Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee

Roundtable on the Role of Efficiency Claims in Antitrust Proceedings

October 25, 2012

1. BIAC appreciates the opportunity to comment on the Roundtable on the Role of Efficiency Claims in Antitrust Proceedings. The treatment of efficiencies by enforcement agencies is an issue of great importance to the business community at large, not least of all in the evaluation of proposed mergers. Mergers often offer firms the ability to gain synergies that they otherwise would not be able to achieve, or would be able to achieve only through the investment of significant amounts of capital over long periods of time. The pursuit of such synergies or efficiency gains is often, therefore, a key driver of merger activity.

2. This submission focuses on the current state of evaluation and acceptance of efficiency claims by competition agencies. Without question, there is greater willingness by most agencies to entertain efficiency claims now than there was even a decade ago. Indeed, in hindsight, the controversy surrounding the proposed GE-Honeywell merger cast the issue of efficiencies into the spotlight and (putting aside the case itself) has had at least some salutary benefit in advancing the discussion of efficiencies in a way that has been productive for agencies, the business community and consumers.

3. Despite this progress, the treatment of efficiency claims by competition agencies remains inadequate. Below we highlight some of the reasons for this state of affairs. In doing so, BIAC does not place the entirety of the blame on the agencies themselves. Further advancements in the economic literature with respect to efficiency claims in the merger context would provide substantial assistance in resolving these issues, as would intensive study on the proper procedural framework for the analysis of efficiency claims. Absent these tools, however, competition authorities have defaulted to a mechanism that is unduly fatalistic to efficiency claims. The agencies, therefore, are positioned to establish the institutional structures and lead the reforms necessary to improve the analysis of efficiency claims, which in turn will result in better outcomes for consumers.

4. Companies may seek to make acquisitions for many reasons, but gaining efficiencies is a significant objective in many horizontal mergers among competitors – i.e., in the types of mergers that are most likely to attract antitrust scrutiny. In this context, he extremely
small number of cases in which the agencies squarely address efficiencies as part of the analysis is therefore notable and surprising.

5. The antitrust authorities have shown reluctance to embrace efficiency analysis. As Former FTC Chairman Pitofsky observed in 2007:

Both the United States and the European Union appear to have accepted, in recent years, that mergers can contribute to efficiency . . . and these efficiencies may occur in markets where they are likely to be passed on to consumers to an extent that the efficiencies outweigh any likely anticompetitive effects. Both jurisdictions have been slow to reach this conclusion and formally to introduce efficiency considerations into merger analysis.... In both jurisdictions, the efficiency defense is deliberately described in a way that makes it difficult to establish.¹

6. BIAC is of the view that the evaluation of efficiencies generally continues to be given short shrift by antitrust enforcement agencies. This stems from numerous factors, including asymmetrical treatment of efficiency analysis as compared to competitive effects analysis, systemic procedural biases that are built in to the merger review mechanism, and an insufficiency of analytical tools and trained agency staff to evaluate efficiency claims. Because of these deficiencies, the agencies, by and large, have concluded that the standard of proof for efficiency claims should be exceptionally high and entirely upon the parties, and in addition viewed as inherently suspect. Applying such a presumption is unfair to merging parties, distorts the merger review process, and is potentially detrimental to consumers.

Agencies Apply an Asymmetrical Analysis of Efficiencies and Anticompetitive Effects

7. If the objective of the enforcement agencies is to promote consumer welfare, then the current approach which treats efficiency claims as inherently suspect is also giving short shrift to consumers. It is now universally accepted, in theory, that efficiencies have the ability to counter anticompetitive harms that may arise from a merger. “That antitrust should promote efficient business practices – once hotly debated – is now widely accepted. Economists have documented numerous ways in which mergers can increase efficiency.”²

8. In theory, therefore, if the objective of merger review is to protect against net competitive harm to consumers, an agency should consider efficiencies on an equal footing with competitive effects. In practice, however, it would be the rare case indeed where a level analysis of efficiencies and competitive effects was applied.

9. Merger review is an inherently predictive analysis. Agencies are called upon to judge the impact of events that have not yet occurred. It entails both the “art” of assessing facts and the “science” of placing those facts within a sound economic construct. Even when perfectly executed, the outcome of the analysis deals in probability principles rather than in certainty.

