Summary of Discussion Points

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

Working Party No. 3

“Cartel Jurisdiction Issues, Including the Effects Doctrine”

October 21, 2008

1. The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee’s Working Party No.3 (WP3) for due consideration at its closed meeting on cartel jurisdiction issues on October 21, 2008.

Introduction

2. The business community shares the concern implicit in the invitation letter that deliberate conduct or practices which cause substantial harm to consumer welfare should not escape the legitimate scrutiny of competition laws. Business entities are often themselves the victims of such anti-competitive practices. The inability of competition law to intervene effectively against restrictive arrangements that damage competition can result in direct harm to the business community at several levels, extending to downstream business purchasers.

3. BIAC recognizes that international cartel agreements can cause substantial consumer harm in a wide number of jurisdictions. On the other hand, due to the potential reach of international cartel enforcement and the corresponding large group of affected jurisdictions having cartel enforcement powers, the potential for excessive multiple punishment is high. The challenge is to develop rules that properly deter international cartel agreements while at the same time avoiding excessive punishment – particularly duplicative punishments for the same harms through the application of extraterritorial jurisdiction.
The Extraterritorial Reach of National Competition Laws

4. Antitrust authorities around the world have become increasingly aggressive in investigating and sanctioning cartels that adversely affect their consumers. The past few years have seen a dramatic increase in the number of cartel convictions and criminal penalties largely as a consequence of the introduction of effective leniency programmes.

5. Increasingly countries are imposing antitrust liability on foreign individuals and businesses that engage in anticompetitive conduct outside their borders. In the US, the Foreign Trade Antitrust Improvements Act (“FTAIA”) makes clear that foreign entities can be held liable for US antitrust violations that take place outside the US if they have a “direct, substantial, and reasonably foreseeable effect on domestic US commerce.”

The US Supreme Court’s Empagran decision, while maintaining the FTAIA’s “effects test” and adding some additional limitations, clearly established the possibility for plaintiffs to obtain recovery for extraterritorial anticompetitive acts committed by foreign entities and their foreign effects.

The Risk of Excessive Cartel Penalties

6. While the effective enforcement of competition laws is vital to protect consumers, excessive punishment of cartels may undermine the goals of these laws with unintended consequences. A key objective of antitrust laws, in addition to compensating victims, is deterrence. BIAC believes that strong deterrence is required to assure that consumers and businesses are not deprived of the benefits of competition. This deterrence can best be achieved through a combination of significant penalties for cartelists as well as an active program of competition advocacy to ensure that a competitive culture is developed and maintained. At a minimum, cartel penalties require that violators be deprived of the unjust enrichment that stems from cartel activity and that an adequate additional penalty is imposed. As with any other deterrence regime, at some point there are diminishing returns obtained by increasing the level of punishment applied to antitrust violations.

7. As more nations implement competition laws, and in particular, laws with extraterritorial reach, participants in an international cartel now conceivably face fines and other penalties from multiple jurisdictions. The incremental deterrent benefit of such duplicative fines is limited. A potential cartel that would risk a fine from one nation would probably not be substantially more deterred by the prospect of additional fines in other jurisdictions. The potential harm from duplicative fines, however, is significant. The cumulative effect of large antitrust penalties could hamper the competitiveness of, or possibly bankrupt a company, removing it from the market.

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3 Empagran limited the FTAIA’s extraterritorial reach in some contexts, holding that foreign nationals cannot sue under the US antitrust laws for conduct that occurred outside the US unless that harm is somehow connected to the anticompetitive effects in the US. Id. at 164.
and harming the very consumers that the competition laws were designed to protect, not to mention "innocent" stakeholders such as shareholders in publicly traded corporations or dependent suppliers to the penalised company. While a single jurisdiction can monitor the impact of its fines and ensure that they are not so substantial as to bankrupt a corporation, there is real risk that a multiplicity of penalty regimes – which rely on a patchwork of different administrative, adjudicative, civil and criminal systems – may not be able effectively to monitor and protect against such an impact.

8. This risk of excessive punishment increases as more and more jurisdictions develop penalty regimes that base fines on a cartel member’s global turnover rather than its effect on that jurisdiction’s commerce. Currently over ten different jurisdictions have such penalty provisions including: the EU, Austria, Czech Republic, Finland, Germany, Latvia, Romania, Spain, Sweden, and the UK. At least in principle, many of these regimes do not limit the size of the fine based on the actual anticompetitive effect within the jurisdiction. One can readily imagine a circumstance in which multiple jurisdictions seek to impose penalties which cumulatively overwhelm a company’s ability to continue as a going concern. If cartel penalties were to begin to cause the demise of companies, it could result in a legislative backlash in some countries (particularly where enforcement efforts are new), limiting the ability to properly deter cartel behaviour. This is not so difficult to envision, particularly in an uncertain and troubled business environment as we seem to be facing at this moment. It would be an unfortunate event if legislators were to undo the substantial progress that has been made in recent years with respect to cartel enforcement.

