Comments by the
***Business at OECD* (BIAC) Competition Committee**
to the OECD Global Forum on Competition

Out-of-Market Efficiencies in Competition Enforcement

December 6, 2023

I. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to comment on the Competition Committee roundtable on out of market efficiencies in competition enforcement. As BIAC has emphasized on a number of previous occasions, the treatment of efficiencies is an issue of great importance to the business community at large, not least of all in the evaluation of proposed mergers. Mergers, as well as less far-reaching collaborative arrangements, often offer firms the ability to gain synergies that they otherwise would not be able to achieve or would be able to achieve only at significantly higher costs or over longer periods of time.

2. Typically, out of market efficiencies affect consumers in different markets from those where possible competitive effects may allegedly be felt as a result of a merger, an agreement, or unilateral conduct. For example, out of market efficiencies could benefit consumers in other product or geographic markets, or future consumers benefitting from efficiencies that will only materialize in the future. As the Call for Contribution for this roundtable observes, one main question is whether competition authorities should balance the impact on consumers that are directly harmed, on the one hand, with beneficial effects that occur outside the market under consideration, on the other hand.

3. The debate about efficiency claims has certainly intensified over the past few years, partly as a result of concerns voiced by some that competition law enforcement should be more aligned with societal interest and partly because of concerns that a failure to give proper attention to the role of efficiencies that materialize outside the boundaries of the relevant market would discourage firms from entering into business strategies with sustainable development goals that would benefit societal welfare overall. For instance, conflicts may arise between environmental or sustainability goals and antitrust law where companies cooperate to implement CO_2 reduction initiatives, which would benefit society at large, but where their collaboration might give rise to higher consumer prices in some markets.[1]

4. As set out in this submission, BIAC is in favor of taking out of market efficiencies on board, preferably on the basis of a well-defined standard and methodology. This position is fully in line with the position it took at the Roundtable on Sustainability and Competition in December 2020, where it stated that "sustainability benefits are economic and cognizable efficiencies" that could and should be credited against harm resulting from an agreement or other business conduct.[2] BIAC would acknowledge that such out of market efficiencies should be recognized only when cognizable and demonstrable but notes that this

[1] Similarly, fishery conservation efforts by fishermen in the form of catch limitations (potentially leading to price increases, thereby affecting consumers in the relevant market) may help to combat resource depletion (benefitting consumers at large), but antitrust law may be an obstacle to those efforts.

[2] OECD, Sustainability and Competition – Note by BIAC, DAF/COMP/WD(2020)71, at 12 (Nov. 13, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)71/en/pdf.

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assessment should be objective and not based on the highly imbalanced and dismissive view of efficiencies that currently pervades most competition authorities.

5. While it would welcome a robust acknowledgement that out of market environmental efficiencies can and should be taken on board, BIAC also is of the view that there is a strong need for a reflection on the treatment of out of market efficiencies more generally. This is because environmental out of market efficiency claims do not present unique features – except perhaps the fact that they will almost always involve benefits outside the potentially harmed market – that merit a *lex specialis* under antitrust law to specifically deal with those types of efficiencies.

6. In fact, the intellectual case in favor of including out of market environmental efficiencies into the competitive assessment is strong and those same considerations apply to efficiencies that provide out of market consumers with other, non-environmental benefits in the form of lower prices, quality enhancements or more innovation.[3] At base, the rationale for including out of market efficiencies is straightforward: as every consumer's welfare counts, regardless of whether a consumer happens to be part of the relevant market impacted by horizontal overlap or vertical relationships, there is no reason to exclude the welfare of those consumers from the antitrust assessment.

7. As BIAC already observed in 2012, the treatment of efficiency claims continues to be given short shrift by antitrust enforcement agencies and is in some cases inadequate.[4] In its 2012 submission, BIAC set out that this stemmed from numerous factors, including "asymmetrical treatment of efficiency analysis [] compared to competitive effects analysis" and "systematic procedural biases" and suggested a number of potential improvements, including an adequate mechanism to recognize dynamic efficiencies, the need to apply the merger specificity requirement in a practical manner, and the development of better tools.[5] Another reason for the allergic reaction of competition authorities to efficiency claims stems from the procedural environment in which they are considered in merger cases. Where there is no anticompetitive harm from a merger, then efficiencies are not necessary to justify approval. But where the agency concludes that anticompetitive harm exists and wants to block a merger or accept an undertaking, admitting the existence of efficiencies (albeit at a level the agency deems insufficient to counterbalance the harm) creates a greater risk that its challenge will be rejected or overturned. Indeed, it is easier and safer to reject the efficiencies in the first place. Unfortunately, since 2012, the state of affairs with regard to the evaluation of efficiencies has not significantly improved.

