Summary of Discussion Points

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

Roundtable on Unilateral Disclosure of Information with Anticompetitive Effects

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The Business and Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its roundtable on Unilateral Disclosure of Information with Anticompetitive Effects.

I. Introduction

1. The antitrust community has long struggled with the question of whether, and if so how, to police unilateral conduct that may facilitate concerted action among competitors. Whereas an actual collusive agreement presents a clear enforcement response, strategic activity by individual firms in interdependent, oligopolistic markets presents a difficult and uncertain enforcement issue. Recent actions by several prominent enforcement agencies demonstrate an increasing propensity to challenge unilateral disclosures, based on the fear that such conduct may facilitate anticompetitive concerted activity. This trend makes the Committee’s consideration of unilateral disclosures especially appropriate at this time.

2. Business entities operate both as sellers and purchasers of goods to and from other business entities. When competing firms limit competition between them, either tacitly or explicitly, the associated anticompetitive harm will extend to business entities who are both immediate and indirect purchasers. Thus, the business community shares the competition authorities’ interest in ensuring an effective response to harmful concerted conduct among competitors.

3. Aside from cartel activity—explicit horizontal agreements to restrict competition that lack any enhancement of productivity or consumer welfare—the effects that disclosures of information may have on competition are often difficult to predict. Information sharing may have substantial pro-competitive benefits such as reducing informational asymmetries, increasing efficiency, and enhancing customer choice. As we discussed in our October 2010 paper on Information...
Exchanges Between Competitors, enforcement agencies should not overlook these pro-competitive benefits in formulating a policy regarding information exchanges.¹

4. Enforcement based on unilateral disclosures requires careful consideration by competition authorities. While many information exchanges are implemented through a formal arrangement among multiple parties—for example, a trade association statistical programme—a unilateral disclosure represents behavior of a single firm. While it may be feared that certain unilateral disclosures “signal” a desired course of action to competing firms in the industry and therefore appear to resemble more obvious forms of overt collusion, unilateral disclosures, like explicit information-sharing arrangements, may also serve pro-competitive purposes and are even less likely than information exchanges to result in concerted action.

5. Because of these inherent ambiguities, BIAC believes that unilateral disclosures should not be considered inherently suspect, much less illegal, absent proof of actual or likely anticompetitive effects. Indeed, since unilateral disclosures are unlikely to produce anticompetitive effects in the majority of instances, it is essential to avoid excessive enforcement action or inflated tendencies to investigate, condemn or penalize such conduct. Otherwise the incentives for firms to compete aggressively, totally independent of any coordination with their competitors, could be chilled, thereby rendering markets less rather than more competitive.

6. The trend in recent competition law developments relating to unilateral disclosures tends toward overemphasizing the potential competitive harm of unilateral disclosures. BIAC believes that convergence among the agencies in application of new rules and policies relating to unilateral disclosures, and the clarification of existing rules, is needed.

7. BIAC is particularly concerned with the agencies’ treatment of unilateral disclosures that are public. While there is general consensus that, compared to private disclosures, public disclosures are less likely to facilitate concerted action and more likely to have a pro-competitive justification, there is considerable inconsistency in enforcement relating to public disclosures among the agencies.² In BIAC’s view, public unilateral disclosures should be considered presumptively legal, not only on competition grounds but also because, for many businesses, certain public disclosures that have a potential bearing on competition may actually be required by other areas of law. Thus, active competition enforcement against public disclosures may create a paradox for businesses, where certain disclosures that are required by one set of laws could form the basis for liability under another.

II. Unilateral Disclosures Provoke Difficult Enforcement Issues

8. As discussed in our October 2010 discussion paper, a unilateral disclosure is broadly grouped under competition law as a type of information exchange among competitors. In some jurisdictions, information exchanges can be used as evidence to infer the existence of a cartel or

² See infra ¶ 14.
considered problematic on a standalone basis. In the standalone context, unilateral disclosures present a unique enforcement question because the disclosures are not agreements themselves and, thus, must be solely analyzed based on their potential to facilitate tacit concerted activity. Indeed, a unilateral disclosure is not an “exchange” in any well-founded sense.

