Summary of BIAC Discussion Points

Presented by the Business and Industry Advisory Committee to the OECD (BIAC) to the OECD Competition Committee Working Party on Co-operation and Enforcement (WP3)

Roundtable on Definition of Transaction for the Purpose of Merger Control

June 18, 2013

1. Executive Summary

1.1 The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments for the Roundtable Discussion on the definition of transaction for the purpose of merger control.

1.2 Legislators, competition agencies and courts have a great variety of views on the definition of relevant transactions for the purpose of merger control. BIAC submits that merger control jurisdiction, including but not limited to where mandatory notification is required, should be established in line with the 2005 OECD Recommendation on Merger Review – particularly through the use of “clear and objective criteria” for determining when a merger should be notified or qualify for review. More specifically, merger control should apply to structural changes in the market and not to transactions whose impacts are not structural, but rather depend on subsequent behaviour. The latter should be dealt with under antitrust rules on coordination and conduct. The variety (and sometimes inconsistency) of approaches may be observed in four topical areas, namely: (1) acquisitions of shares (including acquisitions of minority interests and interlocking directorates); (2) acquisitions of assets; (3) joint ventures; and (4) exemptions (including the de minimis rule).

1.3 Acquisitions of shares (including acquisitions of minority interests and interlocking directorates) – It is appropriate in some instances that competition authorities may investigate and regulate potential anti-competitive effects of minority shareholdings and interlocking directorates. However, BIAC’s concerns in this respect are that (i) notification processes and agencies’ investigations should be limited to those circumstances where legitimate concerns about impacts on competition are likely to occur as a result of such transactions, (ii) the applicable rules should be sufficiently clear to provide maximum legal certainty and (iii) the rules should be reasonably consistent across

---

jurisdictions. This is an area where agencies need to work towards convergence of their criteria, with a view to clearly defining notions such as “control”, and where guidelines, designed in a coordinated fashion between agencies, are a welcome supporting tool. BIAC submits that any such convergence should be aimed at reducing the regulatory burden of international merger controls and, at all costs, avoid regulatory creep increasing the burden on business.

1.4 Acquisitions of assets – Asset deals generally fall within the category of a merger transaction in all jurisdictions, so long as the acquired assets have “sufficient economic significance” to warrant merger review. BIAC recommends that asset acquisitions should only be treated as a merger if they result in changes to market structure (i.e., if they involve an acquisition of a full business with goodwill). BIAC notes that this structural change standard is not reflected in the merger review laws in many jurisdictions, which creates significant ambiguity and uncertainty as to whether an asset deal would fall within the ambit of merger control. This uncertainty exists, in particular, with respect to acquisitions of intangible assets. To the extent that merger control laws in various jurisdictions are not based on a structural change standard, they should be revised accordingly.

1.5 Joint ventures – Joint ventures are flexible business instruments which have no absolute legal definition. Depending on their form, joint ventures may have a structural influence on the market and therefore, depending on whether that is the case in particular deals, joint ventures may be properly subject to merger control. Again, agencies and courts have taken a great variety of approaches, the most advanced likely being the “full-function joint venture” concept of the European Union, which refers to the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity. The variety of approaches towards joint ventures makes planning for regulatory approvals very complex, especially for multi-jurisdictional transactions, and undermines legal certainty with respect to the strategic and operational decisions made in connection with joint ventures. BIAC would encourage agencies to work towards further convergence of their policies in this area, perhaps taking the above-mentioned criterion of “full-function joint venture” as a basis for such harmonization.

1.6 Exemptions (including the de minimis rule) – Finally, most jurisdictions recognize various exemptions, whether “quantitative” (based on thresholds relating to the magnitude of the transaction or the size of the acquired stake in the target company – i.e., de minimis exemptions) or “qualitative” (attempting to capture various categories of transactions that are unlikely to have any competitive significance). BIAC believes that more initiatives should be pursued to bring these frameworks into further alignment, and to enlarge the scope of certain exemptions (either in terms of thresholds or categories of exempted transactions) with a view to increasing predictability for businesses and stimulating investment.

1.7 As in many areas of competition law and policy, BIAC supports convergence to increase efficiency, but, in this area, it is important that such convergence occur without increasing the regulatory and administrative costs associated with merger control rules that capture an ever-expanding set of transactions. A clear and appropriate set of rules is required to ensure that

---

merger control regimes encompass only those transactions that lead to meaningful structural changes in the market.

