Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3.

Limitations and Constraints to International Cooperation

October 23, 2012

1. The Business and Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its discussion on Limitations and Constraints to International Co-operation.

2. BIAC fully supports vigorous and effective enforcement of antitrust legislation to combat hard core cartels. In the same vein, BIAC supports effective cooperation among agencies that are called upon to review mergers with a view to bringing about more consistency and uniformity in merger reviews, expediting the review of those transactions, thereby decreasing both the administrative burden associated with the review of mergers and the risk of inconsistent outcomes, as well as making more effective use of agencies’ scarce resources.

3. Similarly, in the field of hard core cartels, BIAC firmly believes that national and international businesses stand to gain from effective cooperation between competition agencies. However, in BIAC’s view, the need for protection of the rights of defense and of the confidential information of any person or company accused of having taken part in hard core cartel conduct are key values that must at all times be respected. Finally, cooperation between enforcement agencies in the field of unilateral conduct, with particular respect to remedies, may be important where there is a potential for extraterritorial or inconsistent outcomes.

4. However, BIAC notes that, while cooperation has become more common and potentially involves an ever increasing number of competition agencies, it is concerned about two trends. First, it notes that in some cases desirable cooperation does not take place or that the quality of cooperation between agencies is suboptimal. Second, with the proliferation of antitrust regimes around the globe, BIAC is concerned that the respect for procedural rights and guarantees of the parties involved in the investigations risk being compromised and may over time erode. BIAC submits that confidential nature of information provided to enforcement agencies and the due process rights of the parties subject to—notably cartel- investigations deserve the highest respect and should remain key items in the discussion on enhanced international cooperation among agencies and the limitations and constraints thereto. Indeed, international consensus on the substance of and respect for these rights will eventually further effective cooperation.
between agencies. BIAC believes that the OECD can and should play an important role in continuing to build this consensus.

I. Introduction: General Trends and Obstacles to Cooperation

5. BIAC notes that the scope and the practical need for international cooperation between agencies has significantly increased over the past decade and is convinced that the need for international cooperation is likely to continue to intensify. Cooperation between antitrust agencies covers a wide range of topics, ranging from the exchange of best practices on capacity building, priority setting, investigative techniques and advocacy initiatives to exchanging views and collaboration on the substantive treatment of specific mergers, unilateral conduct and cartels brought to the attention of enforcement agencies.

6. Over the past two decades, multiple types of cooperation have come to fruition. Nowadays, multilateral cooperation on competition policy and enforcement takes place in a number of international competition fora, including the OECD, the ICN, the UNCTAD and an increasing number of regional organizations, such as the European Competition Network (ECN), the Nordic Cartel Network (NCN), the Asia Pacific Economic Cooperation (APEC) and, more recently, the regional competition center for Latin America among thirteen agencies in Latin America and the Caribbean (CRCAN). BIAC is a strong proponent of these initiatives and many of the persons and organizations affiliated with BIAC actively participate in these initiatives. It believes that the Competition Committee of the OECD has played a key role in the multilateral dialogue on competition policy and is uniquely positioned to further explore the nature and frequency of the constraints that competition agencies face to collaborate with other agencies and, more importantly, to suggest ways to overcome these constraints. The Competition Committee of the OECD can also play a valuable role in coordinating various cooperative initiatives and, once, agreed upon, to monitor and facilitate the actual implementation of its initiatives. BIAC also notes that, given its authoritative status, the OECD is perhaps the best placed international organization to help further integrate the BRICS countries in the international antitrust community. BIAC welcomes initiatives in that respect.

7. Next to multilateral cooperation, bilateral cooperation agreements, especially with BRICS countries which play increasingly important roles in the global economy, are key instruments to share knowledge between agencies, agree upon best practices with regard to practical, procedural and substantive matters, enhance the efficiency of investigations, thereby potentially reducing the administrative burden on business and lessening the risk of inconsistent outcomes. BIAC points specifically to the updated set of Best Practices on Cooperation in Merger Investigations issued in October 2011, which govern the cooperation between the US agencies and the EC Commission,¹ and the 20 September EU Cooperation Agreement with the three Chinese agencies that supplements the 2004 Cooperation Agreement with MOFCOM.²

8. BIAC acknowledges that there is not “one size that fits all” and that, as a consequence, improved cooperation can best be achieved by a variety of multilateral and bilateral instruments. However, it notes that the Competition Committee of the OECD plays an important role in bringing about more consistency and convergence in working methods and the treatment of individual cases and expresses the hope that it will continue to do so, both independently and in collaboration with other organizations, such as the ICN. BIAC believes that there may be useful work to do for the OECD in this area, perhaps by developing initiatives towards a model treaty along the lines of the OECD Model Tax Convention for the elimination of double taxation, which could help ensure fundamental protections are embedded internationally.

