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EMERGING MARKETS AND U.S. HORIZONTAL MERGER GUIDELINES: A TURKISH COMPETITION LAW PERSPECTIVE

*Gönenç Gürkaynak**, *Serdar Dalkır*† & *Derya Durlu*‡

ABSTRACT

Developed economies have historically been a model for emerging market economies, particularly in the development and enforcement of competition laws. Modifications to competition law rules in developed economies, however, may not always be practical for emerging market economies to adopt. Insufficient knowledge, experience, and power of competition law authorities in emerging markets require a structure with greater legal certainty rather than one that provides a wide berth for interpretation. This article provides an overview of some of the significant developments in the 2010 U.S. Horizontal Merger Guidelines from an emerging market perspective. While taking into consideration the general characteristics of emerging market countries, the treatment of four specific topics under the new Guidelines will be scrutinized from a law and economics perspective: market definition, market shares and market concentration, market entry, and coordinated effects. This article also delves into discussions of Turkish competition law matters, as an example of emerging merger regime models, with respect to each of the four areas of discussion.

JEL: K21; L40

I. INTRODUCTION

In August 2010, the United States Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") adopted the new Horizontal Merger Guidelines (the "2010 Guidelines").[1] The modified style,

* Managing Partner, ELIG, Attorneys-at-Law, Istanbul, Turkey; Faculty Member; Bilkent University Faculty of Law, Ankara, Turkey. Email: gonenc.gurkaynak@elig.com.

† Principal, MiCRA Microeconomic Consulting & Research Associates Inc. Email: sd@micradc.com.

‡ Research Assistant, Private International Law/Conflict of Laws, Bilkent University Faculty of Law, Ankara, Turkey; Attorney-at-Law, Istanbul, Turkey. Email: derya.durlu@bilkent.edu.tr.
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[1] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), *available at* http://www.ftc.gov/os/2010/08/100819hmg.pdf [hereinafter 2010 Horizontal Merger Guidelines].

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tone, and substance of the 2010 Guidelines integrated existing merger review practices.

Although the 2010 Guidelines do not have the force of law, they nevertheless guide the U.S. competition authorities and the U.S. judiciary on matters of competition law, as well as influence competition authorities around the world. Historically, the competition laws of developed economies have served as models for emerging market economies.[2] As the dynamics that shape competition policy in developed economies evolve, emerging economies could choose to continue modeling their competition laws on the practices of developed economies. In certain cases, however, substantive developments in developed merger control regimes may not be well suited to serve as models for the less evolved emerging markets.

This article focuses on lessons from the 2010 Guidelines for competition law regimes of emerging market countries by examining certain adaptations that are important for merger practices in those countries.[3] After providing an overview of the general characteristics of emerging market merger practices, this article will assess in detail four major developments in the 2010 Guidelines: the changes in approach to market definition, market shares and concentration, market entry, and coordinated effects. Finally, the competition law practices in Turkey are weighed against, and contrasted with, the changes in U.S. merger practices to ascertain the best approach for emerging market merger practices.

II. COMPETITION POLICIES IN EMERGING MARKETS

Setting aside tautological distinctions,[4] there is no official definition of an emerging market economy. This article, therefore, relies on the recognized features of emerging market economies:[5] good growth prospects, high rates of

[2] Press Release, International Finance Corporation, Emerging Markets Heading for Banner Year in 2006: IFC Notes Progress, Development Challenges Ahead (Jan. 17, 2006) (the term *emerging markets* having been coined by economists at the International Finance Corporation in 1981).

[3] Because this article aims to assess specific structural merger changes promulgated in the 2010 Guidelines, not all modifications will be examined in this work. Issues that are beyond the scope of this article include the reforms on evidence (Section 2), powerful buyers (Section 8), mergers of competing buyers (Section 12), and partial acquisitions (Section 13).

[4] Distinctions may be drawn between emerging markets and developed markets, as well as between individual emerging markets, without resorting to tautological definitions. *See* TARUN KHANNA & KRISHNA G. PALEPU, WINNING IN EMERGING MARKETS: A ROAD MAP FOR STRATEGY AND EXECUTION 1–6 (Harv. Bus. Rev. Press 2010); *cf.* Tarun Khanna & Krishna G. Palepu, *How to Define Emerging Markets*, FORBES (May 27, 2010, 6:00 PM), http://www.forbes.com/2010/05/27/winning-in-emerging-markets-opinions-book-excerpts-khanna-palepu.html (describing emerging markets as being "'emerging' because they have not 'emerged.'").

[5] *See* William H. Page, *Antitrust Review of Mergers in Transition Economies: A Comment, with Some Lessons from Brazil*, 66 U. CIN. L. REV. 1113, 1114 (1997–98) (emerging market economies are also referred to as 'transition economies').

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return, high levels of risk, markets that are characterized by extreme volatility, an absence of historical foreign investment, and ongoing transition to market economies.[6] These unique features of emerging market economies are essential to understanding the potential effects of changes in developed economy competition policies on emerging markets. Because emerging market competition policies were originally based on developed economy models,[7] the revisions to the U.S. Guidelines could significantly impact merger control practices in emerging markets.

Developed countries play a significant and constructive role in molding the merger control regimes and competition policies of emerging markets, as they guide and promote convergence across younger jurisdictions.[8] As correctly pointed out by Larry Fullerton and Megan Alvarez, the "one step forward and two steps back" approach evident in efforts at converging merger control across multiple jurisdictions requires unified, continued, and sustainable convergence efforts.[9] Western jurisdictions, whose antitrust regimes are more highly developed and oftentimes considered more entrenched, have a considerable impact on rapidly expanding emerging economies,[10] and multi-jurisdictional transactions increasingly encompass these jurisdictions.[11]

There are numerous examples of emerging market merger regimes adapting to changes taking place in more developed jurisdictions, particularly the United States and Europe. For example, in Brazil, the Administrative Council for Economic Defence (*Conselho Administrativo de Defesa Econômica*) ("CADE") was established in 1962. However, the economic liberalization process that began in 1990 prompted the government to promulgate a new competition law in 1994, invigorating the CADE.[12] Thereafter, the Brazilian

[6] Ashoka Mody, *What Is an Emerging Market?* (IMF Working Paper, WP/04/177, 2004), *available at* http://cdi.mecon.gov.ar/biblio/docelec/fmi/wp/wp04177.pdf.

[7] William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075, 1090 (1997–98).

[8] Larry Fullerton & Megan Alvarez, *Convergence in International Merger Control*, 26 ANTITRUST 20 (2012).

[9] *Id.* at 20.

[10] Examples include Brazil, Russia, India, and China; *cf.* Jim O'Neill, *Building Better Global Economic BRICs?* (Goldman Sachs Global Econ. Paper, No. 66, Nov. 30, 2001), *available at* http://www.goldmansachs.com/our-thinking/archive/archive-pdfs/build-better-brics.pdf (coining the term "BRIC"); *see also* Jim O'Neill, Dominic Wilson, Roopa Purushothaman & Anna Stupnytska, *How Solid Are the BRICs?* (Goldman Sachs Global Econ. Paper, No. 134, Dec. 1, 2005), *available at* http://www.goldmansachs.com/korea/ideas/brics/how-solid-pdf.pdf (explaining and estimating projections until 2050 for the N-11—the "Next 11"—which includes Bangladesh, Egypt, Indonesia, Iran, Mexico, Nigeria, Pakistan, Philippines, Turkey, South Korea, and Vietnam).

[11] Terry Calvani & Karen Alderman, *BRIC in the International Merger Review Edifice*, 43 CORNELL INT'L L.J. 73, 74 (2010), *available at* http://www.lawschool.cornell.edu/research/ILJ/upload/Calvani.pdf.

[12] For further information on Brazil's competition law landscape, see OECD, *Competition Law and Policy in Brazil*, A Peer Review 10, *available at* http://www.oecd.org/daf/competition/45154362.pdf.

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competition regime has undergone a series of reforms to align itself with trends and policies in other jurisdictions, including major reforms that went into effect in 2012 that, among other things, united enforcement functions within a single agency and created a premerger notification system.[13]

The Antimonopoly Law of the People's Republic of China also has incorporated certain elements that particularly reflect the perspective of U.S. and EU antitrust laws,[14] as a result of growing cooperation and communication among various antitrust authorities across the globe. In 2011, the Ministry of Commerce issued the Interim Provisions on Evaluation of Impact of Concentrations of Business Operators on Competition that create a high-level merger review framework largely aligned with internationally accepted theories and best practices. Most recently, in April 2013, Chinese authorities announced the creation of a fast-track clearance procedure for "simple cases," similar to that introduced in the United States in 2006.[15]

Similarly, continuing efforts at promoting economic growth led Russia to prioritize aligning its competition laws with those of other countries, ultimately leading to the creation of Russia's Federal Antimonopoly Service. The current federal law "On the Protection of Competition" was enacted in 2006. In 2012, Russia adopted a significant package of reforms, the Third Antimonopoly Reform Package, with the aim to align its competition regime with Europe, and, among other changes, clarify procedures for international transactions.[16]

[13] *Cf.* Marco Botta, *The Cooperation Between the Competition Authorities of the Developing Countries: Why Does It Not Work? Case Study on Argentina and Brazil*, 5 Competition L. Rev. 153, 158 (2009); for the 2012 reforms, see Krisztian Katona & Diego H. Moraes, *Reforms Achieved, but Challenges Ahead: Brazil's New Competition Law*, 3 A.B.A. Sec. Antitrust L. 11–12 (2011), *available at* http://www.ftc.gov/oia/speeches/2011katona-brazil.pdf.

[14] Ministry of Commerce of the People's Republic of China, *Interim Provisions on Evaluating the Impact of Concentrations of Business Operators on Competition*, Document No. 55 (Aug. 29, 2011), *available at* http:/cclp.sjtu.edu.cn/article/?NewsID=3018.

