Discussion Points

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

“Cartels: Approaches to Cartel Investigations”*
(for the OECD Competition Committee Roundtable on Facilitating Practices in Oligopolies)

October 18, 2007

1. 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 “Cartels: Approaches to Cartel Investigations.”

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

3. BIAC recognizes that adopting certain practices short of “hard core” cartel conduct may enable firms effectively to coordinate their conduct in a manner detrimental to competition, customers and consumers, and in particular to raise or fix prices and output, share markets or stifle innovation. These arrangements may not always appear anti-competitive on their face but go beyond the “pure” oligopoly model of non-collusive interdependence. On the other hand, competition agencies should recognize that other forms of horizontal cooperation may stimulate competition and lead to substantial economic benefits.

4. BIAC therefore supports the efforts of enforcement authorities to ensure that effective competition is maintained, and welcomes proposals for a balanced assessment of horizontal arrangements taking into account both economic benefits and anti-competitive effects.

5. BIAC welcomes the focus of the present Roundtable discussion on the treatment in competition law of orchestrated arrangements which by one means or another simplify the process of reaching the supra-competitive price or of eliminating uncertainty between the players in an oligopoly market. The fact that this issue and the separate but closely-linked question of the use of circumstantial evidence to prove “agreement” are often conflated has led to some terminological confusion. The line between the two concepts may even be blurred: as stated in the invitation, competition authorities and courts sometimes consider certain of these practices as “plus factors” to prove that firms have entered into an agreement.

6. In response to the invitation to contribute to the identification of appropriate terminology, for the purposes of the present discussion we would suggest that the term “facilitating device” be

* Paper prepared by Julian Joshua, with substantial contribution from BIAC Competition Committee members.
used (rather than “practice”), if only to avoid any possible confusion with the closely-related notion of “concerted practice” employed in the European Union Treaties and national legislation. When employing the proposed term, it should however be understood that it already involves a value-judgment and implies some mechanism that encourages or promotes a “collusive outcome,” such as anti-competitive coordination of pricing or output, so care should be taken not to attach the label to every form of horizontal industry arrangement that increases transparency including those which are neutral or even entirely beneficial.

7. A helpful starting point for the discussion is the description of facilitating devices employed in the contribution of the United States to the Roundtable on Oligopoly in May 1999 as: “activities that tend to promote interdependent behaviour among competitors by reducing their uncertainty as to each other’s future actions, or diminishing their incentives to deviate from a coordinated strategy.”¹ Economic theory assumes that oligopolists recognize their interdependence, a perception which could lead to strategic coordination and the ability to act as a shared monopoly and raise prices above the competitive level. However, as the paper observes, “it is far from inevitable that oligopolists will price supra-competitively.” Facilitating devices tend to be found in markets which are already prone to collusion but in which the market players face some obstacle. Firms may adopt devices which enable them to mitigate or overcome the market uncertainties that complicate collusion (so-called “complicating factors”).² Effective collusion, whether express or tacit, requires firms to identify terms of coordination, detect deviation from those terms and “punish” the deviators, so facilitating devices have to be aimed at achieving those objectives. Facilitating devices may be, but are not necessarily, the subject of an agreement among competitors to adopt the practice in question.

8. Among the most common forms of industry practice that may be considered potentially to constitute facilitating devices are: advance price announcements with long lead times prior to implementation, base point pricing systems, competitively-sensitive information exchanges and meet-competition or “most favoured customer” clauses.

9. The assessment of such arrangements, which may take myriad forms, will depend upon the nature of the industry and market circumstances in which they are operated, the nature and specifics of the practice at issue, and the potential effect on the behaviour of the participants.

10. However, most practices that could be deemed potentially to constitute anti-competitive purposes may also serve pro-competitive ends. It should also be recognised that in a competitive market, transparency between operators is likely to lead to an intensification of competition. On the other hand, where a market is already characterised by highly concentrated oligopoly, remaining competition could be further impaired by exchanges at short intervals of precise individual information. Thus, while information exchanges could be used by firms to reduce uncertainty as to their respective future actions and so reduce competition, they may also increase market transparency and enable firms to take their own rational and informed individual decisions to adjust supply to demand or reduce costs. Similarly, advance price announcements could allow competitors to coordinate price increases and lead to a supra-competitive price, but they could also benefit customers by allowing them to stock up before the effective date of a price increase or plan their commercial activity more rationally. It should also be noted that an information exchange or other industry practice

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¹ OECD, Oligopoly, at 199, DAFFE/CLP(99)25 (Oct. 19, 1999).
could be ancillary to and essential for the operation of a procompetitive and lawful arrangement.