9. A threshold issue to consider in evaluating the competitive effects of unilateral disclosures is whether the alleged conduct actually facilitates concerted action or, alternatively, whether the alleged conduct is merely rational, profit-maximizing behavior of independent entities in a market where individual firms may exhibit a certain degree of interdependence. Even where it may be thought that such interdependence results in supracompetitive prices or other anticompetitive impact, enforcement agencies and scholars uniformly agree that the latter (interdependent profit-maximizing behavior) cannot and should not be policed. Thus, any enforcement action against unilateral disclosures on a standalone basis must, at a minimum, establish a causal relationship between the disclosure and competitive harm.

10. This fine distinction between concerted action facilitated by unilateral disclosures and merely parallel conduct in interdependent markets illustrates why a presumption of illegality, such as per se or quasi per se treatment, is inappropriate for unilateral disclosures. For example, the per se rule evolved in the U.S. to address “conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output.” Such cannot be said about unilateral disclosures of information and, therefore, enforcement agencies should be required to show by affirmative proof in light of the specific relevant facts and circumstances (rather than by any presumption such as a per se rule), that the actual or potential harm of the disclosure outweighs its pro-competitive aspects. Resolution of this question will likely depend on a number of factors, including the nature of the information.

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3 See In re Flat Glass Antitrust Litig., 385 F.3d 350, 368-69 (3d Cir. 2004).
4 See Ethyl v. FTC, 729 F.2d 128, 135 (2d Cir. 1984) (“The Commission acknowledged that § 5 does not prohibit independent pricing by an individual firm, even at high levels, in an oligopolistic industry”); European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (“Guidelines”), 11 January 2011, ¶ 61 (prohibition against concerted action “does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors”); Areeda and Hovenkamp, ANTITRUST LAW (2011) ¶ 1436a (“interdependent pricing is not regarded as a violation of [antitrust law] because, among other reasons, it cannot be remedied without making antitrust tribunals price control agencies, without incongruously controlling oligopoly pricing more intensively than the more dangerous monopoly power, or without restructuring markets on an enormous scale exceeding the ability or mandate of those tribunals. Furthermore, it is both unfair and socially costly to punish under the criminal or treble damage sanctions of the Sherman Act oligopolists, who can rationally proceed only by observing and estimating their rivals’ behavior.”).
6 FTC v. Indiana Fed’n of Dentists, 476 U.S. 447, 458-59 (1986) (“we are slow to extend the per se rule to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious”); see also Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 35, 50 (1977) (courts apply per se rule only after they “have had considerable experience with the type of restraint at issue”).
disclosed and the context in which it was disclosed, the nature of the market involved, evidence of actual competitive harm, and the legitimate business justifications for the disclosure.

III. Type and Effects of Unilateral Disclosure

11. The clearest end of the unilateral disclosure spectrum is an “invitation to collude” through either an explicit offer to conspire or, implicitly, through a direct non-public disclosure of future pricing intentions to the specific attention of a competitor without an alternative explanation (e.g., because the competitor is also a customer). Such disclosures have been generally condemned by competition authorities because they are likely to result in anticompetitive effects and are unlikely to have any pro-competitive justification.7

12. Other unilateral disclosures are not so easily characterized. For example, a manufacturer may routinely provide advance notification of its price increases to customers. Such disclosures have a clear pro-competitive effect of eliminating information asymmetries, which will allow the customers sufficient time to recalibrate their own purchasing, production, or sales plans or, potentially, to seek out substitutes in the market. Even if these price notifications reach a competitor and affect its decision-making, this should not prevent the manufacturer from providing the customer with useful information, and the pro-competitive purpose and effect of the disclosure should not be discounted.

