1. BIAC is pleased to provide Working Party No. 3 with its comments on the proof of dominance and monopoly power at this critical juncture in time where international fora, such as the ICN, supranational competition agencies, and many national institutions alike have launched a fundamental reflection on the appropriate enforcement standards for exclusionary and other unilateral conduct by dominant firms. Indeed, BIAC believes that the debate on the further development of a proper, transparent and consistent enforcement policy regarding dominant firm behaviour cannot proceed in a sensible manner without a thorough prior understanding of the meaning of dominance, the methodological analysis of dominance, the possible indicators therefore and the factual evidence needed for assessing whether firms possess monopoly power.

2. An assessment of the methodological tools for the establishment of monopoly power as a critical first step in the identification of welfare reducing conduct by dominant firms merits urgent attention by the OECD. Such an assessment would complement much of OECD’s earlier work in related fields, for example, the Competition Committee’s October 2005 Roundtable on Barriers to Entry\(^1\) and its June 2005 Roundtable on Competition on the Merits.\(^2\)

I. **Introduction: The Importance of the Proper Evaluation of Dominance and Monopoly Power**

3. It is undisputed that antitrust rules should be designed and applied in practice so that they deter conduct that is anticompetitive and welfare reducing without discouraging pro-competitive, welfare-enhancing conduct. The implications of misapplying the provisions on abusive conduct by dominant firms, in particular by finding dominance where there is none, are anything but trivial: by restricting or forcing firms to give up the way they license their intellectual property rights, distribute their products, price their products, or engage in other pro-competitive activities, those companies are discouraged from entering into welfare-enhancing activities and, more importantly, from undertaking innovative activities in the first place. Thus, unwarranted competition policy intervention against alleged dominant firms may

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have a profound impact on investments and innovation in general, to the detriment of competition and, ultimately, consumers. Indeed, as the Kok Report acknowledges, “companies will only invest in innovation and R&D if they have the certainty that they will be able reap the awards of that investment.” A proper, well-founded methodology to establish dominance is a cornerstone of a transparent and stable regulatory framework that promotes creativity and innovation.

4. As many industries are increasingly characterised by innovation and shorter product lifecycles, assessing market definition and dominance is becoming more difficult. In particular, with new and innovative products appearing regularly, often taking away market share from older generation products, the use of historical data may convey a distorted picture of reality. Moreover, the costs of Type 1 errors (or false positives) are exacerbated in innovative markets, where such over-enforcement may lead to a loss in consumer welfare due to the non-introduction of valuable goods and technologies for which there may be potential demand. This reality makes it even more important to reconsider the analytical tools used to establish dominance.

5. Over the past few years, market realities have evolved and become ever more complex. So, too, has economic learning advanced in tandem, and now offers many refined tools that can be used in the assessment of monopoly power. As a result, over the past years the traditional market power inquiry underlying the statutes of many jurisdictions has to some extent moved away from relatively straightforward methods of market definition and market power analysis based largely on market share data to much more sophisticated methodologies relying on quantitative data, such as cross-elasticities, diversion ratios, cost and profitability data, market share trends and the like.

6. The increased availability of economic tools and the growing awareness that a finding of monopoly power necessitates a comprehensive analysis of the specific facts of the case, has, however, not led to the application of uniform methods or principles, let alone a common general framework of analysis. On the contrary, and as is apparent in the various submissions on this topic to Working Party No. 3, it appears that there are many important differences among those countries that have chosen to regulate dominant firm behaviour in the way the very concept of monopoly power is defined; the use of presumptions of dominance and the standards under which such presumption may apply; the relative and absolute importance of market shares and other structural factors; and the way in which the existence of dominance is established in particular circumstances, such as in bidding or dynamic high technology markets. Indeed, it is critical that the standards for assessing dominance in high tech industries should reflect the dynamic nature of competition and pivotal role of innovation in such markets.

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4 The increasing significance of economic analysis in competition law has been remarkable in recent years, as highlighted by the 2003 appointment of Lars-Hendrik Roller as the first Chief Competition Economist in DG Competition.

The increasing number of countries actively engaging in the regulation of dominant firms on the basis of competition law and the resulting potential for diverging and inconsistent decisions, renders a critical reflection on the way in which dominance and monopoly power are established and the development of a common understanding and framework on the proof required for such finding even more important.  

