

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**ROUNDTABLE ON CARTELS INVOLVING INTERMEDIATE GOODS**

-- BIAC --

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[www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm](http://www.oecd.org/daf/competition/cartels-involving-intermediate-goods.htm)*

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**-- Business and Industry Advisory Committee (BIAC) --**

1. The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee Working Party No. 3 for its Roundtable on Cartel Cases Involving Intermediate Goods.

**1. Introduction**

2. Cartel enforcement, incorporating appropriate punishment to deter cartel behavior, is a critical priority for antitrust regulators, one which the BIAC fully endorses. As cartel enforcement proliferates to agencies around the world, the risks of undertaking cartel behavior are increasing, and the punishment is likewise increasing, at geometric rates. 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.<sup>1</sup>

3. 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. As agencies evaluate the enforcement against cartels involving intermediate goods, including when and under what circumstances it is appropriate to exercise jurisdiction over indirect sales of goods, the question of enforcement based on direct sales should also be considered. While BIAC appreciates that the concept of “excessive deterrence” is not well received, the concept of proportionality and avoidance of excessive punishment should be carefully considered.

4. The sales of finished goods incorporating price-fixed components can cause harm in some circumstances. To date, however, the approach by most enforcement agencies has focused less on the evaluation of the harm caused in the relevant jurisdiction and more on whether the agency can properly assert its jurisdiction over the parties, or sales, that are the subject of its investigation. BIAC is of the view that jurisdiction over the parties and sales of goods incorporating price-fixed components are necessary but insufficient conditions for exercising enforcement authority or determining the amount of the fine that should be levied. Authorities should also analyze whether, and be able to prove as an element of the offence, the price-fixed component caused an anticompetitive price increase in the finished product as it was sold in the enforcing jurisdiction. In other words, even where subject matter jurisdiction is exercised on the basis of the “effects” doctrine, effects should not be presumed by mere sale of the component in a finished good within a jurisdiction. Fact- and economic-based tests should be the basis for this determination.

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<sup>1</sup> Bill Baer, Ass’t. Att’y. Gen., U.S. Dep’t of Justice, Antitrust Div., Cooperation, Convergence, and the Challenges Ahead in Competition Enforcement, Address Before the Ninth Annual Global Antitrust Enforcement Symposium (Sept. 29, 2015), *available at* [www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-ninth-annual-global-antitrust](http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-ninth-annual-global-antitrust).

## 2. Subject matter jurisdiction may properly be based on either cartel implementation or substantial effects within a jurisdiction

5. A fundamental tenet of due process is that a court or other forum of adjudication must have jurisdiction not only over the person being adjudicated, but also over the subject matter that forms the basis of the complaint against the person.<sup>2</sup>

6. Courts in many established antitrust regimes generally are in agreement that jurisdiction may be based on either one of two different relationships between the conduct of the defendants and the forum. First, it is clear that acts undertaken in furtherance of the cartel within the forum are sufficient to confer jurisdiction. The application of Article 101 depends not on the place where the agreement at issue is concluded, but solely on the place where the agreement is implemented.

*It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof..*

*The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contracts with purchasers within the Community.*

*Accordingly the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.<sup>3</sup>*

7. The jurisdiction of the European Commission (Commission) to enforce goes beyond the physical implementation of the cartel within the geographic boundaries of the Community. In *Woodpulp*, the European Court of Justice (ECJ) made clear that agreements or concerted practices between undertakings “which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market...” fall within the scope of Article 101 and are subject to Community jurisdiction, even where the acts of agreement take place outside of Europe.<sup>4</sup> The court concluded that where producers coordinate on the prices to be charged to their customers in the EU and put that scheme into effect by selling at coordinated prices, “they are taking part in a concertation which has the object and effect of restricting competition within the internal market within the meaning of Article 101 of the Treaty.”<sup>5</sup> The General Court has held that EU law applies if the conduct at issue has immediate, foreseeable and substantial effects in the EU.<sup>6</sup>

<sup>2</sup> See *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

<sup>3</sup> Joined Cases 89/85, 104/85, 114/85, 116/85, 117/85, and 125 to 129/85, *Ahlström Osakeyhtiö v. Comm'n* (‘*Woodpulp I*’), 1988 ECR I-5193, ¶¶ 16-18 (hereinafter *Woodpulp*).