11. In BIAC’s view, care should be taken to distinguish unilateral conduct from coordinated actions. Independent action by an operator (at least to the extent that the operator does not hold a dominant position) should not be the subject of a prohibition. Facilitating devices may be the subject of an express agreement, the most obvious example being the implementation of a formal industry information exchange with detailed rules. On the other hand, more informal practices may be adopted which could restrict competition. Nevertheless, some element of concerted action between competitors should be a precondition to any enforcement action. As with the treatment under competition laws of parallel behaviour, interdependence should not be equated with agreement. Where all that has occurred is unilateral parallel adoption of a practice, even in an oligopoly, a conservative approach should be adopted to avoid the risk of “false positives.” Attempts by enforcement agencies to deploy economic theory to define the elements that could be used to prove that the adoption and use of a facilitating device was an unlawful agreement have had mixed success. The mere fact that the adherents to a scheme derive a benefit only if other industry players adopt the conduct should not be sufficient to ground a finding of unlawful collusion. For a finding of agreement, reciprocity ought to be regarded as a necessary but not a sufficient condition.

12. For similar reasons, BIAC would caution against rendering it unlawful for a single firm unilaterally to make information available publicly to the market place (as by giving information about upcoming price increases). Advance publication of prices by a market leader may allow other firms in the oligopoly to follow a price increase. However, such conduct should be of antitrust concern only if it is part of an agreement or other scheme of collusion. Occurring on its own, the conduct may have a legitimate business reason. In circumstances where the information is shared with customers or made publicly available, it may serve pro-competitive ends. Conversely, where sensitive information is regularly given only to competitors, the evidence may warrant a finding of an agreement or other prohibited form of collusion.

13. Where a facilitating device is the adjunct of a cartel, it should of course be treated as an integral part of the unlawful activity. Conduct consisting “only” of a facilitating device might legitimately fall within the scrutiny of competition law. In certain jurisdictions, a direct exchange of information, for example, might constitute an infringement of the competition laws in its own right. This could be the case where the information exchange demonstrably reduces or removes the degree of uncertainty among the market players as to the operation of the market in question or their respective intentions so that competition between them is substantially affected or eliminated. However, such cases, even where they might fall under the purview of competition enforcement, should not be equated with hard core cartels; in particular, such conduct might, under a comparative rule of reason examination, be deemed not to constitute a violation, or if it constitutes a technical infringement, it might in appropriate circumstances benefit from the application of an exemption, rule of inapplicability, or prosecutorial discretion.

14. Given the many forms that industry arrangements may take, and the need for a case-by-case approach, BIAC does not consider it appropriate to enforce against conduct in this area as

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though they were “per se” violations. On the assumption an industry practice is found to constitute a facilitating device, a careful balancing should then be conducted of the beneficial and negative effects. In judging a business practice, the potentially negative effects should always result from its actual or potential restriction of competition. How this necessary exercise should translate into operation will depend on the purpose, structure and framework of the legislation protecting competition in the particular jurisdiction. Under the EC Treaty, an arrangement that is caught by the terms of Article 81 (1) will be the subject of an analysis under Article 81(3) and benefit if the conditions are fulfilled for a direct exception under Article 81(3). In the United States, apart from the few cases where a “hard core” practice might be considered tantamount to direct price fixing, an analysis under the rule of reason is appropriate before an agreement is found to constitute a violation of Section 1 of the Sherman Act. In Canada, all potential restrictions of competition are assessed under a rule of reason designed to consider potential procompetitive benefits.

15. A business practice could be neutral or benign in competition terms. In BIAC’s opinion, for a commercial practice to be considered unlawful (other than offenses tantamount to hard core price fixing), actual or reasonably foreseeable negative effects upon competition must be demonstrated. The prohibition should be based on a firm showing that the practice in question will lead to the participants altering their competitive behaviour in a manner that appreciably reduces competition. There should be a clear causal connection between the practice and the non-competitive outcome.

16. Positive effects that may outweigh restrictions of competition include better planning of investments and more efficient use of capacity. In other cases, in-depth information exchanges may be necessary to sustain a pro-competitive agreement such as a joint venture for production or the provision of services. Such cost-saving results of information exchanges are likely to benefit consumers in a competitive market. In BIAC’s opinion, this “sliding scale” approach, measuring any restriction against the benefits, is the most prudent one. Where the restrictions are far-reaching, the positive effects must be more accentuated.

17. Further, even if a practice has the potential to facilitate coordinated behaviour, it should not be unlawful if it has a clear and legitimate business purpose and there is no less restrictive way by which it can be achieved.

18. BIAC would caution against imposing fines or criminal sanctions where a facilitating device is not part of a wider violation. An adverse finding should involve a balancing of restrictions against the benefits. Given the uncertainties inherent in the assessment of most industry practices, punitive sanctions would not be appropriate. Even if they are administrative rather than criminal in nature, the imposition of fines involves a finding of wrongdoing and breach of a clear standard. The most suitable remedy from an enforcement standpoint would be a prohibition or other suitably framed “cease and desist” or “consent” order. The same reasoning applies to the necessity of providing for any award of civil damages.

19. Clear, concise and comprehensible guidance on the impact on competition law of potential facilitating devices from a regulator can perform a valuable function. Although the full implications of (for example) an information exchange needs to be assessed on a case-by-case basis, outlining the relevant parameters for the assessment of information exchanges will be beneficial to all market players. Such guidance must strike a balance between the need for transparency of regulation and need for correct assessment in each relevant instance. Imposing too-detailed rules of general application prohibiting information exchanges would
run the risk of being over-cautious, and hence prohibit exchanges which overall have a cost-saving and pro-competitive effect.