2. Acquisitions of Shares (including acquisitions of minority interests and interlocking directorates)

2.1 BIAC recognizes that minority shareholdings can have an influence on the policy of companies. This applies first, naturally, where the minority holding provides access to the corporate governance bodies, such as seats on the Board of Directors or contractual veto rights (a variety of situations which are covered here for convenience under the term “interlocking directorates”). It also extends to so-called “passive” shareholdings where no such rights are provided. Passive minority shareholders being in a position to exercise influence is probably an increasing trend, both as a result of the growing share of the financial funds’ investments in the economy and because of the recent evolution of general corporate governance practices towards a stronger “shareholders’ engagement” by these and other investors.

2.2 Such positions of influence by minority shareholders can affect the market behaviour of companies in some circumstances. Indeed, it is not uncommon that a company holds a minority share in another with which it has market relations, whether horizontal or vertical (in certain cases these shareholdings are reciprocal), nor that a third party (e.g. an investment fund) owns minority shareholdings in several undertakings having between themselves horizontal competitive or vertical relationships. There are usually perfectly valid reasons for these situations, and they can even be recognized as having pro-competitive effects.3 It is however not in dispute that in certain circumstances a minority shareholder can have an influence that is not restricted to the protection of its investment, but rather extends to the determination of the company’s market policy. Even if the investment remains passive – i.e., not supported by interlocking directorship (reciprocal or not) or veto rights – this can affect incentives to compete and information flows.

2.3 Therefore, it is appropriate in some instances that competition authorities investigate and regulate potential anti-competitive effects of minority shareholding and interlocking directorates and, accordingly, that these situations are included in the definition of “transaction” for the purpose of merger control. However, BIAC’s concerns in this respect are that (i) notification processes and agencies’ investigations should be limited to those circumstances where legitimate concerns about impacts on competition are likely to occur as a result of such transactions, (ii) the applicable rules should be sufficiently clear to provide maximum legal certainty and (iii) the rules should be reasonably consistent across jurisdictions. There remains scope for improving the clarity and consistency of approaches across jurisdictions in this respect, notwithstanding that most antitrust regimes provide some safeguards against unnecessary notifications.

2.4 As expressed in BIAC’s contribution to this Committee’s Working Party No. 3 roundtable of February 19, 2008, the improvements would imply “(1) clear guidance on the de minimis thresholds of investment that will not result in agency scrutiny or concern; (2) an explanation of the circumstances under which the agency will deem cross-ownership interests to constitute a threat to competition; (3) an indication of the circumstances under which the agency will challenge cross-directorships between corporations, including subsidiaries and affiliates; and (4) an indication of

---

the potentially acceptable remedies considered if it is found that the minority shareholding can indeed have anti-competitive effects”.4

2.5 The United States has a legal treatment of minority shareholdings and interlocking directorates which is relatively clear: the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (the “HSR Act”) provides a safe harbor if the transaction is “made solely for the purpose of investment” (i.e. passive investments in which the purchaser has no intention of influencing the business decisions of the issuer)5 and if, as a result of the acquisition, the acquiring person would hold 10% or less of the outstanding voting securities of the issuer (15% or less for institutional investors).6 Furthermore, Section 8 of the Clayton Act prohibits in principle interlocking directorates between competing companies, subject only to precise de minimis exemptions.7 Industry’s main concern here is that the de minimis thresholds are exceedingly low, implying that a large number of situations are subject to scrutiny while circumstances where legitimate concerns about impacts on competition are likely to occur are rather rare.

2.6 Like the U.S. system, Canada has a bifurcated merger control system whereby a sub-set of merger transactions (i.e., those that meet certain thresholds) are subject to pre-merger notification and review, while all mergers, regardless of whether they are notifiable, are subject to substantive review and possible remedies.8 A “merger” is defined to include “the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares …, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.”9 As explained in the Canadian Merger Enforcement Guidelines, “a ‘significant interest’ in the whole or a part of a business is held qualitatively when the person acquiring or establishing the interest obtains the ability to materially influence the economic behaviour of the target business, including but not limited to decisions relating to pricing, purchasing, distribution, marketing, investment, financing and the licensing of intellectual property rights.”10 A number of factors are relevant in determining whether a minority interest confers material influence in the