13. Public disclosures pose a particularly difficult enforcement question. While some competition authorities have recently challenged certain public disclosures that indicate future intentions under a “signaling” theory, the public nature counsels against stringent enforcement. When disclosures are made publicly, all market participants including customers, suppliers, investors and manufacturers of complements, are able to gain the benefit of the increased transparency, thereby reducing the likelihood of anticompetitive purpose or effect and establishing likely legitimate business justifications for the disclosure. Due to these ambiguities, there should be a presumption of legality for public disclosures absent proof of a causal relationship between the public “signaling” and the alleged competitive harm.

14. The existence of disclosure requirements in other areas of law also counsels against stringent treatment of public disclosures. This issue arises most prominently in the context of company disclosures to securities markets, including investment analysts, which, in some circumstances, are legally required. For example, in the United States, a company may be subject to enforcement by the federal Securities and Exchange Commission if it were found to have made an “untrue statement of a material fact” or a “misleading” statement through an omission of a material fact.8 In this context, a company’s disclosure regarding, for example, capacity reduction (i.e., cost-cutting) strategy may be required by law to provide investors with material information to evaluate the company’s stock price. Likewise, the disclosure of the


8 17 C.F.R. § 240.10b-5.
impact of a competitor’s actions in the marketplace often is deemed legally required. This issue is particularly acute when a disclosure is made in response to a question from investors or investment analysts.

IV. The Enforcement Landscape Against Unilateral Disclosure is Increasingly Stringent

15. Recent actions by the European Commission, Australia, and the U.S. Federal Trade Commission indicate an increasing effort to police unilateral disclosures.

16. In Europe, standalone information exchanges between competitors, including unilateral disclosures, are covered under Article 101 TFEU. Article 101 broadly prohibits both agreements and concerted action with either an object or effect on competition. While information exchanges are not specifically identified by Article 101 and were not historically the subject of active enforcement in Europe, they have more recently been subject to enforcement actions by the Commission and the member states.

17. The European Commission released its long-awaited Guidelines in January 2011 governing the application of Article 101 to information exchange. The Guidelines relied upon principles established in prior case law, but were designed to clarify and expand upon existing competition rules.

18. Paragraphs 62 and 63 of the Guidelines discuss unilateral disclosures specifically. While a unilateral disclosure is distinguished from a “decision by association of undertakings,” it still may be found in violation of Article 101 if it results in a “concerted practice.” The Guidelines consider it “irrelevant” whether information is exchanged unilaterally or through an agreement, reasoning that unilateral disclosures “reduce strategic uncertainty” and “increase the risk of limiting competition and of collusive behaviour.” The Guidelines further find that “mere attendance at a meeting where a company discloses its pricing plans to its competitors is likely to be caught by Article 101” and, moreover, that any company who “receives strategic data from a competitor . . . will be presumed to have accepted the information and adapted its market


10 See, e.g., 30 March 2010 OFT Press Release, “RBS Agrees to pay £28.5 million penalty for disclosing pricing information to competitor” and 15 October 2003 Italian Antitrust Authority Press Release, “The Competition Authority has begun an investigation into the life assurance business or Ras, Generali, Alleanza, Generalivita, and Ina Vita.” The Authority concluded that a series of unilateral communications of insurance companies to a database amounted to a facilitating practice and condemned the communications as concerted practice.

11 See, e.g., decision 505/V/2010 of the Greek Competition Commission (press announcement by an association of flour mills in Greece regarding possible price hikes due to market developments considered as a decision by an association of undertakings).

12 A “concerted practice” is defined by the Guidelines as “a form of coordination between undertakings by which, without it having reached the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risk of competition.” Guidelines ¶ 60.
conduct accordingly unless it responds with a clear statement that it does not wish to receive such data.”

19. In Paragraph 63, the Guidelines carve out a distinction for a disclosure that is “genuinely public,” (such as through a newspaper), finding that “this generally does not constitute a concerted practice within the meaning of Article 101(1).” However, the Guidelines do not provide any safe-harbours for public disclosures, stating that “a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public announcements by other competitors,” the accumulation of which “could prove to be a strategy for reaching a common understanding about the terms of coordination.”