8. As the OECD Background Paper notes, out of market efficiencies are subject to "at least the same procedural barriers as in-market claims, which are rarely accepted by competition authorities. However, most jurisdictions go further in restricting or entirely ruling out such claims."[6]

9. Against this background BIAC respectfully suggests that it would make eminent sense, in addition to addressing the debate of the treatment of out of market efficiencies, or, even more narrow, to the treatment of out of market environmental efficiencies, to also revisit the treatment of efficiencies more generally. Indeed, rules and practices regarding (environmental) out of market efficiencies only make sense

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[3] Note that in some instances the case for including out of market efficiencies may even be stronger in non-environmental settings, namely where the efficiencies are likely to be immediate and cognizable, as opposed to more benefits that may only occur in the distant future.

[4] OECD, The Role of Efficiency Claims in Antitrust Proceedings – Note by BIAC, DAF/COMP(2012)23, at 197-206 (May 2, 2013) https://www.oecd.org/daf/competition/EfficiencyClaims2012.pdf.

[5] *Id*.

[6] OECD, Out-of-Market Efficiencies in Competition Enforcement – Background Note 3 (2023), https://www.oecd.org/daf/competition/out-of-market-efficiencies-in-competition-enforcement-2023.pdf.

if the basic analytical framework for the evaluation of all types of efficiencies is clear, fair, and methodologically adequate.

II. Out of Market Efficiencies: General Comments

10. As the Background Paper correctly observes, the treatment of out of market efficiencies is closely linked to the objectives of competition policy and, in particular, the applicable welfare standard. It concludes that jurisdictions applying a consumer welfare standard are less receptive to accepting out of market efficiencies, while competition law regimes that include some total welfare considerations, such as Canada, Norway, Australia, and New Zealand, tend to more readily allow out of market efficiencies.[7] However, the Background Paper also points out that some jurisdictions that explicitly apply a consumer welfare standard, such as the UK, allow claims of out of market efficiencies.[8]

11. On past occasions, BIAC has submitted that it views "the consumer welfare standard as the antitrust welfare standard that best embodies the purpose, and ensures the effective application, of the antitrust laws."[9] BIAC also has acknowledged the risk associated with "too narrow a focus on consumer welfare," calling for a "careful and balanced approach to intervention."[10] This position also applies to the evaluation of out of market efficiencies. Accordingly, BIAC is in favor of a robust application of the consumer welfare standard that accommodates cognizable out of market efficiencies under strict conditions.

12. Another important general observation is that in jurisdictions that exclude out of market efficiencies, the definition of the relevant market may determine the scope of efficiencies that can be considered.[11] Indeed, if efficiencies must relate to the affected market, efficiencies materializing outside the boundaries of that market cannot be considered.

13. The Background Paper also notes that nowadays markets tend to be more narrowly defined than in the past and that, at the same time, many jurisdictions place less weight on market definition than they used to, sometimes directly concentrating on the identification of competitive effects.[12]

14. While BIAC favors a predictable, economically rational framework for the identification of competitive effects, it does observe that agencies tend to have some flexibility in the definition of affected markets. Where such flexibility exists, agencies may, as a consequence, also have some room to accommodate out of market efficiencies. If necessary to implement a well-defined framework for considering out of market efficiencies as relates to environmental benefits, agencies should use their advocacy powers to encourage and endorse specific legislation designed to advance environmental goals.

15. Nonetheless, the evaluation out of market efficiencies should not become wholly arbitrary, lest agencies in jurisdictions where out of market efficiencies are excluded seek to "reverse-engineer" broad market definitions to avoid having to take those efficiencies into account.[13]

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[7] *Id*. at 10-11. As the Background Paper notes, this is because a "total welfare [standard] puts more weight on efficiencies, because efficiencies which increase profits in the market under investigation but do not directly benefit consumers in that market can be considered." *Id*. at 11.

[8] *Id*.

[9] OECD, Advantages and Disadvantages of Competition Welfare Standards – Note by BIAC, DAF/COMP/WD(2023)30, ¶ 3 (June 2, 2023), https://one.oecd.org/document/DAF/COMP/WD(2023)30/en/pdf.

[10] *Id.* ¶ 7 (citations omitted).

[11] OECD, Out of Market Efficiencies – Background Paper, *supra* note 6, at 16.

[12] *Id*. at 3.

