BIAC Comments to revision of the OECD 1995 Recommendation of the Council concerning co-operation between Member countries on competition investigations and proceedings

February 25, 2014

The Business and the Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to make this written contribution on the revision of the 1995 Recommendation of the Council concerning co-operation between Member countries on competition investigations and proceedings (the “1995 Recommendation”) and looks forward to participating in the discussions.

BIAC reiterates the importance of effective international cooperation among agencies in the current competition realm. An appropriate transnational cooperation between competition authorities that are called upon to review anti-competitive practices and mergers, coupled with the observance of due process and procedural fairness principles, can expedite the review of transactions, avoid the risk of differential outcomes, bring down administrative burden and costs, and shorten the length of proceedings. These objectives are particularly relevant in light of the increasing number of competition agencies, the increased scope for inter-agency cooperation, the growth of informal cooperation between agencies, the globalisation of business activities and in particular the increase in the number of cross-border mergers.

BIAC fully supports the revision of the 1995 Recommendation and recognizes the significant progress made by the working group. Having regard to the amendments made by the drafting group, BIAC submits that the OECD Competition Committee considers a number of high level general observations while revising the 1995 Recommendation (section I. below). In advancing its observations, BIAC also submits an amended version of 1995 Recommendation and a detailed explanation of its revisions (section II. below). The comments below and the suggested modification to the draft that BIAC has received are of a preliminary nature. BIAC is pleased to contribute to the drafting process and the discussions relating thereto and intends to submit additional suggestions during that process.

I. GENERAL OBSERVATIONS

BIAC agrees that an effective legal framework for the exchange of confidential information should be centered around a clear articulation of the type of information that can be exchanged, the conditions for the transmission of confidential information to another enforcement agency and the use that the receiving agency can make of the confidential information received. Against this background, BIAC submits that the OECD Competition Committee should consider and integrate the following general observations while updating the 1995 Recommendation: (i) the observation of an appropriate level of transparency, procedural rights and due process; (ii) a clearer definition of the term “confidential information”; (iii) a differentiation in the application of the 1995 Recommendation to hard core cartels, on the one hand, and to mergers and anti-competitive practices other than hard core cartels, on the other hand; and (iv) a narrower and more precise definition of the concept of “competition authority.”

1) Due Process and Procedural Fairness
BIAC acknowledges that the international community devotes increased attention to the level of transparency and due process in agencies’ competition proceedings. Procedural fairness and due process have been at the forefront of competition law discussions. As pointed out by the OECD itself following the roundtables on procedural fairness and transparency, “fairness and transparency are essential for the success of antitrust enforcement, and regardless of the substantive outcome of a government investigation it is fundamental that the parties involved know that the process used to reach a competition decision was just.”

This report also recognized a “broad consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement, notwithstanding differences between prosecutorial and administrative systems, and other legal, cultural, historical, and economic differences among members”.

This topic has also been examined recently by the International Competition Network’s Agency Effectiveness Project on Investigative Process (April 2013) which conducted a member survey on transparency practices. Finally, FTC’s Chairwoman Edith Ramirez also emphasized the importance of fairness and due process in her keynote address at the 7th annual antitrust enforcement symposium in September 2013. In that address she discussed the differences in investigative processes that affect the actual and perceived fairness of agencies’ investigations and suggested that all systems should provide at least basic levels of fairness. According to her, “a transparent and meaningful dialogue between parties and agencies about procedures, working theories and the nature of the evidence is not only essential to safeguard rights of parties, but enables better informed agency decisions. Conversely, the failure to provide adequate protections is detrimental not only to the affected parties and agency but also undermine the legitimacy of the interlinked international antitrust enforcement system.”

These discussions, among others, support the integration of due process and procedural fairness principles in any discussion about co-operation between countries on competition investigations and proceedings. Differences in investigative procedures and the absence of adequate safeguards affect the manner in which fairness is being perceived in some jurisdictions. Nevertheless, it is widely recognized that companies should have a right to counsel, the right to understand the basis of the case against them, the right to be heard and respond to accusations.