20. Once a concerted practice has been established, the analysis moves to determining, under Article 101, whether it had an anticompetitive “object or effect.” The Guidelines first provide that information exchanges between competitors of “individualised data regarding intended future prices or quantities” should be considered a “restriction of competition by object” and, thus, fined as cartels. The Guidelines further indicate that such disclosures should be given quasi-per se treatment, stating that they are “very unlikely” to provide countervailing efficiencies under Article 101(3).

21. For all other data exchanges, the Guidelines provide a framework for a rule of reason analysis. First, the Commission will consider the type of data exchanged and the characteristics of the market to determine whether the disclosure had a “collusive effect.” Regarding the type of data exchanged, the Guidelines distinguish: (a) strategic vs. non-strategic information; (b) degree of market coverage; (c) aggregated vs. individualized data; (d) age of data; (e) frequency of the information exchange; and (f) public vs. non-public information. If a “collusive effect” is found, the burden shifts to the defendant to show, under Article 101(3) that the disclosure had a pro-competitive benefit that was a least restrictive alternative.

22. The Guidelines state that by artificially increasing transparency in the market, the exchange of strategic information can facilitate coordination. This may occur through (i) enabling companies to reach a common understanding on the terms of coordination, (ii) increasing the internal stability of a collusive outcome on the market and by (iii) increasing the external stability of a collusive outcome. When analyzing the effects of an information exchange, the counterfactual is a central point of reference, “[t]he assessment of restrictive effects on competition compares the likely effects of the information exchange with the competitive situation that would prevail in the absence of that specific information exchange.”

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13 Guidelines ¶ 62.
14 “Genuinely public information” is defined as “information that is generally equally accessible (in terms of costs of access to all competitors and customers).” Guidelines ¶ 91.
15 Guidelines ¶ 63; see also ¶ 94.
16 Guidelines ¶ 74.
17 Guidelines ¶ 86-94.
18 Guidelines ¶ 65-68.
19 Guidelines ¶ 75.
23. In Australia, the Parliament has recently passed the Competition and Consumer Act Amendment Act of 2011, which will prohibit certain unilateral disclosures relating to price (including discounts, allowances, and credits) when the law becomes effective in the middle of 2012. While this statute will be further defined by regulation, the current expectation is that it will apply only to the banking sector.

24. The Australian act subjects private disclosures to quasi per se treatment, providing an exception for disclosures made “in the ordinary course of business.” For public disclosures (i.e., price signaling), the Act prohibits any disclosure made “for the purpose of substantially lessening competition in a market.” Factors to consider in determining this issue include: (a) the specificity of the price information; (b) whether the information is past, present or future; (c) how readily available the information is to the public; and (d) whether the disclosures are part of a pattern of similar disclosures by the company.

25. In contrast to the EC and Australia, the United States has no regulations or guidelines that specifically cover unilateral disclosures of information. While such disclosures may fall under the Sherman Act, the enforcement possibilities under that statute are relatively limited. Unilateral disclosure as a standalone claim cannot fall under Section 1 because the statute requires an “agreement” between multiple parties in restraint of trade.

26. However, because an “agreement” need not be explicit, courts may rely upon unilateral disclosures as evidence to infer an implicit “meeting of minds.” For example, in a recent case, In re Delta/AirTran Baggage Fee Antitrust Litigation, the plaintiffs successfully survived the defendants’ motion to dismiss a per se horizontal conspiracy claim that rested solely on allegations of signaling through unilateral public disclosures. Plaintiffs had alleged that two defendant airlines had made public statements both to analysts and at industry conferences regarding their intentions to reduce capacity and institute a baggage fee. In lieu of alleging an explicit agreement, plaintiffs claimed that each defendant’s public statements provoked collusive responses by the other that was not in their independent self-interests but for an alleged agreement. While the court recognized that the alleged conduct might have constituted lawful “conscious parallelism,” it did not believe the case should be dismissed prior to discovery on this “mere hunch.”

