Summary of Discussion Points

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

“Quantification of Harm to Competition by National Courts and Competition Agencies”

February, 16, 2011

I. Introduction

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 Roundtable on The Quantification of Harm by National Courts and Competition Agencies. BIAC notes that the role of national competition agencies and courts with regard to the quantification of harm to competition has become increasingly topical and urgent.

2. Estimation of competitive harm is becoming progressively more important as increased attention – and criticism – is placed on the adequacy and reasonableness of sanctions imposed on companies by competition agencies and courts for having engaged in anticompetitive conduct. In this respect, a number of commentators maintain that, nowadays, in many cases, the magnitude of administrative fines is such that they have become disproportionate to the underlying content and harm caused and do not represent the optimal use of administrative tools for sanctioning and deterring firms from engaging in anticompetitive conduct. BIAC shares this general concern and particularly believes that insufficient attention is devoted to the relationship between the impact of antitrust violations and the sanctions imposed. While BIAC does not take the view that fines imposed for antitrust offenses are invariably excessively high and disproportionate, it does believe that there is a need to critically assess the relationship between offenses and sanctions and, where possible, provide for better and more fact-based economic underpinnings of sanctions. In BIAC’s view credible enforcement requires a line to be drawn between deterrence and excessive punishment.

3. Optimal deterrence through financial penalties requires *inter alia* that account is taken of the commercial gains from the illegal conduct and, thus, the welfare losses caused by the conduct. For example, in the United States, quantification of harm for antitrust offenses is made pursuant to an economic assessment of the value of commerce impacted. Under the United States’ Federal Sentencing Guidelines, criminal penalties for both individuals and companies are dependent upon the volume of commerce affected by the illegal conduct and of the acts of
the individual or company involved in the wrongful conduct. The calculation of the value commerce affected is subject to a finding of fact, and therefore depends upon a weighing of the evidence; there is a direct correlation between the harm caused by the illegal conduct and the penalty imposed. In general, an evidentiary assessment of the quantification of harm can involve economic analysis of the impacted commerce and is subject to a standard of scrutiny that requires analytical rigour in order to be admitted into evidence. Thus, there is not only a rational relationship between the impact of the conduct and the severity of the remedy, but there is proportionality. Some may argue as to the level of sanctions imposed for various levels of harm – or indeed with the concept of penal sanctions for antitrust offenses – few would argue against the sense of establishing a connection between the harm caused and penalty imposed.

4. BIAC therefore believes that a more rigorous quantification of harm can help to better structure sanctions and thereby contribute to a more efficient system of competition policy, whilst avoiding the charge of excessive punishment. BIAC notes with concern that in many cases competition agencies, when imposing financial penalties, are either not required at all to estimate or quantify the harm caused by the conduct at hand, or have excessive discretionary power to do so, and that, in any event, there appear to be wide divergences between competition agencies in terms of methodology and rigor. BIAC takes the position that more transparent and uniform approaches in this field are highly desirable. Establishing a closer link between the level of cartel fines on the one hand and the illegal gains and harm to society on the other hand also helps to ensure that sanctions are proportionate to the seriousness of the violation and are perceived as fair.

5. While the general concern regarding the appropriate level of fines in itself justifies a more accurate calculation of competitive harm, the existence of private follow-on actions underscores this need. Using the United States as an example, courts demand significant rigour in the proof of quantification of damages and will often require both factual and economic evidence of harm as a pre-condition to awarding damages. The objective is not to set the bar too high for plaintiffs, but rather to ensure that due process is followed and that an award to plaintiffs is justified by the harm caused by the defendants’ conduct.

6. A system of optimal deterrence is directly related to the total amount that firms are required to pay in the shape of administrative fines and private damages for having violated the antitrust rules. This is particularly relevant because (collective) private actions for antitrust damages are in many parts of the world either already commonplace, or are explicitly encouraged. Moreover, as the availability of private actions proliferates in countries around the world, the risk of duplicative recoveries also increases. For example, some countries permit a “pass-on” defence in private actions while others do not. This can result in recoveries for direct harm in one jurisdiction that are barred in another, and recoveries for indirect harm in the other

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1 Federal Sentencing Guidelines Manual § 2R1.1 (2010). The Sentencing Guidelines are not mandatory for use by courts in the United States but are recommendations that a court may – and often does – take into consideration in issuing a criminal penalty.


