Summary of Discussion Points

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

Roundtable on Market Definition

June 14, 2012

The Business Advisory Committee ("BIAC") to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its Roundtable on Market Definition.

I. Introduction

1. Market definition has long functioned as the bedrock of an economic framework for evaluating whether particular business conduct has, or is likely to have, anti-competitive effects. In the context of horizontal merger control, the primary objective of market definition is to identify which goods or services, in which geographic locations, may significantly constrain the competitive behavior of the merging firms. Defining a relevant market enables agencies to measure market shares and market concentration, distinguish competitive alternatives available to consumers, evaluate the relative significance of these alternatives, and collect a wide range of valuable evidence of supply- and demand-side constraints. As a general matter, market definition therefore provides a critical frame of reference for assessing whether a merger may create or enhance market power.

2. Despite the clear rationale for using market definition to analyze the competitive effects of proposed mergers, it is by now well understood that the concept has certain limitations when applied under certain market conditions including, but not limited to, industries characterized by differentiated products, two-sided markets, sectors in which research and development activity is taking place, and vertical settings. In addition, particularly in dynamic industries, strict reliance on the approach can result in narrowly defined markets that fail to account for important market dynamics such as competition from potential entrants or other so-called over-the-top competitors. Some of these limitations have already been explored in depth during prior OECD roundtables.1 As a result, economists have developed an array of complementary analytical tools such as the UPP and IPR models designed to directly measure the unilateral effects of proposed mergers that do not rely directly on the definition of the relevant market.2

---

3. Recently, several jurisdictions have either expressly or implicitly adopted merger guidelines that incorporate these models, while suggesting that analysis of competitive effects need not begin with market definition. OECD’s consideration of the continuing vitality of market definition is particularly timely in light these developments, which raise questions of critical importance to competition enforcement authorities and the business community, including: (1) to what degree (if any) should market definition continue to function as a fundamental exercise?; (2) how might market definition be meaningfully utilized in examining the unilateral effects of mergers involving differentiated products?; (3) how (if at all) can market definition be effectively employed in concert with alternative analytical tools; and (4) as a policy matter, what might be the consequences of downplaying market definition, or dispensing with the analysis altogether.

4. New and evolving tests are useful in evaluating the potential competitive impacts of mergers and deserve a place in merger analysis. However, formulaic application of these models outside of the rational analytical framework provided by market definition presents numerous risks of concern to the business community as a matter of policy, law, and comity. Thus, alternative economic methods are not a substitute for the use of market definition as a foundational step in the economic, analytical and legal review of mergers and their “place,” therefore, must be one of subservient coexistence with market definition principles.

II. Market Definition in the Merger Control Landscape

5. Recent developments in the international enforcement landscape illustrate that market definition continues to play a significant role in merger control, despite the attempt to downplay the concept in favor of an integrated approach that places an increased emphasis on direct evidence and economic analysis in evaluating competitive effects.

6. In the European Union, the EC Merger Regulation\(^3\) and accompanying Guidelines ascribe a paramount role to market definition in outlining the appropriate analytical framework for analyzing competitive effects. The Commission’s Guidelines on the assessment of horizontal mergers (“EC Guidelines”) state that “the creation or strengthening of a dominant position” denotes the ability of “one or more undertakings [to] wield economic power which would enable them to prevent effective competition from being maintained in the relevant market.”\(^4\) The EC Guidelines provide that “[t]he Commission’s assessment of mergers normally entails: (a) definition of the relevant product and geographic markets [and] (b) competitive assessment of the merger,”\(^5\) noting that “[m]arket shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.”\(^6\)


\(^4\) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 O.J. (C 31) 5.

\(^5\) Id. ¶ 10.

