Submission of the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 2 (WP2) Roundtable on the Regulated Conduct Defence

February 14, 2011

Introduction

1. The Business and Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee Working Party No. 2 for its roundtable on the regulated conduct defence. BIAC also welcomes the Secretariat's paper on the topic. The OECD has previously considered the tension between sector-specific regulation and competition law regimes in a 1998 roundtable on the topic. However, the 1998 roundtable focused largely on avoiding contradictions between regulators, rather than the concerns applicable to businesses that must confront those contradictions.

2. This submission sets forth BIAC’s views concerning the challenges businesses face in confronting regulatory regimes that overlap with competition law regimes. In particular, the submission discusses the application of the regulated conduct defence which, in general terms, should preclude liability for competition law contraventions where a regulatory regime governs the industry at issue. Because competition authorities in different jurisdictions work within different institutional, statutory, and jurisprudential contexts, the precise parameters of the regulated conduct defence vary across jurisdictions.

3. Regulatory and competition law regimes may overlap both within and across jurisdictions. When regimes overlap or conflict within a jurisdiction, issues of federalism and statutory interpretation often arise. When regimes overlap or conflict across jurisdictions, “system friction” results, restricting the ability of businesses to implement consistent business practices throughout the jurisdictions in which they operate, thereby

inhibiting efficient functioning of global commerce. Businesses would welcome greater convergence in this area, at least in terms of fundamental principles and approaches related to the regulated conduct defence. As has been seen in merger reviews (and other areas), OECD Roundtables have assisted in facilitating dialogue among competition law agencies around the world, which can lead to greater cooperation and convergence and can help address business uncertainty and reduce systemic friction. The area of regulated conduct would benefit from the same type of dialogue through this and, potentially, future OECD Roundtables.

4. Where a well-developed regulatory conduct defence (or an equivalent concept) has not been articulated and consistently applied by national regulatory and competition authorities, businesses face legal uncertainty that they cannot easily mitigate. This creates additional costs for both the private and public sectors.

5. A principled and systematic approach to analyzing the regulated conduct defence is important, given the increasingly significant sanctions faced by businesses found in violation of competition law. In addition, the regulated conduct defence is a relatively complicated legal doctrine. It is not usually explicitly spelled out by statute but rather gradually developed by ad hoc judicial analysis balancing competing interests and by antitrust agencies exercising their enforcement discretion. This is not ideal from a compliance perspective as it makes it difficult to predict the consequences of business decisions.

6. From an international perspective, approaching the defence in a principled fashion is also important to establishing clear, guiding principles for jurisdictions with newer competition law regimes, whose specific formulation of a regulated conduct defence is in the process of being established. For many such jurisdictions, the regulated conduct defence will be even more relevant given the trends in certain economies towards deregulation of key national industries. In this sense, a practical and consistent framework is important not only among established competition law regimes, but also among competition law regimes that have been more recently established.

7. Accordingly, this paper identifies a number of fundamental principles important to businesses to help guide competition agencies, regulators and legislators, when interpreting and applying the regulated conduct defence. These fundamental principles include the following:

   a. Businesses should not face criminal or civil liability when dual compliance with competition and regulatory laws is impossible or commercially impractical.

   b. Businesses should not face criminal or civil liability for conduct that a regulator has in fact mandated, specifically approved, or generally authorized. To this end, businesses should not face criminal or civil liability for conduct subject to regulation where (1) the responsible regulator exercises that authority, (2) such that there is the potential for conflicting guidance, requirements, duties, privileges, or standards of conduct between regulation and competition-law requirements (3) with respect to practices central to the regulated activity.

   c. To the extent a competition law-related remedy is warranted at all, competition authorities should only seek prospective injunctive relief to remedy such conduct rather than any monetary penalties.
d. Businesses should not face criminal or civil liability for conduct required or authorized by a regulator, even if that regulator is subsequently found to have acted *ultra vires*. Jurisdictional conflicts between regulators and competition agencies should be the responsibilities of the competent authorities in the first instance, rather than businesses subject to such conflicting requirements.

e. The applicability and scope of the regulated conduct defence should be articulated clearly and explicitly in order to provide greater predictability and certainty to businesses with respect to the status of their operations and practices and to regulators and competition agencies as to the appropriate scope of their authority.