[15] Ministry of Commerce of the People's Republic of China ("MOFCOM"), Draft Regulation on the Standards Applicable to Cases that are Regarded as "Simple" Merger Cases; MOFCOM, Draft Regulation on Acceptable Conditions that Could Remedy Objections to a Concentration (Merger, Acquisition or Joint Venture); *cf.* McDermott Will & Emery, *China's Merger Control Rules Changing: MOFCOM Publishes New Draft Regulations on Remedies and Simple Cases* (Apr. 17, 2013), *available at* http://www.mwe.com/Chinas-Merger-Control-Rules-Changing-MOFCOM-Publishes-New-Draft-Regulations-on-Remedies-and-Simple-Cases-04-17-2013/?PublicationTypes=d9093adb-e95d-4f19-819a-f0bb5170ab6d; Davis Polk, *Chinese Antitrust Authority Releases Draft Regulations on "Simple" Mergers, Merger Remedies* (Apr. 5, 2013), *available at* http://www.davispolk.com/files/Publication/fb837267-ed12-42b0-9eb3-011c060d6a1c/Presentation/PublicationAttachment/7aef3921-612f-4a3c-ab30-017872e434ce/04.05.13.Chinese.Antitrust.html.

[16] Federal Law No. 401-FZ on Amendments to the Federal Law on Protection of Competition, and Certain Legislative Acts of the Russian Federation (Promulgated on Jan. 6, 2012); Federal Law No. 404-FZ on Amendments to the Code of Administrative Offenses of the Russian Federation (Promulgated on Jan. 7, 2012) ("Third Anti-Monopoly Package"); *see also* Federal Antimonopoly Service of the Russian Federation, *The President of Russia Signed the "Third Antimonopoly Package"* (Dec. 5, 2011), *available at* http://en.fas.gov.ru/news/news_31899.html.

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A. Emerging Markets and Their Competition Policy Goals

Emerging market economies require external financing in their pursuit of economic growth and development, often leading to substantial cross-border merger and acquisition activity.[17] The international "merger wave"[18] raises substantial issues for developing markets from a competition perspective, as they seek to align their policies with those abroad. Among the primary benefits of promoting consistency in substantive merger analysis between emerging and developed markets is "enhancing welfare by reducing business uncertainty and raising the quality of enforcement decisions."[19] Common objectives shared between emerging market and Western jurisdictions include thwarting anticompetitive behavior by large private companies and the promotion of competition to increase economic efficiency and to improve consumer welfare and development.[20] On the other hand, certain issues that are indirect effects of cross-border transactions may be of more concern to developing economies than to their developed counterparts, including the increased market power of large multinational companies, reduced contestability of markets, and the effects of transnational merger transactions on the domestic social and political interests of industrializing countries.[21] Systematic privatizations of state-owned companies are another area of concern particular to emerging market economies.[22]

[17] Joseph Silva, *Emerging Market Competition Policy: The Brazilian Experience* 5 (2007), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=joseph_silvia; *see also* Rachel V. Steinwender, *Brazil and the Global Financial Crisis: An Examination of the Effects from Charlotte to Sao Paolo*, 3 N.C. BANKING INST. 411, 413 (1999); Dan Wei, *China's Anti-Monopoly Law and Its Merger Enforcement: Convergence and Flexibility*, 14 J. INT'L ECON. L. 807, nn.132–33 (2011) ("Similar to other developing country's [sic] concerns, the Chinese government preserves a policy space to make sure that FDI and foreign mergers benefit national development."). In these respects, developing countries' trade and investment laws and policies can complement, or conflict with, the goals of their competition laws and policies. In certain cases, a single agency is responsible for enforcing both sets of regulations. For example, in China, MOFCOM, which enforces antimonopoly law, also has powers to regulate foreign investment in China.

[18] Ajit Singh, *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions* 9 (United Nations Conference on Trade and Development G-24 Discussion Paper Series, Research Paper for the Intergovernmental Group of Twenty-Four on International Monetary Affairs No.18, 2002), *available at* http://unctad.org/en/docs/gdsmdpbg2418_en.pdf.

[19] Alden F. Abbott & Samuel N. Weinstein, *The New U.S. Horizontal Merger Guidelines and International Competition Policy Convergence*, ACADEMIC ARTICLES (Sept. 1, 2010), http://www.academic-articles.com/the-new-u-s-horizontal-merger-guidelines-and-international-competition-policy-convergence.

[20] COMPETITION POLICIES IN EMERGING ECONOMIES: LESSONS AND CHALLENGES FROM CENTRAL AMERICA AND MEXICO 23 (Claudia Schatan & Eugenio Rivera eds., Springer 2008), *available at* http://web.idrc.ca/openebooks/401-7/ [hereinafter COMPETITION POLICIES IN EMERGING ECONOMIES]; Singh, *supra* note 18, at 15.

[21] Singh, *supra* note 18, at 12.

[22] *Id.* at 15.

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B. Emerging Market Competition Authorities and Judicial Systems

Among the most significant characteristics of emerging market competition authorities is the absence of an enduring, comprehensive, and sustained culture of merger control. The BRIC competition laws authorizing merger control practices were all enacted quite recently, between 1991 and 2008. Brazil enacted its merger control law in 1994,[23] Russia in 1991,[24] India in 2002,[25] and China in 2008.[26] Underdeveloped (and, to some extent, developing) competition law cultures tend to produce and be overseen by competition authorities that lack sufficient experience, resources, and safeguards to prevent discretionary enforcement, including the absence of reliable judiciaries.[27] Indeed, weak competition authorities and powerless or dysfunctional judiciaries are two principal obstacles to the development of effective competition regimes in emerging market economies.[28] Competition policy in these countries "cannot be a unique, one-size-fits-all, policy" imported from more developed jurisdictions without careful adjustments.[29]

The challenges faced by competition authorities in emerging markets start with human and financial resources. The economic and legal analysis of complex competition law issues requires an adequately sized staff with sufficient professional experience to detect and investigate the effects of business conduct. The scarcity of resources that are allocated to competition agencies in these jurisdictions requires an extraordinary effort to adapt competition

[23] Gesner Oliveira & Thomas Fujiwara, *Competition Policy in Developing Economies: The Case of Brazil*, 26 NW. J. INT'L L. & BUS. 619, 620, 623, 632 (2006).

[24] OECD, Ministry of the Russian Federation for Antimonopoly Policy and Support to Entrepreneurship, Annual Report on Competition Policy Developments in the Russian Federation in 1999, at 1–2 (1999), *available at* http://www.oecd.org/dataoecd/53/7/2406707.pdf.

[25] *See* The Competition Act, 2002, No. 12, as amended by The Competition (Amendment) Act, 2007, Acts of Parliament, 2007 (India), *available at* http://www.cci.gov.in/images/media/competition_act/act2002.pdf?phpMyAdmin=QuqXb-8V2yTtoq617iR6-k2VA8d. Merger enforcement in India did not commence until 2011, when the "Combination Regulations" of 2011 were announced, setting out the relevant notice forms and the details of the review process.

[26] *See* Fan Long Duan Fa [Antimonopoly Law ("AML")] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), *available at* http://www.gov.cn/flfg/2007-08/30/content_732591.htm.

[27] Singh, *supra* note 18, at 8.

[28] *See* COMPETITION POLICIES IN EMERGING ECONOMIES, *supra* note 20, at 32–35 (for an examination of the defects observed in other countries). Such judicial mechanisms have *effectively neutralized and weakened competition laws of emerging countries* even more rather than assisting competition authorities in applying the competition law as effectively, adequately and appropriately as possible. *Id.* at 32. Competition policy in these countries "cannot be a unique, one-size-fits-all, policy" imported from more developed jurisdictions without careful adjustments. Singh, *supra* note 18, at 16.

[29] Singh, *supra* note 18, at 16. Although many semi-industrialized countries have strong and effective governments, they are not fully democratic or transparent on a par with those in the industrialized Western countries. COMPETITION POLICIES IN EMERGING ECONOMIES, *supra* note 20, at 16.

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policies from developed economies to domestic realities.[30] The competition agencies in emerging market countries may also face political pressure and have to fight for policy independence. Furthermore, resource scarcity and political pressure can reinforce each other. For example, Mexico's enforcement regime reportedly has had to grapple with widespread problems with respect to political independence, and has had difficulty addressing the corrupting influence of political pressure on competition authorities, due to various internal financial and political challenges.[31]

In addition, many developing economies do not possess the efficient judicial structures—that is, structures that produce judicial decisions of strength and quality that correspond to international standards—necessary to effectively enforce competition laws.[32] Courts may lack sufficient understanding of market processes and antitrust laws to provide oversight of competition authorities and assist in developing a robust competition regime.[33] Chinese courts, for example, have struggled to adequately fulfill their enforcement and oversight obligations with respect to competition law matters due to their judicial shortcomings and a reluctance to endow the courts with authority over competition matters; the independence of many Chinese courts is doubtful at best, and judges there have limited professional training and capacity.[34]

These deficiencies pose a major challenge to the adoption of successful developed market merger policies by emerging market merger regimes.

C. Flexibility Versus Legal Certainty in Merger Control

The tradeoff between flexibility and rigidity for emerging market economies as they try to achieve the efficiency of developed market economies is an important and ongoing matter of debate in comparative competition law.[35] As in more developed markets, competition authorities in emerging market economies require a certain degree of flexibility to maneuver through complex, analytical, and heavily economics-based merger reviews. Such flexibility would be attained by emerging market competition authorities by focusing on the analytical framework rather than the specific procedural details of the review process.[36] In other words, these authorities could follow the lead of the 2010 Guidelines, which

[30] Aditya Bhattacharjea, *India's New Competitive Law: A Comparative Assessment*, 4 J. Competition L. & Econ. 609, 637 (2008); Kovacic, *supra* note 7, at 1094–96.

[31] Competition Policies in Emerging Economies, *supra* note 20, at 30.

[32] Tay-Cheng Ma, *The Effect of Competition Law Enforcement on Economic Growth*, 7 J. Competition L. & Econ. 301, 306 (2011).

[33] Kovacic, *supra* note 7, at 1039.

[34] David J. Gerber, *Economics, Law & Institutions: The Shaping of Chinese Competition Law*, 26 Wash. U. J.L. & Pol'y 271, 292–93 (2008).

[35] Mody, *supra* note 6, at 4.