---

6 16 C.F.R. §§ 802.9 and 802.64.
7 Section 8 of the Clayton Act generally prohibits a person from serving as a director or officer of two or more corporations that are competitors: Clayton Act § 8, 15 U.S.C. § 19. However, Section 8 does not apply to parent corporations and their wholly-owned subsidiaries.
8 Indeed, among the most recent contested merger cases in Canada is Canada (Commissioner of Competition) v. CCS Corp., which involved a merger that was not subject to pre-merger notification. Among other things, the case also raised questions regarding the scope of the term “business” for the purposes of section 91, discussed infra. In particular, the Tribunal’s decision raises the possibility that, in order to be subject to merger review, a transaction must involve the acquisition of a business that “must have the potential to impact competition in the markets at issue”. The concurring opinion of Crampton C.J. dissented on this point, arguing that the determination of whether a merger involves a “business” should not require any competitive effects assessment. See Brian Facey and Cassandra Brown, Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations (LexisNexis Canada, 2013), at 38-39.
9 Competition Act, s. 91. Emphasis added.
context of a share transaction, including, for example, voting rights attached to the shares being acquired, the status of the acquirer (e.g. general or limited partner), holders and distribution of remaining shares, board composition (and interlocking directorates)\(^{11}\), special voting/veto rights, terms of any shareholder/voting agreement, etc.\(^{12}\)

2.7 The European Union has also clearly established that minority ownership transactions which give to a party “decisive influence” over another fall within the definition of “concentration” for the purpose of merger control. This is the so-called “Philip Morris doctrine”\(^{13}\), later largely incorporated in the Merger Regulation. Other transactions which fall below the threshold of “concentration” may, depending on the circumstances, be subject to substantive review in the context of article 101 and 102 of the Treaty of Rome, which pursue different purposes. Although it is felt that “if there is a gap” in EU merger control, it would appear to cover very few cases\(^{14}\), critics point out that some transactions having an effect on competition do escape the Commission’s review, and that it is hard to draw from the trends of case law or the Consolidated Jurisdictional Notice a clear view of the criteria (such as the level of the shareholding or the nature of contractual rights) used to determine the “influence” which will trigger the application of the Regulation.

2.8 Within their respective jurisdictions, European national laws and the practice of national agencies have different approaches. For instance, while Austria has a simple threshold in terms of equity percentage (25%), Germany uses a double criterion (25% and “the acquisition of a competitively significant influence”) and in both cases filing is compulsory.\(^{15}\) In contrast, the United Kingdom looks for the ability to “materially influence” the target company’s policy (with the acquisition of more than 25% of the voting rights in a target company giving rise to a rebuttable

\(^{11}\) Unlike the United States, Canada does not have an equivalent to section 8 of the Clayton Act which prohibits (subject to certain exceptions) interlocking directorates between competing companies. This may suggest the Canadian Parliament has not sought to place emphasis on addressing such issues through the competition laws. Also, as a much smaller country, interlocking directorships are far more common in Canada. See National Competition Law Section, Canadian Bar Association, Submission on Merger Enforcement Guidelines Consultation, December 2010, available online at: <http://www.competitionbureau.gc.ca/eic/site/cp-bc.nsf/vwapj/Comments-TheCanadianBarAssociation-MEGs-Dec-2010.pdf>$FILE/Comments-TheCanadianBarAssociation-MEGs-Dec-2010.pdf> at 7-8.

\(^{12}\) Ibid. at paras 1.6, 10.1. As set out in the Guidelines, “[i]n the absence of other relationships, direct or indirect ownership of less than 10 percent of the voting interests in a business does not generally constitute ownership of a significant interest. While inferences about situations that result in a direct or indirect holding of between 10 percent and 50 percent of voting interests are more difficult to draw, a larger voting interest is ordinarily required to materially influence a private company than a widely held public company.” Note also that, separate and apart from encompassing acquisitions of shares, the merger provisions under the Competition Act also encompass mergers that are “amalgamations”, a concept which refers to two or more corporations continuing as one corporation pursuant to a statutory procedure.

\(^{13}\) Issued from British American Tobacco Company Ltd and R. J. Reynolds Industries, Inc. v Commission of the European Communities, joined cases 142 and 156/84 of 17 November 1987.

\(^{14}\) Annette Schild, “When is a Merger a Merger?” (Presented at the ABA 71st Annual Antitrust Law Spring Meeting, 12 April 2013) at 16.