10. The predictive tools used in merger analysis have evolved significantly in recent decades. Previous tools – or the absence thereof – resulted in inconsistent and in some cases confounding outcomes. Because of this, the focus of merger analysis has been to develop tools that would more reliably identify those mergers where indicia of anticompetitive effects, in the first instance, are present. Agencies have gained confidence in the use of these tools and cases that present indicia of anticompetitive effects rarely, if ever, escape agency opposition.

11. This does not imply, however, that the science has advanced to the point of optimizing consumer welfare in the context of merger analysis. That exercise entails a balancing of potential anticompetitive effects against potential efficiency gains and measuring the net impact on consumer welfare. While great strides have been made in the tools used to assess anticompetitive effects, there has been little development of the tools required to assess the impact of efficiencies, or to balance these efficiencies against anticompetitive effects. Indeed, the U.S. Horizontal Merger Guidelines specifically reject this premise: “In conducting this analysis, the Agencies will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies.” Instead, the U.S. agencies weight the scale in favor of competitive effects analysis: “In the Agencies’ experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great.”

12. The evaluation of efficiencies, just like competitive effects, is an inherently predictive exercise. But because the evaluation of efficiencies is deemed by the agencies to be a prediction beyond their immediate grasp, it is considered not worthy of equivalent treatment. The U.S. Merger Guidelines state that “[e]fficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms,” and therefore place the full burden of proof on the parties to substantiate efficiency claims. The EC Horizontal Merger Guidelines echo the U.S. position clearly putting the burden of proof on the parties and demanding verifiability as well as insisting that the

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4 Id. at 31.
5 Id.
6 Id. at 30.
8 Id., ¶¶ 86-88.
efficiencies benefit consumers,\(^9\) which is inevitably the most difficult to predict. The authorities in the United Kingdom also “encourage the merger firms to provide evidence to support any efficiency claims whether as part of the SLC analysis or the consideration of relevant customer benefits.”\(^10\) But evidence of efficiencies is no more uniquely in the hands of the parties than data underlying, say, price-cost margins, or innovation strategies, or intended competitive responses, all of which the agencies feel more than equipped to verify and quantify. Viewed in this light, the asymmetrical treatment of efficiency claims is difficult to understand let alone justify.

13. The U.S. authorities have made efforts in recent years to provide some transparency into their evaluation of efficiencies. In certain of the more visible merger matters that they elect not to challenge, the FTC and DOJ have issued “closing statements” that sometimes reflect the role of efficiencies in their evaluation. For example, the DOJ issued a Statement on its decision to close the investigation of Delta Airlines merger with Northwest Airlines, stating that it had “determined that the proposed merger between Delta and Northwest is likely to produce substantial and credible efficiencies that will benefit U.S. consumers and is not likely to substantially lessen competition.”\(^11\) It noted items “such as cost savings in airport operations, information technology, supply chain economics, and fleet optimization that will benefit consumers. Consumers are also likely to benefit from improved service made possible by combining under single ownership the complementary aspects of the airlines’ networks.”\(^12\)

14. This and other similar statements\(^13\) are helpful in explaining the rationale for approving individual transactions and provide some guidance to parties. In most cases, however, these statements are subsidiary to the core competitive effects analysis, which concludes in all such cases that the potential anticompetitive harm was non-existent or de minimis.

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\(^9\) *Id.*, ¶¶ 79-84


\(^12\) *Id.*

Procedural Biases Impact the Evaluation of Efficiencies

15. There are several procedural biases which auger an asymmetrical treatment of efficiencies. These include an agency process that promotes the consideration of competitive effects to near-exclusion of efficiency analysis, a reluctance to credit efficiencies in those cases determined to pose some harm to competition, and a bias by the courts against crediting efficiencies.

16. As one example of procedural bias, agencies have been critical of efficiency analysis that has been advanced by the parties after the initiation of the agency’s review, presumably on the basis that the involvement of antitrust counsel may cause the results to be purpose-driven. Pre-announcement or pre-notification assessments of efficiencies, however, may inherently underestimate the potential for efficiency gains. Mergers are often announced well before a comprehensive study of efficiencies can be completed. In the normal course, parties to a merger reach a tentative agreement (e.g., a letter of intent) that will confirm the good faith intent of the parties to consummate the transaction. Securities laws often dictate that the parties publicly announce an intended transaction when a letter of intent is executed.