\(^6\) Id. ¶ 14.
7. Paragraphs 28 and 29 of the EC Guidelines contain a discussion of competitive dynamics in differentiated product markets where the merging parties’ products are close substitutes, explaining that “high pre-merger margins may … make significant price increases more likely”\(^7\) and that substitutability may be evaluated according to various criteria, including diversion ratios.\(^8\) However, the EC Guidelines clarify that products triggering unilateral effects analysis “may be differentiated within a relevant market,”\(^9\) underscoring the foundational aspect of the market definition inquiry. Consistent with this characterization, the Commission Notice on the definition of relevant market (“Notice”) states that “[m]arket definition serves to establish the framework within which competition policy is applied by the Commission.”\(^10\) The notice further provides that “[t]he definition of the relevant market in both its product and its geographic dimensions often has decisive influence on the assessment of a competition case.”\(^11\)

8. In the United States, revisions to the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines published in August 2010 (“U.S. Guidelines”\(^12\)) reflect a reduced, though continuing, emphasis on the role of market definition in analyzing competitive effects and an increased focus on the utility of direct evidence and alternative analytical tools in merger review.

9. The U.S. Guidelines acknowledge the importance of market definition, noting that “[i]n any merger enforcement action, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition,”\(^13\) and that “[e]valuation of competitive alternatives to customers is always necessary at some point in the analysis.”\(^14\) In a departure from prior practice, the U.S. Guidelines clarify that “[t]he Agencies’ analysis need not start with market definition,” that “measurement of market shares and market concentration is not an end in itself,”\(^15\) and that “[t]he Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence.”\(^16\) Despite these changes, however, market definition remains a necessary component of merger review in the U.S.

\(^7\) Id. ¶ 28.
\(^8\) Id. ¶ 29.
\(^9\) Id. ¶ 28.
\(^10\) Commission Notice on the definition of relevant market for the purposes of Community competition law, 1997 O.J. (C 372) 5.
\(^11\) Id. ¶ 4.
\(^14\) Id.; see also Carl Shapiro, Deputy Ass’t Attorney Gen. for Econ., Antitrust Division, U.S. Dep’t of Justice, Update from the Antitrust Division, Remarks as Prepared for the ABA Section of Antitrust Law Fall Forum 14 (Nov. 18, 2010), available at http://www.justice.gov/atr/public/speeches/264295.pdf (noting that “the revised Guidelines devote nearly 12 pages to product and geographic market definition, in comparison with just five pages in the 1992 Guidelines.”)
\(^15\) U.S. Merger Guidelines, supra note 12, § 4.
\(^16\) Id. § 5.
10. The U.S. Guidelines contemplate an integrated, fact-intensive and non-mechanistic review process in which market definition, direct evidence, and other analytical tools may be deployed, individually and in concert, for the ultimate purpose of determining whether a merger may substantially lessen competition. To underscore this framework, the U.S. Guidelines now begin with new Section 2, “Evidence of Adverse Competitive Effects,” intended to illustrate the types and sources of evidence the Agencies may use to analyze competitive effects.\(^{17}\) The U.S. Guidelines state that direct evidence (1) “can inform market definition;” (2) “may more directly predict the competitive effects of a merger” in some cases; and (3) may be particularly useful where “analysis suggests reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects.”\(^{18}\)

11. Section 6 of the U.S. Guidelines contains an expanded discussion of the analytical techniques used by the Agencies in evaluating unilateral effects in differentiated product industries. These techniques eschew structural presumptions and rely principally on economic analysis of the value of diverted sales among the merging parties as an indicator of upward pricing pressure (“UPP”) signifying unilateral price effects.\(^{19}\) The Guidelines state that in analyzing unilateral effects, the Agencies “need not rely on market definition or the calculation of market shares and concentration,” and may consider “any reasonably available and reliable information … includ[ing] documentary and testimonial evidence, win/loss reports and evidence from discount approval processes, customer switching patterns, and customer surveys.”\(^{20}\) This must be read, however, in the context of the use of market definition in the Guidelines on the whole, as well as the jurisprudential indispensability of market definition, discussed in Part IV, infra.

