SUMMARY OF DISCUSSION POINTS

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

Roundtable Discussion on Remedies and Sanctions in Abuse of Dominance Cases

June 8, 2006

A. Overview of BIAC Position

1. Key policy goals in imposing remedies in abuse cases should be directed toward:
   a) The promotion of competition, not toward aiding particular competitors;
   b) A proportionate remedy that does not go beyond provisions necessary to restore competition, having regard to:
      - minimization of potential chill on future innovation;
      - promotion of economic efficiency; and
      - respect for a party’s fundamental IPRs.

2. When imposing remedies for abuse, behavioural remedies directed toward eliminating barriers to restore competition are clearly preferable to structural remedies.

3. Fines are an inappropriate remedy for abuse of dominance, except where there has been an intentional failure to comply with a pre-existing remedial order.

4. Enforcement agencies conducting parallel or sequential reviews of the same or similar abuse cases should craft and apply remedies that are comity oriented and not inconsistent.

B. Policy Goals for Effective Remedies in Abuse Cases

1. While policy goals in imposing remedies in abuse cases will in part be dictated by the country’s specific policy objectives and the stage of its economy (i.e. developed or in transition), a balanced approach should inform the choice of any remedy, namely, one that goes no further than necessary to restore competition to the relevant market having regard to:
   - minimization of the potential chill on future innovation;
   - promotion of economic efficiency; and
   - respect for a party’s fundamental IPRs.
1.1. Minimize Potential Chill on Future Innovation/Least Interventionist Remedy

- The requirement for restraint is particularly compelling in the case of rapidly changing industries. As noted by Robert Pitofsky, former U.S. FTC Chairman:

  Competition agencies must take into account certain unique attributes of high technology industries when applying competition laws, such as the complexity of the technical issues involved, the speed of market transition, the “self-correcting” nature of high-tech markets through the rapid and seemingly perpetual introduction of new products, and the inapplicability of traditional theories of output and price effects.¹

- The need for caution in the high-tech area was reinforced by Assistant Attorney General Hew Pate’s remarks on the recent EC Decision in the Microsoft case:

  Imposing antitrust liability on the basis of product enhancements and imposing ‘code removal’ remedies may produce unintended consequences. Sound antitrust policy must avoid chilling innovation and competition even by ‘dominant’ companies. A contrary approach risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers that benefit from it. It is significant that the U.S. district court considered and rejected a similar remedy in the U.S. litigation.²

- To the extent possible, any remedy should be “technology neutral”. A remedy should not affect the market for a particular technology, nor the incentives to innovate and develop future technologies, other than affecting specific incentives through the elimination of any improper barriers to entry or expansions, or other anti-competitive conduct.

- Competition law agencies should also act with restraint when considering the imposition of remedies that impinge on a party’s IPRs. Invasive remedies that reduce the value of IPRs can have a chilling effect on lawful product investment, research and innovation. Firms that would otherwise be encouraged to develop technological advancements may be reluctant to invest the necessary resources to do so, for fear that the anticipated benefits would ultimately be dissipated by overzealous antitrust enforcement policies. A dominant firm which believes there is real risk that its innovations may be labelled “essential” would be unlikely to invest in research and development to the same extent as it would absent such risk.

- The Canadian Competition Tribunal has commented that its function in making an order under section 79 of the Competition Act does not include imposing penalties or punitive

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measures and that "simple clear-cut remedies targeted at the fundamental issues are preferable to more complex and interventionist ones that will have a perpetual life and may not cover adequately all situations present and future".3

1.2. Promote Economic Efficiency

- Efficiencies are often discussed in terms of three major components: production efficiency, innovation/dynamic efficiency and allocative efficiency.4 The promotion of dynamic efficiencies is of paramount importance in rapidly changing technology markets, where companies are constantly striving to achieve greater innovation, synergies, cost savings and network efficiencies, and where dynamic efficiency gains represent the greatest opportunity for increased future economic and consumer well-being.

- The Canadian Competition Bureau’s Intellectual Property Enforcement Guidelines (IPEGs) reflect the Bureau’s recognition that dynamic change and innovation, which are fostered by the protection of IPRs, are increasingly important drivers of economic activity and productivity gains and, in many industries, are now the most important indicia of competition.5

- Accordingly, remedies in abuse cases should take into account the need to support, or at least not chill, the realization of dynamic efficiencies. There is a danger that the traditional competition law focus on shorter-term allocative efficiency goals may result in enforcement activities which could adversely affect the incentives to innovate and the long-term benefits to society that flow from the research and development activities which are fostered by the protection of IPRs.