17. This tentative agreement will almost always indicate a price for the shares or assets being acquired. The price and other terms of a letter of intent are subject to confirmation or further negotiation based on the results of the buyer’s due diligence efforts. From the buyer’s perspective, the price offered for the target company reflects a prediction about the likely efficiencies that can be achieved through the acquisition. But the prediction typically is based on a general understanding of the complementarity of the acquired business with the buyer’s existing business, and perhaps on some preliminary level of due diligence. Full due diligence, however, may allow a properly constrained group of the buyer’s employees and experts to examine the seller’s property, plant and equipment, customer relationships, assess production methodologies and techniques, evaluate distribution methods, consider supplies of raw materials and explore other facets such as the level of technology innovation that may allow the buyer to identify the potential for dynamic advancements or to eliminate duplicative costs in products or services. Thus, until the due diligence is completed, the buyer’s ability accurately to predict the expected efficiency benefits is not fully informed. Agencies that would ignore or discount efficiency analysis merely because it occurs after a transaction is announced or notified are, in essence, revealing an institutional bias against the recognition of efficiencies.

18. BIAC would not exclude the potential for some merging parties to overestimate the efficiencies attributable to a potential transaction. That does not suggest, however, that the agencies should be predisposed to view the parties’ efficiency claims as overblown. Indeed, if the agencies must concede that the parties have superior access to the information necessary

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14 See, e.g., id. at 30 (“Projections of efficiencies may be viewed with skepticism, particularly when generated outside of the usual business planning process.”)
to evaluate efficiencies, then to the contrary there should be a presumption that the parties' efficiency claims generally are properly based. As with anticompetitive effects, there should be an effort to test and verify the value of efficiencies as part of the overall competitive effects assessment.

19. Another reason for the asymmetrical treatment of efficiency claims is the nature of the merger review process which places a principal focus on the determination of competitive effects. Perhaps this is understandable, since the merger schemes outlined in most jurisdictions consider efficiencies only as a counterbalance to anticompetitive effects. Thus, efficiency analysis is unnecessary if there are no anticompetitive effects.

20. This procedural bias is revealed in the 2009 survey conducted of the treatment by FTC staff of efficiency claims advanced by parties over a 10 year period. The survey found that the Bureau of Competition considered 342 efficiency claims over that period, rejecting 109, accepting 29 and reaching no conclusion on 204. In other words, the parties’ efficiency claims largely were disregarded in roughly 60% of all cases in which it was raised as an issue.

21. Once the staff concludes that a merger is likely to create a risk of competitive harm, its incentive to credit efficiencies from a procedural standpoint may well diminish. If the staff believes that a merger should be challenged, then crediting efficiency claims may well undermine the staff’s case. This is true both in “prosecutorial” jurisdictions such as the U.S. where the agencies must be prepared to convince a court to enjoin the transaction, as well as “regulatory” jurisdictions such as the EC where a reasoned opinion must be issued that would thereafter be subject to judicial review even though the merger might effectively have been prevented. In cases of a merger challenge by the agencies, there is a strong incentive by the agencies to discount efficiency claims. As former FTC Chairman Muris noted, “the Agencies’ attitude in court remains one of unrelenting hostility toward claims of lower costs.”

22. For the same reasons, courts also may have a bias against accepting efficiency claims. For example, in *U.S. v. Oracle Corp.*, Judge Vaughn Walker ruled in favor of Oracle and against the government on virtually every facet of merger analysis – market definition, competitors, effects, entry, etc. – reflecting a clear belief that the merger should be allowed to proceed. The only area in which he ruled against Oracle was with respect to their asserted efficiencies. Why? Because the standard of review on the findings of fact is one of “abuse of

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15 “Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms.” *Id.*


17 The Bureau of Competition was somewhat more likely to credit the parties’ efficiency claims, accepting 84 and rejecting 37, but also failed to reach a conclusion in 190 instances, roughly 55% of all cases


19 Muris, *supra* note 2 at 751.

20 331 F.Supp 2d 1098 (N.D. Cal. 2004).
discretion,” one could speculate that if Judge Walker had ruled in Oracle’s favor on efficiencies, it would have exposed his decision to being overturned on appeal in a way that otherwise was avoided. Moreover, once he found a lack of substantial anticompetitive effects, no finding of efficiencies was necessary to support the ruling. One could observe that a court ruling the other way (i.e., finding in favor of the government) likewise would have an incentive generally to reject efficiency claims, lest an appellate court determine that the efficiencies should have been sufficient to permit the deal to proceed.²²