9. A few countries helpfully include language within their statutes instructing the enforcement agency to consider the effect of the illegal activity within the jurisdiction as a factor that should influence the size of the penalty. For example, the Czech Republic’s Competition Act instructs the Office for the Protection of Economic Competition to base fines, among other factors, on “the impact or potential impact of the [anticompetitive] activity on economic competition in the Czech Republic.” Explicit adoption of these types of limiting principles should be considered by all jurisdictions that apply their competition laws to extraterritorial conduct.

The Risk of Duplicative Private Lawsuits

10. In addition to a proliferation of criminal penalties in many jurisdictions, there has been extensive discussion over the last few years at EC level about facilitating private rights of action for victims of anticompetitive conduct. The EC White Paper on Damages Actions for Breach of the EC Antitrust Rules (“EC White Paper”) proposes a new European legal framework aimed at providing all victims of competition infringements in the EC with effective mechanisms to compensate them for the harm they have suffered.4 In particular, the EC White Paper outlines

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a proposed framework for permitting private actions seeking damage awards for individuals harmed by violations of the EC’s competition laws.

11. Other jurisdictions are enacting or expanding laws granting private rights of action for antitrust violations similar to those under consideration in the EU. Class proceedings have been available for approximately 20 years in some parts of Canada but have only been introduced in some provinces more recently. Such actions have, however, become very common in cartel cases and are only increasing in frequency. There has not yet been a class proceeding in a price fixing case that has been decided on the merits in Canada, although there have been some important decisions on class certification issues. In France, the governmental projects which are considering the introduction of a "class action à la française" are focusing on consumer rights, and it is still unclear whether competition infringements will be part of the scope. It is interesting to note that the French Commercial Code (art. L.470-7) already provides for a form of group action open to professional organizations, allowing to claim redress of competition offences, but it has never been put to use.

12. With respect to international cartels, it is frequently the case that the effects in a particular country are largely indirect. This raises potential issues with respect to duplicative recovery, as it can mean that the same conduct is the subject of recovery in multiple jurisdictions on both a direct and indirect basis. When adding the prospect for multiple or treble damage recovery, this creates a prospect for severe duplication of damage awards stemming from a single harm. Again, while an individual regime may be able to protect against multiple recovery, for example by providing for a “pass-through” defence, this defence may not effectively preclude recovery for indirect harm in another jurisdiction.

13. Canada is one such country in which the effects of a cartel are frequently indirect. There often are challenges in determining what harm, if any, has actually occurred in Canada as the pass through analysis can be very complex. Canada does not have a doctrine that limits indirect claims in class proceedings (i.e., an “Illinois Brick” doctrine), but court decisions, including Chadha v. Bayer5 and more recently the British Columbia6 and Quebec7 decisions in the DRAM litigation have indicated that recovery for indirect harm on a class wide basis can be very difficult, particularly where the distribution chain for the product in issue is complex.8

14. BIAC recognizes the need for private actions for compensation for infringement of the competition laws within each jurisdiction. Indeed, BIAC agrees with the EC’s view that the threat of private claims increases the likelihood that anticompetitive conduct will be detected and

8 The decision of the B.C. court in DRAM is under appeal.
deterred. Nevertheless, the proliferation of competition laws with both extraterritorial reach and rights to private causes of action carries with it the serious risk of excessive punishment.

15. Unlike public enforcement authorities who frequently cooperate with one another to strike the appropriate balance between effective deterrence and excessive punishment, private plaintiffs – and more significantly plaintiff-oriented class action lawyers – have no self-limiting incentives. They seek only to maximize the financial recovery permitted under any, indeed every, applicable law. Antitrust statutes frequently grant plaintiffs the right to joint and several liability, and plaintiffs have every incentive to collect damages awards in every jurisdiction that permit them.

16. As more jurisdictions implement antitrust laws with both extraterritorial reach and private rights of action, a plaintiff could obtain complete recovery against a single defendant in multiple jurisdictions. Such an outcome would punish anticompetitive conduct in excess of that needed to either compensate a damaged party or to provide the appropriate level of deterrence.