Effective competition implies the requirement to observe the principles of due process. Procedural fairness should thus be a fundamental part of the effective cooperation between member countries that we are trying to foster through the revision of the 1995 Recommendation. Safeguarding these principles ensures not only an adequate protection of the rights and interests of the parties throughout proceedings, builds a greater sense of justice in the marketplace, but also contributes directly to effective international co-operation between competition enforcement agencies. BIAC recommends that appropriate references to the principle of due process and procedural fairness are inserted in the 1995 Recommendation. Without appropriate respect for due process in international enforcement co-operation, business would be subject to the most extensive of any investigation powers but with only the lowest level of respect for due process rights. These suggested insertions should not be interpreted as additional onerous pre-conditions imposed on the cooperating agencies, but as a guiding and underlying principle that enhances, in a constructive manner, the dynamics and the objectives of the 1995 Recommendation.

2) Confidential Information - Notion and Greater Protection

OECD may wish to expand on the notion of “confidential information”. The draft of the revised 1995 Recommendation defines this concept as follows: information the disclosure of which is prohibited or subject to restrictions under the laws, regulations or policies of a Member country; and

---

4 See explanation and example in section II paragraph 25 below.
companies' business secrets. This definition is not entirely helpful as it leaves open what is covered by the expression "business secrets", thus replacing one concept of uncertain meaning by another. This definition also allows historical information, leaving discretion and debate as to how old the non-public information has to be to be treated as non-confidential. Discretion and debate is also left open regarding disclosure of information that could potentially prejudice the commercial interests of an entity. BIAC believes a bright-line test for non-public information would be more useful and less subjective.

Thus, BIAC suggests the following definition of confidential information:

"Confidential information" refers to information the disclosure of which is either prohibited or subject to restrictions under the laws, regulations, or policies of a Member country concerned. In any event, information is defined as confidential if it constitutes non-public business information of an entity.

An alternative approach would be to specifically include information that could prejudice the interests of an entity as an alternative category that constitutes Confidential Information and to add that information in the public domain is generally not confidential:

"Confidential information" refers to information the disclosure of which is either prohibited or subject to restrictions under the laws, regulations, or policies of a Member country concerned. In any event, information is defined as confidential if it constitutes non-public business information of an entity or if its disclosure could potentially prejudice the commercial interests of an entity. Information in the public domain is generally not considered as confidential.

In any event, the confidential nature of business information deserves the highest consideration. Greater certainty and a greater consensus on the respect of such data among various agencies will ensure a better protection of undertakings' commercial interests and will eventually enhance international cooperation. BIAC considers that the OECD should play an important role in establishing this consensus. We put forward a suggested definition.

3) Differentiation between hard core cartels and mergers and other anti-competitive practices

BIAC acknowledges that the OECD intends to apply the revised 1995 Recommendation to mergers and all anti-competitive practices, without creating any differentiating regimes (although there are specific references to mergers, such as at ¶16). BIAC also understands that the drafting team is currently not inclined to create different regimes in order to avoid a “hierarchy” of information that should be exchanged between the agencies during merger filings, on one hand, and anti-competitive proceedings, on the other hand. BIAC supports the proposed broad scope of the revised 1995 Recommendation but underlines the importance of tailoring mechanisms for cooperation to the circumstances of different situations.

Hard core cartels are a broadly-recognised, defined category of serious violations, enforcement against which is a priority for competition agencies and for the business community which suffers from them. Their operations are generally clandestine and their investigation involves the collection of evidence of past wrongdoing and of activities which are completely beyond the parties' legitimate business strategies, although the evidence of wrongdoing may also incorporate legitimate confidential business information.

In contrast, the context and information involved in the review of mergers and anticompetitive practices other than hard core cartels are entirely different.