23. Unlike merger control regimes in other jurisdictions, Canadian merger control law provides for an explicit “efficiency defence,” which is essentially a benefit-cost analysis for mergers. On one side of the ledger are the gains in efficiency that (i) will likely result from the merger and (ii) will not likely be attained if an order against the merger were made against the merger by the Competition Tribunal. On the other side of the ledger are the “effects of any prevention or lessening of competition” that likely would result from the merger. Balancing these costs and benefits against each other, the Competition Tribunal essentially asks whether the order necessary to address the anti-competitive effects of the merger would, in fact, do more harm than good to the Canadian economy. If the answer is yes, the order would do more harm than good, the Competition Tribunal does not have the statutory authority to issue the order and the merger is allowed to proceed, in spite of any consumer harm in affected markets. This is true in all circumstances, including in respect of a merger to monopoly.

24. A comprehensive evaluation of the reasons for asymmetrical treatment of efficiencies vis-à-vis competitive effects is contained in “Rethinking Merger Efficiencies” by University of Michigan Law Professor Daniel Crane.²³ In this article, Professor Crane argues that:

A potential merger efficiency should be given weight equal to an equally likely anticompetitive risk of the same magnitude. To put it more formally, the probability-adjusted net present value of merger risks should be treated symmetrically with the probability-adjusted net present value of merger efficiencies.²⁴

25. Professor Crane concludes that if efficiencies were properly valued, the result would not be that fewer mergers would be challenged by the agencies, but rather that, at the

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²¹ See FTC v. Whole Foods Market, Inc. 548 F.3d 1028 (D.D.C. 2009) (“We review a district court order denying preliminary injunctive relief for abuse of discretion. FTC v. H.J. Heinz Co., 246 F.3d 708, 713 (D.C.Cir. 2001). However, if the district court’s decision ‘rests on an erroneous premise as to the pertinent law,’ we will review the denial de novo ‘in light of the legal principles we believe proper and sound.’” Id.).

²² U.S. v. H & R Block, Inc., 833 F.Supp.2d 36 (D.D.C. 2011) (“Considering all of the evidence regarding efficiencies, the Court finds that most of the defendants’ claimed efficiencies are not cognizable because the defendants have not demonstrated that they are merger-specific and verifiable,” Id. at 92.)


²⁴ Id. at 349.
margins, *different mergers* would be challenged by the agencies, leading to better net outcomes for consumers.\(^{25}\)

**Fixed Cost Efficiencies Should Be Credited**

26. Fixed cost savings that result from a merger often can be substantial. Elimination of overlapping administrative and back-office functions, inefficient equipment or machinery, duplicative sales offices, and other such savings can carry significant cost reductions and make a company more competitive. This is particularly true in some technology-heavy sectors where fixed costs often heavily outweigh variable costs.

27. Agencies have often discounted fixed cost savings, either explicitly or implicitly, in evaluating parties’ efficiency claims. The EC Horizontal Merger Guidelines, for example, explicitly describe variable costs as more likely to result in lower prices to consumers.\(^{26}\) In fact, the EC considers that fixed cost reductions result from a reduction in output though in reality it is unusual for mergers to result in a reduction of business activity except in cases of significant industry consolidation.\(^{27}\) The United Kingdom also indicates the greater likelihood of the authority taking account of marginal/short run variable cost savings than fixed cost savings.\(^{28}\) But it is inappropriate to make a presumption of significance without a more detailed assessment of the facts of a particular case.

28. Professor Pitofsky has noted this irony and disagreed with the premise:

> Since in the long run all fixed costs become marginal costs, the position advocated in the economic community that marginal cost savings are more valuable than fixed cost savings, and more likely to be passed on to consumers, is of questionable validity. It is difficult to believe that a major reduction in the cost of fixed assets as a result of a merger would not be likely to reduce costs to consumers – certainly in the long run – just as would a major reduction in the cost of ingredients.\(^{29}\)

29. The current approach by the EC to discount fixed cost synergies also reflects a disconnect between their evaluation of mergers and their approach to dominance. In mergers, the EC favors the evaluation of variable costs, and there is no indication that the Commission has incorporated any meaningful assessment of fixed costs into its assessment. By contrast, in evaluating dominance of firms – and specifically in evaluating the relevant pricing metric by which a firms’ pricing behaviour is to be gauged, the Commission has applied a “long range

\(^{25}\) *Id.* (“Rebalancing the weighting of efficiencies and anticompetitive effects could have a significant effect on the overall mix and distribution of merger challenges.”)