27. Absent a plausible claim of an agreement, Section 2 of the Sherman Act may also provide an avenue for challenging unilateral disclosures as “attempted monopolization” where

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20 Competition and Consumer Amendment Act (No. 1) 2011 § 44ZZW.
21 Id. § 44ZZX.
22 In contrast, a multi-party agreement to exchange information, for example, through a trade association is covered by Section 1 of the Sherman Act and judged under the Rule of Reason. See United States v. Citizens & Southern National Bank, 422 U.S. 86, 113 (1975).
23 American Tobacco v. United States, 328 U.S. 781, 810 (1946). As one court put it, “a knowing wink can mean more than words” Esco Corp. v. United States, 340 F.2d 10000,1007 (9th Cir. 1965) (emphasis added).
25 Id. at 1361.
26 Id. at 1363.
market circumstances allow proof that the parties involved might have attained or exercised monopoly power by acting together. In United States v. American Airlines, Inc., the Department of Justice successfully challenged a unilateral, private invitation to collude by the CEO of an airline to the CEO of a direct competitor, through which the first CEO explicitly requested the competitor to raise its prices in parallel (which the competitor rejected). Despite the novelty of the theory, which has since been criticized by some commentators, the court held that the DOJ had properly alleged a “dangerous probability” of monopolization because the invitation to collude was unambiguous and, had the competitor accepted, the firms would have had combined market power in certain specific defined relevant markets for airline service.

28. In response to the limitations for challenging unilateral conduct under the Sherman Act, the Federal Trade Commission has been increasingly interested in applying Section 5 of the FTC Act as a means of challenge conduct that may facilitate concerted action. Because Section 5 of the FTC Act broadly prohibits “unfair competition” and has neither the “agreement” nor “monopoly power” requirements of sections 1 and 2 of the Sherman Act, respectively, the FTC considers Section 5 as filling a “gap” in the enforcement tools available against unilateral conduct that may facilitate anticompetitive harm.

29. The FTC’s enforcement record under Section 5 of the FTC Act has varied over time. In its early application, FTC initially took the view that “conscious parallelism” was actionable under Section 5 of the FTC Act, but backed away in the face of strong opposition by Congress and the business community. In the 1980s, the FTC attempted to revive the application of Section 5 to interdependent conduct in the absence of an actual agreement among competitors. However, in two notable cases, Boise Cascade Corp v. FTC and Ethyl v. FTC, these efforts were strongly rebuked by the courts.

30. While Boise Cascade did not involve any allegations of unilateral disclosures, Ethyl involved several allegations of facilitating practices, including the defendants’ unilateral provision of advance notice of future price increases to customers. Relying on the “patent uncertainty” of the FTC’s theory of concerted action, the court held that, absent a tacit agreement on prices, the FTC must show either “(1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.” With respect to the price disclosures, the court found a “fine

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27 743 F.2d 1114 (5th Cir. 1984)
28 Id. at 1117-1119. Other courts and commentators have distinguished this opinion based on its unique facts. For example, in In re Delta/AirTran Baggage Fee Antitrust Litigation, the court rejected a joint attempted monopolization theory and distinguished American Airlines as involving facts that were “much more egregious than the facts alleged here.” 733 F. Supp. 2d at 1367 n.15.
30 See Boise Cascade Corp v. FTC, 637 F.2d 573, 576 (9th Cir. 1980) (discussing early FTC policy and public response).
31 637 F.2d 573 (9th Cir. 1980).
32 729 F.2d 128 (2d Cir. 1984).
distinction" between permissible and impermissible conduct, concluding that “the FTC’s rulings and order appear to represent uncertain guesswork rather than workable rules of law.”

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31. Following the Ethyl and Boise Cascade decisions, the FTC has generally applied Section 5 to less ambiguous unilateral conduct that it characterizes as “invitations to collude.” The FTC has brought several “invitation to collude” cases from the 1990s to the present, finding them to be per se illegal. One notable trend in these cases is the FTC’s recent willingness to rely on public disclosures to support allegations of a per se violation. In early “invitation to collude” cases, previous FTC commissioners had distinguished private disclosures, which were “utterly without efficiency justification,” with public disclosures, in which “market structure analysis, and legitimate efficiency justifications should be given full consideration.”

