Summary of Discussion Points

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

Roundtable on Promoting Compliance with Competition Law

June 29, 2011

I. Introduction

1. The Business and Industry Advisory Committee ("BIAC") to the OECD appreciates the opportunity to submit these comments to the Competition Committee on a matter of great practical significance to business. BIAC is firmly opposed to hardcore cartel behaviour and fully supports agency efforts to eliminate it. These efforts should involve not only active enforcement measures but also preventive measures including advocacy, education and vigorous efforts to promote compliance. BIAC believes that agencies should take active and effective steps to promote and encourage the compliance efforts of business as happens in other regulated areas of activity.

2. This submission addresses the questions raised by the Chairman of the Committee in his invitation letter, focusing on those issues in respect of which business has most direct experience.

II. Determinants of Compliance

3. For the great majority of companies, BIAC is of the view that the strongest driver for compliance with competition law is the desire to conduct business ethically and to be recognised as doing so. A company’s reputation is seriously damaged by the adverse publicity attracted by a decision that it has violated the law and this damage can extend across the group, impacting business divisions not directly involved in the infringement and even hitting the company’s share price.

4. The spread of compliance requirements to reflect developing norms in a wide variety of areas – from bribery and corruption, through environmental law, health and safety, employment and human rights to data privacy -creates an environment in which businesses are developing increasingly sophisticated compliance procedures and are monitoring their performance with the help of external directors and audit committees. Effective corporate governance is the subject of increasing study and effort, reflected in standards and codes to improve governance.
5. Monetary sanctions on companies which violate the law and sanctions on individuals personally responsible for violations, including fines, disqualification and ultimately imprisonment, do also create real incentives to comply. Well-publicised sanctions can be particularly important when competition laws are first introduced, to draw attention to the seriousness with which the new laws are to be taken. Once sanctions are established at a reasonable level, compared to other serious breaches of economic law and business regulation, it does not appear that any further increase is either necessary or likely to improve compliance. BIAC considers that sanctions for breach of competition law have in many jurisdictions already reached, and in some cases may be in excess of, levels required for maximum deterrent effect. It is simply not the case, in BIAC’s experience, that companies consider violating competition law and are prepared to go ahead even if sanctions are serious but are only deterred if sanctions would be even higher.

6. To the extent very high sanctions are imposed for conduct which is not clearly established and understood to be unlawful, this may make it even more difficult to instil the need for rigorous compliance. If the law appears capricious, hard to rationalise and to penalise behaviour which business people view as not only normal but pro-competitive, there is a risk that the law will lose respect and compliance be seen as unattainable, reducing the incentive to try to achieve it. BIAC would point to rules which treat parallel market behaviour, without more, as probative of cartel activity and rules suggesting that normal negotiations with customers can be part of a hub and spoke cartel as the type of rules which could currently, in some jurisdictions, fall into this category. A major determinant of compliance is a body of competition law which is clearly established, understood and, as a consequence, well accepted. Where this is not the case, BIAC would urge competition agencies to review their rules and their advocacy towards and guidance to the business community, as well as advocacy towards society at large as discussed further below.

7. Business is also strongly motivated to comply with competition law by a desire to operate in well-functioning markets. Businesses suffer when others engage in anti-competitive conduct. They benefit as consumers themselves from a general culture of compliance and, where necessary, effective enforcement.

III. Recidivism

8. It is BIAC’s experience that companies which have been subject to a competition law investigation are highly motivated to ensure compliance and avoid any recurrence. Added to the general drivers of compliance discussed above, there is, in this case, a clear understanding of the impact of an investigation in diverting management focus and disrupting the business. In BIAC’s experience companies are generally unlikely to re-offend as a deliberate corporate strategy or through institutional recidivism.

9. In some cases, BIAC would note, what appears to be corporate recidivism is not in fact a knowing or reckless repeat offence. On occasion the timing of prosecutions can make concurrent problems, often generated by the same individual or small group of individuals, appear to be recidivism. In other cases, decades and changes of ownership may have passed between one violation and another in an entirely different division of the business, demonstrating no corporate intention to re-offend. Recidivism should indeed be punished,
as a firm deterrent, but after a careful analysis of relevance, not by the blind application of a multiplying factor.

IV. Promoting better compliance – what agencies can do to drive better compliance

10. BIAC appreciates and supports the efforts made by many agencies to dedicate effort and resource to driving better compliance in positive ways¹, helping companies to understand the law and comply with it, without losing sight of the need to investigate and sanction those who, nevertheless, fail to do so. After all, in many countries whose competition laws are recently introduced, including those which are relatively new to the concept of a market economy, ensuring that companies and their employees understand that competition law is an indispensable tool for the creation and functioning of markets still requires a conscious, concerted advocacy effort.