12. Canada’s Merger Enforcement Guidelines (“MEG”) were recently updated to clarify the role of market definition within the Competition Bureau’s (“Bureau”) analytical framework.\(^{21}\) Closely paralleling the U.S. Horizontal Merger Guidelines, the revised MEGs describe merger review as a dynamic, non-linear process in which market definition is one of several tools the Bureau may use to approach the fundamental inquiry of whether a merger prevents or substantially lessens competition.

13. The MEGs discuss the continuing significance of market definition, noting that “the Bureau will normally identify one or more relevant markets in which competition is prevented or

---

\(^{17}\) Id. §2; see also Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 ANTITRUST L.J. 701, 708 (2010) (“The section is placed near the front of the Guidelines because investigations usually start with the formulation of candidate theories of harm to competition and the exploration of evidence to support or reject those theories. In most cases, especially where market boundaries are unclear, DOJ staff will analyze evidence of possible harm before it has determined the scope of the relevant market.”).


\(^{19}\) Id. § 6.1.

\(^{20}\) Id.

lessened,”22 and that market definition “generally sets the context for the Bureau’s assessment of the likely competitive effects of a merger.”23 However, the MEGs now state that “[m]arket definition, and the measurement of market share and concentration in the relevant market, is not an end in itself,” and “is merely any analytical tool – one that defies precision and can thus vary in its usefulness – to assist in evaluating effects.”24

14. Like the U.S. Horizontal Merger Guidelines, the MEGs describe merger review as an “iterative process in which evidence respecting the relevant market and market shares is considered alongside other evidence of competitive effects, with the analysis of each informing and complementing the other.”25 As such, the Bureau may assess competitive effects using a wide range of qualitative and quantitative evidence.26 The Bureau may rely on such evidence particularly where choosing among several plausible market definitions may significantly impact market share calculations. Moreover, the Bureau may “elect not to define markets in cases in which other reliable evidence of competitive effects is available.”27

15. Finally, the MEGs contain an expanded discussion of unilateral effects in differentiated product industries, predicating analysis of such effects on diversion ratios and variable margins, among other factors.28 Generally, the MEGs note that the Bureau may assess competitive effects from a quantitative perspective using various economic tools, retaining wide discretion in determining which mechanisms it may use on a case-by-case basis.29

III. Limitations of Alternative Analytical Approaches

16. As a policy matter, these trends reflect efforts on the part of several competition authorities to manage merger enforcement by (1) incorporating significant advances in economic learning and (2) promoting transparency by describing how mergers are likely to be evaluated.30 In general, the business community applauds these efforts. Agency adoption of analytical approaches better suited to identify anticompetitive mergers benefits businesses by preserving competitive market conditions. Moreover, greater transparency into agency practice is of critical importance to companies in assessing the costs and risks of pursuing a particular course of conduct. To be sure, the integrative, effects-based approaches outlined above do much to realize these goals. However, they also trigger a concern that agencies may in some

22 Canadian Merger Enforcement Guidelines, supra note 21, ¶ 3.3.
23 Id. ¶ 3.2.
24 Id.
25 Id. ¶ 3.1.
26 Id. ¶ 3.5-.6.
27 Id. ¶ 3.3.
28 Id. ¶ 6.10-.18.
29 Id. ¶ 3.5.
30 See Shapiro, supra note 14, at 13 (“[A] primary motivation in revising the Guidelines was to promote transparency by describing more accurately how the Agencies actually evaluate horizontal mergers. . . . People may differ in how they think we should review horizontal mergers, but hopefully we can all agree that the Guideline should accurately describe how we actually do review them.”) (emphasis in original).
cases be deviating too far from the foundational principles of market definition, or at least failing to adequately articulate the relative importance of market definition in the larger context of merger review.

17. Market definition is an exercise designed to develop an appropriate frame of reference for evaluating the competitive effects of a merger by identifying which products in which geographic locations significantly constrain the competitive behavior of the merging firms. By defining a relevant market, competition authorities are able to distinguish competitive alternatives available to consumers, evaluate the relative significance of these alternatives, and collect a wide range of valuable evidence bearing on supply- and demand-side constraints on merging parties. While alternative methods often are of significant value in evaluating competitive effects, market definition is critical to ensuring that competition authorities are operating within a rational analytical framework.