9. In BIAC’s experience, there are indeed impediments to effective cooperation, both in general matters, and in individual merger and cartel cases. It seems that (i) lack of trust and confidence in legal systems, (ii) institutional and investigatory impediments, including resource constraints and practical difficulties, (iii) differences in legal framework (criminal versus administrative/civil enforcement) and, particularly in individual cases, limitations on information sharing (sometimes attributable to specific legal or even constitutional constraints) are among the main constraints to international cooperation. While some of these constraints can perhaps not be overcome within the near future, BIAC believes first that continued information sharing and general advocacy efforts may have a positive impact on international cooperation. Second, it acknowledges that limitations on confidential information sharing constitute an important factor that may hinder agencies’ possibilities to effectively work together on individual cases. Indeed, meaningful cooperation often requires waivers from the parties involved and third parties, which in some instances may be impossible to obtain. As a consequence, BIAC suggests that further work in this area is particularly centered on how parties can best be incentivized to waive their rights not to have their confidential information shared with other agencies. Obviously, one main variable in this respect is the protection of their procedural rights in the receiving jurisdiction.

10. While BIAC agrees that impediments to effective cooperation exist, it would welcome further empirical research and fact-finding into the precise nature and magnitude of these impediments. This would ideally make clear in which cases cooperation did not prove possible as a result of the existence of legitimate concerns on side of the parties or other impediments.

II. Limitations and Constraints to International Cooperation in Mergers Control

11. Cooperation between agencies which are called upon to review the same transaction under their national merger control regimes is a common phenomenon. For instance, the Antitrust Division of the US Department of Justice is reported to have collaborated in 2011 alone with merger control agencies in Australia, Brazil, Canada, Columbia, the EU, Germany, Japan, Mexico, South Africa and the UK. Often cooperation in these matters took place under waivers from parties and third parties. BIAC agrees that, while product markets and competitive issues may vary significantly between the different jurisdictions affected by the transaction, cooperation

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can often be meaningful and may be conducive in avoiding duplicative work and inconsistent outcomes.

12. It is not surprising that cooperation among agencies in the field of merger control takes place frequently. Indeed, in an effort to expedite the agencies’ review, companies involved in multiple merger control proceedings are often quite willing to waive their rights to not allow a reviewing agency to share confidential information with one or more other agencies. In many cases, those companies may actually stimulate agencies to exchange views. Thus, contrary to cartel investigations, the incentives of companies involved in merger control reviews are often aligned with agencies wishing to expeditiously resolve the matters before them.

13. A second reason why cooperation in the merger field has become so wide-spread, is that the convergence in terms of procedure and substantive treatment has advanced most in this particular area. Here, the work of the ICN and OECD has truly contributed to streamlining agency procedures to allow for more efficient and effective enforcement and in many cases has also reduced burdens and costs for notifying parties. In particular, the OECD 2005 Recommendation of the Council on Merger Review (“Council Recommendation”) has lead to useful changes to, and re-evaluation of, the merger review schemes of a number of OECD members. Moreover, the OECD’s work has influenced non-members and other policy-making bodies in the development and evaluation of merger review practices.

14. However, despite the advances made in this area, BIAC notes that there is more scope for collaboration between agencies. As BIAC notes in its Comments on the Draft Report on Implementation of the 2005 Council Recommendation on Merger Review, there remain divergent practices and, consequently, inefficiencies, particularly with regard to information requirements. Indeed, on many occasions, the parties to a transaction that is subject to merger control in a number of jurisdictions, are still confronted with information requests that are inefficient, inconsistent, or disproportionate. Diverging approaches also exist with regard to pre-notification requirements, transparency and accountability.

15. In contrast to the areas of cartels and unilateral conduct, where the incentives of companies to agree to the sharing of confidential information may be significantly more limited, BIAC believes that there is significant scope for more effective collaboration between competition agencies in the field of merger review by directly concentrating on competition agencies of OECD members.

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4 This does not imply that parties may not have legitimate reasons to withhold their consent to an agency to share confidential business information.
16. First, an intensified dialogue on substantive and procedural issues in merger control may persuade individual agencies to more liberally engage in substantive discussions with fellow agencies with a view to expedite its own review of the matter at hand.

17. Second, the Competition Committee of the OECD could seek means and ways to make the evaluation of the status of compliance of OECD members with the 2005 Recommendations more effective and to stimulate implementation and compliance with those recommendations.