[36] Dennis W. Carlton, *Revising the Horizontal Merger Guidelines*, 6 J. Competition L. & Econ. 619, 624 (2010).

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observe: "[M]echanical application of . . . standards may provide misleading answers to the economic questions raised under the antitrust laws [such that] the Agency will apply the standards of the Guidelines reasonably and flexibly to the particular facts and circumstances of each proposed merger."[37]

However, excessive flexibility in emerging market countries, which lack the experience and institutional depth of more mature economies, risks uncertainty in the application of the standards, thereby undercutting the legitimacy of competition policy in the eyes of local businesses and institutions, even jeopardizing the competitive structure of the markets. Absent clear definitions and analytical procedures or the operational capacity to implement them, merger analysis could become progressively more difficult; in such circumstances the conferral of increased freedom on competition authorities and courts potentially raises the probability of decisions being made based on grounds not directly related to competition law.

The fairly recent establishment of competition authorities in emerging market economies and the limitations and deficiencies of their judiciaries hinder the effectiveness of adopting flexible merger control practices in emerging market economies.[38] Accordingly, while a balance should be struck between strictly observing established rules and practices versus providing leeway in decision making, this balance should be struck in favor of consistency and certainty. While there are certain positive effects arising from a flexible legal regime or policy environment, a successful emerging market regime requires, above all, legal certainty, to minimize the risk of misinterpretations or politically "colored" decisions. Markets that are susceptible to being molded or manipulated based on insufficient specific rules or court and agency practices might find that flexibility unduly jeopardizes consistency and reliability.

Two types of costs can arise from such "influenced actions" by agencies or courts. First and foremost is the static cost of a "false positive" (wrongly prosecuting procompetitive or competitively neutral practices) or a "false negative" (failing to prosecute anticompetitive practices).[39] Second, risk and uncertainty impose additional dynamic costs on the markets, as discussed extensively in

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[37] 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 1.

[38] Kovacic, *supra* note 7, at 1104.

[39] *See, e.g.*, James Rill & Thomas Dillickrath, *Type 1 Error and Uncertainty: Holding the Antitrust Enforcement Pendulum Steady*, 11 GLOBAL COMPETITION POL'Y, ANTITRUST CHRONICLE (Nov. 12, 2009), https://www.competitionpolicyinternational.com/type-1-error-and-uncertainty-holding-the-antitrust-enforcement-pendulum-steady/ ("Recent pronouncements by the leaders of the federal antitrust agencies have brought into sharper focus the debate over how best to balance the risks of Type 1 error (or over-enforcement error) against the risks of Type 2 error (or under-enforcement error) in antitrust enforcement. In this paper, we examine the literature surrounding the debate and suggest that the harm resulting from Type 1 error more likely and more often exceeds that stemming from Type 2 error. Indeed, the Supreme Court has recognized this imbalance in its antitrust jurisprudence, repeatedly insisting on rules that give more weight to avoiding over-deterrence of procompetitive conduct.").

the literature on regulatory uncertainty.[40] The flexible merger screening process proposed in the 2010 Guidelines, when implemented by a relatively resource-constrained enforcement agency may, at best, introduce innocuous yet significant biases in merger screening that can systematically lead to false positives as well as false negatives. For example, the Guidelines propose the use of an upward-pricing pressure ("UPP") method for a first screening of mergers between (presumably) price-setting oligopolists who sell differentiated goods.[41] While the implementation of the UPP method does not necessitate an antitrust market definition as a precondition, it does require knowledge of the marginal diversion ratio from the tested product to the merging product, as well as the dollar margin on the merging product.[42] The result of the UPP test can be sensitive to the measured value of this diversion ratio. If the measurement of the diversion ratio is subject to error, the resulting bias can be substantial. "Shorthand" methods for estimating a diversion ratio may produce significant errors relative to the true diversion ratio.[43]

Consider the following thought experiment. Two products are to merge. The agency wishes to test the first product for the likelihood of a merger-related price increase, based on the UPP method. The agency knows the true value of the unit margin on the second product. But the agency's measurement

[40] From a consumer-welfare perspective, even if these additional costs may be borne in the first instance by firms, at least part of these costs can be expected to be passed on to the firms' customers in the form of higher prices or reduced product quality and variety. We do not, however, think that the presence of these costs is a basis for repealing antitrust laws and abolishing antitrust practices. *See, e.g.*, George Bittlingmayer, *Regulatory Uncertainty and Investment: Evidence from Antitrust Enforcement*, 20 CATO J. 295 (2001), *available at* http://www.cato.org/sites/cato.org/files/serials/files/cato-journal/2001/1/cj20n3-1.pdf. *See also* Rill & Dillickrath, *supra* note 39 ("Especially in the area of single-firm conduct analyzed under Section 2 of the Sherman Act or Section 5 of the FTC Act, the dangers of overly interventionist antitrust rules are not limited to actual government enforcement and private actions that lead to punishing and enjoining procompetitive conduct. Such rules create uncertainty and fear resulting in constructive Type 1 error; that is, businesses forego aggressive competition that benefits consumers for fear of becoming embroiled in government or private enforcement actions. These threats to consumer welfare are compounded by amorphous antitrust rules that make it impossible for businesses to know ex ante whether their conduct will be deemed violative of the antitrust laws. Such legal ambiguity can deter businesses from engaging in efficient, procompetitive conduct; even conduct that would ultimately be found to be legal.").

[41] 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 1, § 6.1.

[42] Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON. 1 (2010).

[43] As an example, a common approximation to the diversion ratio from "product *A*" to "product *B*" is the ratio of the share of product *B* to the share of all related products except *A*. For now, let us put aside the indeterminacy inherent in the expression "related products" or, alternatively, the difficulty of negotiating around the implicit market definition suggested by these shares. At best, this approximation can be considered an estimate of the average diversion ratio and is quite likely different from the marginal diversion ratio. This approximation is equal to the marginal diversion ratio only if the sole product characteristic that any consumer considers during a purchase decision is that product's relative share for all consumers at the time of the purchase.

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of the diversion ratio from the first to the second product may be subject to error. The agency happens to credit the first product with a level of merger-related marginal cost reduction, which would result in that product's post-merger price being identical to its premerger price based on the true diversion ratio.[44] If the agency's measurement of the diversion ratio from the first product to the second product is sufficiently large relative to its true value, then the UPP method will signal that the merger will result in an increase in the price of the first product.[45] Two versions of the UPP formula have been proposed; we refer to them as the *accurate formula* and the *conservative formula*.[46] Each formula is written as a function of the *prices* and the *marginal costs* of, and the *diversion ratios* between, the merging products (collectively labeled "parameters") as well as the presumptive, merger-related percentage reduction in the marginal cost of product 1 ("merger efficiencies"). The defining characteristic of the accurate UPP formula is that, absent measurement error, it signals a "zero price change" for product 1 if and only if the presumptive merger efficiencies equal the percent reduction in the marginal cost of product 1 (E_1^*). If the presumed efficiencies are lower than E_1^* even by a small amount, then the accurate formula will predict a merger-related price increase for product 1. On the other hand, the conservative formula may predict a negative outcome ("no price increase") even when presumed efficiencies are somewhat lower than E_1^*, provided that all parameters are measured without error.[47] At the outset we assume that the presumed merger efficiencies equal E_1^*. In addition, to be able to demonstrate the sensitivity of either UPP formula to a measurement error, we assume that the measurement of the diversion ratio from product 1 to the other merging product is measured with positive error. We demonstrate that even a small measurement error results in a false-positive outcome based on the accurate UPP formula and a larger measurement error can result in a false positive based on the conservative UPP formula.

Table A-1, which gives a demonstrative example in the Appendix of the relationship between measured values and the UPP test result, presents the assumed true values of the parameters as well as the level of E_1^* associated with the true values. The last two rows indicate the outcome of the UPP test based on the accurate and the conservative formula, respectively. Under column 1, the outcome of the accurate formula is exactly zero, meaning that, absent

[44] That is, the reduction in the marginal cost that would exactly offset the price increase absent the cost reduction; *see* Gregory J. Werden, *A Robust Test for Consumer Welfare Enhancing Mergers Among Sellers of Differentiated Products*, 44 J. INDUS. ECON. 409 (1996).

[45] *See* Appendix, *infra* (formally demonstrating the price increase with a numerical example). In the Appendix, "product 1" denotes the merging product subject to the UPP test. We first write the percent reduction in the marginal cost of product 1, shown with symbol E_1^*, which would result in product 1's postmerger price being identical to its premerger price based on the true values of the margins, prices, and the diversion ratios (see Appendix, Equation 1).

[46] Farrell & Shapiro, *supra* note 42, at 11–13; *see also infra* Appendix, Equations 2 and 5.

[47] Because of this property, the conservative formula can be thought to incorporate a tolerance (or safety) margin against small errors in the parameter values.

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measurement errors and with the presumed efficiencies exactly equal to E_1^*, the merger is not expected to lead to an increase in the price of product 1. The last row of column 1 states a negative outcome based on the conservative formula, which may be interpreted as a tolerance margin for relatively small errors. Columns 2 to 4 represent alternative measured values of the diversion ratio and the resulting test outcomes. Column 2 represents "no measurement error." When no measurement error is present, the measured value of the diversion ratio equals its true value. Consequently, the test outcome based on either formula is identical to the respective outcome under column 1. Column 3 represents a 5-percent error in the measurement of the diversion ratio,[48] which results in a positive outcome based on the accurate formula, signaling a predicted price increase. This positive outcome is false because we know that the accurate formula results in a zero price increase based on the true value of the diversion ratio. The last row under column 3 shows that, even with a 5-percent error in the measurement of the diversion ratio, the conservative test has a negative outcome. However, its absolute magnitude (0.00872) is smaller than under the previous column (0.01122), indicating a smaller tolerance margin for additional errors that may be present in the measurement of any other parameter. Finally, column 4 is based on the assumption of a larger (25-percent) measurement error.[49] With a 25-percent error, both UPP formulas signal false-positive outcomes.