18. Of course, market definition is a starting point, not an ending point. Within this framework, authorities must properly assess the competitive dynamics of a marketplace in order to evaluate the impact of a merger. This exercise requires significant factual input. The use of any economic or analytical model is not a substitute for the evaluation of factual evidence. And while economic and theoretical models have advanced, there is still a significant gap, in BIAC’s experience, between the development of the model and the proper application of evidence to the theoretical model. For example, a formula that relies heavily on the use of margins is limited in its utility by the ability to define and measure margins, which is an exercise that has caused considerable challenge to economists for generations. In this light, the use of “tried and true” measures such as market definition must maintain their place of importance as other models – even those which may be theoretically more elegant – strive to catch up in terms of practical application.

19. The practical value of market definition is perhaps best illustrated by the limited utility of alternative economic tools applied on a stand-alone basis to evaluate unilateral effects of mergers in differentiated product markets. Particularly if employed as screening devices in the early stages of merger review without the benefit of traditional market definition, as suggested by some economists, these tools risk unreasonably subjecting (what vast experience would suggest are) non-problematic mergers to scrutiny, imposing unnecessary evidentiary burdens on merging parties, and, ultimately, chilling efficiency-enhancing merger activity.

20. Specifically, economic models such as UPP may impose unreasonable intervention standards, especially at the screening stage. UPP analysis invariably predicts a price increase where the diversion ratio exceeds zero and the merging firms have positive margins. Consider an industry consisting of 10 producers of differentiated products, with each firm possessing an equal market share of 10 percent, where the diversion ratio among all producers is the same positive value. Traditional hypothetical monopolist analysis would yield a relevant market including all 10 producers. If two of the producers merged to comprise a 20 percent share of the

---

relevant market, assuming positive margins, application of the UPP model would reflect a positive value of diverted sales -- and thus suggest an anticompetitive effect -- while under traditional tools (e.g., using post-merger HHIs) the merger would fall squarely within a safe harbor. This simple hypothetical illustrates that inferring anticompetitive effects based on ex proprio application of UPP analysis might result in exceedingly low intervention thresholds that catch efficiency-enhancing mergers. In such cases, market definition can and should be employed in order to meaningfully contextualize results.32

21. Similarly problematic outcomes may stem from strict application of the UPP model to analyze unilateral effects in industries with high fixed costs and low variable costs. In such industries, even where diversion ratios approach zero, high margins may yield disproportionately high UPP values that overstate unilateral effects. By way of example, the combination of two patents with variable cost margins of 97.4% (due to the low variable costs of licensing patents) with a 1% diversion ratio results in a predicted price increase of 65%.

22. In addition to their limitations as a stand-alone merger screens, economic models that analyze substitution patterns among merging parties entail significant evidentiary and methodological challenges. Such models typically depend on at least two critical data points: margins and diversion ratios. In practice, collecting data sufficient to derive these values is often both difficult and speculative. Moreover, these data are input into formulae that make several critical assumptions regarding market dynamics. These challenges can impose significant burdens on merger parties while undermining the reliability of results.

23. Calculation of margins based on management accounts can be extremely difficult and time-consuming, assuming suitable data is available and the appropriate measurement can be identified in the first instance.33 Actual diversion ratios are rarely available; diversion ratios can be estimated using win/loss reports, consumer survey data, econometric analysis, or market shares. However, unless the merging parties maintain robust records of competitive events, win/loss reports are frequently disaggregated, providing an impressionistic view of the industry that is of limited use in calculating diversion. Similarly, the reliability of consumer survey responses is largely a function of thoughtful survey design and respondent bias. Econometric analysis of customer demand, while capable of generating relatively accurate measurements of diversion ratios, is especially data- and time-intensive. Utilizing market shares to compute diversion ratios implicates the very analytical limitations respecting differentiated industries that UPP was designed to avoid.34 Indeed, it risks making market definition the “end point” in a way