\(^{15}\) An acquisition of a minority shareholding below 25% is notifiable if the acquiring party obtains “competitively significant influence”: see Section 37(1)(4) of the Act Against Restraints of Competition, for instance, in the case of the PSA (Peugeot)/General Motors alliance, the Bundeskartellamt considered that the contractual rights contemplated in the transaction gave to GM “significant influence” over PSA while its stake was only 7% of shares and 5.58% of voting rights (decision No B9-32/12).
presumption of material influence) and relies on voluntary filing. French law addresses “decisive influence” (influence déterminante) whether or not substantiated by shareholding.

2.9 The diversity of approaches is even wider in the rest of the world, ranging from the requirement of a filing for the acquisition of “any level of minority shareholding (e.g. in Ecuador, Egypt, El Salvador or Jordan and many other countries), to a variety of thresholds in terms of percentage of voting rights (e.g. 10% in Pakistan, 20% in Armenia, 25% in Kazakhstan or Ukraine, one third in Chinese Taipei, 35% in Mexico or Uzbekistan) or more complex combinations of thresholds like in Japan or South Korea where the ranking of the share of the acquirer in the target company comes into play. In some cases the filing requirements depend on the configuration of the market, e.g. a dominant position (Moldova) or are specific to certain sectors (e.g. bank and insurance in Guatemala, telecommunications in Thailand) or certain types of companies (public companies in Nigeria). Yet in other countries the filing remains voluntary, and necessary if the acquisition creates a situation where anticompetitive practices might occur (New Zealand, Venezuela, Zambia).

2.10 To a certain extent, this diversity in approaches simply reflects the complexity of the matter. It is hard to recommend a happy medium between the legal certainty provided by the application of rigid equity (or voting rights) thresholds, and the flexibility necessary to accommodate the reality of the markets in order to exercise control over only those transactions which merit attention from a competition perspective. Inevitably, the sheer diversity of approaches makes multi-jurisdictional transactions more complex and costly, which can only hamper investment. This is clearly an area where the agencies need to work towards convergence in their criteria, with a view to clearly defining notions such as “control” and “influence”, and where guidelines, designed in a coordinated fashion between agencies, are a welcome supporting tool.

3. Acquisitions of Assets

3.1 An acquisition of assets generally falls into the category of a merger transaction in all jurisdictions, so long as the acquired assets have “sufficient economic significance” to warrant merger review. BIAC recognizes that there has been substantial harmonization and convergence across jurisdictions on this issue. However, BIAC recommends that asset acquisitions should only be treated as a merger if they result in changes to market structure (i.e., if they involve a full business with goodwill). BIAC notes that this structural change standard is not captured by the merger review laws in many jurisdictions.

3.2 In the United States, for instance, the HSR Act applies to every transaction involving an acquisition of tangible or intangible assets. The FTC and DOJ have taken the position that the term...
“assets” should be given a broad interpretation to include intellectual property. As such, an asset for HSR purposes includes tangible assets as well as intangible assets, including IP, goodwill and exclusive licenses. However, non-exclusive intellectual property licenses or exclusive licenses for marketing and distribution rights are not assets for HSR purposes. Note also that proposed amendments to the HSR act would extend the notification requirement to certain acquisitions of exclusive pharmaceutical patent licenses that historically have not been reportable because the licensor retained manufacturing rights under the patent.

3.3 In the EU, the concept of “concentration” under Merger Regulation 139/2004 (the “ECMR”) includes the acquisition of direct or indirect control, whether by purchase of securities or assets, of the whole or parts of one or more other undertakings. A concentration can consist of the acquisition of intangible assets if those assets form the basis for a business to which market turnover is attached. As in the U.S. context, a concentration under the ECMR excludes the acquisition of non-exclusive licenses.

3.4 In the UK, a reviewable merger under the Enterprise Act consists of two enterprises (defined as the whole or part of a business) being brought under common ownership or control. This process may include the transfer or pooling of assets: indeed, the Office of Fair Trading has provided guidance stating that the transfer of physical assets alone may be sufficient to constitute an enterprise in some cases, such as where a transfer consists of facilities or sites that allow a particular business activity to be continued. However, intangible assets such as IP rights “are unlikely, on their own, to constitute an ‘enterprise’ unless it is possible to identify turnover directly related to the transferred intangible assets that will also transfer to the buyer.”

24 Annette Schlief, loc. cit. at 11.
operating as part of a business and have in fact been inoperative for a period. This suggestion is consistent with the position put forward in the OFT’s interpretation guidelines.