3 Id.
jurisdiction that are barred in the first. In addition, some countries permit a right of contribution as between defendants while others do not. There is no means in international law for moderating between these diverse results and no mechanism by which private plaintiffs—or more accurately private plaintiffs lawyers—are disciplined in seeking an “optimal” amount of damage recovery. Every loophole of multi-jurisdictional law and procedure will be exploited to maximize recoveries.

7. BIAC is of the opinion that, as the prospect of successful private actions for anticompetitive conduct becomes more realistic, there is even more need to critically assess whether the combined “mix” of pecuniary sanctions optimally penalises companies from behaving anti-competitively. Given the risk of multiple recoveries and multiplied (doubled or trebled) damages, there is risk that such penalties can cause companies to exit the industry or become inefficient competitors saddled by significant debt or increased operating costs possibly for many years.

8. Moreover, a more robust quantification of harm, in particular by agencies at the time the antitrust violation is identified, may be an important factor in stimulating private follow-on litigation. While the quantification of competitive harm is aimed at identifying the overall loss to society (and is not, in itself, directly instructive in determining the actual damage suffered by specific classes of victims), the two analytical approaches are in many respects similar, whereby the identification of the “total” harm to society may be instructive as an upper bound for any subsequent private damages. As a result, the (early) quantification of harm (by antitrust agencies) may indirectly structure, streamline and facilitate private damage actions, especially where courts are ill-equipped to enter into the complex assessments that are necessary to reliably estimate societal harm and damages.

9. BIAC is in favour of more widely accepted and uniform methodologies for the calculation of competitive harm, as well as damages and believes that significant strides can be made in that field. However, it also appreciates that the calculation of competitive harm is highly fact-specific, often complex and dependent on multiple variables and must therefore be tailored to the case at hand.

10. BIAC believes that particularly in the field of price-fixing cartels progress can be made, particularly by more clearly identifying the various ranges of direct (overcharging) and indirect (pass-on and output) effects that may occur. On the other hand, BIAC is doubtful whether the methodologies developed to quantify harm in cartel matters can and should readily be transposed to unilateral conduct that is alleged to have raised prices, such as—in some jurisdictions—excessive pricing conduct, tying, bundling and other types of vertical restraints. The ways in which these practices cause competitive harm often differs significantly from the ways cartels tend to do so. In addition, the identification of competitive harm and damage suffered in non-cartel cases may be complicated by the existence of cost- and dynamic efficiencies. BIAC is of the view that where this might be the case, a full analysis of pro-and anti-competitive effects is in order.
11. It is a well-known fact that the stability of cartels, their functioning and their effectiveness tends to vary significantly and depend on the facts of the case. Moreover, each cartel displays unique characteristics. In this light, BIAC submits that any suggestions that cartels “typically” raise prices by certain percentages are misconceived. As a corollary, BIAC is strongly opposed against the use of any (rebuttable) presumptions of “average” overcharges in competition law.

II. General Principles for Quantifying Cartel Damages.

12. BIAC takes the general view that victims of antitrust infringements should, as a matter of principle, be able to claim full compensation for damage suffered. The starting point for quantification of damages is an assessment of the “but for” world assuming that defendants' conduct had not occurred. In other words, damages should be quantified according to the degree to which the defendants conduct adversely impacted the price (or, in economic terms, quality adjusted price) of the goods sold. It requires the isolation of the effect of defendants' conduct from all other effects on pricing. It also requires an analysis of the consequential downstream effect of the overcharge and the injured party.

13. This implies that BIAC is not in principle opposed to the use of the pass-on defence. Indeed, in principle the party that pays the overcharge should be the one with standing to collect damages and defendants should not be made to pay damages to plaintiffs who did not in fact suffer the amount of damages claimed because it was able – and did in fact- pass on all or part of the overcharges to its customers. In the same vein, BIAC believes that the principle of “full compensation” militates in favour of allowing indirect purchaser claims. However, BIAC notes that the actual identification of which parties are affected by an antitrust violation and to what extent those parties are eligible for compensation requires sufficient analytical rigour to ensure that equitable goals are being achieved.