As regards mergers, these are legitimate transactions which form a key part of the competitive strategy of many businesses and which are generally efficiency-enhancing, often contributing positively to economic growth and the expansion of trade. To avoid the risk that in a small minority of cases mergers may significantly impede effective competition, many countries have chosen to subject all large mergers to prior notification and review. In the course of such notifications, merging
parties provide extensive information including current and forward-looking information of the most sensitive strategic importance to their business. In particular, they may be required to file Board papers and reports analyzing the merger and its rationale, including in some cases details of other acquisitions considered, competitive conditions and potential for growth and expansion. So the context of mergers involves legitimate transactions and highly sensitive confidential information crucial to the business’ legitimate commercial interests and core strategies. Since parties need to obtain all requisite approvals before implementing a merger, they have a strong incentive to assist competition agencies having jurisdiction promptly to reach a positive evaluation of the transaction or, where necessary, to agree consistent and minimally invasive remedies to avoid any likely anticompetitive effects. Smooth inter-agency co-operation in reviewing mergers assists business in achieving timely and appropriate decisions and parties have every incentive to facilitate such co-operation by providing confidentiality waivers in appropriate cases. A party will only unusually decline to provide a necessary confidentiality waiver, and so compromise its chance of a speedy and positive outcome, and will only do so when it has a good over-riding reason to do so. Such reasons have nothing in common with a cartelist's desire to hide its covert wrongdoing and because they signify the party’s decision to risk prohibition of its transaction instead of agreeing to exchange confidential information, they deserve the utmost respect.

Also the context for other potentially anticompetitive practices is very different from that of hard core cartels. Unilateral conduct remains a vexed area of competition law, with relatively little international consensus as to which businesses and what conduct are subject to applicable prohibitions. Conduct which in one country is accepted as effective competition may be criticized in another as illegal. Similarly, what one country classifies as benefitting from the legitimate rewards of risky but successful innovation may be condemned as abusive in another country. Regardless of these differences however, unilateral conduct is rarely clandestine and its defence frequently requires disclosure and analysis of sensitive forward-looking business information and strategic considerations.

Market studies and investigations, which are also apparently within the proposed definition of investigations and proceedings, provide yet another sensitive context. They normally involve no clear suspicion of illegality and require the disclosure of particularly comprehensive confidential business information.

Given these widely divergent contexts, BIAC recommends that a clearer distinction be made between hard core cartels, mergers and other anti-competitive practices in the 1995 Recommendation, to serve as a guiding principle for the whole revised 1995 Recommendation.

4) **Sectoral regulators under the term “competition authority”**

The revised 1995 Recommendation defines a “competition authority” as government authorities and agencies that enforce competition law in Member countries. BIAC considers that this definition is too broad as it may include sectoral regulators whose main purpose is not the enforcement of competition law in a Member country (even though they might be allowed to make decisions on competition law matters, but only as a secondary attribute).

Sectoral regulators frequently have overarching objectives and duties involving industrial policy and public interest considerations and may be subject to oversight or controls by other government ministries and so be less independent than general competition authorities, as well as frequently being closely associated with national champions in their sector of competence. Although BIAC understands that in such sectoral regulators, the division of functions and enforcement attributions may be divided, BIAC recommends that the definition envisages only authorities that have as primary duty the general application of competition law.

II. **LINGUISTIC RECOMMENDATIONS**
Please find below a detailed explanation of BIAC’s recommendations to the revised 1995 Recommendation:

1) **Recital 4.** Deletion of “and mergers” after “anticompetitive practices” and inclusion of “and that while mergers may often positively enhance such economic goals, mergers which significantly lessen effective competition may constitute an obstacle to them”. The proposed modification intends to create a difference between anti-competitive practices, on the one hand, and mergers, on the other hand. BIAC does not believe that mergers constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals, but on the contrary, generally enhance economic and consumer welfare. Only mergers that significantly lessen effective competition may amount to an obstacle to welfare.