32 Some competition authorities have addressed such outcomes by clarifying that where the value of diverted sales is small relative to lost revenues attributable to a price increase, significant unilateral price effects are unlikely. See U.S. Merger Guidelines, supra note 12, § 6.1; see also United Kingdom Competition Comm’n, Sommerfield plc & Wm Morrison Supermarkets plc (Sept. 2005) available at http://www.competition-commission.org.uk/assets/competition/commission/docs/pdf/non-inquiry/rep_pub/reports/2005/fulltext/501, ¶ 7.12 (“It seems to us likely that ... where the diversion ratio is low and the illustrative price increase is low (because margins are low), there is no SLC: that any lessening of competition is non-existent or insubstantial.”).


34 Id. at 6.
which agencies have long foresworn. Finally, these two metrics (margins and diversion) are often highly sensitive to the time period in which they are measured. This effect is compounded by the problem that UPP relies on a static observation of the marketplace. These methodological challenges can significantly limit the usefulness of UPP analysis, particularly as a screen early in the merger review process.

24. Moreover, economic models designed to analyze unilateral effects by definition provide a myopic view of competitive dynamics relevant to proposed mergers. For instance, the UPP model is a demand-side analysis of economic incentives involving prices, costs, and quantities. As such, the analysis does not itself account for supply-side dynamics including entry, expansion, and brand repositioning. In assessing market power, a key normative factor is whether barriers exist preventing new competitors from entering the market, or established competitors from expanding. It is generally accepted that without barriers to entry, there can be no enhancement of market power because new competitors will discipline price increases. Supply-side constraints such as entry can only be assessed in relation to a defined market.

25. Thus, even if alternative tools are employed to evaluate unilateral effects, competition authorities should nonetheless define the market in order to contextualize and properly take into account supply-side dynamics. By way of example, in discussing unilateral effects analysis, Canada’s Merger Enforcement Guidelines provide:

In addition to considering the value of sales currently devoted to rivals, the Bureau evaluates the likely competitive responses of rivals, including whether rivals in the market are likely to expand production, reposition their product line to discipline unilateral market power that would otherwise occur as a result of the merger. The Bureau also considers existing sellers that may only occupy a particular niche within the relevant market and whether they provide an alternative for a sufficient number of buyers. In addition, the likelihood and likely impact of entry is considered.

IV. Jurisprudential Significance of Market Definition

26. Analytical tools used by agencies to evaluate competitive effects should be fundamentally aligned with established judicial principles. Such alignment functions to minimize unnecessary conflict between various instruments of government. For businesses and practitioners, increased alignment results in greater predictability regarding the standards that will govern assessment of mergers, not only during agency review but also in the event

35 See Shapiro, supra note 14, at 25.
36 Id. at 26 (“While [UPP] analysis can be highly informative, the Agencies understand full well that measuring upward pricing pressure, or even performing a full merger simulation, typically is not the end of the story, especially in rapidly changing industries. Repositioning, entry, innovation, and efficiencies must also be considered.”).
37 Canadian Merger Enforcement Guidelines, supra note 21, § 6.17; see also U.S. Merger Guidelines, supra note 12, § 6.1 (“Repositioning is a supply-side response that is evaluated much like entry, with consideration given to timeliness, likelihood, and sufficiency.”).
transactions are challenged in the courts. This in turn enables businesses to more accurately evaluate the risks and potential outcomes of contemplated mergers. From a regulatory standpoint, this predictability can better inform critical decisions regarding whether to challenge conduct. Finally, greater alignment can yield significant efficiency benefits for businesses, regulators, and courts, as arguments and evidence painstakingly developed during the review process can be effectively marshaled to aid judicial review.

