

Summary of Discussion Points

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

Serial Offenders: A Discussion on Why Some Industries Seem Prone to Endemic Collusion

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The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Global Forum on Competition for its session on *Serial Offenders: A Discussion on Why Some Industries Seem Prone to Endemic Collusion*.

1. There is good economic guidance which identifies the structural circumstances in which collusion is more likely to occur. A small number of competitors, high barriers to entry, mature markets with limited innovation, similar size and capacity, and other recognized factors all are conditions that facilitate coordination and collusion.¹ We think this guidance is valuable in identifying industries in which cartels are more likely to occur and would observe that many of the industries identified in the issues paper have these types of characteristics.
2. Other economic factors are also necessary to make a market conducive to cartel behavior and to cause a cartel to be effective. These include an ability to raise price due to inelasticities of demand, low expectations of severe punishment, low organizational costs, and ease of detecting and punishing cheating.² The confluence of structural and economic indicators creates the most dangerous environment for potential cartel behavior.
3. These structural and economic characteristics, however, are a (usually) necessary but always insufficient set of circumstances to determine whether cartelisation has occurred. At its heart, a cartel requires human contact, a common purpose, and a degree of trust among the participants of the cartel. Regulators should consider how those elements play into the analysis of recidivism and endemic collusion. For example, some industries with only moderate structural and economic indicators may be more prone to unlawful collusion because they entail or require pervasive interaction among industry participants on legitimate issues such as joint product development, joint project investment, risk-sharing measures, regulatory coordination or other activities that are, of themselves, fully lawful and

¹ See, e.g., U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines 25-27 (2010) (§ 7.2), available at www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf.

² Dennis Carlton & Jeffrey Perloff, *Modern Industrial Organization* 127-144 (4th ed. 2005).

often pro-competitive. Other industries, in contrast, with strong structural and economic indicators may be free of problems because the competitors operate in relative isolation from one another.

4. This also implies that the conditions necessary to support collusion cannot predict collusion and that agencies would be wrong to condemn industries merely because they have these structural characteristics. Indeed, absent collusion these same characteristics suggest that prices in these industries would be among the most competitive of all segments of the economy. There are many major industries that have a structural make-up that resembles the chemical industry, for example, that have been spot-free of competition problems.

5. BIAC would also observe that some of the industries identified as being subject to endemic collusion involve localized markets, which is not surprising. As some experts have observed, “The smaller the geographical area of a market, the more likely it is that a few firms have a large share of the business.”³ But these endemic problems may represent no more than a small, predictable percentage of the large number of relevant geographic markets that have fallen prey to cartel behaviour. And for the many instances of problems in more “localized” markets such as concrete, food, etc., there are far more examples of honest industry than of collusion.

6. It also should be noted that some of these past indiscretions have lead some industries, for example in the chemical sector, to invest greatly in the development of compliance tools and learning in a way that has benefitted all industries. The development and implementation of compliance tools has been an enormous development in competition law over the past 20 years. Enforcers have made their message clear, and the vast majority of businesses have received and acted upon that message, with many of the industries purportedly exposed to “endemic collusion” among the most vigilant. There is still work to be done, especially on the localized front and among SMEs, but the progress already is substantial.

7. On this basis, the proper approach of regulators should be to keep an ever-watchful eye, but not a suspicious one. Investigations in these sectors, like others, should be based on reasonable grounds to believe that an infringement has occurred rather than condemnation of an industry merely because of its structural characteristics.

8. Finally, BIAC agrees that true recidivists, i.e., those who infringe the law in the same product market already having been caught, should receive enhanced penalties. These penalties should include an uplift in fines that is clearly reflected in fining guidelines, calculable with reasonable certainty, so as to send a proper message of deterrence. BIAC believes that a proposal regarding divestiture is an extreme measure that is not appropriate as it will not eliminate the structural or economic factors and, in effect, serves to punish shareholders rather than culpable business operators. Recidivist treatment should be applied to those situations in which the repeat offense is closely connected to the original offense in some identifiable way. An effort should be made to distinguish between true recidivist behavior and separate offenses that occur in separate, far-flung businesses that happen to be part of the same large conglomerate group or in separate, far-distant timeframes. If there is no commonality between the two

³ *Id.* at 134.

offenses in relation to business group, management, product market, etc., then the basis for applying recidivist penalties is weakened.