8. Finally, it is important to recognize that, in certain cases, the existence of a regulatory regime may be relevant to a competition law analysis even if no explicit regulated conduct defence is applicable (e.g., in determining barriers to entry, the reasonableness of certain conduct). For example, the existence of a comprehensive regulatory regime may influence how competition law standards are set. In *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, the U.S. Supreme Court determined that a duty to deal did not exist under the antitrust laws because, under the Telecommunications Act of 1996, access to the defendant’s telecommunications network was governed by a comprehensive regulatory scheme. In addition, dialogue between competition law authorities and their sector-specific regulatory counterparts can be helpful. For example, some competition agencies have an explicit statutory authority to either intervene in or submit comments to regulators. The U.S. antitrust agencies frequently submit testimony or comments on regulatory initiatives, and likewise the Canadian Commissioner of Competition may, on her own initiative, make representations to and submit evidence before a federal or provincial agency with respect to competition concerns. It is preferable from a predictability standpoint to have a competition authority express concerns with a regulatory decision or policy *ex ante* rather than *ex post* through inefficient, costly litigation.

9. The remainder of this paper describes the regulated conduct defence as applied in the United States, Canada and the European Union. Particular attention is paid to a growing divergence between the application of the regulated conduct defence in Canada and the U.S., on the one hand, and the European Union, on the other, where the European Commission’s enforcement limits the scope of the regulated conduct defence available to businesses governed by national regulatory regimes inconsistent with E.U. competition law. Given the growing importance of cross-border trade and corporate operations, clear definition and operation of the law in this area is vital.

**United States**

10. Generally speaking, the regulated conduct defence applies in a number of forms in the U.S.: the “state action” doctrine where state regulation is concerned and the “implied immunity” doctrine where there is an asserted conflict between federal regulatory standards and federal antitrust law. Also important in a multijurisdictional context is the “foreign sovereign compulsion” doctrine, which exempts a private party from liability for

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acts or failures to act which are compelled by a foreign government.\textsuperscript{6} The state action doctrine applies when a person claims that state regulation precludes the application of federal antitrust laws.\textsuperscript{7} The individual invoking the state action doctrine bears the burden to demonstrate that (1) the challenged restraint is “one clearly articulated and affirmatively expressed as state policy,”\textsuperscript{8} and (2) the policy is “actively supervised”\textsuperscript{9} by the state itself.\textsuperscript{10}

11. The parameters of the state action doctrine are in large measure consonant with the fundamental principles identified at the opening of this paper.

   a. First, the active supervision and clear articulation requirements help ensure that individuals will not face liability when dual compliance with regulatory and antitrust laws is impossible.

   b. Second, by focusing on the foreseeable consequence of a regulator authorizing or permitting conduct, the doctrine seeks to avoid the more subjective and indeterminate question of whether a regulator specifically intended to exempt


\textsuperscript{7} \textit{Parker v. Brown}, 317 U.S. 341 (1943). As a matter of statutory interpretation (and implicit federalism concerns), the U.S. Supreme Court has found that state regulation may preclude the application of federal antitrust law because the federal antitrust laws were not intended to prohibit state-level regulation of industries that could be inconsistent with free competition. \textit{Id.} at 351.

\textsuperscript{8} With respect to the “clear articulation” requirement, articulation will often be found through an express statutory provision, but authorization need not be specific: “if the State’s intent to establish an anticompetitive regulatory program is clear, ... the State’s failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.” \textit{Southern Motor Carriers Rate Conference v. United States}, 471 U.S. 48 (1985). Such an intent could be inferred if anticompetitive conduct foreseeably results from regulation. \textit{Town of Hallie v. City of Eau Claire}, 471 U.S. 34, 42 (1985) (reasoning that broad authority over sewage treatment included authority over sewage collection and transportation, precluding monopolization claims); \textit{City of Columbia v. Omni Outdoor Advertising}, 499 U.S. 365, 373 (1991) (finding “[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants”). Moreover, “a state policy that expressly permits, but does not compel, anticompetitive conduct may be ‘clearly articulated.’” \textit{Southern Motor Carriers Rate Conference}, 471 U.S. at 61. The U.S. Federal Trade Commission (“FTC”), however, has typically required a stronger indication that regulators have deliberately intended to replace competition than courts. See \textit{South Carolina Bd. of Dentistry}, 138 F.T.C. 229, 251-52 (2004) (“‘Foreseeability’ in this context, however, must be restricted to only those regulatory schemes in which the anticompetitive conduct would ‘ordinarily or routinely result’ from authorizing legislation in order to ensure that there was a deliberate and intended state policy”).

\textsuperscript{9} With respect to the “active supervision” requirement, this element asks whether the state regulators have played a “substantial role in determining the specifics of the economic policy” under challenge. \textit{FTC v. Ticor Title Ins. Co.}, 504 U.S. 621, 635 (1992). The FTC has identified several relevant factors to determining whether active supervision exists, including an agency’s: (1) factual record; (2) written decision; (3) assessment of conduct; (4) collection of business data; (5) economic studies; (6) review of profits; and (7) disapproval of inappropriate rates. \textit{Kentucky Household Goods Carriers Ass’n}, 139 F.T.C. 404, 414-30 (2005), aff’d, 199 Fed. Appx. 410 (6th Cir. 2006).