<sup>4</sup> *Id.*, ¶ 11.

<sup>5</sup> *Id.*, ¶ 13.

<sup>6</sup> Case T-102/96, *Gencor v. Comm'n*, 1999 ECR II-753, ¶ 90.

8. Similarly, the United States Supreme Court has held that “the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”<sup>7</sup> Courts have interpreted this effect to exist when either the actions in furtherance of the conspiracy occurred within the United States or where the conspiracy had a substantial and intended effect in the United States.<sup>8</sup>

9. The key question, therefore, for purposes of exercising jurisdiction, often is whether the cartel produces “substantial anticompetitive effects” within the forum. In the case of international cartels involving intermediate goods, the answer to this question is neither obvious nor automatic. More importantly, the answer to this question cannot be presumed solely by the nature of the conduct involved or the intent of the parties.

10. There is no debate that certain types of conduct are so pernicious by their very nature that they may be judged as unlawful without an evaluation of their potential competitive benefits. These “*per se*” offenses, however, are adjudged as *unlawful* by the nature of the acts; it is a separate, and relevant, question in each case as to whether these pernicious acts had any *effect*. Thus, attaching the *per se* or even criminal label to the conduct does not obviate the need to demonstrate that the conduct in question produced substantial anticompetitive effects.

11. There is no dispute that direct sale of a (non-transformed) price-fixed product within a jurisdiction at an inflated price normally is sufficient to establish an effect and to justify the exercise of jurisdiction, irrespective of where the agreement or other related conduct took place. The United States, pursuant to the Foreign Trade Antitrust Improvement Act, requires that the impact of the impact of the conspiracy (e.g., the increased price) be a direct, substantial and reasonably foreseeable effect of the infringing conduct.<sup>9</sup> This is a logical rule, which ensures that those cartelists who purposefully direct their illegal conduct at a foreign jurisdiction, and succeed in doing so, are held accountable for the harm caused in that foreign jurisdiction. It makes clear that “effect” requires more than mere unlawful conduct and malicious intent. In other words, a failed attempt to influence US prices would not suffice as a basis for exercising jurisdiction. A direct sale at an inflated price, however, would suffice.

12. Indirect sales, however, where the price-fixed good is sold within a forum solely by virtue of its incorporation into another product, do not necessarily confer subject matter jurisdiction upon that forum. These sales must be evaluated based on an effects-based test.

### **3. There should be no presumption of substantial anticompetitive effects based on mere end-product resale**

13. The mere resale in a jurisdiction of a price-fixed intermediate good that has been incorporated into another product is an insufficient basis on which to presume substantial anticompetitive effects in the forum in which the end-product (or downstream product) is sold.

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<sup>7</sup> Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796.

<sup>8</sup> U.S. v. Hsu Huiung, 778 F.3d 738 (9th Cir. 2014).

<sup>9</sup> Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. § 6a, Pub. L. No. 97–290, §§ 402-403, 96 Stat. 1246-47.

14. In *Innolux*, the ECJ considered whether the Commission could properly take into account the value of the finished goods in calculating the fine against Innolux where only the LCD screen, a component of the finished good, was cartelized.<sup>10</sup> The Court first noted that “the concept of the ‘value of sales’ referred to in point 13 of the Guidelines on the method of setting fines cannot extend to encompassing sales made by the undertaking in question which in no way fall within the scope of the alleged cartel.”<sup>11</sup> This is clear guidance that any consideration of fines based on intermediate goods must exclude the value of the finished product that is not comprised by the price-fixed good.