\(^{26}\) *Id.*, ¶ 80.

\(^{27}\) *Id.* (“Cost reductions, which merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers.”)

\(^{28}\) *UK Guidelines*, *supra* note 10, ¶ 5.7.9.

\(^{29}\) Pitofsky, *supra* note 1, at 1421.
average incremental cost‖ (LRAIC) test\textsuperscript{30} or an average avoidable cost (AAC) test that incorporates fixed cost elements such as salaries.\textsuperscript{31} These two approaches are irreconcilable.

30. Both tests are designed to evaluate the basis for competitive pricing offered by a company, and the extent to which fixed versus variable costs are to be weighed. In the case of mergers, the Commission essentially assumes the standard model that “price equals variable cost,” and therefore discounts the extent to which a merger would reduce non-variable (i.e., fixed) costs. In the case of dominant firms, the Commission implicitly concludes that some element of fixed cost must be recovered over time and is properly included in determining the competitive price. In other words, the LRAIC test concedes that in the long run “all fixed costs are marginal costs.”

31. The economic literature supports the consideration of fixed cost savings as part of efficiency evaluation of mergers. This is particularly true in situations where firms first choose quality levels and then compete on price. In such cases, there is a strong relationship between fixed costs and price, indicating that a decrease in the fixed cost of producing a given level of quality due to a merger will decrease prices on a quality-adjusted basis and increase consumer welfare.\textsuperscript{32}

There is No Adequate Mechanism for Recognizing Dynamic Efficiencies

32. Dynamic efficiencies differ significantly from static or cost-based efficiencies. Josef Schumpeter described growth from dynamic efficiencies as

\[ \text{[C]ompetition from the new commodity, the new technology, the new source of supply, the new organization...competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and outputs of the existing firms but at their very foundations and their very lives.} \textsuperscript{33} \]

33. The work of Nobel Prize winning economist Robert Solow determined that dynamic efficiency gains were to be credited for a remarkable share -- fully seven-eighths -- of economic growth in the U.S. from 1909 to 1949. From this perspective, competition policy should aggressively recognize the potential for dynamic innovation in mergers.


\textsuperscript{31} See Case COMP/C-3 /37.990—Intel, Comm’n Decision (May 13, 2009) (summary at 2009 O.J. (C 227) 13), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/37990/37990_3581_18.pdf, at ¶ 1135 (“Professor [...] proposes to exclude the basic salaries from the avoidable costs and then to treat only commissions and bonuses as avoidable. . . . This is manifestly incorrect.”).


\textsuperscript{33} \textsc{Josef Schumpeter, Capitalism, Socialism and Democracy} 84 (1942).
34. The OECD is in accord with this view. In its report on a 2007 roundtable on dynamic efficiencies in merger review, the OECD Secretariat noted:

The OECD has likewise concluded that innovation is responsible for most of the increase in material standards of living that has taken place since the industrial revolution. It seems likely that dynamic efficiencies have a considerably greater potential to benefit consumers than static efficiencies have. Therefore, it would be desirable – in an ideal world – for dynamic efficiency considerations to feature more frequently and more prominently in merger decisions.  

35. But the current evaluative model does exactly the opposite. Without a word as to the potential magnitude of dynamic efficiencies, the U.S. Guidelines, for example, state that

When evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively. Such efficiencies may spur innovation but not affect short-term pricing. The Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations. Licensing and intellectual property conditions may be important to this enquiry, as they affect the ability of a firm to appropriate the benefits of its innovation.

36. Similarly, the EC Guidelines on the treatment of horizontal mergers apply an overly strict requirement with regard to the verifiability of dynamic efficiencies, thereby creating a significant hurdle in practice.

37. And while the United Kingdom recognizes dynamic efficiencies, they are all but rendered theoretical by requirements such as that the agency be satisfied by "compelling evidence" that the efficiencies are sufficient to prevent a SLC.