11. As regards the background referred to in the invitation to contribute to this roundtable discussion, according to which the fact that cartel prosecutions did not decline might imply that current agency efforts are not very effective, BIAC would suggest that, from a business perspective, the compliance culture and knowledge of competition law issues within businesses are definitely growing, both in depth and geographically. The vast majority of larger companies, and many not so large, have positive and actively managed compliance programmes in place. Trade association management is becoming more professional, at the insistence of member businesses. Zero tolerance for cartel behaviour is the norm. The statistics regarding cartel prosecutions referred to in the invitation to contribute may reflect not only the broader geographic sweep of cartel enforcement but also the fact that current cartel prosecutions extend well beyond classic hard-core cartels and include, for example, hub and spoke, pure information exchange and mere parallel pricing cases.

12. Improving compliance depends on establishing and maintaining a culture of competition and compliance within the company, the industry and the country over an extended period of time. Creating this overall culture is a task in which the authorities and companies all have a role.² Specifically in respect of what agencies can do to drive better compliance, we suggest agencies consider the following:

a. agencies can act as advocates to ensure that anti-competitive behaviour is understood to be morally wrong and unethical within the business community and to explain its adverse consequences in clear terms, for example by demonstrating its economic cost. Agencies already publicise their work and completed cases. Press releases on agency websites are useful for specialist lawyers but most business people do not regularly consult these websites and a more active and positive engagement with the media is needed to publicize effectively the need for

¹ Including by exchanging best practices, as occurred during the 10th Annual Conference of the ICN in the Hague in May 2011 and as is the objective of this roundtable.
² Compare the approach to human rights issues, recognising that both governments and corporations have shared responsibility to achieve improvements, in the Ruggie Report on the issue of human rights and transnational corporations and other enterprises to the UN. Human Rights Council, 24 March 2011 and Guiding Principles Framework (open for comment).
compliance and issues involved. Agencies could also work with business organisations, trade groups, law schools and business schools to ensure that competition law topics are regularly covered in a lively, informative, economically relevant and engaging manner.

b. recognise compliance programmes as a critical, if not infallible element of full compliance and integrate them into enforcement efforts, rather than viewing them as a smoke screen, potential sham or, even somewhat bizarrely, as an aggravating factor in the event of any infringement. Compliance programmes should be more actively encouraged as a tool in creating the necessary competition culture and should not be discouraged. BIAC is interested to note examples of agencies choosing to enforce mandatory compliance programmes in place of (simply) fining infringers, or to moderate sanctions in consideration of commitments to set up or reinforce compliance programmes\(^3\) and would encourage similar initiatives.

c. study drivers of compliance within their own business environments and publish practical guidance on how businesses of every type can develop a culture of competition compliance and appropriate compliance policies.\(^4\)

d. provide incentives for business to invest in compliance efforts. Firms do not, in BIAC’s experience, regard compliance investments as detrimental to their interests, as one of the roundtable questions suggests. But embedding and constantly renewing compliance knowledge requires significant expenditure on an ongoing basis and, when budgets are under pressure and being cut all around, compliance budgets will also be under pressure. The incentives should include recognising commitment to compliance and taking good faith, reasonable efforts to comply into account as a mitigating factor when considering sanctions (see further below).

e. ensure that a clear distinction is drawn in the intensity of enforcement and sanctions between hard-core behaviour which is generally well understood to violate competition law on the one hand and more nuanced, newly identified violations involving conduct which only on balance crosses the line beyond legal behaviour. This will help to ensure that business education and understanding can keep up with legal developments. It will also help reinforce the credibility of public and private compliance efforts.

f. agency guidelines can help to supplement legal rules and case law in promoting understanding and compliance where they are clear and practical.

g. act as advocates within government and towards regulatory agencies to ensure that conduct which the competition agencies consider violative is not

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\(^3\) See e.g. Netherlands authority – NMa – insurance market investigation, various decisions of the French authority - laundry cleaning and renting and temporary employment - and the Australian and US practice.