15. The ECJ noted, however, that it would be “contrary to the goal pursued by Article 23(2) of Regulation No 1/2003 if the vertically-integrated participants in a cartel could, solely because they incorporated the goods the subject of the infringement into the finished products outside the EEA, expect to have excluded from the calculation of the fine the proportion of the value of their sales of those finished products in the EEA that are capable of being regarded as corresponding to the value of the goods the subject of the infringement.”<sup>12</sup>

16. The ECJ was not reviewing the finding of the General Court in *Innolux*, which had held that there, in fact, had been a substantial effect resulting from the infringement.<sup>13</sup> The ambit of the ECJ was limited to assessing whether, given the effect, it was proper to consider the value of the finished goods in setting the fine. Thus, the question addressed by the ECJ was how to determine “the proportion of the value of . . . sales of [the] finished products . . . corresponding to the value of the goods . . . subject [to] the infringement.”<sup>14</sup> But, indeed, this may not be the salient question.

17. For example, it is entirely possible that a component constituting a high percentage of the end-product price might not have much effect at all on the actual price of the end product. This could easily occur where there is a high degree of competition in the end product and the cartelization is not ubiquitous – i.e., not all manufacturers of the end product are subject to the inflated prices. In that circumstance, the finished product manufacturers may compete-away the overcharge (and absorb the harm themselves in the foreign jurisdiction), while passing-through little or none of the cartel overcharge to the consumers of the finished goods.

18. By contrast, it is possible that a product that represents only a small proportion of the price of the end-product could produce a substantial effect. This might occur where all manufacturers of the price fixed good substantially raise prices to all end-product customers. Even if this reflected a relatively small proportion of the end-product manufacturers’ total costs, the cost increase would be expected to be passed-on fully to consumers, particularly where there is inelastic demand downstream.

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<sup>10</sup> Case C-231/14 P, *Innolux v. Comm’n*, July 9, 2015, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=165650&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=380709>.

<sup>11</sup> *Id.*, ¶ 55.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, ¶ 58 (referring to the unchallenged finding that the price of cartelized panels affected the price of the finished products).

<sup>14</sup> *Id.*, ¶ 53.

#### 4. Economic analysis is relevant to the determination of effects

19. As reflected above, economic analysis is essential to the evaluation of effects related to intermediate goods. Moreover, the structural and econometric tools to be utilized in measuring pass-on of cartel overcharges are well-developed. For example, claimants in civil actions are required to prove the amount of harm that was caused to them by the cartel behavior.<sup>15</sup> The harm cannot be presumed, no matter how pernicious the underlying conduct. In this way, Courts have reasonable assurance that plaintiffs are not unduly enriched and that defendants are not unreasonably penalized.

20. The economic tests that are used in these situations typically aim at quantifying the counterfactual situation, that is, the equilibrium that would have prevailed, absent the infringing practice. The calculation of effect, expressed as damages in civil actions, results from the comparison between the actual and the counterfactual situation in terms of prices, quantities, entry on the market etc. Common economic and econometric tests include:

- “Before-after/during the practice” comparisons: In this analysis, one compares the prices of the goods that prevailed during the infringement to the prices that existed either before or after the infringement. This may require the use of econometric techniques. For instance, an econometric model may establish prices in the absence of any collusive behavior. This model is then used to compute the price that would have prevailed without the cartel (the counterfactual price) and the effect derives from the comparison of the observed and the counterfactual prices. This type of approach is the minimal work that can usually be done with the available data. However, it does not eliminate the possible impact of other factors (like variations of the input prices or of the demand configuration) that may have affected the market during the period of the practice. Therefore, subject to the availability of data, economists often favour other tests.
- “Difference in differences” test: In this type of test, more recently introduced to the toolbox of competition economists and econometricians, a control group is determined according to the following criterion: the control group is affected by the same elements than the test group, except for the infringing practice. For instance, if the collusion is localized to a single region, another region may be used as a control group. In this case, the test group should behave similarly to the control group during the practice, and the difference is due to the anticompetitive practice. When appropriate data is available, this “diff in diff” approach is preferable since it captures a causality effect between the practice and the difference between the counterfactual and the observed price.