38. This construction places little emphasis on the potentially dramatic benefits of dynamic change. Rather it focuses on its lack of effect on short-term pricing (i.e., implications

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36 EC Guidelines, supra note 7, ¶ 86. "Where reasonably possible, efficiencies and the resulting benefit to consumers should therefore be quantified. When the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a clearly identifiable positive impact on consumers, not a marginal one. In general, the longer the start of the efficiencies is projected into the future, the less probability the Commission may be able to assign to the efficiencies actually being brought about."
37 UK Guidelines, supra note 10, ¶ 5.7.12-14; see also Enterprise Act 2002, § 30(1) which defines relevant consumer benefits to include greater innovation.
38 UK Guidelines, supra note 10, ¶ 5.7.4.
on competitive effects) and the share of the benefit “appropriated” by the producer. Both of these points reflect a bias against the recognition of dynamic efficiencies and their potential value to consumers.

39. To properly evaluate the potential for dynamic efficiencies, the agencies should apply a probability-weighted factor to the dynamic efficiency and a coefficient to value the potential contribution of the dynamic efficiency. Although the probability of dynamic efficiencies may be lower than static efficiencies, they should not be ignored. The 2007 Roundtable recognized the practical problem that still needs to be addressed. “When competition agencies assess efficiencies, they typically consider several factors to determine how much weight to assign to them, including whether the efficiencies are quantifiable. Due to their complexity, it appears that dynamic efficiencies will rarely be quantifiable.”\(^{39}\) So long as agencies rely on strict requirements of quantifiability, dynamic efficiencies, including those that could be seen as having a reasonable probability of coming to fruition, are destined to be fully discounted thereby potentially blocking the realisation of such dynamic efficiencies.

**The Merger Specificity Requirement Should Be Practically Applied**

40. The merger specificity requirement as it is applied also presents a nearly insurmountable hurdle. The EC Guidelines provide that “[e]fficiencies are relevant to the competitive assessment when they are a direct consequence of the notified merger and cannot be achieved to a similar extent by less anticompetitive alternatives.”\(^{40}\) Carried to its literal conclusion, this would prevent the acceptance of an efficiencies defense in virtually every case. Theoretically, parties could nearly always enter into a joint venture to combine resources and extract synergies, *if* they were willing to accept the negotiation risk of doing so in the absence of a merger. But as a practical matter, these negotiation risks are a serious inhibition.

41. A fine example is the EC’s decision in the unconsummated merger of Inco and Falconbridge, two producers of nickel and other primary metals. The parties argued that the optimization of their production facilities in Canada’s Sudbury basin would de-bottleneck operations and substantially increase output. In that case the Commission held that “while the efficiencies presented by the parties are quantified and well-supported by several studies prepared by Inco and are likely to effectively materialize, the parties did not demonstrate to the requisite standards that the efficiencies could not have been achieved by other means. . . .”\(^{41}\) The Commission concluded that the efficiencies could have been achieved by a joint venture between the parties.\(^{42}\) This conclusion was reached despite the fact that over the 80-year history of their operations in Sudbury, not such agreement had ever been achieved because each party was concerned about getting the worst of the deal. It is notable that the Commission

\(^{39}\) OECD, *supra* note 34, at 10 (emphasis in original).

\(^{40}\) EC Guidelines, *supra* note 7, ¶ 85.


\(^{42}\) *Id.*, ¶ 542.
had accepted remedies in that case (the divestiture of a downstream refinery) and that the acceptance of efficiencies arguments may have called into question the need for the divestiture.

42. In evaluating merger specificity, it is fundamental that the mere possibility of achieving the efficiencies through alternative means should not be the standard. Rather, because the counterfactual is that there would be no integration of assets and resources, this condition should assess whether it is likely that the efficiencies would be achieved in the absence of the merger. Mere speculation on the possibility of alternative means of achieving the efficiencies would create a condition that swallows the rule.

Better Tools Are Needed

43. The problem with respect to evaluation of efficiencies is a simple one: efficiencies do not fit neatly into the paradigm of competitive effects analysis. Indeed, they interfere with the orderly evaluation of effects like the proverbial fly in the ointment. Despite a near-universal acceptance of the theory that efficiencies should be credited and may counteract anticompetitive harms, there is no practical approach to their assessment.

44. Better tools for the assessment of efficiencies are needed. These include not only better models for the economic evaluation of efficiencies, but also better institutional mechanisms that remove the asymmetries and procedural biases against efficiencies and allow them to be regarded on equal footing with potential competitive harms. Competition authorities have fought to overcome the “efficiencies offense” moniker that was levied in the past and have issued Guidelines which purport to credit efficiencies, but have not removed the institutional biases which continue to weigh against the acceptance of efficiency claims.