2) **Recital 5.** Deletion of “and mergers” after “anticompetitive practices” and insertion of “and that may in consequence be subject to multiple reviews enhancing costs, delays and barriers to positive mergers on the one hand and be subject to inconsistent analysis and remedies, undermining the effective control of mergers which may significantly impede effective competition on the other”. As in recital 4 above, this modification intends to create a difference between anti-competitive practices, on the one hand, and mergers, on the other hand. BIAC does not believe that mergers generally adversely affect the interests of Member countries and considers that the added language is necessary to highlight the negative effects of multi-jurisdictional filings and the lack of international cooperation.

3) **Recital 7.** Insertion of “effective review of” before “mergers”. BIAC considers that enhanced cooperation between agencies should lead to more effective analysis and review of notified mergers.

4) **Recital 8.** Insertion of a new recital “RECOGNISING that effective co-operation between Member countries in respect of investigations and proceedings requires that such investigations be fair and adequately safeguard the due process and procedural rights of the parties concerned”. The modification intends to highlight the importance of due process and transparency in competition proceedings. As mentioned under section I. above, BIAC considers that the inclusion of a reference to the principle of due process and procedural rights ensures an adequate protection of the rights and interests of the parties throughout proceedings, builds a sense of justice in the marketplace, and is essential for effective international enforcement systems and cooperation.

5) **Recital 12.** Insertions of “review mergers so as to” and “which significantly impede effective competition”. The amendments intend to distinguish between anti-competitive practices and mergers. BIAC believes that mergers generally enhance welfare and that only transactions significantly impeding competition have harmful effects. Moreover, BIAC considers that Member countries should also cooperate closely in respect of merger control filings.

6) **Recital 14.** Insertion of “to ensure effective and efficient review of transnational” in relation to mergers. The modification aims to create a distinction between anti-competitive practices and mergers. In respect of mergers, BIAC considers that their transnational character could trigger effective cooperation issues. It is recommended that mergers are reviewed as effectively and efficiently as possible in all jurisdictions.

7) **Paragraph I.** Insertion of “insofar as their laws permit but without prejudice to these recommendations in respect of such laws”. Although countries should amend their competition laws in light of the revised version of the 1995 Recommendation, BIAC recommends that Member countries consider other laws as well (such as data privacy laws).

8) **Paragraph I(b), definition of competition authority.** Insertion of “as a primary duty” and “general”. BIAC considers that this definition is too broad as it may include sectoral regulators which do not have as their main attribution the enforcement of competition law in a Member country, but only secondarily. For the reasons explained in BIAC’s General Observations,
paragraph 4 above, BIAC recommends that the definition envisages only authorities that have as primary duty the general application of competition law.

9) **Paragraph I(c), definition of investigation or proceeding.** Insertion of “respecting standards of fairness and adequately safeguarding the due process and procedural rights of the parties concerned”. The modification intends to highlight the importance of due process and transparency in competition proceedings. As mentioned under section I. above, BIAC considers that the inclusion of a reference to the principle of due process and procedural fairness ensures an adequate protection of the rights and interests of the parties throughout proceedings, builds a sense of justice in the marketplace, and contributes to effective international enforcement and cooperation.

10) **Paragraph I(e), definition of confidential information.** Insertion of “concerned” and replacing “the” with “a” in respect of a Member country; replacing “for example” with “in any event” and “could be” with “is” in respect of information; replacing "business secrets" with "non-public business information"; replacing “a company” with “an entity” and deletion of “or if its disclosure in normal circumstances could prejudice the commercial interests of a company. Information in the public domain or historic is generally not considered as confidential.” As discussed under BIAC’s General Observations paragraph 2 above, the term “business secrets” which appears in the current draft is itself a term which requires definition and the allowance of historic information as well as the determination of information the disclosure of which could prejudice the commercial interests of an entity leave room for too much discretion and debate. BIAC’s suggestion is intended to avoid this uncertainty and to be sufficiently broad to cover business information which is, in fact, confidential. As to the final suggestion, taking into consideration that, regardless of an entity’s legal status and the manner in which it is financed, an entity could still fall under the scrutiny of competition agencies, BIAC considers that the term “company” is too narrow.