\textsuperscript{10} \textit{California Retail Liquor Dealers Ass’n v. Mideal Aluminum, Inc.}, 445 U.S. 97, 105 (1980). Note, however, that the doctrine appears to vary where municipalities or subordinate state agencies are involved. For example, the Supreme Court has established that the state supervision requirement “should not be imposed in cases in which the actor is a municipality”. See \textit{Town of Hallie supra} note 8 at 46. The Court in \textit{Hallie} went on to state that, although the issue was not before it, it is likely that active state supervision would not be required in cases where the actor was a state agency.
certain conduct from antitrust law. Such an inquiry is likely to be conducted in hindsight and does not afford predictability to individuals. By contrast, an inquiry into whether a regulator caused allegedly anticompetitive conduct or such conduct was a foreseeable result of regulator activity is a question that can be answered *ex ante* with greater predictability for individuals subject to overlapping regulatory and antitrust regimes.

c. Third, the development of the concept through extensive judicial case law discussion has provided some degree of clarity and predictable standards to a very complicated area of law.

12. Similarly, the implied immunity doctrine, which applies when a federal regulatory regime conflicts with federal antitrust law, also offers a principled framework for assessing liability.\footnote{The U.S. Supreme Court has explained that “[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavoured, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.” *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 350-51 (1963). See also *Credit Suisse Securities (USA) LLC v. Billing*, 127 S. Ct. 2383, 2392 (2007) (identifying as relevant factors in challenge involving securities regulation: (1) “the existence of regulatory authority under the securities law to supervise the activities in question”; (2) evidence that the responsible regulatory entities exercise that authority”; (3) “a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct”; and (4) “[whether] the possible conflict affect[s] practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.”).}

13. The parameters of the implied immunity doctrine also offer a principled framework for determining liability, in that:

a. The doctrine recognizes that antitrust liability should not be predicated on conduct that is subject to competing or inconsistent regulatory requirements. In *Credit Suisse v. Billing*, supra n.9, the Supreme Court found that antitrust enforcement decision makers (such as juries in private treble-damages antitrust actions) could arrive at decisions as to liability different than expert securities regulators who would better understand industry practices and might have different policy goals.

b. The doctrine acknowledges that the benefit of applying antitrust law may be low where conduct lies directly within an area over which a sector-specific regulator exercises authority.

c. The framework of the implied immunity doctrine is helpful in that it identifies practical, relevant factors. The more factors that are found to be present and the greater their weight, the more likely the doctrine will be found to apply. In the absence of an explicit statutory clause repealing the application of antitrust law in a given regulated sector, this may be the most practical approach for determining when the regulated conduct defence can be successfully invoked.

**Canada**

14. The regulated conduct defence in Canada arose in a series of cases upholding provincial statutes governing the production and marketing of agricultural products against challenge on the basis that they were contrary to the federal government’s competition
The foundation of the defence is a recognition that federal competition laws are directed against private actions contrary to the public interest, and publicly regulated actions ought not to be considered as contrary to the public interest.

15. Under Canadian law, the regulated conduct defence has three basic elements: (1) the relevant provision of the Competition Act (or other statute) must contain the necessary statutory intention\(^{14}\) to demonstrate that a consideration of the public interest is contemplated\(^{15}\); (2) the regulatory legislation must be valid; and (3) the impugned activity must be authorized\(^{16}\) by and not frustrate the regulatory scheme.

16. Consistent with the principle of transparency, the Competition Bureau (“Bureau”) has provided guidance to individuals on when and how it will recognize the regulated conduct defence in its Regulated Conduct Bulletin (“Bulletin”).\(^{17}\) Equally importantly, the Bureau has updated its guidance on the regulated conduct defence following major judicial decisions and statutory amendments.\(^{18}\)

17. With respect to provincially regulated conduct potentially conflicting with criminal conspiracy law, the Bureau represents that where provincial law “authorizes (expressly or impliedly) or requires the impugned conduct . . . the Bureau will not pursue a [criminal
conspiracy] case.”19 This policy is consistent with the principle that regulatory uncertainty should not carry the risk of criminal liability.

18. With respect to conduct regulated by federal law other than Competition Act, the Bureau will attempt to discern whether dual compliance is “reasonable”; whether federal law “authorize[s] or require[s] the particular conduct or, more generally, provid[es] an exhaustive statement of the law concerning a matter”; and whether preclusion of the Competition Act is implied by Parliament’s enactment of “specific provisions to address the conduct in question.”20 This policy is consistent with the principle that displacement of competition law may be express or implied, and where regulatory action is taken by one regulatory authority, potentially conflicting action should not be taken by another which may be at cross purposes.