[13] *Id*. at 16. *See also id*. at 19 (discussing an opposite approach in the U.S. Supreme Court decision in *Amex*, where the court found the two sides of Amex' payment card business to be part of the same markets. Accordingly, the harm to merchants resulting from Amex's conduct could be balanced against the benefits to cardholders.).

III. Agencies Take Different Approaches

16. Practice among competition enforcement agencies differs significantly as to whether out of market efficiencies can be considered to permit firms' conduct. In addition, competition agencies, such as the Netherlands Authority for Consumers and Markets (ACM), may base their decision not to pursue (sustainability) business initiatives in whole or in part on the existence of out of market efficiencies, without requiring that consumers in the affected market are entirely compensated.[14]

17. The European Commission's policy leaves little room for the appreciation of out of market efficiencies but leaves some room for out of market efficiencies provided that the group of consumers affected by the restriction and benefitting from the efficiency gains are substantially the same. The EC's 2023 Horizontal Guidelines provide that: "[a]lthough the weighing of the positive and negative effects of the restrictive agreements is normally done within the relevant market to which the agreement relates, where two markets are related, efficiencies generated on separate markets can be taken into account, provided that the group of consumers that is affected by the restriction and that benefits from the efficiencies is substantially the same."[15]

18. In the United States, out of market efficiencies are generally prohibited with specific exceptions. In the merger context, the leading authority is *Philadelphia National Bank*. In that case, the parties argued that the merger would create consumer benefits outside the relevant market which would compensate any anticompetitive harm incurred within the relevant market. The U.S Supreme Court rejected the out of market efficiencies, holding that the anticompetitive effects in one market could not be justified by the efficiencies created in a separate market under the Clayton Act.[16]

19. Until recently, however, the 2010 U.S. Horizontal Merger Guidelines provided for a limited exception in relation to markets that are inextricably linked. In those cases, it may not be possible to tailor remedies to deal with the anticompetitive effects while preserving the gains.[17] As the Background Paper notes, this approach can be considered as an exception to the principle that out of market efficiencies cannot be considered but has been removed in the U.S. agencies' draft Merger Guidelines issued in 2023.[18] BIAC notes, however, that in the U.S., the Merger Guidelines reflect only the Agencies' intended approach and do not impact the law under which mergers are assessed by the courts.

20. In addition to a number of exceptions to the rule that out of market efficiencies cannot be considered in the competitive assessment that apply in a number of jurisdictions, the Background Paper also provides

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[14] *See* Netherlands Auth. for Cons. & Mkts., Policy Rule: ACM's Oversight of Sustainability Agreements – Competition and Sustainability, ACM/UIT/596876 (Oct. 4, 2023), https://www.acm.nl/system/files/documents/Beleidsregel%20Toezicht%20ACM%20op%20duurzaamheidsafspraken%20ENG.pdf. *See also* Van de Sanden and Sauter, De beleidsregel Toezicht ACM op duurzaamheidsafspraken: Toepassing prioriteringsbeleid bij oneigenlijke concurrentie en milieuschade, MARKT & MEDEDINGING 2023 (forthcoming).

[15] Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2023 O.J. (C 259) 1, ¶ 583, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01) (citation omitted). For more context, *see* OECD, Sustainability and Competition – Note by BIAC, *supra* note 2.

[16] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). One prominent commentator observed in 2010 that "[t]his 'out of market' efficiency problem obviously does not originate with the HMGs [] at all. The cause of the problem is *Philadelphia National Bank*. Despite the dramatic changes in merger law since 1963, the inability to balance cross-market effects remains the law. . . . This failure to incorporate 'out of market' efficiencies into merger analysis flies in the face of the modern trend in favor of analyzing actual competitive effects rather than adopting simplifying and potentially misleading proxies." Joshua D. Wright, *Comment on the Proposed Update on the Horizontal Merger Guidelines: Accounting for Out-of-Market Efficiencies* 4 (Geo. Mason Univ. L. & Econ. Rsch. Paper No 10-38, 2010) http://ssrn.com/abstract_id=1656538.

[17] OECD, Out of Market Efficiencies – Background Paper, *supra* note 6, at 13.

