Summary of Discussion Points

Presented by the Business and Industry Advisory Committee to the OECD (BIAC) to the OECD Competition Committee Working Party on Co-operation and Enforcement (WP3)

Discussion on International Co-operation and the 1995 Recommendation: Next Steps

June 18, 2013

1. The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its discussion on international cooperation and consideration of the ways in which the 1995 Recommendation on Co-operation between Member countries on Anticompetitive Practices affecting International Trade (the “1995 Recommendation”) could be amended and improved. In an increasingly globalized economy, both businesses and antitrust authorities stand to benefit from effective cooperation between agencies that streamlines enforcement, improves efficiency, and reduces the time and cost of investigation.

Introduction

2. Over the last 45 years, the OECD has developed a number of recommendations on international cooperation, most recently culminating in the 1995 Recommendation, which remains in force today.¹ The 1995 Recommendation reflected the 1986 version in its entirety but amended the ‘Guiding Principles’ Appendix. No substantive amendments have been made to the recommendation itself since 1986.² Given the advances in antitrust policy, globalization and technology over the past couple of decades, a review and practical consideration for revising and updating the 1995 Recommendation is particularly timely. By way of example, leniency programs were comparatively embryonic in 1986 and 1995, whereas leniency programs in a growing number of countries now represent an important tool for detecting and investigating cartels.

3. Since the 1995 Recommendation, BIAC has made a number of substantial contributions to the discussion surrounding the need for improved international cooperation in the antitrust realm. We do not propose to repeat at this time the broad range of issues, discussions and analyses

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¹ See Council Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(67)53(Final)]; Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade [C(73)99(Final)]; Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(79)154(Final)]; Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(86)44(Final)]; Recommendation Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade [C(95)130(Final)].

contained in the various submissions that BIAC has made in response to Secretariat papers over this period of time; they are cited below for further consideration.3

4. Having regard to previous policy papers made by BIAC and other committees, and the experience of member and non-member countries in transborder cooperation since the 1995 Recommendation, and having regard to the specific issues raised in the Secretariat’s recent Discussion on Possible Amendments to the 1995 Recommendation on International Co- operation,4 BIAC submits that the Competition Committee could consider the following areas for further study and possible update of the 1995 Recommendation: (i) greater protection of confidential information; (ii) more effective collaboration on investigations; (iii) harmonization across leniency programs and marker policies; (iv) cooperation in fashioning remedies; and (v) consistency in use and meaning of key enforcement terms such as ‘cartel’. In advancing these areas for further study BIAC recognizes that elements of the underlying competition regime of member countries may differ.

I. Confidential Information

5. BIAC submits that the protection of due process rights and confidentiality of the parties subject to investigations deserve the highest respect and should remain key items in the discussion on enhanced international cooperation among agencies. In light of recent technological developments, ever greater quantities of confidential information may be held by enforcement authorities, and the maintenance of the highest levels of protection and safeguards for such information is crucial. Moreover, the protection of confidential information takes on heightened importance given that certain conduct is treated as a civil matter in some jurisdictions and as a criminal matter in others.

6. In order to effectively cooperate, enforcement agencies understandably ought to have the ability to exchange confidential information and, indeed, many view legal limitations on the ability to exchange information as the most crucial obstacle to the development of effective cooperation.5 The OECD may wish to revise and enhance the provisions of the 1995 Recommendation on the exchange and protection of confidential information. In particular, a revised recommendation could expand on the confidentiality provisions to outline what constitutes confidential information (including providing for consultation with the business in this regard) and include a clear framework of standards and safeguards to protect such information.

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5 Ibid. at para 14.
7. The exchange of commercially sensitive and confidential information should only be authorized under certain circumstances and conditioned upon appropriate safeguards (e.g., information should not be shared with enforcement authorities that have not enacted appropriate safeguards for the protection of confidentiality). A revised recommendation should contribute to developing a set of protocols and mechanisms for the exchange of sensitive information between agencies, and a model waiver for the exchange of such information. Improved consistency of waivers can provide confidence that cooperative efforts between agencies will be conducted for defined purposes and under a legal framework for the use of exchanged information, which can promote willingness by leniency applicants and other businesses to grant such waivers.

II. Collaboration on Investigations

8. The current substantive and procedural differences between competition agencies create problems during international cooperation for both companies and authorities. Without effective coordination on investigations, divergent standards and practices lead to misallocated agency resources and the duplication of efforts of other agencies.

9. A revised recommendation could contribute to new ways of cooperation that allows for streamlined international enforcement. This could include provisions that develop principles for identifying a “lead” or “best placed” agency on cross-border investigations, and criteria relating to resource and work sharing arrangements among agencies. This system would lead to significant investigative synergies, including decreased costs for agencies and business, and would reduce the administrative burden on companies, particularly with regard to pre-notification and information requirements.