A related source of error is selection bias, which may be significant in bidding (auction) markets. Historical shares of bids submitted to a customer, or even across customers, may omit potential bidders who may have been discouraged from bidding, especially if preparing a bid is costly. However, any of these bidders may submit a bid in the postmerger market if the expectation of a profit is higher because of the merger. Accurate analysis of mergers in bidding markets may be particularly resource intensive if the computation of the marginal diversion ratios requires estimating equilibrium bid functions.[50] Consequently, a resource-constrained agency may be particularly inclined to use approximations when analyzing such mergers. One shortcut may be to consider all bidders in a market as identical. For example, a premerger market with three bidders, two of whom propose to merge, can be analyzed as a transition from a market with three identical bidders to one with two identical

[48] A 5 percent measurement error signifies that the measured value equals 105 percent of the true value.

[49] A 25 percent measurement error signifies that the measured value equals 125 percent of the true value.

[50] *See* Serge Moresi, *Bidding Competition and the UPP Test* (HMG Review Project—Comment, Project No. P092900, 2009), *available at* http://ftc.gov/os/comments/horizontalmergerguides/545095-00040.pdf; *see also* Serge Moresi, *The Use of Upward Price Pressure Indices in Merger Analysis*, 9 ANTITRUST SOURCE 1, 1 (2010), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Feb10_Moresi2_25f.authcheckdam.pdf; Gregory J. Werden & Luke M. Froeb, *Unilateral Competitive Effects of Horizontal Mergers*, *in* HANDBOOK OF ANTITRUST ECONOMICS 43 (Paolo Buccirossi ed., MIT Press 2008).

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bidders. When predicting the price effect of a merger, ignoring asymmetries across bidders can lead to predictions that are orders of magnitude higher than the true expected price increase.[51] Such shortcut approaches can result in so many false positives and false negatives that they may be considered uninformative.

At its worst, a screening process that is not bound by transparent rules or constrained by informed courts will be prone to being used as an instrument of shadow policymaking. As the numerical example discussed above suggests, a flexible merger screening process similar to the one proposed in the 2010 Guidelines can be manipulated to produce false positives as well as false negatives for any particular merger or set of mergers through arbitrary measurements of the relevant parameters. Thus, ill-defined procedures can be used to target any single merger or a set of mergers for investigation while letting through others with similar expected effects on welfare. Such procedures can be as simple as selectively determining diversion ratios on the basis of shares, which have been calculated without a market definition that can be challenged in a court.

Perhaps the most damaging outcome of a merger screening regime that allows for seemingly arbitrary decisions would be the uncertainty about their source: do they emanate from resource insufficiency or are they a product of shadow policymaking? Such indeterminacy can severely damage public support for competition policies.

III. U.S. HORIZONTAL MERGER GUIDELINES AND EMERGING MARKETS

The formal objective of the U.S. Horizontal Merger Guidelines is to provide transparency into the government's merger review process.[52] In practice, the Merger Guidelines provide critical guidance to the courts in evaluating cases, to practitioners in advising clients, and to academics and other researchers in developing and evaluating antitrust theory and policy. The 1992 Guidelines described a step-by-step framework to analyze mergers between competitors and have been criticized for "guid[ing] the rest of the world to a place at which the United States has not resided for a long time."[53] The revised merger guidelines present a less systematic and more holistic, multi-faceted approach for

[51] *See* Serdar Dalkir, John W. Logan & Robert T. Masson, *Mergers in Noncooperative Auction Markets: The Effects of Mergers on Prices and Efficiency*, 18 Int'l J. Indus. Org. 383, 383 (2000).

[52] U.S. Dep't of Justice & Fed. Trade Comm'n, 1992 Horizontal Merger Guidelines § 0.1 (1992) [hereinafter 1992 Horizontal Merger Guidelines], *available at* http://www.justice.gov/atr/public/guidelines/horiz_book/toc.html ("The Guidelines are . . . designed to articulate the analytical framework the Agency applies in determining whether a merger is likely . . . to lessen competition.").

[53] William Blumenthal, *Thy Lamp Unto the World: International Convergence After the 2010 Guidelines*, 2 Competition Pol'y Int'l Antitrust J. 3 (2010).

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merger review, "shifting away from administrability and predictability in favor of flexibility and generality."[54] The revised Guidelines were intended to serve as a statement of existing agency practices that had significantly evolved since the last major revision of the Guidelines in 1992.

Rather than providing a comparative perspective on general merger policies in emerging market economies,[55] this article focuses on specific nuances of the framework for addressing merger concerns in the United States and Turkey. This part analyzes "market definition," "market shares and concentration," "market entry," and "coordinated effects" under the current U.S. merger review practices, thus establishing a basis for comparison with merger practices in emerging market economies, Turkey in particular.

A. Market Definition Diminution

Among the most significant changes in the 2010 Guidelines was the shift in emphasis regarding both product and geographic market definition[56] requirements.[57] The 2010 Guidelines embraced market definitions as one of several analytical tools that can help to identify anticompetitive effects, rather than as a necessary starting point for evaluating merger cases.[58] Although existing legal precedents emphasize market definition,[59] with many cases being won or lost on that basis, the 2010 Guidelines explain that market definition is merely a "tool," useful only "to the extent that it illuminates the merger's likely competitive effects."[60] For example, direct evidence of anticompetitive effects—such as

[54] *Id.* at 5.

[55] *See* Calvani & Alderman, *supra* note 11, at 78–83 (for an overview of the merger policies of BRIC countries).

[56] *See* Mika Oinonen, *Modern Economic Advances in Contemporary Merger Control: An Imminent Farewell to the Market Definition?*, 32 Eur. Competition L. Rev. 629 (2011) (for criticism on the usage of "market definition" by competition authorities and the structural approach employed by such authorities in general); George J. Stigler & Robert A. Sherwin, *The Extent of the Market*, 28 J.L. & Econ. 555, 555 (1985) ("the market is that set of suppliers and demanders whose trading establishes the price of a good.").

[57] 2010 Horizontal Merger Guidelines, *supra* note 1, § 4; *see also* Richard A. Feinstein, *2010 Revisions to the U.S. Horizontal Merger Guidelines*, 7 Competition L. Int'l 6, 7 (2011).

[58] Rachel Brandenburger & Joseph Matelis, *The 2010 U.S. Horizontal Merger Guidelines: A Historical and International Perspective*, 25 Antitrust 48, 50 (2011) (stating that other jurisdictions, such as the European Union, Canada, France, and the United Kingdom, also share this approach); European Commission, Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law, 1997 O.J. (C 372) 3, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1997:372:0005:0013:EN:PDF.

[59] United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) ("in determining whether a transaction will create or enhance market power, courts historically have first defined the relevant product and geographic markets within which the competitive effects of the transaction are to be assessed. This is a 'necessary predicate' to finding anticompetitive effects.").

[60] 2010 Horizontal Merger Guidelines, *supra* note 1, § 4.

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evidence of actual or planned price increases following the merger—might obviate the need for a rigorous market definition, while at the same time informing what the relevant market should be. Other forms of evidence, such as the willingness-to-pay econometric analysis used by the FTC in hospital mergers, are insensitive to market definition but nonetheless predict changes in market power that are useful in evaluating merger effects.[61]

Despite the change in emphasis, it is clear that the agencies continue to routinely take market definition into account in their analyses and it often remains an important early step in a merger review.[62] There are still two important roles that market definition may fulfill in horizontal merger analysis: (1) identifying the area of commerce and geographic area where competitive effects may occur; and (2) identifying market participants and their market shares, which may provide an indication of potential competitive problems resulting from a merger when other forms of evidence are not available.

Moreover, thus far, U.S. courts have continued to require well-supported product and geographic markets and the agencies have not attempted to bring a court challenge without market definition as distinct, if not primary, evidence.[63] It remains to be seen whether courts may ultimately adopt the flexible approach advocated by the 2010 Guidelines, though a significant recent decision, *United States v. H&R Block*, acknowledged the possibility. In *United States v. H&R Block*, the court noted that the 2010 Guidelines "reflect the understanding [that] as a matter of applied economics, evaluation of unilateral effects does not require a market definition in the traditional sense at all."[64] Though the court went on to observe that "as a legal matter, a market definition may be required by Section 7 of the Clayton Act," it hinted at the possibility that "evolving understandings in economics" might lead to the use of more flexible approaches by the courts in the future.[65] In any case, the

[61] *See, e.g.*, David Dranove & Andrew Sfekas, *The Revolution in Health Care Antitrust: New Methods and Provocative Implications*, 87 MILBANK Q. 607, 607–32 (Sept. 2009) (explaining the WTP model); *see also* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 1, § 4 ("Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition.").

[62] 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 1, § 4 ("Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects. For example, evidence that a reduction in the number of significant rivals offering a group of products causes prices for those products to rise significantly can itself establish that those products form a relevant market. Such evidence also may more directly predict the competitive effects of a merger, reducing the role of inferences from market definition and market shares.").

[63] *Id.* (a properly defined market is a requisite element for any agency challenge to a merger in court); *see also* F.T.C. v. ProMedica Health Sys., No. 3:11-CV-47, 2011 WL 1219281 (N.D. Ohio Mar. 29, 2011); United States v. H&R Block, 833 F. Supp. 2d 36 (D.D.C. 2011).

[64] *H&R Block*, 833 F. Supp. 2d at 84 n.35. The court also rejected the mechanical use of minimum market share thresholds to find liability under a theory of unilateral effects. *Id.*

[65] At least one recent challenge filed by the Federal Trade Commission reflects the change in the emphasis in the 2010 Guidelines and may hint at future efforts to urge courts to adopt a more

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acknowledgement of the evolving understanding reflected in the 2010 Guidelines underscores that there has been a notable and influential change in presentation in the new Guidelines.

This departure from earlier guidelines shifts the starting point for merger analysis and creates a new flexibility with respect to interpretation for both the agencies and the courts.[66] Key factors that have led the U.S. agencies to adopt this approach are the sophisticated institutional structures developed from years of experience in reviewing mergers, ample financial and human capital, and the variety of factual evidence available to the agencies during their investigations.[67] The constraining effect of the courts, which relies on a robust body of antitrust law developed over decades, is also an important factor in preventing the agencies' newfound flexibility from being abused.