Excessive Punishment Raises Multiple Concerns

17. Excessive punishment can result in various unintended or undesirable consequences. First, excessive punishment may force cartel members to declare bankruptcy. Few companies can withstand criminal penalties from multiple jurisdictions amounting to a large percentage of their annual turnover in addition to any possible private claims. In addition to punishing "innocent" stakeholders, bankrupting a cartel member eliminates a competitor and further concentrates an industry thereby reducing consumer choice and potentially increasing prices.

18. Excessive punishment may also deter companies from self-reporting violations when they are detected. When a cartel member understands the limits of the penalties it may face, it is far more likely to seek amnesty than if it faces an unknown and potentially crippling number of fines and private lawsuits which it would not be able to survive. As self-reporting under amnesty agreements has been the primary driver of cartel enforcement, the ability of an amnesty applicant to project its total exposure is crucial to the ongoing success of such programs.

19. Cooperation among enforcement agencies along with the sound use of comity principles both in the construction and application of antitrust jurisdiction is necessary to provide effective deterrence while avoiding the risks presented by excessive punishment of international cartel behaviour.

Cooperation and Communication among Enforcement Agencies

20. The coordination between the US Department of Justice Antitrust Division ("DOJ") and the UK’s Office of Fair Trade ("OFT") in their investigation of cartel conduct in the marine hose industry is a possible model for enforcement agencies cooperating to impose the appropriate penalty on a cartel that affected a number of different jurisdictions.
21. Cooperation between the DOJ and OFT resulted in plea agreements with three British citizens on December 12, 2007 in the marine hose cartel investigation. These agreements marked the first time in the US or UK that jail sentences were imposed on cartel members for offences committed in another jurisdiction.

22. In the process of investigating the marine hose cartel the DOJ and OFT recognized the threat of cumulative criminal penalties. To resolve this issue, both agencies agreed to plea agreements that contemplated the defendants’ cooperation with the OFT in addition to their cooperation with and prosecution by the DOJ. Critically, the plea agreements negotiated by the two agencies allowed for the possibility of concurrent prison sentences. The two agencies agreed that if sentences of imprisonment were imposed in the United Kingdom, the DOJ would recommend that the US sentencing court reduce the prison sentences in the US by one day for each day of imprisonment imposed in the United Kingdom. In effect, the agencies agreed that only the harsher of the two countries’ prison sentences would be imposed.9

23. While the mechanism applied by the agencies in the marine hose case could be a useful model for future cooperation on criminal sanctions and could also be applied (as discussed below) to fines, it does not address the potential for excessive punishment on the private damage side of the equation. That will require careful adoption of legislation in each jurisdiction that is prepared to adapt to an evolving global profusion of private damage actions.

**Active Application of Comity Principles**

24. When applying their antitrust laws to conduct outside their borders, most nations recognize the importance of comity – the principle that a nation limits its laws so that they do not unreasonably interfere with the sovereignty of other nations. For example, US courts exercise subject matter jurisdiction over Sherman Act claims only when they determine that “as a matter of international comity and fairness,… extraterritorial jurisdiction of the United States [should] be asserted over [the restraint].”10

25. Comity principles should guide jurisdictions not only in whether to apply antitrust laws to extraterritorial conduct, but also in the size of the criminal penalty that should be imposed. Almost all jurisdictions have enacted statutes that grant enforcement authorities flexibility in the application of fines for extraterritorial anticompetitive activity, but few have explicitly instructed enforcement authorities to correlate fines to the harm inflicted within the jurisdiction. Statutory provisions and/or enforcement guidelines that specifically link the size of fines to the harm caused within a jurisdiction will provide clarity and reduce the risks associated with excessive

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10 *Timberlane Lumber Co. v. Bank of America National Trist & Savings Ass'n*, 549 F.2d 597 (9th Cir. 1976).
punishment. Similarly, comity principles should guide nations in limiting the damages awarded to plaintiff’s in private antitrust actions.

**Conclusion**

26. BIAC believes that the effective prosecution of international cartels is necessary to protect consumers and that, in many cases, each nation’s competition laws must reach beyond its borders in order to achieve this goal. Nevertheless, the proliferation of national competition regimes with extraterritorial reach brings with it the risk of excessive punishment that may have undesirable unintended consequences without providing any additional deterrent benefits. Cooperation among enforcement agencies along with the sound use of comity principles should lead to antitrust policies that provide effective deterrence while avoiding the adverse consequences presented by excessive fines and duplicative private damages awards.