18. Third, the Competition Committee of the OECD could consider stimulating a debate on best practices in inter-agency collaboration in merger review. In that context, it would for instance be worthwhile exploring the scope for defining or discussing the types of circumstances in which agencies are encouraged to share information at an early stage of the review procedure.

19. Fourth, BIAC believes that there is significant scope for further work on bringing about more uniformity in information requests and the way in which pre-notification discussions are organized.

20. Fifth, the Competition Committee of the OECD might consider taking the lead in the development of new initiatives with a view to bringing about more convergence in merger review procedures. Particular subjects that BIAC believes are worthwhile discussing are transparency of procedures and outcomes, accountability of agency’s actions and timely review.

III. Limitations and Constraints to International Cooperation in Cartel Investigations

21. As the 2005 OECD Report recognizes, international cooperation in discovering, investigating, and prosecuting international cartels has reached unprecedented levels and confidentiality waivers in cases of simultaneous leniency applications have created more opportunities for multi-jurisdictional co-operation. The 2005 report also notes that the number of bilateral international cooperation agreements continues to grow significantly.

22. BIAC stresses that it fully supports vigorous and effective enforcement to combat hard core cartels as businesses themselves are often the direct victims of cartel behaviour. As a corollary, BIAC firmly believes that national and international businesses stand to gain from effective cooperation between competition agencies in international hard core cartel cases. However, in BIAC’s view, the need for protection of the rights of defense and of the confidential information of any person or company accused of having taken part in hard core cartel conduct are key values that must at all times be respected. In its recent submission to the 2012 OECD Global Forum on Competition, BIAC has set out its position that the maintenance of the highest level of protection and safeguards to protect commercially sensitive and other confidential information are essential, particularly in light of the increased technological sophistication of investigation techniques that enable enforcement agencies to access and duplicate ever greater

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7 See above, note 6.
quantities of confidential information, while at the same time data systems are increasingly subject to hacking, espionage and other illegal acts.\textsuperscript{9}

23. The OECD has played an important role in facilitating meaningful cooperation between enforcement agencies in international hard core cartel cases. Indeed, the OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels of 1998 (“the 1998 Recommendation”), the various reports on the implementation of the 1998 Recommendation and the OECD’s Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations 2005 (“the 2005 OECD Best Practices”) have helped establish the notion that the exchange of confidential information gathered in the course of investigation between enforcement authorities is to be limited to defined purposes, according to an established set of protocols, while respecting essential safeguards for the protection of confidential information, thereby significantly contributing to effective cooperation between enforcement agencies.\textsuperscript{10}

24. However, BIAC acknowledges that a variety of factors may still limit meaningful cooperation between enforcement agencies, especially when involving the exchange of confidential information provided by business. Obviously, as many cartel investigations critically depend on the willingness of business to provide information on illegal hard core cartel conduct, often in the context of leniency programmes, one critical factor for enforcement agencies is to provide the optimum level of incentive to business to do so. Similarly, because the exchange of confidential leniency information generally requires waivers from the party that has provided the information, it is important to optimally stimulate parties to consent to such waivers. In BIAC’s view, this can only be achieved by ensuring that effective safeguards are in place against the improper use of the information. BIAC is of the view that there is significant scope for enforcement agencies and governmental agencies to better incentivize business to make confidential information on hard core cartel conduct available and to consent to the sharing thereof with other enforcement agencies. The OECD can play a key role in that respect.

25. First, by adopting more transparent procedures, gaining credibility, hiring and training adequate staff and resources, undertaking tailored advocacy initiatives and, more generally, by adequate institution building, enforcement agencies can build the trust that is necessary and conducive for business to come forward and, once confidential information has been made available to the agency, to allow the receiving agency to share that information with equally well-established and trustworthy agencies. One important factor that BIAC has stressed in this respect is the independent status of the enforcement agency and the need for clear demarcation lines between governmental and commercial interest.\textsuperscript{11}

\textsuperscript{9} Written Contribution of The Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Global Forum on Competition- Improving International Co-operation in Cartel Investigations, 16-17 February 2012.

\textsuperscript{10} In some cases formal “mutual legal assistance” and similar international co-operation agreements can provide similar assurances.