\(^4\) There is much good material already available including from US, Canadian, Australian and UK agencies. Guidelines from the French Authority are expected later this year.
condoned, much less actively encouraged or approved by government or regulators. Contradictory approaches to competition policy within government and agencies undermine compliance efforts by creating uncertainty and doubt as to what the law requires.

h. use their advocacy role to eliminate legislative obstacles to the implementation of certain aspects of effective compliance programmes (such as whistle blowing and data privacy).

i. recognise that denying legal privilege to in-house lawyers is an impediment to efficient compliance programmes given the primary role of in-house lawyers in driving such programmes. Business people need to be able to rely on their in-house lawyers’ professional secrecy and should not be discouraged from consulting lawyers because confidential deliberations risk being disclosed.

j. extend competition advocacy beyond business to society at large so that the general public will recognise the importance of competitive markets and compliance. The more competition law is embedded in the moral fabric of society generally, the easier it will become for companies to instil competition law compliance as a part of their corporate culture. This may prove a particular challenge in countries which do not yet have a cultural background affirming the benefits of competition but more is needed even in countries with long-established competition law regimes. BIAC has noted with interest efforts by some agencies to use social media to reach out to the public and to create engaging learning tools.

V. Corporate Competition Compliance Programmes

13. BIAC is strongly of the opinion that genuine, effective corporate compliance efforts will be strengthened if good faith, reasonable efforts to comply are taken into account as a mitigating factor when sanctions are under consideration. In any event, it is positively damaging for agencies to view the existence of a compliance programme as an aggravating factor, merely because an isolated infringement has occurred. The level and intensity of sanctions should be adjusted to recognise instances where a well-established compliance programme is in place and generally respected, has helped to detect the infringement or facilitated cooperation.

14. Compliance programmes are indispensable for employees to understand the often complex rules of competition law and to understand that while they are incentivised to maximize profit (especially through performance-based compensation systems) their companies will not tolerate this being achieved in an illegal manner. Approaching compliance efforts as an appropriate mitigating factor is likely to lead to more proportionate outcomes than striving for an appropriate "discount" figure to apply as a general reward for operating a compliance programme and so is likely to be more successful in encouraging effective compliance. Although the ideal outcome and benefit of effective compliance efforts

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6 See e.g. the Singapore Competition Commission Facebook page.
will be the total elimination of violations, BIAC suggests that giving appropriate recognition to good efforts is not only deserved but will encourage further efforts to enhance actual compliance in practice. Such recognition will secure fairer outcomes, treating those who have made appropriate efforts to comply more favourably than those who neglected compliance. It may also help compliance officers and in-house legal departments to justify investments, to show a potential for concrete return on investment and so resist budget limitations.

15. Agencies should also consider imposing an obligation to set up, or improve, a compliance programme as part of the remedy or settlement arrangement in appropriate cases.

16. Some legal systems provide for a defence in respect of other corporate infringements based on the defendant company proving that it had adequate compliance procedures in place\(^7\). This approach may lead to substantial additional and innovative compliance efforts, since the onus of proving adequacy will be firmly on the defendant, and BIAC commends consideration of the application of a corresponding defence in the competition law field.

17. The invitation to the roundtable asks how competition authorities can distinguish sham compliance programmes from genuine ones. In BIAC’s experience businesses do not introduce and invest in sham programmes. While there may be cases where compliance programmes are inadequately supported, perhaps as a result of budget cuts driven by financial concerns, and even, in isolated cases, situations where a rogue individual may have used knowledge gained in compliance training to avoid detection, these are in BIAC’s opinion the exception and BIAC does not consider that authorities need to be concerned about sham programmes as such\(^8\).

18. As to how authorities can distinguish between the best compliance programmes and those which require additional effort, BIAC considers the key criteria for a successful programme to be top level commitment, culture, compliance know-how and organisation controls, effective and active training and constant monitoring and improvement\(^9\).

19. Commitment and active involvement of senior management is a crucial cornerstone, creating the right tone at the top of the organisation on which commitment can be built throughout the business. This commitment to competition compliance is ideally, and in practice most often, an element of a broader compliance and ethics programme, covering the whole range of compliance challenges faced by the company, including anti-corruption, financial regulation, conflict of interest and insider trading, human rights and industrial relations, environmental controls, health and safety, export controls and consumer law.

\(^7\) For example s.7(2) Bribery Act 2010 (UK).

\(^8\) Of course, if a programme were proven to be demonstrably sham (for example, being used not to encourage compliance but knowingly to hide blatant violations), it would be a compliance programme in name only and an agency could always consider taking that into account in setting the appropriate level of the time.