11) **Paragraph I(f), definition of waiver or confidentiality waiver.** Insertion of “or relates to” and “or its business”. The modification aims to cover situations whereby permission was granted by third parties that have provided information relating to other parties than themselves.

12) **Section I(A), paragraph 2, second intend.** Insertion of “or” and “in accordance with this Recommendation” and deletion of “and litigations”. The amendment uses the term that is being defined in the revised 1995 Recommendation: “investigation or proceeding” in broad terms to cover agency actions.

13) **Section I(A), paragraph 3.** Insertion of “and to businesses subject to those rules” and “and businesses concerned”. The modification intends to ensure an adequate protection of the rights and interests of the parties throughout proceedings, transparency and procedural fairness. BIAC believes that it is of significant importance that businesses receive sufficient information on substantive and procedural competition rules and agencies’ enforcement actions.

14) **Section I(A), paragraph 4.** Insertion of “and to ensure that fairness and adequate safeguards for the procedural rights of the parties concerned are guaranteed under their legislation and rules”. The modification highlights the importance of due process and transparency in competition proceedings. As mentioned under section I. above, BIAC considers that the inclusion of a reference to the principle of due process ensures an adequate protection of the rights and interests of the parties throughout proceedings and is essential to effective international co-operation.

15) **Section I(C), paragraph 9.** Insertion of “including merger filings”, “investigations”, “or markets” and deletion of “formal or informal”. The amendment intends to bring more clarity with respect to the definition of “investigation or proceeding” for purposes of notifications. BIAC believes that an express reference to merger control filings is required as these may not necessarily be considered “business conduct or routine filings”.
16) **Section I(C), paragraph 15.** Insertion of “and subject to appropriate safeguards including those relating to confidential information”. BIAC submits that information exchanged through notifications should be appropriately safeguarded; for example, these data may refer to confidential information, the disclosure of which would significantly harm the entities involved.

17) **Section I(D), paragraph 20.** Insertion of “and subject to appropriate safeguards including those relating to confidential information”. Similarly to point 16 above, BIAC submits that the steps envisaged in coordination activities between competition authorities should ensure appropriate safeguards to the parties involved, including the adequate protection of confidential information.

18) **Section I(E), paragraph 22.** Insertion of “necessary and”. BIAC considers that the information exchanged should be what is necessary in the investigations in the receiving country in order to take actions related to anticompetitive practices and mergers.

19) **Section I(E), paragraph 23.** Replacement of “would” with “might”. This is a language recommendation.

20) **Section I(E), paragraph 25.** Insertion of “but does not incorporate confidential information”. BIAC understands that the scenario enshrined under this paragraph is different from the one whereby information is exchanged through information gateways (and which may also include confidential information subject to appropriate safeguards). BIAC considers that the information generated by an agency should be exchanged freely if it does not include confidential information but if it does include such information, authorities should ensure that appropriate safeguards are applied.

21) **Section I(E), paragraph 26.** Insertion of “and where necessary, appropriate and proportionate for the investigation or proceeding concerned”. BIAC recommends that confidential information should be exchanged through waivers and information gateways only in situations where there are necessary, appropriate and proportionate for the proceedings. Agencies should not exchange confidential information that goes beyond the scope of or it is not related to the investigation or proceeding concerned.

22) **Section I(E), paragraph 29.** Insertion of “and solely for the investigation or proceeding specifically identified”. A confidentiality waiver is given in respect of an identified collection of information and in respect of a specific investigation or proceeding. Use for other purposes should require a further waiver. Should the exchanged confidential information be used in other investigations or proceedings than the ones expressly specified, BIAC considers that there is the risk of inappropriate use by the receiving agency. This could affect Member countries' interests and it could, overall, endanger effective international cooperation.

