speculative potential. The EU, particularly in pay-for-delay and non-compete cases, focuses the evidence on the time of the agreement.
- **Feasibility given entry barriers and market context:** All approaches take into account barriers to entry and market structure. The EU expressly weighs entry barriers and legal/economic context; the OECD lists barriers as a primary lens; Chile and the UK/Australia consider whether market conditions make entry realistic.
- **Objective Evidence of Plans or Steps:** Most jurisdictions place weight on concrete indicators such as internal plans, preparatory steps, or resource reallocation. The U.S. guidelines highlight objective evidence like internal expansion plans, while the EU considers preparatory steps but clarifies they are not strictly required.
- **Market Participants' Perceptions:** Several jurisdictions consider customer and rival perceptions that a firm is poised to enter. The EU also treats such perceptions as useful, though insufficient on their own, and notes that non-compete agreements can strongly signal perceived competitive proximity.

In short, the test across all jurisdictions is whether a firm has the ability and incentive to enter the market in a timely manner that would exert real competitive pressure. Even though, these common elements are very similar to the only Mexican precedent, going forward, the Mexican

authority will need to make clear the weight it assigns to objective indicia (e.g. plans, investments, capabilities, feasible routes, barrier analysis), how to treat perceptions as corroborative evidence, and the probative value to assign to non-compete clauses.