27. In jurisdictions where market definition is required as a matter of statutory or judicial precedent, the concept should stand on substantially equal footing in the context of agency analysis of competitive effects. For example, in the U.S., Section 7 of the Clayton Act declares unlawful any merger that substantially lessens competition “in any line of commerce or ... in any section of the country.” Consistent with this language, the U.S. Supreme Court has long held that determination of a relevant market is a necessary predicate to establishing a violation of Section 7. While formulaic reliance on market concentration has waned as courts increasingly undertake more wide-ranging analyses of proposed mergers, market definition remains a fundamental concept in U.S. antitrust jurisprudence. Similar, long-standing doctrinal underpinnings can be observed in several other jurisdictions, including the EU, the United Kingdom, and Canada. In developing and applying merger control policy, competition

39 United States v. E.I. DuPont de Nemours & Co., 353 U.S. 586, 593 (1957) (“Determination of the relevant market is a necessary predicate to finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition within the area of effective competition. Substantially can be determined only in terms of the market affected.”); see also Jonathan B. Baker, Market Concentration in the Antitrust Analysis of Horizontal Mergers, in ANTITRUST LAW & ECONOMICS (Keith Hylton, ed. 2010) (“In the United States, the contemporary doctrinal framework for analyzing horizontal mergers assigns a fundamental role to market concentration, basing a presumption of harm to competition from merger on high and increasing concentration.”).
40 See United States v. Baker Hughes, Inc., 908 F.2d 981, 984 (D.C. Cir. 1990) (describing market concentration as “a convenient starting point for a broader inquiry into future competitiveness,” and noting that “[t]he Supreme Court has adopted a totality-of-the-circumstances approach to evaluating horizontal mergers.”); United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1110-11 (N.D. Cal. 2004) (noting that although “defin[ing] the relevant product and geographic markets ... is a necessary predicate to finding anticompetitive effects ..., [b]oth the Supreme Court and appellate courts acknowledge the need to adopt a flexible approach in determining whether anticompetitive effects are likely to result from a merger.”) (international citations omitted).
41 See, e.g., FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (“The definition of the relevant market is necessary to identify that area of trade within which a defendant allegedly has acquired or will acquire an illegal monopolistic or oligopolistic position.”).
43 Office of Fair Trading v. IBA Health Ltd., [2004] EWCA (Civ) 142, [68] (Eng.) (noting the importance of “clear exposition of the working of the market concerned,” providing greater assurance “that all material considerations [have] been taken into account and all material facts ascertained.”).
44 R. v. Nova Scotia Pharmaceutical Society, [1992] S.C.J. No. 67 at 95 (S.C.C) (“As a preliminary step, definition of the relevant market is required”); (Canada) Director of Investigation and Research v. Southam Inc., [1995] 3 F.C. 557 at 113 (Fed. C.A.) (“It is universally accepted that a merger must be examined in terms of its likely effect on competition within a relevant market”); (Canada) Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd., (1992) 41 C.P.R. (3d) 289, at 15 (Comp. Trib.) (“In order to determine the likely effects of any merger or acquisition it is first necessary to determine the boundaries of the relevant market.”) (emphasis in original).
authorities must be mindful that it is ultimately judicial precedent, not agency practice, that binds courts.\textsuperscript{45}

V. International Consensus Regarding Importance of Market Definition

28. Utilization of market definition as a foundation element of competitive effects analysis is consistent with international norms in merger review. The consensus view of the global competition community is aptly summarized in the International Competition Network’s (“ICN”) Merger Guidelines Workbook ("Workbook")\textsuperscript{46} and Recommend Practices for Merger Analysis (“Recommended Practices”).\textsuperscript{47} The Workbook states that “[t]he starting position for identifying the scope of competition involves identifying products which are substitutable from the point of view of customers,”\textsuperscript{48} adding that “market definition sets the stage on which competition takes place … provid[ing] an intellectually disciplined tool with which to gather and assess evidence on the sources of competitive constraints.”\textsuperscript{49} Likewise, the Recommended Practices provide that “[a]gencies generally should assess the competitive effects of a merger within economically meaningful markets,”\textsuperscript{50} and note that “[m]arket shares and measures of market concentration can provide useful initial guidance to help identify mergers that may raise competitive concerns requiring further analysis.”\textsuperscript{51}