32. However, in two recent cases, Valassis and U-Haul, the FTC obtained consent orders based on “invitations to collude” involving public disclosures without analyzing the likelihood of competitive harm. For example, in Valassis, the FTC based its complaint solely on statements made by the defendant’s CEO in an earnings call with investment analysts, where the defendant allegedly attempted to establish a price floor with its competitor. In an analysis accompanying the proposed order, the Commission stated that it may challenge such conduct “as an invitation to collude under Section 5 of the FTC Act even where the conduct did not result in competitive harm.” These cases suggest that the FTC is willing to extend per se treatment to unilateral disclosures that are alleged to amount to invitations to collude, in the absence of anticompetitive effects.

33 Id. at 139.
35 Kevin J. Arquit, The Boundaries of Horizontal Restraints: Facilitating Practices and Invitations to Collude, 61 ANTITRUST L.J. 531 (1993); see also Mary Lou Steptoe, The Impact of Section 5 of the FTC Act on Communications Among Competitors, Remarks Before ABA Section of Antitrust Law, Advanced Antitrust CLE Inst. (Oct. 15, 1993), reprinted in 7 Trade Reg. Rep. (CCH) ¶ 50.120 (cautioning against extending per se treatment to “instances of public communications, "where there are “more likely to be efficiency justifications” and “the public nature of the communication itself may cast doubt on a real collusive purpose or expectation”).
38 Valassis Analysis at 5; see also U-Haul Analysis at 4 (the Commission need not “define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision”).
V. The Business Community Needs Reasonable, Consistent Standards Governing Unilateral Disclosures

33. While BIAC appreciates the efforts of the agencies to protect against concerted action, it is concerned that the pendulum has swung too far in favor of enforcement against unilateral disclosures of information. In the modern economy, a substantial number of efficient, competitive industries are characterized by moderate or high levels of concentration. As the Ethyl court recognized, there is a “fine distinction” between lawful, unilateral conduct and impermissible concerted action when information exchanges occur in concentrated industries.\(^{39}\) In light of this, a proper standard of proof suggests that enforcement agencies:

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\text{[O]we[] a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that business will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.}^{40}\]

Otherwise, this lack of clarity and unpredictability could have a chilling effect which might actually deter disclosures which are desirable and procompetitive.

34. To that end, BIAC believes that, at a minimum, the enforcement agencies should work to establish safe harbours for unilateral conduct that is innocuous or generally pro-competitive and, thus, will not be subject to enforcement action. For example, no business entity should be subject to competition enforcement for any public disclosure that is required by another area of law or has clear pro-competitive business justification.\(^{41}\)

35. BIAC also believes that enforcement agencies that harbour enforcement intentions regarding unilateral communications should establish a framework for the competitive analysis of unilateral disclosures. This need is particularly strong for the U.S. Federal Trade Commission, given its increasing reliance on Section 5 of the FTC Act to challenge public disclosures on a standalone basis to fill coverage “gaps” under the Sherman Act, including its more recent challenge of public unilateral disclosures as “invitations to collude.” Such guidance has already been strongly advocated by former FTC Chairman Kovacic.\(^{42}\)

36. While BIAC appreciates the efforts undertaken by the European Commission to establish its Guidelines for unilateral disclosures, these Guidelines should be revised to provide

\(^{39}\) 729 F.2d at 139; see also Areeda and Hovenkamp ¶ 1436f (“We must conclude with a frank recognition legal attention to unilaterally adopted facilitating practices is fraught with double uncertainty. We have seen substantial doubt not only about the content of Sherman Act § 1 and FTC Act § 5, but also about the application of any plausible legal rules.”).

\(^{40}\) 729 F.2d at 139.

\(^{41}\) See Valassis Consent Order at 3-4 (providing a safe harbour for any public disclosure of information that is “required by the Federal Securities Laws”).