19. Finally, the Bulletin recognizes that, even where the regulated conduct defence does not apply, “a party may still benefit from other defences or doctrines, such as a lack of requisite mens rea, official inducement of error, statutory justification, issue estoppel or Crown immunity.”21 Because the application of the regulated conduct defence in any given case without guiding precedent can be uncertain, it is important, as a fundamental principle of fairness, to recognize that other defences (such as those identified above) may preclude the imposition of liability where no criminal or otherwise wrongful intent exists.

20. Like the U.S., Canadian courts and competition authorities have attempted to provide businesses a measure of guidance and leeway where regulatory and competition law regimes intersect.

**European Union**

21. In general terms, the scope of the regulated conduct defence under E.U. competition law is much narrower than the scope of the defence in the U.S. or Canada. Many sectors are subject to both competition law and sector specific legislation, and overlap of jurisdiction between the two sets of rules does exist in many circumstances. To make matters more complex for companies operating in Europe there are a number of authorities with different mandates and responsibilities (e.g. the European Commission, national competition authorities, national regulatory authorities) that may be simultaneously positioned to oversee commercial activities. This complex overlapping structure leads, in some instances, to business facing difficulties in complying with sets of rules that may have divergent objectives.

22. In Europe, the approach towards a regulated conduct defence is somewhat different than in the U.S. and Canada, in part owing to the applicable legal and institutional framework in Europe. The primacy of E.U. law and the duty on Member states to ensure the fulfillment of their obligations under E.U. law have been interpreted to mean that Member States must not maintain legislative, regulatory or other measures which may undermine E.U. law, including E.U. competition rules. In the event a national regulation or action by a regulator leads to outcomes contrary to E.U. competition rules, the Director General of Competition may pursue the Member State for breach of its treaty obligations and/or,

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19 Bulletin at 4.
20 Bulletin at 7.
21 Bulletin at 2.
simultaneously or alternatively, pursue the regulated undertaking, including to impose fines.

23. As a matter of policy development and legal authority, the burden of ensuring compatibility between regulatory and competition law regimes should be that of government authorities and not private business. Accordingly, businesses operating in the E.U. would very much welcome a regulated conduct defence.

24. The regulated undertaking has no defence based on the fact it was complying with national law or regulations, whether the allegedly unlawful conduct is merely permitted or specifically authorized.\textsuperscript{22} The telecommunication margin squeeze cases (e.g., Case C-280/08 Deutsche Telekom v Commission, Judgment of 14 Oct 2010, on appeal from T-271/03) are examples of pricing decisions which had been approved by national regulators but were later held to be an abuse of dominance. In the Deutsche Telekom case, the Commission had held that despite the regulatory approvals, “competition rules may apply where the sector specific legislation does not preclude the undertaking it governs from engaging in autonomous conduct that prevents, restricts or distorts competition”.

25. This position is endorsed by national competition authorities. For instance, the French Autorité de la Concurrence stated in a recent case where heavy fines were imposed French banks in relation to an agreement on inter-bank commissions for cheque clearances (Decision No 10-D-28, 20.09.10) that the approval (and even “active support”) of the practice by the bank regulator (Commission Bancaire) and the country’s central bank (Banque de France) was not a valid defence absent the imposition of a binding rule.

26. Absent a specific regulated conduct doctrine, defences based on, inter alia, legitimate expectations and proportionality are unsuccessful.

27. At most, in a few cases, a conflicting regulatory approach has been viewed as a partially mitigating factor when applying sanctions for breach of competition law.\textsuperscript{23}

28. The application of the regulated conduct defence where there is a direct contradiction between incompatible requirements of the national regulator and E.U. competition law and no flexibility to comply with both (where a state compulsion defence would be available if the requirement were imposed by a third country's legislation) is less clear.


a. The Directorate General for Competition proposed to take the approach that even such an incompatible requirement was no defence in the *Norwegian Gas GfU* case, arguing that even if the conduct was required by the laws of Norway, the companies should have refused to comply with an unlawful national law (Norway being an EFTA Member State bound by an obligation not to breach E.U. competition law similar to that binding E.U. Member States). The case was eventually settled without fines, on the basis of undertakings given by Norway and the companies concerned since Norway agreed to change its law.

**Conclusion**

29. The U.S. and Canada appear to have well-developed concepts of the regulated conduct defence. For regulators and competition agencies, it is important that consistent standards be observed in the application of the regulated conduct defence to avoid system friction. For businesses, it is important that predictable guidance be developed on how to proceed when regulatory and competition law regimes overlap leaving the scope of permitted conduct ambiguous. For countries with newer competition agencies or in the process of deregulating state-controlled industries, a principled framework of the regulatory conduct defence can serve as useful guidance.

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25 Id.