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COMPETITION COMMITTEE**

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Global Forum on Competition

ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from BIAC

-- Session II --

This contribution is submitted by BIAC under Session II of the Global Forum on Competition to be held on 8 and 9 February 2006.

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Summary of Discussion Points

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

PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT*

1. BIAC welcomes the opportunity to provide the views of the business community to the sixth meeting of the Global Forum on Competition on the issue of prosecuting cartels without direct evidence of agreement.
2. The goal of efficient and effective prosecution of hard core cartels is embraced by the business community. Not only are hard core cartels, when they occur, a form of fraud, deception, and theft, but the most usual victims of bid rigging and price fixing cartels are businesses and governments. A significant percentage of cartel cases involve firms whose primary customers are business entities.
3. A failure to effectively enforce competition laws against cartels can often result in direct harm to the business community at several levels, extending to downstream business purchasers. In short, it is the business community as consumers that the antitrust enforcers are often seeking to protect. The business community appreciates and supports these enforcement efforts.
4. On the other hand, the business community can be an unintended victim of misdirected cartel prosecutions. There is also a substantial cost associated with defending an investigation into alleged conspiratorial action. In a typical governmental or agency investigation, parties will spend hundreds of thousands or millions of dollars in legal and administrative fees, and incur enormous expense of human resources – including senior business executives – in order to sort out the facts and comply with requests for information. These are resources which, if spent on innovation or investment, could result in a higher use and greater level of consumer welfare.
5. For every clear-cut cartel case, there are cases in which the evidence of an agreement is unclear. Business arrangements can be complex and their purpose and effect often must be inferred from an array of circumstantial evidence.
6. Given the substantial penalties and fines that can be levied on businesses during cartel prosecutions, BIAC believes that antitrust agencies should be very conservative in pursuing cartels absent direct evidence. Companies can also face great damage to their reputations during a cartel investigation. For a leading public company to be prosecuted by a regulatory authority comes close to "scandal" proportions and can make a very bad impression on investors which can then lead to a substantial fall in stock price. This then punishes the innocent investor. This sort of reputational damage should not be inflicted without very good grounds and a case which is solidly based on reliable evidence.
7. A crucial distinction must be drawn between the presence of parallel conduct in a market and the presence of collusion in a market. In the vast majority of markets, especially those involving undifferentiated products, the presence of parallel conduct is a sign of vigorous competition rather than collusion. This would be observed, for example, where competitors match every price discount of their competitors in order to maximize their sales opportunities. In such a situation, identical prices reflect the competitive process rather than the lack of competitive process.

8. The difficulty is that competitive parallel conduct can appear to be conspiratorial conduct. Therefore, it is vital that investigations of potential collusion not be based solely on parallel conduct in a market and that substantial evidence of actual collusion be adduced before forcing companies to endure such expenses, disruption and reputational damage.

9. The best form of substantial evidence of cartel behaviour will take the form of direct evidence of agreement between the parties. In the majority of cartel prosecutions, the agencies have had access to one or more of the participants in the conspiracy. The evolution of leniency programs in the North America, Europe and elsewhere has not only helped to uncover cartels that otherwise would have gone undetected, but also has helped to ensure that cartel prosecutions and investigations are based on direct evidence.

10. Direct evidence can take the form of either documentary evidence or testimonial evidence. Direct documentary evidence need not take the form of a formal contract or agreement, but may also properly include evidence of an understanding or mode of cooperation or conspiracy short of a formal agreement. BIAC would agree that such evidence should be deemed "direct" evidence sufficient to form the basis of a prosecution.

11. Direct testimonial evidence necessitates the cooperation of a participant or immediate witness to the conspiracy. Testimony of a current or former company employee that was not directly involved in the alleged cartel should be recognized as indirect evidence. While such testimony may have probative value and may, if corroborated, add to the cumulative amount of information on which a cartel prosecution is based, it should not be used as the sole basis for prosecuting a cartel. As U.S. courts have recognized, "a conviction may not be based solely on circumstantial evidence from which a trier of fact could infer facts tending to prove a defendant's guilt, or facts tending to prove his innocence."¹ Under Canadian law, proof of an agreement is a required element of the offence of conspiracy. While the Competition Act provides that the court may infer the existence of an agreement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties, the courts have been reluctant to find an agreement based on evidence of parallel conduct even where there has been communication about the conduct between parties unless it can be proven that the parties did in fact act in concert (*i.e.*, did not make independent business decisions).

12. Indirect evidence will usually take one of two forms: economic evidence suggesting that the defendants were not in fact competing; and non-economic evidence suggesting that the parties had agreed not to compete. Both forms of indirect evidence should be seen as necessary preconditions to form the basis of a cartel prosecution, but independently inadequate to form the basis of a cartel prosecution.

13. Economic evidence often is used to demonstrate that the structure of the market was conducive to making covert price fixing feasible. Typically, this involves analysis concluding that terms of agreement are easy to reach, detecting deviations from the agreement is possible, and punishing those deviations is rapid and meaningful. Economic evidence may also include analysis of the dynamics of the market intended to show that the market behaved in a non-competitive manner.²

14. Indirect non-economic evidence will often consist of documents or statements that are not conclusive on their face, but which could be interpreted to suggest that an illegal agreement may be present. These documents are frequently ambiguous and require additional testimonial or circumstantial evidence in order to properly interpret. Moreover, there is a risk that these documents will be used selectively, choosing to consider those which may suggest an illegal agreement while failing to credit those which suggest a competitive environment.

15. The most probative indirect evidence is that which suggests that an explicit agreement exists. Indirect evidence that suggests only the possibility of a tacit agreement is of particularly dubious value.

16. Indeed, basic game theory suggests that a company will anticipate the next move of its competitor and act in anticipation of that next move. Therefore, for example, documents projecting competitors' future actions and reflecting an effort to act similarly are forms of indirect evidence that could easily (but wrongly) be used as a basis for assuming an illegal agreement, but in fact may reflect aggressive competition.

17. In Europe, the Commission has acknowledged that the use of indirect evidence in European investigations has now become indispensable, as direct evidence becomes increasingly elusive from investigators' grasp. With the changing character of international cartels, which now are well aware of antitrust risks posed by their activities and so take increasingly sophisticated means to avoid leaving a paper trail, the Commission now generally relies on a combination of direct and indirect evidence in its antitrust decisions.

18. BIAC understands that indirect evidence may be used in cartel analysis but submits that it is imperative that such evidence only be used where there is also direct evidence of an agreement. Indirect evidence should not be relied upon in and of itself as proof of an agreement under Article 81 EC, Sherman Act §1, or similar regulations. The Commission must sustain its burden of producing sufficiently precise and consistent evidence to support its finding of an agreement and the existence of an agreement.

19. An interesting development in recent years in European cartel enforcement has been the move by the Commission to accept "oral only" leniency statements by companies – *i.e.*, statements offered by the corporate entity itself rather than by an individual employee or witness. BIAC recognizes that the increasing dearth of "smoking-gun" cartel documents, and a greater need to rely on corporate statements and indirect evidence to prove a cartel, not to mention fears over potential discovery in U.S. civil actions, may mean that the European Commission has to be able to accept corporate statements as evidence. However, unlike the U.S. Section 1 offence, an Article 81 EC infringement is not a *per se* violation and cannot be evidenced alone by an admission of an agreement by a corporation's employees. Moreover, corporate statements to the DOJ, as such, are not admissible evidence. If the case were to go to trial, the personnel giving statements may be required to testify on oath in court.

20. The European Court has urged caution in relying on corporate statements and has identified relevant factors that may influence their probative value as direct evidence of an agreement, given as they often are in furtherance of the company's application for potentially significant reduction or immunity from fines and given maybe years after the fact. Yet even within these parameters the Commission has relaxed its evidential standards and gone so far as to accept such un-sworn statements as proof of an agreement itself, rather than limiting them merely to triggers for further in-depth investigation and unannounced raids.

21. It is, in the view of BIAC, an unwelcome development that international cartels in Europe are increasingly being proved by corporate statements which, although technically "direct" evidence, still warrant the same corroboration by additional evidence that "indirect" evidence would, as a matter of course, require. Corporate statements are not put to test: the European Commission procedure is administrative, not judicial, and there is no mechanism for the Commission or other parties to cross-examine witnesses on statements given in furtherance of a leniency application. In BIAC's opinion, such statements should not be accepted, without verification of individual witnesses and corroboration of other evidence, ideally contemporaneous and direct evidence of cartel activities.

22. Finally, there should be a direct correlation drawn between the ability of a company to provide direct evidence of conspiracy and the willingness of the Commission to offer leniency. The Commission's current Leniency Notice³ is still in relative infancy: it takes a number of years from when a company first starts to cooperate with the Commission to when the final decision is taken, so parties are only just starting

to see decisions under the present leniency program. Only time, and the experience of judicial review by the Courts in Luxembourg, will show how circumstantial evidence will be accepted as a basis for leniency decisions and as a means to prosecution of cartels. Any imbalance between the Commission's reliance on circumstantial evidence on the one hand, and credit given for companies providing such evidence, would be undesirable and could have the effect of chilling the Commission's leniency program.

23. The lack of transparency of the Commission's leniency program means that parties are more or less unaware of the Commission's evidence, not to mention wholly unable to gauge whether any indirect evidence that they produce will be sufficient to corroborate other direct evidence (whatever it may be) of an infringement.

24. In the U.S., the courts have held that mere interdependent parallelism does not establish the contract, combination or conspiracy required by Sherman Act §1.⁴ The courts have gone on to hold that even obviously interdependent parallel pricing alone does not infer conspiracy absent certain "plus factors,"⁵ or "the additional facts or factors required to be proved as a prerequisite to finding that parallel action amount to a conspiracy."⁶

25. The leading U.S. treatise notes that parallelism, including interdependent parallelism or "tacit collusion" should not be used as the basis for a finding of conspiracy.⁷ It is well accepted that mere parallelism, including parallel pricing, cannot form the basis for demonstrating a violation of Section 1 of the Sherman Act. Indirect evidence could be just as consistent with competition as with conspiracy, and if indirect evidence is used to prosecute a cartel and is interpreted incorrectly, it could harm competition, prohibiting practices which are pro-competitive. Instead, courts require proof of "plus factors" designed to demonstrate that express collusion is more than a mere possibility. Importantly, however, the treatise recognizes that while the absence of these plus factors tends to weigh against an inference of conspiracy, the presence of plus factors is not sufficient to allow an inference of conspiracy.⁸

26. BIAC would also like to note the essential difference between cartel proceedings in the U.S. and elsewhere which is that in the U.S. the case is determined by a Court operating under criminal standards of evidence with a higher burden of proof whilst in most other jurisdictions the proceedings are administrative with an ultimate right, albeit very difficult in EU cases, of appeal to a Court on a relatively narrow basis. In such administrative proceedings, it is even more important that reliance on "circumstantial" evidence should not be relied upon unduly given the relative lack of rigour of such administrative processes.

27. While BIAC recognizes the important adjunct role that indirect evidence plays in the proof of cartels, it is equally concerned about reliance on indirect evidence alone as a means of prosecution of cartel cases. While a substantial amount of indirect evidence may, in certain cases, justify the further investigation of facts to determine whether direct evidence exists, the prosecution of cartels in the absence of direct evidence of conspiracy creates a substantial risk of chilling pro-competitive, welfare-enhancing activity. This is particularly true in jurisdictions that allow for fines based on agency prosecution alone without recourse to full judicial process prior to the imposition of fines.

NOTES

- * Paper prepared by John Taladay, Partner, and Sara Jordan, Associate, both of Howrey LLP with substantial contribution from BIAC Competition Committee members.
- 1. *United States v. General Elec. Co.*, 869 F. Supp. 1285, 1290 (S.D. Ohio 1994) (citing *United States v. Leon*, 534 F.2d 667, 676-77 (6th Cir. 1976)).
- 2. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002).
- 3. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ [2002] C 45/3.
- 4. *Brooke Group Ltd. v. Brown & Williams Tobacco Corp.*, 509 U.S. 209, 227 (1993) (“conscious parallelism . . . [is] not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.”)
- 5. *Baby Food Antitrust Litig.*, 166 F.3d 112, 123 (3d Cir. 1999) (“Because the evidence of conscious parallelism is circumstantial in nature, courts are concerned that they do not punish unilateral, independent conduct of competitors. They therefore require that evidence of a defendant's parallel pricing be supplemented with ‘plus factors.’ . . . They are necessary conditions for the conspiracy inference.”)
- 6. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1433(e) (2d ed. 2003).
- 7. *Id.* ¶ 1434.
- 8. *Id.* ¶ 1433-4.