14. As noted, quantifying harm to competition, as well as calculating private damages is in many cases complex as it involves a reconstruction of the situation that would have existed “but for” the antitrust violation. This in turn often requires elaborate economic analysis. The starting point for this analysis is the identification of the price overcharge, i.e. the price actually charged during the time the cartel was in force minus the price that would have prevailed had the cartel not been in operation. While direct purchasers suffer damage in the shape of higher prices, they may pass on part of those elevated prices to their customers. When determining the damage suffered by direct purchasers, the extent of pass-on should therefore be subtracted from the prices charged to this group of purchasers. In BIAC’s view, both elements are crucial in the determination of damage suffered by direct purchasers.

15. It is well-established that in addition to price effects, cartel arrangements may also lead to volume effects, i.e. lost sales. Typically, price rises imposed by a cartel will lead to a reduction of sales that would otherwise have taken place. BIAC is of the view that –provided they can be reliably calculated- the lost profits of direct purchasers associated with those lost

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4 ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 53 (2d ed. 2010).
sales should be taken into account when computing the damage of direct purchasers. Conversely, the deadweight loss, i.e. “lost” sales of end-consumers should not qualify as recoverable damage.

16. BIAC is in favour of a more explicit assessment by competition agencies of the impact of cartel offenses on prices and volumes when agencies reach infringement decisions. BIAC appreciates the intricacies involved in this (additional) task and submits that competition agencies are nonetheless best placed to do it. These more explicit assessments may be limited to specific aspects of the quantification of harm and or damage and could perhaps be phrased as preliminary findings. However, by its nature, this additional task would involve a study into the effectiveness of the alleged cartel and pass-on effects. Such a greater involvement of antitrust agencies at an early stage would, in BIAC’s view, stimulate an early exchange of views on the evidence (and thereby partly lessen the “tragedy of information asymmetry” in private litigation cases and thus also streamline follow-on private damage actions. In addition, the insights gained may help to set fines at the “right” level and provide greater transparency and predictability, which may in turn lead to more efficient resolution of cases through settlement procedures. BIAC does not believe, however, that final decisions of competition agencies regarding the quantification of harm should be binding on courts. Indeed, BIAC believes that the parties concerned should be able to defend their case in this respect while availing themselves of the procedural safeguards applicable in court proceedings.

17. In practice, competition agencies may avail themselves of a number of methods to quantify cartel damages, including (i) (empirical) methods that are based on benchmark prices and (ii) simulation analysis and other methods that seek to construct the competitive “but-for” pricing. BIAC believes that particularly empirical methods (as opposed to methodologies that rely on “constructed” prices by means of simulation analysis and the like) can be instructive in assessing price overcharges and quantifying damages. Indeed, while the required regression analysis requires a high degree of analytical rigour, BIAC believes the accurate specification of (oligopolistic) market conduct in economic modelling is particularly challenging. Economic analyses centred around actual (benchmark) prices may be slightly less prone to flaws. In this light, BIAC expresses a preference for empirical methodologies to quantify harm and damage.

18. BIAC appreciates that competition agencies and courts may be faced with a trade-off between accuracy and practicality. BIAC favours an approach that prioritises the accurate identification of the effects of the anticompetitive conduct, even if this implies that the choice of the methodology involves significantly more analytical requirements in terms of the quality and quantity of the underlying data, analyses and resources. However, BIAC also acknowledges that 100% precision is unrealistic.

19. In light of the foregoing, BIAC is strongly opposed to the use of simple (rebuttable) presumptions about the average price effects of a particular cartel offense as a basis for the calculation of harm and damages. Indeed, such an approach does not correspond to the complexities involved in these types of calculations, is not justified in light of the severity of sanction, may put defendants in an unjustifiable vulnerable position and may have a negative impact on civil litigation.
20. The applicable legal standards of proof, as well as the distribution of proof, are factors that determine how well a system of antitrust policy functions. In civil actions in the U.S., the courts have repudiated methodologies which permit the finder of fact to engage in “speculation and guesswork” as to the amount of harm. Instead, the finder of fact must base its conclusions on a “just and reasonable estimate” of damages.\(^5\) The economic tests of these estimates are held to a higher standard which requires that the analysis utilize a methodology that is scientifically valid.\(^6\) BIAC believes that a credible system of competition policy requires high standards to prove anticompetitive conduct, as well as rigorous standards to quantify damages. In this respect BIAC is not in favour of systems that allow courts to estimate the magnitude of harm at a lower standard once the existence of harm has been shown.

