Discussion Points on

Addressing Future Challenges in Competition Policy

Presented by the Business and Industry Advisory Committee (BIAC) to the
OECD Competition Committee

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Session III: Future Challenges

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The Business and Industry Advisory Committee (BIAC) to the OECD appreciates the opportunity
to submit these comments to the OECD Competition Committees on the occasion of its 100th
Meeting, Session III addressing: Future Challenges.

Especially over the past twenty years, the international dimension of antitrust and competition law
has grown from a marginal phenomenon to a key issue for agencies and business alike. For
instance, nowadays the effective prosecution of hard core cartels often involves the active
participation of agencies from multiple jurisdictions. Similarly, it is not uncommon for mergers to
be submitted to five, ten or even more agencies for approval. Obviously, the main reason for this
trend is the successful “exportation” of competition law regimes from the US, Canada and, more
recently, Europe, to other jurisdictions, many of which are in various stages of economic
development. In fact, the proliferation of competition law regimes is truly impressive. Significantly,
in many cases the introduction of competition law regimes is motivated by macro-economic
considerations and closely linked to the growing acceptance of the market economy as the
preferred, or at least in some respects most valuable, economic model. The recent adoption of a
comprehensive system of competition law in China and similar developments in India are just two
telling examples. This belief is fuelled by economic research that demonstrates the importance of
competition for economic growth.1

The OECD and, in particular, the OECD Competition Committee, has performed a significant role
in the development of competition policy and its enforcement.

However, the adoption of competition law regimes in formerly Eastern European countries, Asian
countries and a large number of developing countries over the past years tends to obscure the fact
that in many ways the international business community, i.e. the very object that those competition
law regimes seek to control, has already experienced a similar process of internationalisation many

1 See for example Lewis, The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability (Univ. of
27-50 and Neven, Competition Economics and Antitrust in Europe, Economic Policy, October 2006. While the precise
quantification of the effects of competition law enforcement is difficult, the overall belief appears to be that the gains
are likely to outweigh the costs greatly.
decades ago. Today, many companies are active on three or more continents and many markets have become truly international. As a consequence, the proliferation of competition law regimes can in some respects be viewed as a response to the internationalisation and expansion of the business community – rather than an purely *sui generis* development.

The interaction between, on the one hand, the ever more internationally oriented business world and, on the other hand, the multitude of jurisdictions that have established competition agencies with some form of market oversight is, obviously, multi-faceted. However, while fully acknowledging the many benefits that are associated with the increasing number of competition law regimes, four main trends may be distinguished that give rise to concern.

First, the mere fact that more than hundred countries across the world have now adopted competition law regimes, does not imply that these regimes are strongly aligned and operate on the basis of the same common policy choices. In fact, in some important respects, these many agencies still hold very different views on fundamental policy issues with regard to – for instance -- the very objectives of competition law, the (non) importance of industrial policy and efficiency considerations in the analysis of business transactions, the evaluation of “dominance”, the trade-off between static and dynamic welfare effects, and the circumstances (if any) in which criminal sanctions are appropriate. BIAC believes that, perhaps ironically, the further proliferation of competition law regimes over the next decade may bring a growing number of different approaches, objectives and ways of working among agencies to light. In this sense, the proliferation of competition law regimes necessarily holds the seeds for increasing divergence among an even larger number of jurisdictions which could become a serious obstacle to market access and international business. To counter this risk, BIAC urges the members of the OECD Competition Committee Working Party 3 (WP3) not to content themselves with the growing acceptance of competition law principles across the world, but, instead, to step-up their efforts to build actual and effective consensus on these and other essential elements of a rational competition policy. The advantages are evident: a more rational and efficient system of antitrust enforcement on a global basis, coupled with a more level playing field for international business.

Second, while the number of competition agencies increases, the communication and consultation mechanisms, as well as other inter-agency means to cooperate on the detection of hard core cartels and other fields and to avoid conflicting enforcement actions, become more important. In that regard, we refer you to the discussion on comity in the BIAC Discussion Points on Effective Competition Reform submitted to the 100th Competition Committee Meeting. However, BIAC notes that, despite encouraging initiatives in international cooperation, there is a risk that work on these important instruments of coordination will be given lower priority.