II. The Meaning of Dominance and Monopoly Power

Market power is generally defined as the ability of a firm in a properly defined market (both product and geographic) to profitably raise prices above the competitive level for a sustainable period of time. Significantly, although there is a common understanding that monopoly power requires “something greater” than mere market power, there is no formal distinction between the two terms – they only differ in the extent to which prices can be maintained above the competitive price level. As a result, while court and competition agencies have attempted to distinguish between the two notions, the actual distinction – and thus the very concept of monopoly power itself – is, to some extent “standardless.”

Regardless of how dominance or monopoly power is defined, dominance itself is generally not objectionable. Indeed, the finding of dominance is not an end unto itself, but a means to identify anticompetitive conduct. This observation, together with the limited usefulness of structural indicators which traditionally serve as proxies for “dominance,” has led some commentators to suggest that the separate verification of dominance is superfluous and that the inquiry into the alleged dominant firm’s conduct should instead focus directly on the competitive harm that the firm would be able to bring about due to his dominant position. BIAC submits that the application of this approach avenue would be erroneous. Not only is

6 For example, the Japan Fair Trade Commission recently stated in its “Grand Design for Competition Policy” that it intends to undertake “stronger enforcement against Antimonopoly Act (“AMA”) infringements.” Available at http://www.jftc.go.jp/e-page/policyupdates/granddesign.pdf.


8 “To the extent that there is a distinction between market power and monopoly power, it reflects, in part, a recognition that market power exists on a continuum, ranging from its complete absence - perfect competition - to its fullest manifestation - a true sole-seller monopolist.” Eric L. Cramer & Daniel Berger, The Superiority of Direct Proof of Monopoly Power and Anticompetitive Effects in Cases Involving Delayed Entry of Generic Drugs, 39 U.S.F.L. Rev. 81, 96 (Fall 2004).

9 Some legal regimes however sanction unilateral conduct even if it does not involve a dominant company. For instance, under Section 2 of the US Sherman Act, a firm that is not yet dominant may be guilty of attempted monopolisation if its conduct would lead to monopolisation and there is a dangerous probability that it would succeed in doing so. 15 U.S.C. §2.

the establishment of dominance an essential prerequisite under most statutes that prohibit the
abusive behaviour of dominant firm, the finding of dominance also functions as a safeguard
against unwanted Type 1 errors, i.e. situations where abusive conduct is found where it did not
exist. This is particularly important in view of the often ambiguous nature of abusive conduct
and the difficulties associated with adequately identifying that type of conduct. As a
consequence, BIAC believes that, as part of the evaluation of allegedly dominant firms’
conduct, the assessment of “dominance,” i.e. the ability to control price or restrict output in a
relevant market, which ultimately results in harm to consumers, is essential. The inquiry
should therefore concentrate first and foremost on the firm’s ability to maintain or enhance
monopoly power, because only if that ability is effectively demonstrated, may “abusive”
effects occur. Then–and only then–need the analysis proceed to an inquiry of any effects
resulting from the abusive behaviour in question.\textsuperscript{11}

10. It is undisputed that the notion of monopoly power raises a number of intricate questions. In
view of the resulting uncertainty and the risk that inconsistent treatment of dominance across
jurisdictions may hamper efficient behaviour, BIAC submits that the OECD Competition
Committee could in particular contribute to a better understanding of the phenomenon of
monopoly power– and thus a policy less prone to overinclusiveness- by investigating whether
it would be possible to define a number of factors that would help agencies, courts and the
business community, given the specific market context at hand, to determine when monopoly
power exists, for example by expounding on the prerequisite barriers to entry necessary to find
dominance. BIAC would support a similar initiative with respect to the question how durable
significant market power should be to become qualified as monopoly power.

III. Market Power Analysis in Markets That Present Special Challenges

11. The increasing presence of complex markets outside the standard economic models presents
special challenges for the analysis of market power. This applies in particular to markets that
are composed of differentiated products, innovation markets, in particular where intellectual
property rights are important, network industries and bidding markets; in other words, many
of the “high-tech” dynamic markets that constitute large parts of today’s global economy. The
assessment of market power and the evidence relied upon to establish dominance should take
proper account of the unique characteristics of these complex markets.

A. Differentiated Product Markets

12. Market definition and the determination of the amount of market power held by manufacturers
of competing, but differentiated products, generally require a more sophisticated approach
than the ones used in markets with homogeneous products. In particular, in these markets
conventional indicators of market power, such as market shares, may convey only little
information on the ability of other products to effectively constrain the alleged dominant firm.
Therefore, BIAC submits that in these types of markets a finding of dominance should, at
minimum, be preceded by a thorough analysis of the precise competitive relationships among
the alternatives available to consumers in the relevant market.\textsuperscript{12}

\textsuperscript{11} This does not imply that the effects of the alleged abusive behaviour could not be examined in order to reach a final
view on whether the company is indeed dominant.