#### 5. Prosecution based on the indirect sale of intermediate goods presents a substantial risk of double-penalization of infringing parties

21. In *Motorola*, Judge Posner highlighted the risks of double-recovery in a civil action in a way that speaks directly to the identical risk in a government prosecution.<sup>16</sup> Citing the “Charter of Economic Rights and Duties of States” adopted by the U.N. General Assembly in 1974, he noted the States had committed to regulate the activities of corporations to ensure compliance with its laws, and to “cooperate with other States in the exercise of the rights set forth.”<sup>17</sup> He criticized that the “United States and other developed countries refused to buy th[at] theory” because they pick and choose which corporate formalities to

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<sup>15</sup> Most jurisdictions do not require exactitude in proof of damages, but require only that they be proven to a reasonable standard.

<sup>16</sup> *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7th Cir. 2015), *cert. denied*, 135 S. Ct. 2837 (2015).

<sup>17</sup> *Id.* at 820.

respect, and which to ignore.<sup>18</sup> This creates the problem, he noted, of creating antitrust penalties for both direct and indirect injury, noting that when both claimants seek redress “their claims would be redundant, because if the direct victim received full compensation there would be no injury [to the indirect victim and] he or it would probably be as well off as if the antitrust violation had never occurred.”<sup>19</sup>

22. Within their own borders, most countries have been very careful to set up civil regimes that avoid the potential for double-penalization. Canada, for example, allows class actions by all affected purchasers but imposes a requirement that damages be apportioned to each group according to the actual harm suffered.<sup>20</sup>

23. European member states allow joint and several liability claims, but permit defendants to introduce contribution claims against other co-conspirators in order to prevent the potential for undue penalization of individual cartelists while still facilitating civil recovery of full damages.<sup>21</sup>

24. Indeed, even the notable exception to this rule, the United States, faltered only due to the autonomy of individual states within a federal system and it was the failure of coordination among them – i.e., the same risk that currently confronts OECD members -- that lead to the current outcome.

25. The U.S. Supreme Court eliminated the potential for double-recovery under the Sherman Act by declaring, in *Illinois Brick*, that indirect purchasers have no standing to bring claims under federal law.<sup>22</sup> They concluded, in essence, that only direct purchasers had cognizable claims of anticompetitive effect. It was some of the individual U.S. States, which have autonomy to enact their own laws on recovery, that reintroduced the prospect of double-recovery by enacting “Illinois Brick Repealer” statutes.<sup>23</sup> Even in that circumstance, however, plaintiffs must demonstrate that pass-through of damages has occurred in order to recover.

26. The principle of proportionality that is reflected within the laws and procedures of each country are viewed as fundamental tenets of due process. Different countries acting on the same cartel, by attacking both direct and indirect sales resulting from cartels, introduce a risk of dis-proportionality and double recovery which – for the same reasons that apply within an individual country – should be avoided.

27. The mechanism for achieving this result could be implemented by agencies. Fining guidelines could be modified to adjust the fines on direct sales of price fixed goods to take into consideration the proportion of those goods that are exported in downstream products. These guidelines also could be adjusted to calibrate the fine for indirect sales to reflect the actual effect (incorporating the concept of pass-through) in the jurisdiction. At a minimum, fining guidelines could be open to consideration of these facts and provide for differential analysis of direct and indirect effects in individual cases.

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 821.

<sup>20</sup> *Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57; *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58; *Infineon Technologies AG v. Option Consommateurs*, 2013 SCC 59.

<sup>21</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, 2014 O.J. (L 349) 1, ¶ 37.

<sup>22</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>23</sup> For a list of states with *Illinois Brick* Repealer Statutes, see Michael Lindsay, *Overview of State RPM, ANTITRUST SOURCE*, Oct. 2014, at i-xvii, available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/lindsay\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf).