



Activity Update

Competition Committee

January 2016

ABOUT BIAC

As the officially recognized voice of business to the OECD, the Business and Industry Advisory Committee (BIAC) conveys business perspectives and expertise to policymakers on a broad range of global economic governance and policy issues. In the framework of its consultative status with the OECD, BIAC keeps the OECD informed of the private sector's response to different policy options, thus giving the business community a chance to shape the development of long-term policies in OECD countries.

The BIAC Competition Committee informs and encourages senior regulators and antitrust enforcers to act consistently and proportionately in accordance with due process and best practice, with respect to the objectives of effective enforcement of competition laws. Its primary objective is maintenance of business competitiveness and the efficient operation of markets with a minimum necessary level of regulatory intervention across all business sectors.

This *Activity Update* provides an overview of key activities of the OECD and of the BIAC Competition Committee in the field of Competition Law and Policy.

COMMITTEE LEADERSHIP

- **Chair:** Ms. Lynda Martin Alegi, Of Counsel, Competition and Trade Department, Baker & McKenzie (United Kingdom)
- **Vice Chairs/Extended Bureau:** Mr. Wolfgang Kopf, Deutsche Telekom AG (Germany), Mr. Paul Lugard, Baker Botts LLP (Netherlands), Mr. Paolo Palmigiano, Sumitomo Electric Industries (United Kingdom), Mr. John Taladay, Baker Botts LLP (United States), Ms Anne Perrot, MAPP (France).

COMPETITION AT THE OECD

The OECD provides governments with the analytical basis to develop public policies, through performance reviews, data collection, policy analysis, and projections. For several decades, the OECD has been supporting member and non-member countries to design public policies that are both efficient and effective at promoting a sound framework for competition.

The OECD Competition Committee and Working Parties promote regular exchange of views and analysis on competition policy issues. Their work has already generated substantial results in many countries, such as the voluntary adoption of ‘best practices’, substantial analytical convergence, the establishment of strong networks of enforcement authorities, and enhanced co-operation in international merger reviews, cartel investigations and other cases.

COMPETITION POLICY

*In BIAAC and OECD views, Governments should consider **Competition Policy** and its potential benefits across the whole range of their policies. Establishing a framework of competition law and liberalising sectors is important and so is assessing the competitive effects of regulations and government intervention in other policy areas.*

Disruptive Innovation

Disruptive innovation has been high on the agenda of the OECD Working Party on Cooperation and Enforcement (WP2) in 2015.

Disruptive innovations come about when companies pursue business models of providing simpler, cheaper, or more convenient products, processes or delivery methods, and where this pursuit drastically redefines performance along parameters such as accessibility, simplicity, convenience, or user-friendliness. While the concept of disruptive innovation is not limited to “new” technologies, disruptive innovations are often associated with internet-based service: increasingly, disruptive innovations are platform-based. Platforms first appeared for the diffusion of content, but are now also present in other sectors, such as banking (payment platforms, crowdfunding and P2P Lending Systems), with great pressure exerted on existing retail financial institutions and payment systems.

The importance of disruptive innovation in particular, for economic growth, is undisputed. In a hearing of the OECD Competition Committee (16 June) focusing on Disruptive Innovation and in a hearing of WP2 on

26 October on Disruptive Innovation in the Financial Sector, BIAAC took the view that the regulatory environment and antitrust policy should be squarely attuned to innovation, accommodate novel business models, and create and stimulate innovation incentives.

However, the analytical framework that is commonly used to identify pro-and anti-competitive business conduct is in a number of respects not conducive to a proper evaluation of innovation-related business transactions.

Coming up: OECD discussions on disruptive Innovation in Professions, focusing on Legal Services

Across Platform Parity’ Agreements

“Across Platform Parity Agreements” (APPAs) are agreements between suppliers and retailers that specify a relative relationship between prices of competing products or charged by competing retailers. APPAs are characterised by two elements: (i) a vertical element, because they involve firms at different levels in the value chain, and (ii) a horizontal element, because they link prices of competing goods and/or of competing retailers.

At a hearing on APPAs in November 2015, BIAAC explained that the treatment of APPAs by Competition Authorities is a concern for business and the challenge in assessing them is reflected by the fact that, although multiple investigations into these arrangements have been opened across the world in recent years, a number of different approaches are taken, with differing outcomes

Oligopoly Markets

At an OECD hearing on oligopolies in June 2016, BIAAC strongly encouraged agencies to enforce the competition laws against market actors, including those in an oligopoly market structure, who violate the competition laws. We also encouraged agencies to investigate markets where there is evidence of a competition law violation.

This includes the rigorous use of laws against price fixing, customer and market allocation, bid rigging, and other offenses which occur most often in oligopoly market structures and unquestionably harm consumers. This enforcement may properly extend, at times under different legal or evidentiary standards, to less “naked” conduct, including the improper sharing of highly sensitive information, invitations to collude, interlocking directorates, and other highly suspect conduct that may not rise to the level of an illegal agreement but may still have direct competitive harm.

At the same time, we expressed concern about efforts to initiate investigations in markets that are perceived to be operating sub-optimally absent any evidence of anticompetitive acts by the competitors in the market. In BIAC’s view, investigations of markets by enforcement agencies should be based on sound economic and factual evidence that provides a strong indication that competitors have undertaken anticompetitive actions beyond mere strategic interdependence. For reasons discussed below, BIAC does not believe that this is an appropriate or efficient use of agency resources: it is not likely to result in sustainable outcomes, and imposes significant costs on industry that often are unjustified.

2015 Best Practice Roundtables

- Hearing on ‘Across Platform Parity’ Agreements (APPA)
- Discussion on Competitive Neutrality and Roundtable discussion on Competitive Neutrality in Competition Enforcement, Hearing on Competitive Neutrality
- Hearing on Competition and Disruptive Innovation
- Hearing on Oligopoly Markets
- Discussion on Institutional Design

BIAC Submissions

- Disruptive Innovation
- Across Platform Parity’ Agreements
- Oligopoly Markets

Coming up

- Roundtable discussion on Fidelity Rebates
- Roundtable discussion on Commitment Decisions

COMPETITION AND REGULATION (WP2)



2015 Hearings and Best Practice Roundtables

- Structural Separation: Review of the Recommendation
- Reference Guide on the Ex-Post Evaluation of CA Enforcement
- Disruptive Innovations in the Financial Sector
- Roundtable discussion on Liner Shipping
- Hearing on Auctions and Tender

BIAC Submissions

- Disruptive Innovations in the Financial Sector

COOPERATION AND ENFORCEMENT (WP3)

Cartels in Intermediate Goods

Cartel enforcement, incorporating appropriate punishment to deter cartel behavior, is a critical priority for antitrust regulators, one which the BIAC

fully endorses.

Roughly 130 countries have antitrust laws, most with cartel provisions, and in 2014 a total of \$6.5 billion in criminal fines and administrative penalties was levied by almost 20 jurisdictions against cartel conduct.

As cartel enforcement increases, the degree of enforcement within and between jurisdictions should be considered in evaluating whether the level of enforcement and punishment is proportionate to the harm created by cartel offenses. Cartels involving intermediate goods raise this issue directly, as the same price-fixed goods may touch several jurisdictions. In turn, this creates the potential for punishment for the same cartel behavior – and the same cartel harm – in several jurisdictions at once.

Public and Private Enforcement

BIAC had the opportunity to contribute to an OECD Roundtable on the relationship between public and private antitrust enforcement. In BIAC's view, the current balance between public and private antitrust enforcement across many jurisdictions is both inconsistent and unsatisfactory. While several jurisdictions have been encouraging more private enforcement to achieve the goals of deterrence and compensation, it is important to keep safeguards in place so as not to stifle pro-competitive business conduct or overcompensate victims. The OECD is in a position to propose convergence measures that would create more consistency across jurisdictions, and promote the appropriate balance between public and private antitrust enforcement.

2015 Hearings and Best Practice Roundtables

- Roundtable on Cartel Cases Involving Intermediate Goods
- Inventory of Provisions in International Cooperation Agreements
- Public and Private Antitrust Enforcement in Competition

BIAC Submissions

- [Relationship between Public and Private Antitrust Enforcement](#)
- [Cartel Cases Involving Intermediate Goods](#)

Coming up

Following up on a decision made at the last meeting of the OECD Working Party on Cooperation and Enforcement (WP3), a half-day joint meeting with the **OECD's Working Group on Bribery (WGB)** is scheduled to take place in June 2016. Likely issues for the joint meeting are:

- Cooperation between competition and anti-corruption enforcers, in particular in the area of public procurement, with a focus on incentives for procurement officials to take an interest in fighting collusion.
- Challenges to the exchange of information between enforcers.
- Whistle-blowers' protection

Merger Control, Public Interest Considerations and Jurisdictional Nexus will also be high on the agenda.

GLOBAL FORUM ON COMPETITION

BIAC actively participated in the 14th OECD Global Forum on Competition (GFC) which was held in Paris on 29-30 October 2015.

The GFC traditionally brings together high-level competition officials from close to 90 competition authorities. It provides an opportunity for policy dialogue between OECD countries and non-OECD economies. The GFC provides a venue in which important issues can be debated with competition authorities and other representatives of the developing world. At the same time, given its broad focus on development, the GFC promotes a wider dialogue that encompasses the linkages between competition policy and other cornerstones of economic development.

In 2015, high-level competition officials from more than 100 delegations worldwide came together to discuss:

- Does competition kill or create jobs? The links and drivers between competition and employment
- Competition law and policy in Kazakhstan
- The impact of disruptive innovations on competition law enforcement
- Serial offenders: Why do some industries seem prone to endemic collusion?

Global Forum on Responsible Business Conduct

A strong business delegation participated in the annual OECD Global Forum on Responsible Business Conduct (RBC), which took place in Paris on 18-19 June 2015. BIAC nominated speakers for most of the sessions, including a panel discussion on Competition Law and Responsible Business Conduct.

This session discussed potential issues related to RBC and competition law, and the question whether competition law may pose a challenge to RBC by discouraging collaboration for fear that it may lead to collusion. as well as recommendations for managing such issues.

UPCOMING MEETINGS



Please find below a non-exhaustive list of meetings scheduled for 2016. Some meetings are subject to confirmation and others will be added. Don't hesitate to contact the BIAC Secretariat for final confirmation.

JANUARY

18 **BIAC Annual Consultation with OECD Ambassadors**

May

31 -1 June **OECD Forum**

1-2 **OECD Council Meeting at Ministerial Level**

13-18 **OECD Competition Week**

November

28 -2 Dec **OECD Competition Week**

Maud Garnier Burrelly | garnier@biac.org
Director Policy & Communications

Business and Industry Advisory Committee to the OECD
13/15 Chaussée de la Muette
75016 Paris
France

Tel. +33 (0)1 42 30 09 60
Fax +33 (0)1 42 88 78 38
email: biac@biac.org
www.biac.org



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