\(^{42}\) See William E. Kovacic & Marc Winerman, Competition Policy and the Application of Section 5 of the Federal Trade Commission Act, ANTITRUST L.J. 929, 944 (2010) (“The first institutional predicate is for the Commission to articulate, in a policy statement or guidelines, its views about what constitutes an unfair method. Such an articulation should describe how the agency will exercise its enforcement discretion and, beyond that, set forth a high-level framework for analyzing Section 5 cases in adjudication”).
clearer standards of enforcement. In particular, Paragraph 63, which relates to public disclosures, should be revised to provide both (a) well-defined safe harbours; and (b) clear standards to determine when a public disclosure may be unlawful. Similarly, BIAC believes that more explanation is needed to clarify the “ordinary course” exception for non-public price disclosures in the Australian Competition and Consumer Act.

37. Agencies should analyze likely anticompetitive effects centered around a plausible theory of harm that aims to explain why (unilateral) exchanges of information contribute to restrictive effects on competition. Consideration of the counterfactual alone, i.e. the competitive situation that would have prevailed in the absence of the specific information exchange, does not fully address the need for a causal connection between the information exchange and the increased potential for anticompetitive effects. This applies in particular to markets that already display a certain degree of transparency and lend themselves already to some degree of interdependent strategic behaviour.

38. BIAC is also concerned with the increasing trend by enforcement agencies to subject certain unilateral disclosures to per se or quasi per se treatment without consideration of actual or likely competitive effects. While some unilateral disclosures may constitute unambiguous “invitations to collude,” the trend in FTC enforcement in the United States illustrates the risk that per se treatment will extend to conduct that produces ambiguous effects, for which such application is inappropriate.\(^\text{43}\) BIAC also believes that the imposition of quasi per se standards by the European Commission and Australian Competition Act for certain information exchanges does not take into account the inherent uncertainty in categorizing unilateral disclosures and determining an anticompetitive purpose.

39. Given these policy concerns, BIAC proposes the following framework governing the enforcement of unilateral disclosures. First, the agencies should provide clear safe harbours for certain public unilateral disclosures to be considered categorically lawful. As discussed above, BIAC believes that disclosures required by law or having a clear pro-competitive justification should fall within this safe harbor.

40. Second, unilateral disclosures should be considered presumptively lawful absent an indicia that the disclosure prompted (or, in the case of an invitation to collude, was designed to prompt) concerted action from a rival. BIAC offers the following indicias for consideration:

\(\text{(a) evidence that the disclosure was made privately to one or more rivals and not to the general public;}\)
\(\text{(b) evidence that there was an actual, non-public response to a public disclosure by one or more of its rivals;}\)
\(\text{(c) evidence that information disclosed was by its nature demonstrably more meaningful or intended to be more meaningful to rivals than to customers and/or suppliers;}\)

\(^{43}\) See Business Electronics, 485 U.S. at 726.
(d) evidence that the disclosure was accompanied by covert actions or other efforts to conceal and avoid detection by enforcement agencies;

(e) evidence that the discloser and its rivals had a recent history of proven, sanctioned, anticompetitive behavior through public disclosures; or

(f) evidence of specific intent harm competition.

Absent one or more of these indicia, the unilateral disclosure should be considered lawful because there would be no evidence (as opposed to supposition) indicating a risk that the disclosure was or could be reciprocated by a competitor.

41. Finally, if one or more these indicia exists, the disclosure should be subjected to a rule of reason analysis in which actual or likely anticompetitive effects are weighed against the procompetitive benefits. Importantly, these indicia should be considered in context, rather than in isolation, to ensure that they are consistent with the alleged mechanism of coordination that forms the basis for any potential enforcement action. BIAC emphasizes that, due to the inherently ambiguous nature of unilateral disclosures, a presumption of illegality is inappropriate, even if one of the above indicia are satisfied. Rather, competition agencies should establish actual or likely anticompetitive effects resulting from a unilateral disclosure before the burden shifts to the defendant to show those effects are outweighed by pro-competitive efficiencies.