However, for emerging markets, market definition often remains the starting point for merger analysis,[68] and it is one of the most difficult tasks that confronts the competition authorities in those countries, especially where they may lack access to more sophisticated forms of evidence and analysis.[69] Increased flexibility in emerging markets, thus, may unduly increase legal

flexible view to market definition. *See* 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 1. The complaint filed in *F.T.C. v. Reading Hospital* led with direct evidence of competitive effects obtained from documents and witness testimony before relying secondarily on market shares and market concentration to prove a violation of Section 7 of the Clayton Act. The complaint emphasized that "it can be inferred from this [direct evidence] alone that the Acquisition will result in serious competitive harm." Complaint, *In re* Reading Hospital & Surgical Institute of Reading (No. 9353), *available at* http://www.ftc.gov/os/adjpro/d9353/121116readingsurgicalcmpt.pdf. As the Guidelines attest in Section 4, direct evidence of competitive effects does not have to be an alternative to, or replacement for, market definition; direct evidence of competitive effects (or of their absence) can support or refute the validity of an antitrust market defined through other methods. Moreover, techniques (for example, a particular econometric model) used to produce direct evidence of competitive effects can often be used for a market test (for example, the SSNIP test) as well.

66 *See, e.g.*, AUTORITÉ DE LA CONCURRENCE, MERGER CONTROL GUIDELINES ¶ 301 (2009) (asserting that although market definition is an "essential step" in merger review, defining the relevant market may be left "open" when "market definition is not indispensable for reaching a conclusion"); *see also* Brandenburger & Matelis, *supra* note 58, at 51 n.61.

67 The DOJ and FTC can readily obtain data inputs for econometric analyses and thousands (or millions) of pages of documents from the parties to the transaction and third parties through voluntary requests, Second Requests, and subpoenas, and they possess, or can contractually acquire, the technical expertise necessary for processing them into pertinent information.

68 Ulf Bernitz & Shouzhi An, Case Comment, *Convergence or Parallel Paths? Comparison of Substantive Tests of Merger Control in EU and China*, 31 EUR. COMPETITION L. REV. 248, 250 (2010); Avinash Sharma, *Merger Control Under India's New Competition Law: A Comparative Perspective*, 32 EUR. COMPETITION L. REV. 602, 606 (2011). *See also* Joined Cases C-68/94 & C-30/95, France v. Comm'n of the European Communities, 1998 E.C.R. I-1375, 1998 C.M. L.R. 829 at 143; ANTIMONOPOLY COMMISSION, STATE COUNCIL GUIDELINES ON DEFINITION OF RELEVANT MARKET art. 2 (2009) (China) [hereinafter CHINA ANTIMONOPOLY COMMISSION].

69 COMPETITION POLICIES IN EMERGING ECONOMIES, *supra* note 20, at 26.

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uncertainty.[70] Overall, emerging market merger regimes benefit from examining and interpreting the premise of a transaction through a systematic, step-by-step process while the U.S. approach relies on the abundance of available fundamental economic analysis to justify deemphasizing market definition. Emerging markets are unlikely to achieve the same efficacy or derive comparable benefits from abandoning the market definition requirement. In jurisdictions unprepared or ill-equipped to maneuver with the flexibility required by the 2010 Guidelines, merger review practices should diverge from the U.S. approach and proceed with more caution.

The Chinese *Coca Cola/Huiyuan* case illustrates the importance of market definition in emerging market economies and exemplifies the potentially hazardous implications of divergence from this standard.[71] Before the Chinese Antimonopoly Guidelines came into effect and mandated market definitions in merger reviews,[72] the Ministry of Commerce of the People's Republic of China ("MOFCOM") blocked Coca Cola's acquisition of Huiyuan for $2.4 billion on March 18, 2009. In its decision, MOFCOM did not define a relevant market, which raised doubts as to whether the merger block was instigated by nationalism or a bias favoring domestic companies.[73] This case is a clear warning sign that increased flexibility in merger analysis in the hands of competition law authorities without substantial experience could lead to arbitrary decisions or decisions that may be perceived as arbitrary.

B. De-Emphasized Market Shares and Concentration

Market shares and concentration have also decreased in importance under the 2010 Guidelines, due to reduced emphasis on market definition and the introduction of a step-by-step approach to assessing the anticompetitive effects of mergers in the United States.[74]

The 2010 Guidelines, in line with the previous Guidelines, acknowledge that, while high market shares are indicative of enhanced market power, this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to actually increase market power.[75] Indeed, market shares have

[70] Wei, *supra* note 17, at 10.

[71] *See* MOFCOM, Notice 22/2009 of MOFCOM on Coca-Cola Company Merger with Huiyuan Juice Group Ltd. (2009), *available at* http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html (the *Coca-Cola/Huiyuan* acquisition was the first transaction to have been prohibited since the AML took effect in August 2008).

[72] China Antimonopoly Commission, *supra* note 68, art. 2.

[73] Chrisopher Hamp-Lyons, *The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review*, 62 Vand. L. Rev. 1577, 1601 (2009); Calvani & Alderman, *supra* note 11, at 131.

[74] 2010 Horizontal Merger Guidelines, *supra* note 1, § 2.1.3.

[75] *Id.* § 2.1.3 ("Mergers that cause a significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power, but this presumption can be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power.").

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always served as rebuttable presumptions.[76] However, in the 2010 Guidelines, the emphasis on when and how market definition and concentration are evaluated in a merger review has been substantially altered, and both factors are now analyzed secondarily to the description and examination of competitive effects.

Nonetheless, just as defining the scope of the relevant market is a fundamental tool for adequately assessing the competitive effects of a proposed merger, market shares serve as important proxies for market power[77] when other evidence is not available. Market concentration indices such as HHIs can illuminate the foreseeable impact of mergers on competition, including discouraging "false positives." Moving away from market shares and concentration in emerging markets whose competition agencies are less equipped to engage in more nuanced analyses runs the risk of producing arbitrary and opaque decisions by competition law authorities, and setting off costly legal processes, due to the less structured nature of this method of analysis.[78]

C. Reassessing Market Entry

The 2010 Guidelines eliminated the bright-line test of what "timeliness" ordinarily means for determining whether a horizontal merger raises concerns in light of the ease of market entry. The 2010 Guidelines moved away from the two years rule and replaced it with an approach that concentrates more on industry-specific conditions and uses more general language. The new wording provides less specific guidance, while adhering to the principle that in certain cases an otherwise anticompetitive transaction may not be challenged by the U.S. competition authorities if entry is deemed to be "timely, likely, and sufficient."[79]

[76] *See generally* 2007 A.B.A. SEC. ANTITRUST L., ANTITRUST L. DEVELOPMENTS 231 (6th ed. 2007) ("A market share in excess of 70 percent generally establishes a prima facie case of monopoly power, at least with evidence of substantial barriers to entry and evidence that existing competitors could not expand output."); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 319 ¶ 801a (2d ed. 2002) ("Although one cannot be too categorical, we believe it reasonable to presume the existence of substantial single-firm market power from a showing that the defendant's share of a well-defined market protected by sufficient entry barriers has exceeded 70 or 75 percent for the five years preceding the complaint."); *see also* Basic Inc. v. Max L. Levinson, 485 U.S. 224 (1988); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945); Am. Tobacco Co. v. United States, 328 U.S. 781, 813–14 (1946); Exxon Corp. v. Berwick Bay Real Estates Partners, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam); Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 n.18 (10th Cir. 1989) (citation omitted); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005).

[77] CHRISTOPHER W. BELLAMY & GRAHAM D. CHILD, EUROPEAN COMMUNITY LAW OF COMPETITION 240 (Peter Roth & Vivien Rose eds., Oxford Univ. Press 6th ed. 2008); *see also* RICHARD WHISH, COMPETITION LAW 25 (6th ed., Oxford Univ. Press 6th ed. 2009); ALISON JONES & BRENDA SUFRIN, EU COMPETITION LAW 61–84 (Oxford Univ. Press 4th ed. 2010) (for general discussions of market definition and market power).

[78] GIORGIO MONTI, EC COMPETITION LAW 17 (Cambridge Univ. Press 2007).

[79] 2010 HORIZONTAL MERGER GUIDELINES, *supra* note 1, § 9.

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By abandoning the two-year requirement, U.S. merger review authorities adopted, instead, a "rapid" entry criterion.[80] "Rapid" entry into the market may signify a period shorter or longer than two years. The speed and ease with which firms can become market participants can also depend on whether the pre-entry time frame is short enough to prevent significant consumer harm when deterrence of anticompetitive effects fails. Thus, timely entry into the market is not defined with any meaningful specificity in the 2010 Guidelines, and this arguably causes the Guidelines to provide less useful guidance to businesses than before.[81]

Other mature competition regimes have also adopted similar criteria for determining the parameters of appropriate market entry, but they continue to standardize their merger review guidelines based on more explicit timeframes. The Merger Enforcement Guidelines in Canada ("Canadian Guidelines"),[82] for example, require a two-year period, in conjunction with the relevant case law,[83] to determine whether the beneficial effects of entry on market prices have occurred, similar to the previous U.S. practices and the EC Merger Guidelines.[84] Despite this precise limit, the Canadian Competition Bureau operates with a broad mandate, within which it applies its enforcement for mergers causing anticompetitive effects, and some divergence has been observed between actual enforcement practices and the Canadian Guidelines.[85]

As seen in the differing levels of specificity prescribed by the U.S. and the Canadian Guidelines, and the different ways that flexibility versus rigidity manifests in those jurisdictions, competition authorities in emerging markets should adopt a competition policy that is well suited to the capacities of their particular jurisdictions to skillfully execute merger control measures.[86] While some jurisdictions may have the capability to assess entry solely on a case-by-case basis, others may benefit from more prescribed limits.

D. Coordinated Effects

The 2010 Guidelines identify coordinated effects as a credible basis for competitive harm due to explicit agreements among firms or coordinated

[80] *Id.* § 9.1.

[81] 1992 Horizontal Merger Guidelines, *supra* note 52, § 3.2 (timely entry is defined as an entry that could be completed "within two years.").