3.5 In Canada, the merger provisions in the *Competition Act* define a merger as an acquisition of a direct or indirect interest in a business by any means, including by “purchase or lease of shares or assets….” The *Merger Enforcement Guidelines* state that “asset transactions…that generally fall within the scope of section 91 include the purchase or lease of an unincorporated division, plant, distribution facilities, retail outlet, brand name or intellectual property rights from the target company”. According to the *Merger Enforcement Guidelines*, “[t]he Bureau treats the acquisition of any of these essential assets, in whole or in part, as the acquisition or establishment of a significant interest in that business. Further, acquiring a subset of the assets of a business that is capable of being used to carry on a separate business is also considered to be the acquisition or establishment of a significant interest in the business.”

The notification provisions of the *Competition Act* provide additional guidance on this issue: they state that pre-merger notification is necessary in respect of a proposed acquisition of any of the assets in Canada of an operating business if certain thresholds are met. Note, however, that some uncertainty exists with regard to the meaning of an “operating business”: the term is defined broadly under the *Competition Act* as “a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work”, rather than more traditionally in terms of revenue capacity and/or expectation of profit.

3.6 As indicated above, the approach taken in major jurisdictions creates significant ambiguity and uncertainty as to whether an acquisition deal would fall within the ambit of merger control. BIAC encourages enforcement agencies to clarify such areas of ambiguity in order to help foster greater certainty for businesses contemplating asset transactions. Most importantly, BIAC recommends that asset acquisitions should only be treated as a merger if they result in changes to market structure. To the extent that merger review laws in various jurisdictions – such as the UK’s definition of an enterprise as including “part of a business” – fails to define such structural change, they should be revised accordingly. Asset transactions whose impact depends on subsequent behaviour should be addressed through antitrust rules on coordination and conduct, rather than through merger control.

4. Joint Ventures

4.1 There is no universally accepted definition of joint ventures, whether in competition law or other areas of the law, and most academics have recognized that attempting to provide a legal definition

---


29 *Competition Act*, s.91. Emphasis added.


32 *Competition Act*, s. 110 (2).

is futile. \(^{34}\) Yet the term is widely used in the business world and businesspeople are fully aware that the transactions that they call joint ventures, irrespective of their broad variety of forms, can have anticompetitive effects. These can result from contractual or unwritten commitments to restraints of competition between the parents or between one or several of the parents and the joint venture, or from spill-over effects. However, only those joint ventures whose formations constitute a structural change should fall within the ambit of merger control. However, again, in practice, a great variety of approaches can still be observed in this respect.

4.2 The United States has a pragmatic approach to joint ventures. Like in most competition law systems, “joint ventures” are not identified as such, and the Antitrust Guidelines for Collaborations between Competitors make clear that the formation of a joint venture, irrespective of its form and in particular whether or not a separate entity is created, may be dealt with as a “relevant agreement” for the purposes of Section 7 of the \textit{Clayton Act}. The HSR Act further requires a complex legal analysis to determine whether the transaction requires a notification.

4.3 The European Union, having introduced in 1997 the new criterion of “full-function joint venture”, has an entirely different approach. The concept of “full-function joint venture” is satisfactory inasmuch as it fits the economic purposes pursued by antitrust law, i.e. to capture transactions which have an effect on the market. Notwithstanding the benefits of the “full-function joint venture” standard, this standard nevertheless requires a close review of contractual documentation and can result in an increasingly burdensome notification process (including with respect to the negotiation of remedies).

4.4 The approaches of European national agencies’ differ, resulting in control of joint ventures that would not qualify as “notifiable full-function” in EU law, and triggering a variety of forms of control, sometimes \textit{ex-ante} (as in Germany) and sometimes \textit{ex-post} (as in the U.K.). Admittedly, these differences do not necessarily result in major distortions as to the substance of the decisions, as the national legislations are progressively adjusted to get closer to the European model. \(^{35}\) However, they make the planning of transactions extremely complex for companies endeavouring to design an international strategy.