- Awareness of this danger is reflected in the U.S. approach to balancing the exclusive rights afforded to the owner of intellectual property and the objectives of competition law, as succinctly summarised by Debra A. Valentine, former General Counsel, U.S. FTC:

  Antitrust law promotes market structures that encourage initial innovation with a competitive market ‘stick’ - that is, firms that fail to innovate will get left behind. Intellectual property law encourages initial innovation with the ‘carrot’ of limited exclusivity, and the profits that flow there from. Antitrust law enables follow-on innovation by protecting competitive opportunities beyond the scope of the exclusive intellectual property right. Intellectual

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3 Laidlaw

4 See Brodley, J., *The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress*, November 1987, New York University Law Review, pp. 1020-1043 at 1025. Production efficiency is achieved when output is produced using the most cost-effective combination of productive resources available under existing technology. Innovation or dynamic efficiency is achieved through the invention, development and diffusion of new products and production processes. Allocative efficiency is achieved when the existing stock of goods and productive output are allocated throughout the price system to those buyers who value them most, in terms of willingness to pay or willingness to forego other consumption.

property law enables follow-on innovation by requiring public disclosure of the initial innovation (at least in the patent context) and affording follow-on innovators rights of ‘fair use’ and freedom from intellectual property ‘misuse’. The basic principle that mediates the tensions ... is that intellectual property rights provide legal monopoly power, but only within the defined, limited scope of the right.6

- Canadian law implicitly recognises that traditional competition laws and IPRs are designed for the same purpose – to reward success on the merits of skill and hard work. For example, there is an IP exception to the Competition Act to the abuse of dominance provisions, which provides that an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act. In addition, the abuse provisions include a “superior competitive performance” exception that states that in determining whether a practice will prevent or lessen competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

1.3. Promote Competition, not Competitors

- Remedial orders which are directed toward aiding particular competitors interfere with the effective functioning of competitive markets, preventing the achievement of the benefits that would otherwise have been achieved as a result of competition. Further, protecting competitors puts the competition agency in the role of industrial engineer, which is not something it, or any government agency, is particularly well suited to do.7

- This objective also reflects and encompasses the accepted and respected international competition and trade norms of non-discrimination and procedural fairness in the application of a state’s laws, particularly with respect to “national champions”.8 No special treatment favor or aid should be directed toward any specific entity in a remedial order; rather, the focus of the remedy should be on removal of anti-competitive barriers and practices in order to restore the process of competition to the relevant market.

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6 “Abuse of Dominance In Relation To Intellectual Property: U.S. Perspectives And The Intel Cases”, Remarks before The Israel International Antitrust Conference, Tel Aviv, Israel, November 15, 1999.

7 As noted by the U.S. Supreme Court in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 124 S. Ct. 872 (2004).

8 Both the ICN and the WTO have endorsed the principles of non-discrimination and procedural fairness. The ICN’s Guiding Principles For Merger Notification and Review include non-discrimination on the basis of nationality and procedural fairness. (http://www.internationalcompetitionnetwork.org/icnnpguidingprin.htm) The structure of the WTO is similarly based on these principles. For example, TRIPs provides that WTO Members shall accord the treatment provided for in the Agreement to the nationals of other Members. Article 3 embodies the national treatment principle, providing that each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property. Further, Article 4, Most-Favoured-Nation Treatment, provides that, “with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members”.

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C. Behavioural Remedies to be Favoured