[82] Competition Bureau Canada, Merger Enforcement Guidelines (2011), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf [hereinafter Canada Merger Guidelines].

[83] *Id.* § 6.3 (timeliness).

[84] European Commission Notice, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 3, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:en:PDF [hereinafter 2004 European Commission Notice]; European Commission, Case M.430, Procter & Gamble/VP Schickedanz, 1994 O.J. (L 354) 32, ¶ 77.

[85] *See* Canada (Commissioner of Competition) v. Superior Propane Inc., [2003] 3 F.C. 529 (Can.).

[86] Kovacic, *supra* note 7, at 1111.

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interaction through parallel accommodating conduct.[87] In the latter scenario, each competitor's response to the competitive moves made by the others encourages further price increases and weakens competitive incentives to reduce prices or to offer customers better terms.[88]

The 2010 Guidelines retain the traditional analytical elements used for evaluating the risk of coordinated interaction due to a merger but also clarify the essential role of market concentration and propose methods for reviewing the significance and consequences of each of these elements.[89] Accordingly, the presence of three conditions may lead to a merger challenge by the U.S. agencies: (1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) the market shows signs of vulnerability to coordinated conduct; and (3) there is a credible basis to conclude that the merger may enhance that vulnerability.

The 2010 Guidelines provide numerous details with respect to the question of what it means for a market to be vulnerable to coordination—many factors that are common to the previous Guidelines and to horizontal merger guidelines around the world.[90] Nonetheless, the open-ended nature of this approach to coordinated effects analysis provides intriguing but potentially risky options for competition authorities in emerging market economies. If antitrust enforcement practices for parallel accommodating conduct rely on the notion that "I know an anticompetitive effect when I see it,"[91] the implications for emerging markets would be tantamount to arbitrary scaremongering by competition authorities.

Emerging market economies may benefit most from adopting the EC Merger Guidelines approach, which identifies coordinated effects as a type of anticompetitive conduct based on either express or tacit understandings.[92]

[87] 2010 Horizontal Merger Guidelines, *supra* note 1, § 7 ("Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others."). *Cf.* 1992 Horizontal Merger Guidelines, *supra* note 52.

[88] 2010 Horizontal Merger Guidelines, *supra* note 1, § 7 ¶ 2. ("Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction. Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms.")

[89] *Id.* § 7 ("Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others.").

[90] Examples include previous collusion, market transparency, and the ability to observe rivals, rivals' ability to respond, contract terms, the characteristics of the buyer, and so forth.

[91] *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing obscenity).

[92] 2004 European Commission Notice, *supra* note 83, ¶ 39; 2010 Horizontal Merger Guidelines, *supra* note 1, § 7.

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The EC Merger Guidelines also specify three key conditions that must be present for coordinated effects concerns to arise, providing helpfully specific guidance to emerging markets.[93]

E. Assessment of the U.S. Merger Guidelines

The evolution reflected in the 2010 Guidelines clearly demonstrates the increasing familiarity with competition law issues in the United States. Extensive experience in analyzing mergers and substantial investigative resources provide the authorities in the United States with the ability to enact flexible regulations and enforce them with sophisticated economic analysis tools for assessing mergers. The recent modifications to market definition, market shares, timely market entry, and coordinated effects indicate the growing flexibility and nimbleness of merger analysis in the United States. Although U.S. merger review practices have traditionally served as a model for countries that are in the process of developing merger laws, the modified approach in the United States following the 2010 Guidelines may require emerging market economies to more closely scrutinize the suitability of the U.S. practices as a model for their own laws and adopt the new guidelines only after adjusting them in line with their own experiences, skills, and capabilities.

IV. ASSESSMENT OF TURKISH MERGER CONTROL

As an emerging market economy, Turkey's economic growth impacts the development of its competition law. Although the implementation of competition law in Turkey has a relatively short history,[94] the applicable legislative framework has undergone numerous changes to improve and enhance competition law in line with the growing economy. Turkey represents an ideal test case for assessing the potential impact of external influences on the competition law policies of an emerging market economy.[95] Turkey is a prototypical

[93] 2004 European Commission Notice, *supra* note 83, ¶¶ 44–55 ((1) The merger must increase the likelihood that competitors will reach a common understanding on the terms of coordination; (2) There must be means for effectively monitoring firms' adherence to the common understanding; and (3) There must be credible deterrent mechanisms to respond to deviations.).

[94] The national competition law agency responsible for enforcing merger control rules in Turkey is the Turkish Competition Authority, a legal entity with administrative and financial autonomy. The Turkish Competition Authority was established in 1997. The Turkish Competition Authority consists of the Competition Board, the Presidency, and the Main Service Units. As the competent decision-making body of the Turkish Competition Authority, the Turkish Competition Board is responsible for, *inter alia*, reviewing and resolving merger and acquisition notifications.

[95] *See* Turkish Competition Board, Decision No. 09–33/744–180, Akşehir—Dialysis (July 15, 2009); Turkish Competition Board, Decision No. 09–36/912–220, Lanxess-Gwalior (Aug. 19, 2009); Turkish Competition Board, Decision No. 05–86/1187–339, Çimsa-Modern Çimento (Dec. 20, 2005) (for references to the 1992 Guidelines).

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example of an emerging market economy with a competition law regime modeled according to Western standards.[96]

A. Merger Control Under Turkish Competition Law

Merger control in Turkey is primarily regulated under Article 7 of Law No. 4054 on the Protection of Competition (the "Turkish Competition Law").[97] Article 7 governs mergers and acquisitions, and authorizes the Turkish Competition Board to regulate which mergers and acquisitions require a notification to the Board in order to gain legal validity.

The Turkish merger regime underwent two substantial revisions immediately following the adoption of the 2010 U.S. Guidelines,[98] neither adopting a flexible merger review approach comparable to that of the 2010 U.S. Guidelines. First, Communiqué No. 2010/4 set out new criteria for transactions that need to be notified to the Turkish Competition Authority. The new legislation created an affected market test for notification that relies on the notion of market definition, in contrast to the recent de-emphasis on market definition in the United States. An affected market is one that has "a possibility to be impacted by" the transaction, where the merging parties have commercial activities, whether horizontally or vertically. The second significant change was the adoption of the Guidelines on Undertakings Concerned, Turnover and Ancillary Restrictions in Mergers and Acquisitions, which closely parallels European Commission standards in defining the undertakings and turnover calculations that are covered by the merger control regime. Despite these

[96] *See* International Bar Association, *Interview with Murat Çetinkaya, Competition Board Member, Competition Authority Turkey*, 5 COMPETITION L. INT'L 28 (2009) (On the question of "What other competition agency in the world do you regard as most influential?" Çetinkaya responds: "When it comes to defining the most influential competition agency, I think we see a competition between DG COMP of the European Union and the US agencies (FTC and DOJ).").

[97] Turkish Competition Law, No. 4054, art. 7 ("Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking—except by way of inheritance—of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its/their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited. The Board shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Board and for which permission has to be obtained, in order for them to become legally valid.").

[98] Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board (published in the Turkish Official Gazette, Oct. 7, 2010, enforced Jan. 1, 2011); Communiqué No. 1997/1 on Mergers and Acquisitions Subject to the Approval of the Competition Board (the Communiqué that preceded Communiqué No. 2010/4, and continued to be enforced until January 1, 2011 by the Turkish Competition Authority as an important instrument in assessing merger cases in Turkey); *see also* Turkish Competition Authority, Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions (Nov. 2010) (for enforcing Communiqué No. 2010/4).

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recent changes, enforcement policy in Turkey with respect to merger control issues is still nascent.

B. Market Definition

Under Turkish competition law,[99] as in the U.S. Guidelines and EC competition law,[100] demand-side substitutability is one of the most effective and important factors for defining the relevant market. An increase in the price of a good normally affects the demand for that particular good, which decreases as a result of demand-side substitutability. The quickest and most practical response to an increase in the price of a good is decreased demand, assuming there are available substitutes, which makes demand-side substitutability a key component in defining the relevant product market under competition law. However, where supply-side substitutability has a comparable magnitude with demand-side substitutability, the two will be taken into consideration together.[101]

The Turkish Competition Board's guidelines on the enforcement of Turkish merger control rules are based explicitly on market definition, as well as supply-side and demand-side analysis. The specificity of the guidelines provides valuable resources to companies considering a merger. The respective guidelines are closely modeled after the European Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law.[102]

C. Market Shares, Concentration, and Market Entry

The criteria used in assessing market shares, concentration, and market entry in the Turkish competition law regime fall into many categories, but, in

[99] Turkish Competition Authority, Turkish Guidelines on the Definition of the Relevant Market 3–4 (2008), *available at* http://www.rekabet.gov.tr/File/?path=ROOT/Images/Application+Guide/kilavuz8.pdf [hereinafter Turkish Relevant Market Guidelines].

[100] *See* BELLAMY & CHILD, *supra* note 77, at 743 ("In defining relevant product markets and appraising the parties' market positions, the Commission takes account of . . . notably the competitive constraints placed on the parties by demand-side substitution, supply-side substitution and potential competition.").

[101] Turkish Relevant Market Guidelines, *supra* note 99, at 3-4.

[102] *See* European Commission, 1997 O.J. (C 372) 3, *supra* note 58. The Turkish Competition Board also released two other comprehensive guidelines on merger control. *See* Turkish Competition Authority, Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions, *available at* http://www.wipo.int/edocs/lexdocs/laws/en/tr/tr130en.pdf (covering topics and questions regarding (1) the undertakings concerned, (2) turnover calculations, and (3) ancillary restraints. This document is closely modeled after Council Regulation (EC) No 139/2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:en:NOT; Turkish Competition Authority, Guidelines on Remedies That Are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions (2011), *available at* www.wipo.int/edocs/lexdocs/laws/en/tr/tr129en.pdf (almost an exact Turkish translation of two documents: European Commission, Commission Notice on Remedies Acceptable Under Council Regulation (EC) No 139/2004, 2008 O.J. (C 267) 1; Commission Regulation (EC) No 802/2004 Implementing Council Regulation (EC) No. 139/2004, 2004 O.J. (L 133) 1).