\(^9\) See “Antitrust Compliance Programmes – Can Companies and Antitrust Agencies do More” by Anne Riley and Margaret Bloom in CLJ 2011 p21. These 5 Cs of compliance were originally articulated by Fiona Carlin of Baker & McKenzie, Brussels. Other ways of describing the process include the UK Office of Fair Trading’s virtuous circle.
20. Commitment from the top effectively communicated throughout the organisation will lead to creation of corporate values which are expected throughout the business’ operation as part of the way business is done - a culture of compliance.\textsuperscript{10}

21. The development of compliance know-how will start with a clear statement of the rules, tailored to the specific risks and challenges the business faces. So an initial step will always be a careful risk analysis of the competition law issues likely to arise, specific to the business and its employees. Training programmes then need to be developed and delivered to all the relevant individuals, tailored to their specific needs and risk profile. The most effective training is typically practical, addressing specific situations which may confront the group and, where possible, interactive, permitting questions and concerns to be addressed and worked through. It must be seen as driven by management and their commitment to comply. Training needs to be reviewed and updated regularly to reflect changes in the business and the law and to ensure the message is kept fresh and engaging. The management of effective training programmes throughout a large business can require substantial organisation, cost and commitment.

22. Controls are needed to ensure that any business process is working properly and the compliance programme is no exception. Checking that all at-risk personnel have received training is a starting point. Some businesses require employees to confirm regularly that they understand the compliance programme and are not aware of any instances of non-compliance and some companies require employees to confirm following training that they understand the training and will comply with the law. Employees who have questions should be able to access legal advice and, where appropriate, a confidential helpline\textsuperscript{11}. Compliance violations should be sanctioned internally and, where possible without undermining the general expectation of full compliance, exceptional compliance efforts rewarded.\textsuperscript{12}

23. Constant monitoring and improvement should be built into compliance efforts, as they are into other business processes. The processes should be audited regularly and updated to take account of audit findings. Some companies have attempted to audit substantive antitrust compliance but there are serious drawbacks to such audits\textsuperscript{13} and they are not and should not be considered as generally useful or standard.\textsuperscript{14}

\textsuperscript{10} The Australian ACCC Guidance on Corporate Trade Practices Compliance Programmes (2005) notes three phases to institutionalise a compliance culture - commitment to comply, compliance know-how, integrated as part of the internal business practice.

\textsuperscript{11} The divergence of national laws governing how a confidential helpline can be managed and reports followed up makes it difficult for companies operating internationally to operate this type of support. Competition authorities could help promote effective compliance efforts by lobbying to harmonise laws to permit such support efforts.

\textsuperscript{12} Any disciplinary process needs to be sufficiently flexible to secure employee cooperation with a view to obtaining leniency should that prove necessary. Agencies should be willing to be flexible in their requirements to enable such cooperation to be delivered.

\textsuperscript{13} For example, an audit is unlikely to uncover violations which are hidden by the individuals concerned, producing false negative results and a risk of complacency as well as possible resistance to further necessary compliance efforts and investments.

\textsuperscript{14} BIAC thus strongly disagrees with the suggestion in para 74 of the OECD Secretariat paper that it might be fair to expect companies to include some mock surprise inspections as part of their compliance programmes.
24. Agencies should be encouraged to promote the development and implementation of compliance programmes as a key factor in promoting compliance. There is already a great deal of useful material in this area. Working together, BIAC suggests that agencies use the opportunity not necessarily to attempt to develop a uniform approach, since there is no one-size-fits-all solution to this compliance challenge, but rather to develop a broad range of alternative materials to be made readily available to business to support a wide range of business needs. Guidance notes, specimens of alternative compliance policies and pro forma training materials, where possible adapted to specific business segments, starting with those perceived to be most at risk, are all useful. Training films and on-line materials which can be used as part of a business' tailored training may be particularly welcomed by small and medium sized businesses who would particularly benefit from this increased engagement. Agencies can usefully work with business groups and trade associates to ensure the materials developed are as relevant and practical as possible. A first step, which might readily be developed following this roundtable, could be a comprehensive index of all material currently made available on-line by the various agencies who have already committed resources to this effort.

VI. Conclusion

25. BIAC supports vigorous efforts to promote compliance with competition law by the authorities strenuously enforcing the law with appropriate sanctions and making enhanced advocacy efforts in order to gain recognition for the importance of competition law and to create a culture of compliance in society at large. International agencies assist in this effort, as the OECD itself does when it encourages developing countries and other non-member countries to adopt effective competition laws. Our proposals for the recognition, encouragement and, where appropriate, reward of genuine compliance programmes implemented by businesses are a natural extension of these activities designed to spread the culture of compliance beyond national governments to the businesses which operate in their countries.

26. BIAC commends the Competition Committee’s decision to focus on this crucial topic and looks forward to participating in the roundtable.