10. The OECD may wish to develop standards relating to knowledge sharing between agencies, best practices with regard to practical, procedural and substantive matters, and efficiency of investigations. This would also lead to greater transparency and accountability, and would lessen the risk of inconsistent outcomes. In addition, an intensified dialogue on substantive and procedural issues in merger control may stimulate discussions among agencies and may encourage them to engage with each other in order to expedite their own reviews.

III. Leniency Programs

11. A growing number of countries now have leniency programs, which represent an important tool for detecting and investigating cartel activity. Divergences between leniency and marker policies across jurisdictions, however, make these programs difficult to rely on in international cases. Moreover, such inconsistencies disincentivize businesses’ cooperation with cartel enforcement through recourse to leniency programs.

12. Inconsistent approaches to leniency programs, including divergent marker policies (with respect to availability, information requirements, timing and scope) and differing standards respecting safeguards on the use and disclosure of information, create an added burden and complexity for companies engaged in hard core cartel matters to utilize the leniency programs available to them. The OECD may wish to revise the 1995 Recommendation to provide for a more uniform approach, including a common set of principles and practices, to leniency

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applications and a “one-stop shop” marker policy that would preserve applicants’ place in line across jurisdictions, and would stimulate and encourage the use of leniency programs.

IV. Remedies

13. As more countries enact competition laws and as commerce moves across borders, there is a greater prospect of conflicting and inconsistent enforcement decisions. Without effective cooperation, the unilateral pursuit of distinct remedies by different agencies can lead to misallocated resources and inconsistent results (inconsistent for reasons other than differences in underlying legal regimes) that may be difficult to enforce. It also may give rise to increased costs and inefficiencies to businesses that may be faced with disparate and potentially conflicting obligations across various jurisdictions, which may ultimately impede business planning and result in diminished investments and reduced innovation. Avoiding conflicting remedies is particularly important in merger and unilateral conduct cases.

14. The application of comity principles could eliminate the uncertainty and inefficiency associated with remedies that vary across jurisdictions. A revised recommendation could define the circumstances under which presumptive deferral of a remedy may be appropriate, whereby agencies would allow the jurisdiction with the greatest interest in the conduct or transaction at issue, or with the greatest ability to enforce a remedy, to take the lead in devising a remedial order. Presumptive deferral should not, under any circumstance, be construed as involving a withdrawal of jurisdiction over a case; rather, presumptive deferral seeks to exploit investigative synergies and avoid situations that may lead to inconsistent remedies. This revised recommendation also could include a framework for regulators to defer to and recognize the outcomes of parallel investigations in other jurisdictions.

15. The OECD may wish to provide guidance and define situations where antitrust agencies could work cooperatively in fashioning remedies so as to find the best possible outcome and not create inconsistent obligations or mutually exclusive remedial orders. This may entail a more practical protocol aimed at allowing agencies to share views on parallel investigations, assist in each other’s investigations, and exchange information relating to regulatory outcomes and the rationale underlying decisions. It could also provide a mechanism whereby companies that are subject to divergent remedies and requirements could request or initiate a consultation between the relevant regulators.

16. Effective and enhanced cooperation also may entail a variety of joint activities, including clear communications regarding regulatory rationales and outcomes, joint investigations and collaborative discussions on merger topics, including the efficacy of remedies. This system would reduce inefficient outcomes and avoid inconsistencies that may thwart the competition objectives of other jurisdictions impacted by the conduct or transaction.

V. Common Definitions and Procedural Consistency

17. While differences in the law across jurisdictions are inevitable, common recognition of what behaviours constitute prohibited practices leads to universal condemnation of those acts and provides the business community with clear rules within which to operate. Consistency in how agencies apply their enforcement efforts also is important.

18. As more jurisdictions develop competition law regimes and as they seek to apply their antitrust laws to a wider range of perceived problematic conduct, the term “cartel” is sometimes used over-broadly and inconsistently across jurisdictions. A comprehensive definition and
consistent approach to identifying what constitutes hard-core cartel conduct is essential and is a critically important form of international cooperation that regulators can take. It also is necessary to clearly distinguish what agreements and arrangements are excluded from such a definition. A revised recommendation should contribute to standardization in this regard, both in terms of concept and enforcement efforts.

19. Similar convergence on fraud, deception and other illicit practices also is highly important, and the OECD may wish to revise the 1995 Recommendation to encourage the recognition of common definitions and consistency in enforcement actions.

Conclusion

20. BIAC submits that this is an important topic that warrants attention from Working Party 3 and the OECD Competition Committee. BIAC is prepared to contribute to this discussion in a manner that provides constructive input and experienced views from stakeholders in various jurisdictions that will ultimately assist in ensuring that future amendments to the 1995 Recommendation are as fair, effective and efficient as possible.