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essence, the Turkish Competition Authority takes into consideration mainly the structure of the relevant market and conducts its merger review based on market shares and concentration, as well as a market dominance test.[103] Article 3 of Law No. 4054 defines "dominant position" as "any position enjoyed in a certain market by one or more undertakings by virtue of which, those undertakings have the power to act independently from their competitors and purchasers in determining economic parameters such as the amount of production, distribution, price and supply." The approach relies on a two-prong test wherein, to block a transaction, the resulting concentration must both create or strengthen a dominant position and also significantly impede competition in at least a substantial part of the country.

Commentators have expressed the view that the rationale behind analysis of market shares and concentration under Turkish law is not wholly realized as the applicable legislation provides for a typical market definition and market share assessment but overlooks product differentiation and fails to take into account any economic methods for evaluating the direct effects of mergers on prices, such as those incorporated in the 2010 Guidelines.[104] Nonetheless, the framework has thus far led to a fair measure of consistency and reliability in agency actions.

Selected case law of the Turkish Competition Board and the Council of State, summarized below, shed light on the interpretation adopted by the Board in assessing market shares and concentration.

In the first-ever decision by the Turkish Competition Board to prohibit an acquisition in 2000,[105] the Board reviewed the purchase by Toros Gübre of İGSAŞ's shares (amounting to 99.98% of outstanding shares) and refused to clear the transaction on the grounds that the barriers to market entry were high. The Board explicated its reasoning by stating that, given the oligopolistic nature of the market, Toros Gübre would control more than half of the sales in the market for fertilizers after the acquisition, thereby achieving a dominant position in this market. The Turkish Competition Board considered structural parameters as well as balancing factors in its analysis, while also evaluating the relevant market from a dynamic efficiency perspective.[106]

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[103] Mehmet Yanık, *Rekabet Hukukunun Hakim Durum ve Hakim Durumun Kötüye Kullanılması Uygulamalarında Piyasa Giriş Engelleri* [Entry Barriers to the Market in the Practice of Dominance and Abuse of Dominance in Competition Law], Expert Thesis, Turkish Competition Authority (Feb. 2003), *available at* http://www.rekabet.gov.tr/File/?path=ROOT/Documents/Uzmanl%C4%B1k+Tezi/tez19.pdf.

[104] Remzi Özge Arıtürk, *Birleşmelerin Kontrolünde Kullanılan Esasa Ilişkin Test: AB Deneyimi ve Türkiye için Çıkarımlar* [The Substantive Test Used in Merger Control: The EU Experience and Inferences for Turkey] 64, Expert Thesis No. 91, Turkish Competition Authority (May 2009), *available at* http://www.rekabet.gov.tr/File/?path=ROOT/Documents/Uzmanl%C4%B1k+Tezi/tez108.pdf.

[105] Turkish Competition Board, Decision No. 00–43/464–24, *IGSAŞ* (Nov. 3, 2000).

[106] A stylized unilateral-effects model retrospectively applied to this case predicted large price increases related to the merger. Serdar Dalkır & Ekrem Kalkan, *Predicting Potential Welfare*

In its *Gaziantep Çimento* decision,[107] the Turkish Competition Board once again declined to approve the transaction, this time in 2005, by reasoning that the merged company would become twice as big as its closest competitor in terms of market share. The Turkish Competition Board also concluded that the market in question had low demand-side flexibility and was mature, with very high barriers to entry.[108] The Turkish Competition Board interpreted these high entry barriers as indicating a need for USD $100 million in capital to enter into the market, the use of economies of scale, the presence of vertical integration, and the need for a wide network of distribution.[109] Based on these factors, the Turkish Competition Board ultimately decided to block the merger.

Market entry has also been an important factor in assessing mergers and acquisitions in Turkey, albeit an area that is not often referenced in the Turkish Competition Authority precedents. Analysis conducted with respect to market entry is often presented in a narrow context.[110] Nonetheless, market entry conditions are a potential remedy to mergers and acquisitions under the rules of the Turkish Competition Board; lowering entry barriers to prompt the entry of new competitors into the market is held to potentially counteract the potential anticompetitive effects of a merger.[111]

D. Coordinated Effects

Traditionally, the Turkish Competition Authority has assessed mergers and acquisitions by focusing on their unilateral effects. In exceptional cases, however, the Competition Board has evaluated coordinated effects under a joint dominance test, and rejected certain transactions on those grounds. For

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Effects of Actual and Hypothetical Merger Proposals in the Turkish Privatization Program, 31 METU STUD. DEV'T 167 (2004); Serdar Dalkır & Ekrem Kalkan, *Bir Yoğunlaşma İşlemi Sonucunda Ortaya Çıkması Beklenen Refah Etkilerinin PCAIDS [Proportionality-Calibrated AIDS] Modeli Ile Tahmin Edilmesi: IGSAŞ'ın Özelleştirilmesinin "Tek Taraflı Etkileri" [Unilateral Effects]* [Predicting Potential Welfare Effects Through the PCAIDS Model: "The Unilateral Effects" of the Privatization of IGSAŞ], 19 TURKISH COMPETITION J. 6 (2004).

[107] Turkish Competition Board, Decision No. 05–86/1190–342, *Gaziantep Çimento* (Dec. 20, 2005).

[108] *See also* Turkish Competition Board, Decision No. 05–86/1192/344, *Van Çimento* (Dec. 20, 2005); *see, e.g.*, Turkish Competition Board, Decision No. 06–96/1225–370, *THY-DO&CO/USAŞ* (Dec. 29, 2006); Turkish Competition Board, Decision No. 00–29/308–175, *Glaxo Wellcoeme/Smithkline Beecham* (Aug. 3, 2000); Council of State, Decision No. 2005/10038, *Ladik Çimento* (Mar. 1, 2006).

[109] *See* Turkish Competition Board, Decision No. 05–86/1190–342, *Gaziantep Çimento* (Dec. 20, 2005).

[110] Yanık, *supra* note 103, n.109.

[111] Turkish Competition Authority, Guidelines on Remedies that Are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions 21 § 3.1.1 (2011), *available at* http://www.rekabet.gov.tr/dosyalar/kilavuz/kilavuz16.pdf.

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example, the Turkish Competition Board considered the coordinated effects of the sale of cement factories by the Savings Deposit Insurance Fund and blocked the transactions under this test because it concluded that the transactions would lead to joint dominance in the relevant market. The Turkish Competition Board took into account factors such as structural links between the undertakings in the market, past coordinative behavior, entry barriers, transparency of the market, and the structure of demand. The Competition Board concluded that certain factory sales would lead to joint dominance by certain players in the market and thus impede competition. In a subsequent appeal, the Council of State held, *inter alia*, that Turkish Competition Law prohibited only unilateral dominance and therefore stayed the implementation of the Competition Board's decision, which was based on an economic theory of collective dominance.

E. Reflections on the Turkish Merger Control Regime

The post-2010 revisions to the Turkish merger control regime reflect both convergence and divergence from trends in the United States and other developed jurisdictions. Although the text of Communiqué No. 2010/4 is concise on certain topics, its overall posture embodies some of the antitrust imprints from the U.S. approach, as well as the direct influence of the EC Merger Regulation and the Consolidated Jurisdictional Notice under Council Regulation.[112] Nonetheless, the emphasis on legal certainty is apparent from revisions such as the shift to turnover thresholds instead of market share thresholds for notification, sparing companies from engaging in thorny issues of market definition to determine whether notification is necessary.

Through Communiqué No. 2010/4, the Competition Board was expected to shift its focus from merger control cases to cartel and abuse of dominance cases.[113] Raising the merger control thresholds and determining an affected market for notification purposes were considered solid and effective measures intended to decrease the number of required merger notifications. Instead,

[112] Council Regulation 139/2004, On the Control of Concentrations Between Undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1 (EC); European Commission, Commission Consolidated Jurisdictional Notice Under Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings, 2008 O.J. (C 95) 1.

[113] *See* OECD, 2011 ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN TURKEY 16 (May 31, 2012), *available at* www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/AR(2012)8&docLanguage = En; s*ee also* COMPETITION AUTHORITY, 14TH ANNUAL REPORT (2013), *available at* http://www.rekabet.gov.tr/File/?path=ROOT/Documents/Faaliyet%20Raporlar%C4%B1/faaliyet14.pdf (in 2012, out of the 687 cases in total, the Competition Board decided on a total of 303 antitrust infringement cases, 282 mergers, acquisitions, and joint venture cases, and 50 related to exemption and negative clearance cases); Turkish Competition Authority Statistics, Table 1—Distribution of Cases Based on Their Types (2012), *available at* http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKarar+%C4%B0statistik%2f2012.pdf.

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there was a significant increase in the number of merger control filings in 2011, due to the confluence of a number of unforeseen factors. First, overlaps at the global level are now sufficient to trigger a notification requirement, provided that one of the parties to the transaction has activities in Turkey in at least one of the overlapping areas. Second, companies have been inclined toward a risk-averse interpretation of the scope of an affected market, and prefer to be cautious and file notice of a transaction for legal certainty. Third, the merger control thresholds are relatively low. Although the Turkish Competition Board's purpose was to require fewer merger control notifications and concentrate on more rigorous antitrust enforcement in other areas, the revised guidelines, low thresholds, and concerns over the affected market requirement point toward increasing convergence with developed countries.

These developments may exert a long-term influence as the Turkish merger regime gains momentum under the Competition Authority's practice.[114] However, particular attention should be placed on the EC merger control system, which could provide a useful point of departure from the U.S. merger control system in light of the changes brought by the 2010 Guidelines discussed above.

V. CONCLUSION

Domestic and cross-border mergers and acquisitions are integral features of the global economy. An appropriate regulatory framework for effective enforcement of competition laws is crucial for emerging market economies to establish policies aligned with developed economies. Nonetheless, domestic political and economic considerations cannot be overlooked when emerging market economies converge with (or diverge from) the approaches embraced by developed economies.