\textsuperscript{12} This inquiry should include, among other factors, include an evaluation of the (sunk) costs involved in product
B. Innovation Markets

13. Markets with high innovation rates, such as the markets for game consoles, biotechnology, medical imaging equipment, pharmaceutical products and various ICT markets are often characterised by abruptly shifting supply and demand patterns. Significantly, the firms active in these markets, may, by developing innovative products or services temporarily achieve leading positions and enjoy substantial profits over a short period of time, only to be replaced by the next generation of innovative products. As noted by Carl Shapiro and Hal Varian:

The information economy is populated by temporary, or fragile, monopolies. Hardware and software firms vie for dominance, knowing that today’s leading technology or architecture will, more likely than not, be toppled in short order by an upstart with superior technology.\footnote{See, e.g., Case M.2537, Philips/Marconi Medical Systems, 2001 O.J. (C 321/16) 12.}

14. Within the general category of dynamically competitive markets, ICT markets may constitute a separate category of markets where marginal costs of production are low and network effects are important. Also, standardisation, technological convergence and intellectual property rights may play a significant role in these markets.

15. The inquiry into dominance in these dynamic markets should proceed carefully. Indeed, market shares calculated at a static point in time may often be misleading and not indicative of the ability to charge supra-competitive prices for a sustained period of time. Similarly, the fact that successful firms may be very profitable at a specific moment in time, does not in and of itself indicate monopoly power. As a consequence, BIAC submits that the analysis of market power should take account of the special features of these markets and should go significantly beyond the mere assessment of market shares and other factors that might at first glance be suggestive of monopoly power in more traditional markets.\footnote{CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 173 (Harv. Bus. School Press) (1999).} Indeed, such markets are often “winner-takes-all,” leading to high market shares that will only be maintained if the incumbent continues to innovate. Therefore, the inquiry should focus on the longer term competitive nature of the market and, in particular, the ability of present and future market players to enter the market.\footnote{See, e.g., Robert Pitofsky, Antitrust Analysis in High-Tech Industries: A 19th Century Discipline Addresses 21st Century Problems, Address Before the ABA Section of Antitrust Law’s Antitrust Issues in High-Tech Industries Workshop (Feb. 25-26, 1999), available at www.ftc.gov/speeches/pitofsky/hitch.htm.} A rigorous analysis of market power and the need to avoid “false positives” is particularly important in these markets, as Type 1 errors may directly reduce the incentives to invest and innovate in innovative products and services.

16. In innovative and more traditional markets alike, the protections afforded by intellectual property rights merit specific attention. Indeed, these protection provides incentives to
innovation, leading to dynamic efficiency gains over time,\textsuperscript{17} while the possession of an intellectual property right does not automatically confers a dominant position.\textsuperscript{18} Indeed, a patented technology may face fierce competition from rival technologies.\textsuperscript{19}

\textbf{C. Network Industries}

17. Network industries such as the markets for telecom services, credit card systems,\textsuperscript{20} and software and other markets that compose products that are more valuable to consumers when more people make use of them, exhibit a number of specific economic characteristics that require careful analysis.\textsuperscript{21} Importantly, network effects have important implications for market structure as they may be conducive to one or few firms having the lowest cost due to economies of scale and a large share of the market. Nonetheless, when a new network offers a clearly superior technology, the dominance of the established network may erode quickly. Moreover, breaking up consolidated networks may reduce customers' welfare and thus be inefficient. Again, BIAC submits that the analysis of market power should factor in the specific features of these markets and in particular concentrate on factors like potential entry and customers' switching costs.

\textbf{D. Bidding Markets}

18. Bidding markets differ from other markets in that sales are made through a tender process. Typically, if a firm is chosen as the winning bidder, it supplies the whole tender; while others that have not been elected supply nothing. This “all or nothing” aspect has important implications for the analysis of market power. This applies in particular if the size of the tenders are large relative to the size of the total market. BIAC submits that in these types of cases dominance is unlikely to exist if a sufficient number of credible bidders exist.