23) **Section I(E), paragraph 30.** Insertion of “in respect of hardcore cartels but not other anticompetitive practices or mergers” and “where a confidentiality waiver cannot be obtained” and insertion of “except for leniency information[to be defined]”. The amendment intends to highlight that information gateways should be used only in relation to hardcore cartels where, we may assume, confidentiality waivers cannot generally be obtained, except where appropriate from a leniency applicant. BIAC stresses the sensitivity of the exchange of confidential information in cartel proceedings because of the different manner leniency applications are protected in various jurisdictions and the potential impact of such exchanges on follow-on actions for damages and suggests that leniency information, which will need to be appropriately defined, should only be exchanged with prior consent, to avoid further dampening the incentives for companies to apply for leniency in the first place. In relation to limiting this section to hard core cartels, see also BIAC's General Observations in section I, paragraph 3 above.

24) **Section I(E), paragraph 32.** Insertion of “Before providing any confidential information the transmitting country shall notify the party concerned and provide an opportunity for comment
and appeal unless to provide such a notification would seriously undermine the investigation or proceeding in the transmitting or receiving country," and “shall satisfy itself that the investigation or proceeding will be fair and adequately safeguard the procedural rights of the parties concerned and”. The modification intends to highlight the importance of due process, procedural fairness and transparency in competition proceedings. The principle of due process should be respected both in the relationships transmitting authority-party involved in the proceedings and between agencies. First, BIAC considers that notification of the party whose confidential information will be exchanged should be made in all cases where this would not undermine any of the proceedings concerned, since the possibilities to comment and to appeal in this situation ensure transparency and safeguard the parties' rights, without prejudicing the agencies' proceedings. While the draft revised Recommendation in paragraph 32 seeks to introduce a number of safeguards against the improper use by the receiving agency, BIAC notes that those requirements mentioned only apply to the transmitting agency. BIAC is of the view that transmitting agencies may, however, in some cases not be able to verify whether the safeguards in the receiving jurisdiction apply, or may not have the incentives to do so. Thus, BIAC believes that transmitting agencies may not always be the best defenders of the investigated entities' interests and submits that the companies whose due process rights are at stake should be offered an opportunity to make their voice heard.

The second suggestion implements BIAC's concern regarding respect for overall standards of fairness and due process. Without such respect, in international matters business would be subject to the most extensive of any investigation powers but only the lowest level of respect for due process rights would apply, as an example demonstrates. Suppose an agency with extensive investigation powers (which are balanced in its domestic legislation by appropriate due process protections for the accused) uncovers apparently incriminating evidence. If this apparently incriminating evidence is provided to an agency which does not offer due process rights such as an effective right to reply and offer witness evidence in defence, then the receiving agency may condemn and sanction the defendant even if the transmitting agency, operating its fair process, should later conclude that there has been no violation since a perfectly good defence exists.

25) Section I(E), paragraph 32(i) and (v). Insertion of “[t]he seriousness of the matter and the interests of the receiving country affected” and, “(v) whether the requesting country’s investigation or proceeding relates to conduct which would not be deemed hard core cartel conduct by the transmitting country”. Information exchange through information gateways should be used cautiously and only if appropriate and proportionate. The matter should be sufficiently serious and the transmitting agency should have the discretion to choose and prioritize which cases could be subject to information gateways. As to the suggestion in (v), information gateways should be used only in respect of conduct which would be illegal in both countries concerned.

26) Section I(E), paragraph 30(iv). Insertion of “legal, physical and technological”. The amendment intends to specify the types of protection that are necessary to be ensured by the receiving agency. There should be consistency between the protection referred to under this para. and the following ones of the 1995 Recommendation (see para. 34(i)). BIAC recommends that the legislation of the receiving country provides for appropriate protection of such confidential information. Taking into consideration that data may be stored both physically and electronically, BIAC considers that appropriate physical and electronic protection should be mentioned.