The revisions to the U.S. Horizontal Merger Guidelines could pave the way for emerging market economies to converge their merger review policies with those of leading competition enforcement agencies in jurisdictions that have adequate resources, access to evidence, and reliable oversight mechanisms. Otherwise, however, the revisions could cause emerging market economies to depart from the tradition of modeling their competition laws on certain prominent competition authorities. Emerging market economies may recognize the potential challenges to implementing policies aligned with U.S. merger practices and instead adopt practices aligned with their appropriate level of expertise and access to regulatory skills and resources.

[114] The Draft Guidelines on Transactions Considered as Mergers and Acquisitions and the Concept of Control was released for public consultation in early April 2013, which is a clear sign of the Competition Authority's willful intention to provide guidance in line with evolving competition law practices across the world.

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Among the most prominent divergences in U.S. merger practices is a departure from the traditional five-step formulaic approach, and its replacement with an integrated approach to determining whether a transaction will result in competitive harm.[115] The U.S. approach toward market definition, market shares, market entry, and coordinated effects provide the U.S. authorities with flexibility backstopped by the oversight provided by the judiciary. However, such revisions could raise questions for emerging market economies regarding the resulting lack of transparency from the 2010 Guidelines. The fact-driven process underlying U.S. practices could support a myriad of methods for conducting merger analysis, thereby fostering legal uncertainty rather than transparency in emerging markets.

As liberating as the U.S. approach appears to be, the implications for merger policies employed in emerging markets indicate that these economies are largely unprepared to adopt these changes in their entirety. The relatively minimal experience of the competition authorities and the judiciary in most emerging market economies acts as a barrier to the successful implementation of the flexible requirements adopted by the United States. In ill-prepared economies, the open-ended nature of the 2010 Guidelines' framework could produce arbitrary decisions subject to corruption or disregard for competition law efforts and undermine efforts to increase the credibility of competition law policy.

The U.S. approach could be viewed as either an intellectual guidepost or a critical tipping point causing unforeseeable consequences for competition law enforcement in emerging markets. Legislative developments in Turkish competition law, in particular, align themselves with competition policies adopted by other emerging markets rather than with the fact-intensive approach embodied in the U.S. Guidelines. While the original U.S. approach to competition law could serve as a valuable model, emerging market economies need to recognize the limits of their current capabilities and implement effective policies for assessing mergers and acquisitions, regardless of revised approaches in developed economies.

APPENDIX

In a seminal article, Gregory J. Werden proposed a test for the likely price effect of a merger that is not sensitive to the demand function.[116] He derived the following formula which states for a merger between product 1 and

[115] U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines 2 (2006) ("the ordering . . . in the Guidelines . . . is not . . . significant, because the Agencies do not apply the Guidelines as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies or failing assets."), *available at* http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

[116] Werden, *supra* note 44.

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product 2 the magnitude of the percentage reduction in the marginal cost of product 1 that is required to exactly offset the merged firm's unilateral incentive to increase the price of product 1 relative to its premerger price:

$$E_1^* = \frac{m_1 d_{12} d_{21} + m_2 d_{12} p_2 / p_1}{(1 - m_1)(1 - d_{12} d_{21})}, \tag{1}$$

where, somewhat differently from the original notation, E_1^* denotes the percentage reduction in the marginal cost of product 1 required to exactly offset the merged firm's incentive to raise the price of product 1, m_1 and m_2 are the premerger price-marginal cost margins, each expressed as a percentage of the respective product price, d_{12} (d_{21}) is the diversion ratio from product 1 to product 2 (from product 2 to product 1), and p_1 and p_2 are the premerger product prices.

For the UPP test, two basic formulas have been proposed. The following expression has been proposed as the *accurate* UPP formula to test the likelihood of a merger-related price increase:[117]

$$d_{12}(p_2 - c_2) + d_{12} d_{21}(p_1 - c_1(1 - E_1)) - E_1 c_1 > 0, \tag{2}$$

where E_1 is the level of percentage reduction in marginal cost that the agency credits to product 1. Expression 2 implies that unless E_1 is sufficiently large, the left-hand side will be positive, signaling that the merged firm will find it profitable to unilaterally increase the price of product 1 relative to its premerger price despite the reduction in marginal cost. Farrell and Shapiro derive expression 2 from Werden's formula displayed as equation 1 above. The relationship between equation 1 and expression 2 is such that when the output of Werden's formula (E_1^*) is substituted for E_1 in expression 2, the left-hand side of expression 2 equals exactly zero:

$$d_{12}(p_2 - c_2) + d_{12} d_{21}\left(p_1 - c_1\left(1 - E_1^*\right)\right) \; - E_1^* \, c_1 \equiv 0. \tag{3}$$

If $\hat{d}_{12}$ is the measured value of d_{12} such that $\hat{d}_{12} = d_{12} + \varepsilon$ for some error value $\varepsilon > 0$, substituting $\hat{d}_{12}$ for d_{12} on the left-hand side of 3 and writing out $\hat{d}_{12} = d_{12} + \varepsilon$ yields:[118]

$$\varepsilon\left((p_2 - c_2) + d_{21}\left(p_1 - c_1\left(1 - E_1^*\right)\right)\right) \; > 0. \tag{4}$$

The left-hand side of inequality 4 is positive because both $p_2 - c_2$, the

117 Farrell & Shapiro, *supra* note 42, at 13.

118 Substituting $d_{12} + \varepsilon$ for d_{12} in equivalence 3 produces $(d_{12} + \varepsilon)(p_2 - c_2) + (d_{12} + \varepsilon)\, d_{21}\, (p_1 - c_1 (1 - E_1^*)) - E_1^*\, c_1$, which, after de-parenthesizing $(d_{12} + \varepsilon)$, becomes $d_{12}\, (p_2 - c_2) + d_{12}\, d_{21}\, (p_1 - c_1\, (1 - E_1^*)) - E_1^*\, c_1 + \varepsilon\, (p_2 - c_2) + \varepsilon\, d_{21}\, (p_1 - c_1\, (1 - E_1^*))$. This is equal to $\varepsilon\, (p_2 - c_2) + \varepsilon\, d_{21}\, (p_1 - c_1\, (1 - E_1^*))$ because $d_{12}\, (p_2 - c_2) + d_{12}\, d_{21}\, (p_1 - c_1\, (1 - E_1^*)) - E_1^*\, c_1 \equiv 0$ (see equivalence 3). Finally, $\varepsilon\, (p_2 - c_2) + \varepsilon\, d_{21}\, (p_1 - c_1\, (1 - E_1^*))$ can be parenthesized into $\varepsilon\, ((p_2 - c_2) + d_{21}\, (p_1 - c_1\, (1 - E_1^*)))$.

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premerger margin of product 2, and $p_1 - c_1\ (1 - E_1^*)$), the margin on product 1 that accounts for merger efficiencies, are positive. This demonstrates that when product 1 is credited with the marginal cost reduction E_1^*, an upward error in the measurement of d_{12} will always create a false-positive result based on the accurate UPP formula—that is,

$$\begin{aligned}\hat{d}_{12}\ (p_2 - c_2) + \hat{d}_{12}\ d_{21}(p_1 - c_1(1 - E_1^*))\ - E_1^*\ c_1 \\ = \varepsilon((p_2 - c_2) + d_{21}(p_1 - c_1(1 - E_1^*)))\ > 0.\end{aligned}$$

Farrell and Shapiro also propose a more conservative UPP test based on a simpler formula:[119]

$$d_{12}(p_2 - c_2) - E_1 c_1 > 0. \quad (5)$$

Substituting E_1^* for E_1 and using inequality 3,

$$d_{12}(p_2 - c_2) - E_1^*\ c_1 \equiv\ - d_{12}d_{21}(p_1 - c_1(1 - E_1^*\ )). \quad 6)$$

The right-hand side of equivalence 6 is negative, which means that if the agency credits E_1^* as the percentage efficiencies for product 1, the simple UPP formula will produce a negative result, rather than zero. Relative to the accurate UPP formula, the simple formula is more conservative because its result may be negative even when the efficiencies are somewhat lower than E_1^*. Because of this, we refer to the simple formula as conservative. If d_{12} on the left-hand side is measured with error ε, equivalence 6 becomes:

$$(\mathrm{d}_{12} + \varepsilon)(\mathrm{p}_2 - \mathrm{c}_2) - E_1^*\ \mathrm{c}_1 \equiv\ - \mathrm{d}_{12}\mathrm{d}_{21}(\mathrm{p}_1 - \mathrm{c}_1(1 - E_1^*))\ + \varepsilon(\mathrm{p}_2 - \mathrm{c}_2). \quad (7)$$

When constructing the right-hand side of equivalence 7, the term $\varepsilon(p_2 - c_2)$ has been added to the right-hand side of equivalence 6 to preserve the identity. If ε is relatively small, equivalence 6 can be negative. Specifically, if $\varepsilon < d_{12}\ d_{21}$ $(p_1 - c_1\ (1 - E_1^*))/(p_2 - c_2)$, then the conservative UPP formula will be negative. However, a sufficiently large error will imply a false positive for the conservative UPP formula as well. Table A-1, which gives a demonstrative example of the relationship between measured values and the UPP test result, presents an illustrative example of the false positives that can result from either of the two UPP formulas, depending on the relative magnitude of the measurement error.

[119] Farrell & Shapiro, supra note 42, at 11.

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Table A-1. Demonstrative example of the relationship between measured values and the UPP test result

Variable	Column (1) True value	Column (2) No measurement error	Column (3) Small (5%) measurement error	Column (4) Large (25%) measurement error
p_1	1.000			
p_2	1.000			
c_1	0.500			
c_2	0.500			
m_1	0.500			
m_2	0.500			
d_{12}	0.100	0.100	0.105	0.125
d_{21}	0.200			
$E_1 = E_1^*$	0.12245			
UPP_1: accurate	0	0	+0.00306 (false +)	+0.01531 (false +)
UPP_1: conservative	–0.01122	–0.01122	–0.00872	+0.00128 (false +)

Notes: For the assumed values of prices and marginal costs, even a small error in the measurement of d_{12} will produce a false positive based on the accurate UPP formula. A larger measurement error will produce a false positive based on either UPP formula.

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