\textsuperscript{11} See also comments by BIAC in relation to the work on SOEs and the need for a level playing field in competition law.
26. Second, BIAC believes that a discussion of the obstacles to- and need for international cooperation between enforcement agencies should take account of the information gathering instruments that enforcement agencies have in their home jurisdictions and notes that adequate and well-balanced investigatory instruments, including leniency programmes, may compensate for the perceived lack of international cooperation between agencies in the form of the provision of confidential information. A (renewed) discussion on appropriate investigatory powers and the proper use thereof may be helpful to detect and prosecute hard core cartels nationally and internationally and, indirectly, contribute to more effective cooperation between enforcement agencies.

27. Third, the Competition Committee of the OECD can further support international cooperation between enforcement agencies by continuing to stress the importance of appropriate safeguards— which meet or exceed the 2005 OECD Best Practices Guidelines- for the provision of confidential information between agencies. In particular, (i) the discretion that each enforcement agency has to act upon requests to provide confidential information, (ii) the need for adequate safeguards for the rights of parties under the laws of the receiving jurisdiction and (iii) requirements preventing the use of exchanged information for other public law enforcement purposes, disclosures to third parties and unauthorized disclosure, are of fundamental importance. In addition, the OECD can contribute to enhanced cooperation by clarifying key notions of the 1998 Recommendation, such as the definition of a “hard core cartel” and the notion of “confidential information.” In this respect, BIAC underlines the need to maintain a clear distinction between hard core cartels and other types of conduct that may be subject to competition laws, but which does not fall within the definition of hard core cartel. While the question whether specific information is “confidential” may complicate the cooperation between enforcement agencies, BIAC takes the position that the view of the party that has made the information available should weigh heavily in deciding upon this question.

28. As BIAC has noted previously, a key aspect of business’ contribution to, and cooperation with, cartel enforcement takes place within the context of leniency programmes. As more authorities around the world recognize the value of leniency regimes and adopt their own leniency programmes, there is currently concern that divergences, and even outright contradictions, between these programmes create problems which make it more difficult to rely on leniency programmes effectively in some international cases and even more difficult to agree waivers for the exchange of leniency information. Whilst business welcomes the spread of leniency programmes, it would be unfortunate if problems in the way the various programmes function together were to lead to reduced use of them in international cases. BIAC believes that the Competition Committee of the OECD can significantly contribute to more uniform approaches to leniency applications and in particular a type of “one-stop shop” mechanism with regard to marker policies and thereby stimulate and encourage the use of leniency policies.

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12 See above, note 9.
13 See in this respect also Submission Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3 Leniency for subsequent applicants, October 2012.
29. Areas where inconsistencies and diverging approaches between leniency programmes exists include (i) fact-finding requirements imposed on potential leniency applicants, (ii) marker policies with respect to the availability, information requirements, timing and scope, (iii) the extent of the jurisdictional nexus required to trigger an investigation, (iv) safeguards regarding use and disclosure of leniency information (including commitments to oppose disclosure for use in private litigation), (v) the extent of cooperation with enforcement agencies (and civil plaintiffs) required following leniency applications, (vi) recognition of legally privileged materials and approaches regarding legal privilege in general, as well as in relation to in-house legal counsel and (vii) timing and scope of requests for applicants to provide information exchange waivers.

30. BIAC submits that meaningful progress can be made particularly by efforts aimed at harmonizing leniency and marker policies and, potentially. BIAC would welcome an in-depth discussion of an efficient global mechanism to report potential cartel conduct that would be centered on the existence of a “one-stop shop” for markers that would preserve applicants’ place in line in all participating jurisdictions. By launching such an initiative the OECD can help to ease the burden and complexity of seeking leniency, potentially in numerous jurisdictions, and at the same time assist newer and less practiced regimes develop their cartel programmes.

IV. Conclusions

31. Whilst BIAC supports the effective enforcement of competition laws and is concerned by the risk of inconsistent outcomes in cross border cases it acknowledges that there are indeed impediments to effective cooperation between enforcement agencies, both in general matters, as well as in individual merger and cartel cases. While the nature of these impediments differs, depending on the context and the nature of the type of case at hand, there is potential for improvement. The Competition Committee of the OECD has already contributed significantly to enhancing international cooperation between enforcement agencies. This notes sets out a number of suggestions for further work in this area, both with respect to cooperation on cartel investigations and the review of mergers.

32. One specific initiative that merits further consideration in the cartel context are efforts aimed at harmonizing leniency and marker policies. BIAC would welcome an in-depth discussion of an efficient global mechanism to report potential cartel conduct that would be centered on the existence of a “one-stop shop” for markers that would preserve applicants’ place in line in all participating jurisdictions. By launching such an initiative the OECD can help to ease the burden and complexity of seeking leniency, potentially in numerous jurisdictions, and at the same time assist newer and less practiced regimes develop their cartel programmes.