29. By adopting the analytical principles outlined by the ICN, merger enforcement authorities can facilitate greater cross-border cooperation and convergence towards sound merger review policies. In light of the continuing proliferation of merger control regimes internationally, it is critical that agencies ensure their practices do not introduce conflicts or impose inconsistent standards for parties pursuing transactions with a cross-border dimension.\textsuperscript{52}

\textsuperscript{45} See Monfort of Colorado, Inc. v. Cargill, Inc., 761 F.2d 570 (10th Cir. 1985) ("[The Horizontal Merger Guidelines] are more useful for setting prosecutorial standards than delineating judicial standards."); see also Shapiro, supra note 14, at 15 ("The Division recognize the necessity of defining a relevant market as part of any merger challenge we bring."); J. Thomas Rosch, Commissioner, Federal Trade Comm’n, Theoretical and Practical Observations on Cartel and Merger Enforcement, Remarks before the George Mason Law Review’s 14th Annual Symposium on Antitrust Law 18 (Feb. 9, 2011) available at http://www.ftc.gov/speeches/rosch/110209georgemasoncartelsmergers.pdf ("[M]arket definition remains as important as ever in Section 7 litigation. This may seem counterintuitive, given the treatment of market definition in the 2010 Merger Guidelines.").


\textsuperscript{48} ICN Workbook, supra note 46, at 15.

\textsuperscript{49} Id. at 16-17.

\textsuperscript{50} ICN Recommended Practices, supra note 47, at 4.

\textsuperscript{51} Id.

\textsuperscript{52} See generally Donald Baker, \textit{Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects}, \textit{in Policy Directions for Global Merger Review} 72 (Sebastian O’Meara, ed., 1999) ("[T]wo different national agencies may reach legitimately different conclusions on the basis of the same data, simply because standards are imprecise, the evidence is uncertain, and the core biases are different.").
30. It is equally important that new and developing competition authorities are able to effectively employ analytical tools capable of producing legitimate outcomes. The many challenges facing emerging regimes in the field of competition enforcement are well known and were the subject of a prior OECD Roundtable in 2009. These challenges include inadequate financial and human resources, limited indigenous expertise in competition law, limited access to critical information at a firm and industry level, and apathy for competition policy objectives. Young agencies operating in these conditions may find it exceedingly difficult and costly to effectively apply alternative methods such as UPP in evaluating competitive effects. As such, for these agencies, market definition can be particularly useful as a practical and efficient analytical framework for analyzing competitive effects in the merger context.

31. Consistent use of market definition among agencies can likewise yield significant benefits for businesses contemplating cross-border transactions. With more than 100 competition regimes operating worldwide, businesses pursuing such transactions already face significant costs and burdens from the process of obtaining merger clearances. Companies must identify jurisdictions in which a transaction may be subject to merger control, an exercise that often entails consultation with local competition counsel and detailed analysis of jurisdictional thresholds varying widely in substance and scope. Once relevant jurisdictions have been identified, businesses must navigate a complex array of distinct notification requirements, deadlines, penalties, information requests, and waiting periods. Following notification, companies are confronted with differing substantive standards and often must identify and address unfamiliar industrial policy considerations that also may inform merger review in various jurisdictions. Finally, companies face the risk that different jurisdictions may reach inconsistent outcomes regarding a proposed transaction.

32. Addressing these challenges can entail extraordinary costs, including filing fees; out-of-pocket expenses for legal and economic advice; opportunity costs of delayed efficiency realization; and business disruption. In order to mitigate the significant uncertainty and costs stemming from review of cross-border mergers, the business community strongly supports the adoption of international best practices with respect to appropriate analytical approaches for evaluating competitive effects.