1. BIAC submits that when imposing remedies for abuse, a predisposition to behavioural remedies is mandated.

- In abuse cases, a structural remedy may deprive the market of aggressive and efficient dominant firms particularly when:
  i). dealing with IPRs;
  ii). rapidly changing markets; and
  iii). cases involving an element of superior competitive performance.
- A behavioural remedy is a more effective tool than a divestiture remedy, permitting the realisation of the projected efficiencies while constraining the future exercise of market power.
- Behavioural remedies can be more specifically designed to meet particular anti-competitive practices. For example, in enforcing the Canadian Competition Act, remedial orders in abuse of dominance cases have been directed toward the elimination of specific contract clauses (rights of first refusal and other types of ties) as well as anti-competitive types of conduct. These have been considered effective in restoring competition.
- In addition, divestiture remedies are inflexible. If a behavioural remedy is adopted, any misjudgement of the potential anti-competitive effects can be addressed by adjusting the remedy.
- Moreover, structural remedies are potentially problematic in rapidly changing markets because it is reasonably likely that the competitive dynamics of the market will have fundamentally shifted by the time the remedy is implemented. In such a case, the dominant entity may no longer have the market power it had at the time of the investigation and may be prevented from being an effective competitor by a divestiture remedy. A behavioral remedy is more flexible and can be adapted to changing market conditions. Arguably, requiring divestitures in rapidly changing markets may unduly stifle innovation and efficiency.

1.1 Removal of Barriers to Competition

- The focus of remedial orders in abuse of dominance cases should not be on punishment of the dominant firm, but on facilitating competition in the relevant market. Remedies that eliminate barriers or constraints on competition are preferable to structural remedies or punitive fines.
- In Canadian abuse cases, for example, unlike in merger cases, the Competition Tribunal has focused on behavioural remedies. Remedial orders issued by the Canadian Competition Tribunal have included prohibitions against one or more of the following:
  i). enforcing certain contractual terms (e.g. exclusivity clauses) (*NutraSweet*; *Laidlaw*; *Nielsen*)
  ii). entering into certain contractual terms (e.g. long term contracts or contracts with exclusivity clauses) (*NutraSweet*; *Laidlaw*; *Nielsen*)
  iii). acquisitions of competitor (*Laidlaw*)
iv). withdrawing from a market (Laidlaw)
v). threatening litigation (Laidlaw)
vi). rejecting customer orders (Tele-Direct)
vii). delaying processing of customer orders (Tele-Direct)
viii). disparaging services of others (Tele-Direct)

The Competition Tribunal has issued one order to supply for a defined term. (Nielsen)

- Monitoring a carefully crafted behavioural remedy is not likely to be more onerous than monitoring a divestiture remedy in a merger case, which involves not only monitoring the sale process but the interim management of the assets; the behavioural remedy just may have to be monitored periodically for a longer period of time. In addition, various mechanisms can be used, in appropriate cases to remove the mentoring burden. For example, the terms of the order can be widely publicised and reliance can be placed on industry members to bring any issues forward with provision that monitoring of a behavioural remedy could be delegated to an arbitration process.

1.2 IPRs

- The protections offered by IP laws provide incentives to innovation, leading to dynamic efficiency gains.9

- The requirement that IPRs be protected in order to provide incentives for the development of valuable works, has been accorded global recognition in treaties such as the World Intellectual Property Organisation (WIPO) treaties and the WTO treaty concerning Trade-Related Aspects of Intellectual Property (Art. 7). [Specifically, Article 7 of TRIPs provides that the protection and enforcement of IPRs should contribute: (i) to the promotion of technological innovation and to the transfer and dissemination of technology; (ii) to the mutual advantage of producers and users of technological knowledge; (iii) in a manner conducive to social and economic welfare; and (iv) to a balance of rights and obligations.] Overriding these valuable protections may be expected to stifle innovation, impede efficiency gains and detract from consumer and public welfare.

- The Canadian abuse of dominance provision states that the mere exercise of an IPR is not an anti-competitive act. In Canadian cases where anti-competitive conduct with respect to IPRs has been alleged or remedies have been sought which affect a party’s IPRs, the Competition Tribunal has demonstrated a respect for, and reluctance to interfere with the mere exercise of, such rights. The Canadian IPEGs10 indicate that conduct involving a mere exercise of IPRs will only be challenged in circumstances where invoking a remedy against the IPR holder would not adversely alter the incentives to invest in research and development in the economy; the alleged competitive harm stems directly from the refusal and nothing else; and no appropriate remedy is available under the relevant intellectual property statute.

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D. Fines

- Fines are an inappropriate remedy for abuse of dominance, except in circumstances where there has been a clearly established intentional failure to comply with a pre-existing remedial order.

E. Consistent Remedies

- Where more than one jurisdiction is reviewing the same or similar conduct in the course of an abuse of dominance investigation, they should aim, at a minimum, to adopt a comity-oriented approach. This should encompass consultations on a timely basis which take into account each others’ concerns, and, to the fullest extent possible, devise remedies that are not inconsistent, but rather are compatible with another and will operate coherently throughout the relevant market. 