27) Section I(E), paragraph 33. Deletion of “to the fullest extent possible consistent with its laws”. BIAC recommends that Member countries will adjust their legislation further to the amendment of the 1995 Recommendation and therefore the condition of consistency with laws would not be necessary.

---

28) **Section I(E), paragraph 33(i).** Insertion of “only” and “the” and replacement of “litigation” with “or proceeding specifically identified”. BIAC recommends the use of the term investigation of proceeding as defined by the revised 1995 Recommendation.

29) **Section I(E), paragraph 33(ii).** Insertion of “and the standards of legal, physical and technological protection of information as”. Please see BIAC’s comment under point 27 above.

30) **Section I(E), paragraph 33(v).** Insertion of “[r]espect standards of fairness and safeguard the due process rights of the parties concerned”. Please see BIAC’s comment under points 4 and 25 above.

31) **Section I(E), paragraph 34.** Insertion of “in any event”. This is a language recommendation.

32) **Section I(E), paragraph 34(i).** Insertion of “and technological” in relation to protection. Please see BIAC’s comments under point 27 above.

33) **Section I(E), paragraph 34(ii).** Insertion of “and in connection with the specific investigation or proceedings” and replacing “or” by “and”. Please see BIAC’s comments under point 23 above. In addition, such information could not be used for e.g., custodial sanctions.

34) **Section I(E), paragraph 35.** Replacement of “apply” with “respect both its own rules and” and insertion of “and dealing with”. BIAC recommends that a receiving agency respects both its national and the transmitting country’s legislation when dealing with exchange of confidential data. These rules should be respected both when the information is being obtained, but also when it is used.

35) **Section I(E), paragraph 36.** Replacement of “should consider whether it is appropriate to” with “shall promptly”. Due to the harmful or negative effects that unauthorized disclosures may have upon parties subject to the investigations or the agencies themselves, BIAC recommends that the transmitting agency promptly informs the source of information when such disclosures occur. It is not reasonable for an agency to treat a breach of confidentiality as itself confidential from the owner of the information. The owner of the information needs to be aware of the disclosure in order to be able to mitigate its effects on the business.

36) **Section I(E), paragraph 37.** Deletion of “subject to the applicable laws” and “or absent those sanctions, to consider introducing appropriate legislation providing such sanctions”. Please see BIAC’s comments under point 28 above.

37) **Section I(F), paragraph 38.** Replacement of “anticompetitive practice or merger” with “hardcore cartel”. BIAC considers that investigative assistance is most appropriate in relation to hardcore cartels because: first, cartels, due to their tendency to have a global character, involve more agencies, and second, procedural issues generally occur during cartel proceedings. International cooperation is of significant importance in relation to cartels for the avoidance of e.g., lengthy proceedings, inconsistent outcomes, increased costs and resources. See also BIAC’s General Observations in section I paragraph 3 above.

38) **Section I(F), paragraph 41.** Insertion of “and any assistance will fully respect the provisions of this Recommendation regarding the protection of confidential information”. As expressed in relation to other examples of cooperation above, BIAC considers that confidential information should be protected during investigative assistance proceedings.

39) **Section I(F), paragraph 42.** Deletion of “conveniently”.

40) **Section II, paragraph 2.** Insertion of “wherever practicable” and “where necessary, appropriate and proportionate”. The amendment is aimed at bringing more clarification to the instructions of the Competition Committee. BIAC highlights that confidentiality waivers should be used where practicable but that there may be situations where using waivers may not be
practical and it reiterates that confidential information should be exchanged only when it is necessary, appropriate and proportionate (note BIAC’s comment under point 22 above).

41) **Section II, paragraph 4.** Insertion of “including costs for the parties concerned”. Competition matters involve significant costs on the sides of both agencies and parties and enhanced co-operation should seek to reduce all of these costs.