Third, next to the variety in policy settings among agencies and jurisdictions, it is clear that, despite attempts undertaken by WP3, the International Competition Network (ICN) and individual countries, there is a lack of consensus on the fundamental principles informing a number of important substantive issues. These include the proper analysis of exclusionary conduct of dominant firms, the evaluation and quantification of dynamic efficiencies and resale price maintenance. BIAC strongly believes that the divergence in these areas creates obstacles to the international business community and urges WP3 to intensify its efforts to develop and promote adequate, rational,

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2 The June 2007 WP No. 3 Roundtable on proving dominance/monopoly power highlighted a number of significant differences among jurisdictions in this respect

3 See BIAC Discussion Points on Effective Competition Reform, submitted to the OECD on 20 February, 2008 on the occasion of its 100th Competition Committee Meeting.
practical and broadly shared evaluation methods. In this respect, BIAC hopes that WP3 would critically reflect on how it could improve the acceptance and implementation of its findings.

Fourth, in many instances, the administration of antitrust and competition law has become, especially over the past ten years, unnecessarily complicated, cost-inefficient and overly time-consuming. For instance, while many jurisdictions have adopted a system of prior notification of mergers, more than 90% of the notified transactions in most jurisdictions do not raise any competition concern. However, the administrative burden, as well as the costs associated with (multi-jurisdictional) merger filings are significant. Also, while businesses that are found to be involved in illegal (cartel) conduct would wish to quickly and adequately settle these cases, the average time period until agencies arrive at (preliminary) conclusions is in many cases excessively long. This phenomenon has become even more pressing in light of the recent trend in several jurisdictions to increase fines, especially in cases of (questionable) recidivism.

While appreciating the indispensable work of WP3 and the intrinsic difficulties associated with an increasing number of national competition regimes, BIAC is concerned that there is a real risk that the attempts to establish convergence and improved coordination between enforcement agencies, will, over the next years, slow down.

In this light, BIAC respectfully submits the following three suggestions.

1. BIAC urges WP3 to continue and intensify its attempts to deepen its members’ insight into- and knowledge of the proper framework of analysis of exclusionary conduct, dynamic effects of business transactions, resale price maintenance and other substantive issues that are characterised by diverging approaches among various jurisdictions.

To make progress in these areas, BIAC hopes that WP3 would enter into a critical debate on how the existing ways of working substantively among the members of WP3 can be improved, whether it would be possible to arrive at joint views and how more weight could be given to the recommendations of its members. In BIAC’s view, the work of WP3 would benefit greatly from new and creative ways to incentivise member countries to implement new policies and best practices.

2. BIAC suggests that WP3 gives (renewed) attention to the way in which antitrust- and competition law is administered in its member countries and that this is done through a “risk based cost-benefit” lens. In BIAC’s view, two components merit specific attention:

   a. Whether agencies devote the right resources to the right cases and do so in an efficient manner 4, and;

   b. Whether the procedures that govern agencies’ enforcement interventions are adequate. With regard to the latter subject BIAC submits that informal guidance as well as improved settlement mechanisms should be considered as key elements of the way forward.

3. The administration of antitrust and competition law as an “international phenomenon,” raises the question of whether there is room to improve the existing process of OECD Competition Committee peer reviews of country competition policy systems. BIAC

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respectfully submits that, while authoritative, peer reviews sometimes appear to have limited impact on the policies of the countries concerned and would hope that there would be ways to achieve greater tangible result from these reviews. To optimise their effectiveness, WP3 may consider accepting the need for more transparency in conducting these reviews, as well as the modifications that result from the reviews. Many of the principles set out in BIAC discussion points on effective competition reform can be adapted to facilitate the transparency and effectiveness of peer reviews.

4. BIAC also believes that, while maintaining the necessarily confidential features of peer reviews, those reviews would benefit from the views of the business community which are also key stakeholders in the competitive process. Indeed, the practical experience that the international business community has with the operation of existing rules, procedures and policies may be a valuable input for these types of reviews.