[18] *See* U.S. Dep't of Justice, Antitrust Div. & Fed. Trade Comm'n, Draft Merger Guidelines (July 2023), https://www.justice.gov/d9/2023-07/2023-draft-merger-guidelines_0.pdf.

valuable insights into a number of (other) limited, but general exceptions that have been suggested in the literature.[19] In particular, Yun suggests four circumstances in which out of market efficiencies should be considered: where there are economies of scope in production, upstream and downstream markets with the same supply chain, multisided platforms with indirect, cross-group network effects, and between markets for products which are complements in demand.[20]

21. BIAC notes that the exceptions suggested by Yun and others all seem to draw on the concept of "inextricability" or "substantial similarity" in the customer base and supports further research and debate along these lines, both within and outside the OECD Competition Committee.

IV. Should Out of Market Environmental Efficiencies Claims Be Treated Differently?

22. In its submission to the 2020 OECD Competition Committee meeting on Sustainability and Competition, BIAC noted that "it is hard to overestimate the importance of the global challenge that lies ahead and the urgency required to tackle it" and strongly recommended "that agencies work towards a transparent and consistent approach to factor sustainability benefits into the analysis of potentially anti-competitive agreements." It added that "[s]pecific attention in this respect should be given to the methodologies to account for (i) sustainability benefits for the entire society; (ii) 'out of market' efficiencies; and (iii) benefits to non-users (e.g., employees)."[21]

23. Meanwhile, and as set out in the Background Paper, a number of authorities, including in the Netherlands, Austria, Greece, and the United Kingdom, have taken concrete policy initiatives to accommodate environmental benefits into the competitive assessment. By and large, those initiatives center around the recognition that agreements and business conduct that produce general benefits to all or many consumers may be justified, even if those benefits do not fully compensate the harm that consumers in a particular relevant market may suffer. In line with its general position set out above and the considerations that militate in favor of accommodating out of market efficiencies more generally, BIAC is supportive of these initiatives. The potential benefit of such policies is far less likely to be realized, however, as long as divergence exists between and among jurisdictions because the largest environmental impacts, and potential synergies, are likely to impact numerous jurisdictions at once.

V. Concluding Comments

24. While the ensuing trend of acknowledging out of market environmental benefits is helpful in supporting welfare enhancing business activities, BIAC respectfully submits that there is a continuing and important need to simultaneously address the treatment of efficiencies generally, regardless of whether they materialize in-or outside of the affected market. This is because, even if out of market environmental claims are recognized as a matter of principle, those claims would still be subject to the same stringent requirements that apply to all efficiency claims; it would not make good sense to allow environmental out of market efficiency claims, but at the same time subject those claims to such stringent requirements that the practical effect of that rule would be zero. While of significant societal importance, environmental efficiencies do not differ fundamentally from other consumer benefits. Moreover, a general approach that captures out of market environmental efficiencies, as well as other types of efficiencies would potentially do away with a patchwork of diverging approaches that lacks one single, clear analytical framework.

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[19] BIAC agrees with the observation that "[a] proposal simply to treat OOM efficiencies the same as in-market efficiencies is unlikely to catch the mood of the times: it would involve clearing more mergers and approving more conduct." OECD, Out of Market Efficiencies – Background Paper, *supra* note 6, at 22.

[20] John M. Yun, *Reevaluating Out-of-Market Efficiencies in Antitrust* (Geo. Mason L. & Econ. Rsch. Paper No. 22-38, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4233360.

[21] OECD, Sustainability and Competition – Note by BIAC, *supra* note 2, ¶¶ 2, 33 .

25. BIAC supports initiatives to allow out of market efficiencies under defined conditions. These conditions may include terms specified in new legislation. However, for consistency and other reasons the debate should preferably concentrate on the treatment of out of market environmental efficiencies and other types of out of market efficiencies alike.

26. Any further debate on out of market efficiencies should in any event include discussions on consumer benefits in other markets arising from efficiencies that are "inextricably linked" to the merger or other business conduct, as well as the notion that in-market consumers may not always be fully compensated.

27. The discussion on out of market efficiencies concentrates on mergers and (horizontal) collaboration agreements. However, it believes that it is desirable, and indeed necessary, to also include in the discussion the scope for out of market efficiencies in the context of unilateral conduct and vertical agreements, even if the treatment of efficiencies in those settings may raise specific challenges.

28. Allowing out of market efficiencies as part of the competitive assessment of business conduct under strict conditions and based on a robust and rational methodology would not lead to underenforcement or lead to a "slippery slope." Indeed, out of market efficiency claims would always require a careful balancing of the harm that is likely to occur in one market against the benefit to consumers outside the boundaries of that market, and the parties will still bear the burden of proving efficiencies.

29. Further discussion on the evaluation and quantification of out of market efficiencies and best practices for the treatment of those efficiencies, in particular environmental benefits, is essential to helping countries to fulfill their mandates.