21. U.S. Courts have also begun to apply standards for quantification of harm at the class certification stage, which has become a significant battleground for determining the sufficiency of evidence in recent years. In the case *In re Hydrogen Peroxide Antitrust Litigation*, the 3\(^{rd}\) Circuit, the court considered whether class certification was appropriate and, in doing so, examined whether the questions of law and fact common to class members predominated over questions related to individual class members.\(^7\) The appellate court found that a “rigorous analysis” was required and found it necessary to examine the credibility of the economic testimony even at the certification stage. Courts have increasingly disfavoured the analysis of “average impact” in such cases and instead requiring a more robust analysis.\(^8\)

### III. Some Methodological Issues

22. BIAC does not express a preference for any particular methodology to quantify competitive harm and damages. However, it does believe that empirical tools may in many cases have distinct advantages. Causality between the challenged conduct and harm suffered is a key component in any methodology to quantify harm.

23. Defendants should have early access to methodologies and data that agencies use to quantify harm and damages and to be able to assess the relevance, reliability and consistency of economic analyses. As it is essential that the models used in a particular case adequately reflect the competitive interaction in the industry, antitrust procedures should allow for rigorously testing and calibrating the selected approach.

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\(^6\) Daubert, 509 U.S. at 597 (“General acceptance” is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence -- especially Rule 702 -- do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.).

\(^7\) 552 F3d 305. 319 (3d Cir. 2008).

\(^8\) Reed v. Advocate Health Care, 2009 U.S. Dist. LEXIS 89576 (N.D. Ill. 2009).
24. While the calculation of pass-on and output effects may complicate the calculation of damages, the quantification of those effects is a necessary component of the accurate quantification of harm. In contrast, BIAC a priori believes that cartel-members (and non-participating sellers) should not be held liable on the basis that non-participating companies have raised their prices under the protection of a “price-umbrella” created by the cartel.

25. The calculation of damages should be geared towards identifying the amounts of damage actually suffered. Benefits, interest rates, and taxes, as well as inflation, should be properly accounted for. In the (perhaps exceptional) case that the cartel results in certain incremental benefits for customers, like for instance lower transportation costs, those benefits should be factored in as well.

26. BIAC is in favour of (further) developing and using best practices for the use of economic evidence for the quantification of harm and damages.

IV. Quantification of Harm in Non-Cartel Cases

27. On a general level, the definition of the “but-for” world with a view to the quantification of competitive harm and causality between the conduct and harm may display conceptual similarities. For instance, in some cases of exploitative abuse similar techniques as in the case of cartels may be used to quantify harm and damages. However, in the vast majority of non-cartel cases this is not so. These types of non-cartel cases involve predatory pricing, unilateral non-price conduct such as bundling and tying and exclusive dealing (which may or may not involve dominant firms) and various other types of vertical restraints. In these cases, the quantification of harm is significantly more complex. In addition to the difficulties involved in distinguishing between efficient and non-efficient conduct, one complication is that in cases that involve customer- and input foreclosure, the conduct is targeted against competitors, while various categories of downstream customers in different markets may only be negatively affected in an indirect manner and in different time periods. Second, in many non-cartel cases, competitive harm only occurs in specific market structures, in particular in the presence of significant market power held by the firm at hand, while the conduct of that same company by definition changes the market structure. This phenomenon results in additional analytical challenges. Third, many cases involving non-cartel conduct not only bring about negative effects, but also result in (partly or wholly offsetting) efficiencies. For instance, resale price maintenance may simultaneously result in higher consumer prices and expansion of demand and, as a result, be pro-competitive. Obviously, the pro-competitive effects of this type of conduct must be adequately factored into the analysis of competitive harm.

28. In the light of the preceding paragraph, BIAC submits that harm allegedly inflicted upon consumers by dominant firms that are claimed to delay innovation because better products would have replaced the products of the dominant firm or would have at least competed with those products, had the dominant form not engaged in the anticompetitive conduct, is particularly difficult to quantify. This is because the relevant counterfactual, the “but-for” reality, is even more difficult to construct as a result of the prospective nature of the analysis and the various types of innovation at stake. While innovation is a critical part of consumer welfare,
competition agencies should not only apply significant rigour in finding anticompetitive conduct, but also be particularly cautious in finding and quantifying harm in these types of cases, especially when the dominant firm's actions provide immediate consumer benefits. Claims of harm to innovation and quantifications thereof should be justified by particularly robust and credible theory and evidence.