4.5 Other approaches can be found in other countries. In Canada, the definition of a merger transaction is broad enough that it could include strategic alliances and joint ventures, where there is an acquisition of control over or a significant interest in the whole or a part of a business; however, joint ventures or strategic alliances also may be examined under section 90.1 of the \textit{Competition Act}, which permits the Competition Tribunal to issue a prohibition order in respect of an existing or proposed collaboration that prevents or lessens, or is likely to prevent or lessen competition substantially in a market. In China, joint venture transactions, which have played a key role in the country’s international development, are subject to the recent antitrust law regime if one of the parties acquires “decisive influence.” \(^{36}\) In Brazil, the new law captures “association


\(^{35}\) As was the case for instance in the French \textit{Loi des Nouvelles Régulations Economiques} of May 15, 2001, and more recently Lithuania since May 1, 2012.

\(^{36}\) MOFCOM, the responsible regulatory authority, usually considers not only rights related to the decision-making for strategic business policy but also other ways to exercise influence over the target (“plus factors”) that are not examined in other jurisdictions such as the EU, e.g. the right to appoint middle level key
agreements, consortium agreements and joint ventures” but the definition of these transactions is still less than clear.

4.6 This shows that, while it is undisputable that certain joint ventures may have a structural influence on their markets and therefore deserve to be subject to merger control, the variety of approaches taken by antitrust agencies makes the planning of the regulatory approvals very complex, especially for multi-jurisdictional transactions, and undermines the legal certainty of the strategic and operational decisions made in their respect. BIAC would encourage agencies to work towards a further convergence of their policies in this area, perhaps taking the above-mentioned criterion of “full-function joint venture” as a basis for such harmonization.

5. Exemptions (including de minimis rule)

5.1 BIAC believes that governments in all jurisdictions, in consultation with the business community, should use objectively quantifiable criteria to identify an appropriate threshold for the target’s turnover, below which small mergers are unlikely to have a significant adverse economic effect in light of the characteristics of the local economy, and create clear exemptions for transactions falling below that threshold. More generally, BIAC believes in the value of continuing harmonization and convergence across jurisdictions with respect to exemptions. BIAC urges that certain exemptions be expanded to promote investment and reflect current economic and institutional conditions. These points are discussed below with reference to the laws of specific jurisdictions.

5.2 In the United States, the HSR Act and accompanying rules exempt from notification various categories of asset acquisitions that are unlikely to have competitive significance, such as acquisitions of assets in the ordinary course of business, acquisitions of non-voting securities, acquisitions by securities underwriters, creditors, insurers and institutional investors, acquisitions of less than 50% of an unincorporated entity (i.e. partnerships or limited liability companies), certain financing transactions, acquisitions of real property assets and acquisitions of voting securities “solely for the purpose of investment” if, post-investment, the acquiring person would hold 10% or less of the outstanding voting securities of the issuer. This last exemption

personnel, such as a finance manager, and/or key members in charge of sales, production, site-management and marketing.


38 So long as such acquisitions are made in the ordinary course of the security underwriters’ business: 16 C.F.R. § 802.60.

39 So long as such acquisitions are made in the ordinary course of the creditors’ business in connection with a bona fide debt workout: 16 C.F.R. § 802.63.

40 16 C.F.R. § 801.1(f)(1). Moreover, acquisitions of 50% or more of an unincorporated entity are exempt, regardless of value, if the acquisition is for the purpose of financing and the purchaser will hold less than 50 percent of the unincorporated entity after it realizes the return on its investment: 16 C.F.R. § 802.65.

essentially creates a safe harbour for partial equity investors. As mentioned in Section I above, BIAC is of the view that the current threshold of 10% – which was established decades ago without the benefit of economic learning on the subject – is far too low to reflect current economic and institutional thinking.

5.3 In the EU, Article 3 of the ECMR provides that a “concentration” shall not be deemed to arise in cases of (a) acquisitions of securities by financial institutions or insurance companies in the ordinary course of business with a view to reselling within one year, and (b) transfers to liquidators in connection with liquidation proceedings, winding up, insolvency, cessation of payments and so forth. Further, under current EC merger rules, a transaction qualifies for simplified notification and review if the parties’ own a combined share below 15% in each market where there is an overlap, and a combined share below 25% in each market that is upstream or downstream of a market where the other party is active. Further, in March 2013, the European Commission opened a consultation on proposed regulatory amendments that would increase the above thresholds to 20% and 30% respectively. BIAC applauds this potential increase to market share ceilings, which the Commission estimates will result in approximately 10% more mergers benefiting from the simplified procedure. However, the EC’s proposed regulatory amendments would also heighten the Commission’s powers to conduct full-scale review of transactions that would otherwise qualify for simplified procedure. BIAC believes that this shift would reduce predictability and increase the burden on businesses.