VI. Conclusion

33. The limitations of market shares and market concentration as proxies for market power are well understood by enforcement authorities, commentators, and courts alike and there is broad consensus that the evaluation of mergers cannot end with market definition. Likewise, few would argue the conceptual and practical value of economic tools such as UPP and IPR in

---


54 Id. at 3, 4, 16; see also William E. Kovacic, Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies, 66 U. Cin. L. Rev. 1075, 1093 (1998) ("Transition economy competition agencies typically must operate with limited access to data that offers an accurate view of existing market conditions and the competitive significance of individual firms.").
analyzing competitive effects under certain market conditions, particularly where differentiated products are at issue and sufficiently reliable evidence is available for their effective deployment. To the extent that these methods can be meaningfully and reliably employed to help to identify mergers that may harm competition, the business community encourages their adoption and use by competition authorities.

34. Alternative analytical methods applied on *ex proprio* basis without the benefit of market definition exhibit numerous shortcomings including, but not limited to: (1) a tendency to identify unilateral effects in virtually any merger where margins and diversion are positive; (2) an inherent bias against mergers in high-margin industries; (3) dependence on evidence that may be difficult to obtain and subject to measurement error; (4) reliance on a range of restrictive assumptions; and (5) a disregard of supply-side competitive constraints. As a policy matter, these shortcomings limit the effectiveness of stand-alone alternative techniques in identifying anti-competitive effects. Moreover, they can introduce significant costs and burden early in the merger review process and limit the ability of companies to predict outcomes.

35. In light of these shortcomings, BIAC submits that competition authorities should continue to utilize market definition as the fundamental analytical framework for evaluating the competitive effects of proposed mergers. Market definition is an intellectually disciplined exercise that enables agencies to distinguish competitive alternatives available to consumers. This information is critical to identifying competitive harm, even where alternative tools ostensibly can be employed to directly measure the unilateral effects of mergers involving differentiated products. Of course, market definition is “not an end in itself.” and the method should not be reduced to a formulaic, line-drawing exercise. Competition authorities must be careful not to define markets too narrowly, rely on anachronistic market characterizations, or give excessive deference to assessments made by other regulatory agencies.  

36. BIAC commends competition authorities that have developed and adopted a range of sophisticated methods that can be used in an integrated fashion to better analyze proposed mergers. Furthermore, BIAC welcomes efforts by these bodies – in consultation with the international enforcement community, practitioners, scholars, and the private sector – to publish guidelines that attempt to accurately and describe agency practice. Transparency into the particular techniques agencies use to evaluate proposed mergers significantly mitigates costs and risk for businesses contemplating merger activity. However, as investigative toolkits become increasingly diversified, agencies should recognize that it is not enough to describe a spectrum of analytical methods, any one of which may be used depending on the circumstances of a particular case. To provide the necessary degree of transparency for the benefit of business, the relevant context in which various methods will be applied, and each method’s relative importance, must be adequately clarified. Otherwise, guidelines fail to provide guidance.

---

55 This consideration is particularly relevant for mergers in regulated wholesale markets.
37. For jurisdictions in which merger control maintains a judicial dimension, BIAC encourages competition authorities to align their analytical approaches with established legal precedent. Although courts are often guided by principles of agency practice and agencies must often lead the way, agency practice typically is not binding in the judicial review of challenged mergers. Thus, where market definition is a foundational inquiry as a matter of law, it should occupy a foundational position in agency analysis of proposed mergers. Such alignment will minimize conflict and divergent outcomes between various instruments of government; enable enforcers to more efficiently develop evidence that may be marshaled in courts; and lead to greater predictability for businesses and practitioners regarding the standards likely to govern merger review.

38. Agency practice should likewise align with international norms and consensus views within the global competition community. With respect to market definition, these norms are summarized in ICN’s Recommended Practices for Merger Analysis, which ascribes a paramount significance to market definition in merger review and provides that “[a]gencies generally should assess the competitive effects of … merger[s] within economically meaningful markets.” 56 BIAC submits that agency adoption of the ICN’s Recommended Practices respecting market definition will (1) increase transparency and mitigate the extraordinary costs facing businesses contemplated mergers with a cross-border dimension; (2) facilitate greater convergence among the growing number of competition enforcement authorities worldwide; and (3) and will aid emerging, resource-constrained regimes in implementing efficient and effective merger control policy.

56 ICN Recommended Practices, supra note 47, at 4.