\textbf{IV. Evidence Used to Prove Monopoly Power in Dominance/Monopolisation Cases}

\textbf{A. General Observations}

19. BIAC acknowledges that the evidence used to prove monopoly power is highly case-specific. Moreover, while the initial assessment of the competitive strength of a company typically involves the measurement of market shares and concentration ratios, there appears little or no


\textsuperscript{18} See, e.g., Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006) (rejecting presumption that a patent confers monopoly power in the context of an antitrust tying claim). BIAC believes that if a careful analysis warrants a finding of dominance due to possession of intellectual property rights (the factual analysis endorsed by the Supreme Court in \textit{Independent Ink}), regulators should be cautious in finding abusive conduct and, in particular be careful not to allow inroads on the use of these rights by, \textit{inter alia}, compulsory licensing.

\textsuperscript{19} For instance, in the market for optical storage technologies, the HD-DVD and Blu-ray technology, while both patented, compete fiercely for market acceptance.

\textsuperscript{20} See, Summary of Discussion Points, presented by BIAC to the OECD Working Party No.2 on Competition and Regulation, Increasing Competition in Paperless Payment Instruments, June 6, 2006.

consensus on the overall methodology to determine whether companies possess monopoly power.

B. Market Shares

20. Although large market shares are frequently associated with dominance, the relationship between high market shares and conduct that is generally associated with dominant firm behaviour is often difficult to establish in practice. And, indeed, the importance and significance of market shares may vary from industry to industry. Nonetheless, in spite of the theoretical and practical complexities of relying on market shares as a proxy of market power, market shares are frequently considered as prima facie evidence of monopoly power.

21. While market shares may provide some guidance as to whether a case should be further investigated, a specific market share should not in and of itself be sufficient to support a finding of dominance. For example, a 65% market share in a market where there are no barriers to entry or where “leapfrogging” is a frequent phenomenon, is not likely to enable a firm to exercise market power to the detriment of consumers.

22. In view of the above, BIAC is of the opinion that, while market shares may in some cases provide valuable insights into the company’s strength, a general presumption of dominance in the form of specific market shares may give rise to unwarranted (preliminary) conclusions and excessive burdens on companies, increasing the likelihood of “false” findings of dominance.

C. The Need For a Comprehensive Analysis

23. Given the inherent uncertainties in defining markets and determining whether firms hold a required level of market power so as to qualify as “dominant,” and the severe negative impact of “false” findings of dominance on companies’ investment decisions that may ultimately harm consumers, BIAC is strongly of the opinion that each finding of dominance must be preceded by a thorough and comprehensive analysis and be based on sound economics. While BIAC acknowledges that the assessment of monopoly power is, to some extent, case specific,
it would urge reviewing agencies to take account of both direct evidence (e.g., profitability, demand elasticities, pricing and exclusionary conduct), and indirect evidence (e.g., market shares, concentration ratios, pricing conduct, and likelihood of entry). As safeguarding long term consumer welfare is the ultimate goal competition authorities and courts should focus on industry- specific factors showing probable ineffectiveness of the market mechanism to correct or constrain a market power position in the industry in reasonably foreseeable time. In this respect, regulators and reviewing agencies should not hesitate to make use of new methodologies to define markets, calculate concentration ratios and assess the actual workings of the market in question, to avoid static analysis of factors that may provide false positives and ultimately redound to the detriment of consumers. BIAC also advocates the availability of thorough judicial review of competition agencies’ interpretation of the evidence, including the choice and selection of evidence.

24. BIAC submits that each inquiry into dominance should, as a starting point, take account of the specifics of the relevant markets affected and should try to ascertain whether the alleged dominant position can be explained by the market context under investigation and whether the dominant position is maintained over a sustainable period of time, and whether the dominant position is likely to give rise to negative effects on consumer welfare in the first place. If the agency finds a plausible dominant position, such a conclusion must be supported by other findings, in particular the existence of barriers to entry and expansion, the inability of other actual or potential competitors to constrain the dominant company, the inability of existing rivals to expand capacity, the absence of countervailing power and the practical realities of the market in question.


26 There is broad consensus among economists that markets will behave competitively if entry is easy. Some commentators have suggested that entry barriers are the fundamental source of market power and that, as a consequence, the inquiry into the existence of market power should start with an assessment of barriers to entry. See, John Fingleton, Undefining Market Power, Trinity Economic Paper Series, Paper No. 2000/4, at 25, available at http://www.tcd.ie/Economics/TEP/2000_papers/TEPNo4JF20.pdf.