5.4 The Enterprise Act in the UK imposes no requirement for merger notification, even where the OFT would otherwise possess jurisdiction to review a merger. As such, merger notification is conducted on a solely voluntary basis. Note, however, that the OFT is empowered by legislation to investigate both anticipated and completed mergers (and to refer such mergers for possible remedial action), even where a merger is a relatively small transaction. In this regard, BIAC believes that the current system in the UK would benefit from increased certainty and predictability.

5.5 Among the implications of the voluntary nature of the UK’s notification regime is that parties may choose not to notify a temporary transaction, such as a break-up bid where one or more entities purchase an enterprise pursuant to an agreement that the acquired business be divided up shortly thereafter. The question therefore arises whether the OFT will consider the first transaction as a separate relevant merger, or whether it will examine only the ultimate acquisitions in the second step, after the target is split up. The OFT’s jurisdictional and procedural guidelines for mergers provide that “the OFT will generally be unlikely to seek to examine a relevant merger situation where it is clear that it will be merely an interim step in the context of a wider transaction and that the subsequent steps will occur within the four month time period within which the OFT

43 Ibid. at para 14.
has the ability to refer the initial acquisition.” Similarly, in France, the question of transactions which involve an acquisition of control on an interim basis (e.g. with a firm commitment to resell in whole or in part within a short period), by parties other than financial institutions or insurance companies, was considered in Autorité de la Concurrence, Décision No 12-DCC-48, April 6, 2012. Similarly, in France, the question of transactions which involve an acquisition of control on an interim basis (e.g. with a firm commitment to resell in whole or in part within a short period), by parties other than financial institutions or insurance companies, was considered in Autorité de la Concurrence, Décision No 12-DCC-48, April 6, 2012 Sofides/ITM Entreprises, which found that, depending on the circumstances, transactions that do not result in any lasting change in corporate control are not subject to merger control rules. In BIAC’s view, such exemptions from the application of merger control rules are worthwhile, in that they rightly exempt transactions that will not result in any lasting structural change in the market.

5.6 Canada’s Competition Act exempts transactions from notification that, given their nature, are not expected to give rise to anticompetitive effects in any market in Canada, including, for example, acquisitions of real property or goods in the ordinary course of business, transactions among affiliates, acquisitions of insolvent businesses by creditors, certain non-corporate joint ventures, as well as acquisitions of shares/certain other interests made for the purpose of underwriting securities, acquisitions resulting from gifts or inheritances and acquisitions of non-voting shares.

5.7 While the legal frameworks reviewed above have undergone some harmonization, more initiatives should be pursued to bring these frameworks into further alignment, with a view to increasing predictability for businesses and stimulating investment. Moreover, certain exemptions, including the exemption for partial equity investors in the U.S., should be expanded in order to reflect economic reality. Finally, BIAC submits that the creation of clear exemptions from notification and intervention in all jurisdictions for de minimis mergers will benefit growth and competitiveness, provided that the de minimis threshold is established using objectively quantifiable criteria, in consultation with the business community.

6. Conclusion

6.1 The wide variety of approaches taken by legislators, competition agencies and courts to defining relevant transactions for the purpose of merger control – in particular, including transactions other than plain mergers – leads to the unnecessary expenditure of time and resources, especially now that it is quite common that multi-jurisdictional transactions require multiple filings.

6.2 As in many areas of competition law and policy, BIAC supports convergence with respect to the definition of transaction for the purpose of merger control. However, given the risks (in terms of time and expense) associated with an ever expanding scope of transactions subject to merger control, it is important that such convergence occur without expanding the types of transactions that are subject to merger control.

48 In order for a joint venture to be exempt from notification, certain requirements must be met, including, inter alia, (i) there is no change in control over any party to the joint venture; (ii) the range of activities of the joint venture are restricted by the joint venture agreement; and (iii) the joint venture agreement contains provisions that would allow for its orderly termination. See s. 112 of the Competition Act.
6.3 BIAC appreciates the opportunity to submit these comments for the Roundtable Discussion on the definition of transaction for the purpose of merger review and would encourage agencies to consider ways to increase clarity and certainty as to which transactions should be subject to merger control, including the specific recommendations made in this paper with respect to (1) acquisitions of shares, (2) acquisitions of assets, (3) joint ventures and (4) exemptions.