



SUMMARY OF DISCUSSION POINTS

Presented by James F. Rill

of the Business and Industry Advisory Committee (BIAC) to the OECD
at the OECD Joint Meeting of the
Competition Committee and the Committee on Consumer Policy
on Cross-Border Enforcement Cooperation

October 13, 2004

BIAC welcomes the opportunity to provide its views to the Joint Meeting of the Consumer Protection and Competition Committees concerning international cross-border enforcement in consumer protection. BIAC commends the Secretariat for bringing together a broad group of experts to consider this increasingly important issue and for producing its very instructive and insightful Background Paper.

INTRODUCTION

1. In today's global economy effective consumer protection enforcement requires cross-border cooperation. Cooperation is vitally important because deceitful actors often ignore or take advantage of national boundaries in pursuit of illicit profits at the expense of consumers and legitimate businesses. Recent history in consumer protection is rife with examples of fraudulent actors engaging in a type of forum shopping – establishing their operations in one country, where the laws and regulations are more favourable, and targeting their activities toward consumers in another country, where standards of conduct may be more thoroughly developed and enforcement more vigorous.
2. In the *Guidelines for Protecting Consumers from Fraudulent and Deceptive Commerce Practices Across Borders* (the “*Guidelines*”), the OECD recognized that “fraudulent and deceptive commercial practices against consumers undermine the integrity of both domestic and global markets to the detriment of all businesses and consumers, and undermine consumer confidence in those markets [.]”¹ This breach in consumer trust injures the business community because, as noted by former U.S. FTC Chairman Timothy Muris, legitimate businesses are forced to take extraordinary measures to

¹ *Id.* at 7.

restore consumer confidence.² Even after taking such measures, there is no guarantee that full consumer confidence will be restored.

3. Businesses also can be the direct targets of fraudulent and deceptive commercial practices. One area of recent enforcement by the U.S. FTC has been against bogus office supply schemes, which utilize deceptive selling and billing techniques to target thousands of large and small businesses, causing their victims an estimated \$200 million annually.³
4. The business community believes that OECD members can and should do more to increase cooperation in this area, and should apply lessons learned in international antitrust enforcement to develop further cooperation in consumer protection.
5. As the members explore and discuss these issues, the business community urges them to consider three core principles: consistency, clarity and transparency. Both BIAC and the International Chamber of Commerce (“ICC”) have endorsed these principles in international antitrust enforcement.⁴ We believe they are just as applicable in the context of consumer protection.

CLARITY

6. Clarity means providing lucid, unambiguous and well-understood rules of conduct. In the antitrust context, BIAC has stated repeatedly that “[b]usinesses seek to compete on a level playing field under known rules.”⁵ Similar clear standards are needed in consumer protection, for as the U.S. Federal Trade Commission (“FTC”) has recognized, “the more commonality among different consumer protection regimes, the less burdened merchants are in figuring out different, and potentially conflicting, marketing rules.”⁶
7. The need for clarity already is well recognized in antitrust. Despite differences in the law among various jurisdictions, certain well-defined and patently anticompetitive practices, such as conspiracies to fix prices or allocate markets or customers, are now universally condemned. These standards in the antitrust field provide businesses with clear rules in which to operate, and often distinguish legitimate and procompetitive business objectives from illicit and anticompetitive schemes.

² See *The Interface of Competition and Consumer Protection*, prepared remarks by Timothy J. Muris, Chairman, Federal Trade Commission, at the Fordham Corporate Law Institute’s Twenty-Ninth Annual Conference on International Antitrust Law and Policy at 5 (Oct. 31, 2002) (“Deceit by one group of sellers may lead consumers to doubt the integrity of an entire industry or distrust markets generally. . . . Truthful sellers must resort to extraordinary measures to persuade consumers of their honesty. Even if honest suppliers take such precautions to show their trustworthiness, some consumers may reduce their purchases and go without products whose acquisition would improve their well-being.”).

³ See U.S. Federal Trade Commission, *Talking Points and Tips on Office Supply Scams*, available at <http://www.ftc.gov/bcp/conline/edcams/supplies/pubs/tpsboss.htm>

⁴ See, e.g., Presentation by Calvin Goldman and James Rill to the OECD at the OECD Joint Global Forum on Trade and Competition, May 15, 2003; Competition Policy on the WTO: Doha Declaration Issues, Doc. No. 225/580 Rev. 3, Apr. 9, 2003 (ICC’s recommendations to the WTO on the Doha Declaration); Presentation by Peter Plompen, Chair of the Competition Committee of the Business and Industry Advisory Committee to the OECD Joint Committee on Trade and Competition, June 3, 2002; Recommended Framework for Best Practices in International Merger Control Procedures, Oct. 4, 2001; ICC/BIAC Comments on the Report of the US International Competition Policy Advisory Committee (ICPAC), June 5, 2000.

⁵ Presentation by Calvin Goldman and James Rill, *supra* note 4.

⁶ Federal Trade Commission, Bureau of Consumer Protection Staff Report, *Consumer Protection in the Global Electronic Marketplace: Looking Ahead* at 12 (Sept. 2000).

8. Similar well-defined standards are needed in consumer protection. In the *Guidelines*, the OECD stated that Member countries have “a common interest in preventing fraudulent and deceptive commercial practices against consumers,”⁷ and recommended that Members improve their cooperation in enforcement against such practices.
9. BIAC supported the OECD’s adoption of the *Guidelines* and its call for increased international cooperation against fraudulent and deceptive commercial practices.⁸ BIAC continues to believe that fraud and serious deception are core areas that different jurisdictions have a common interest in combating. Therefore, we urge OECD members to continue their efforts to harmonize their laws to prohibit such practices and enhance international cooperation to find and punish actors that engage in such activity, regardless of the actor’s location or the nationality of the intended victims.

CONSISTENCY

10. Consistency has several facets:

- One key area, of course, is the recognition of common prohibited practices across national boundaries, such as fraud and deception.
- The principle of consistency applies equally, however, to how jurisdictions define and implement their enforcement efforts in these areas.

11. Common definitions of what constitutes fraud, and what constitutes deception, are important. The business community urges members to share their enforcement experiences in these areas, recognize common forms of illicit practices, and structure laws and enforcement efforts to their prevention and prohibition.

- The definitions of fraud and deception provided in the *Guidelines* provide a useful starting point.
- Additionally, BIAC encourages the inclusion in the definition of fraud and deception “email spam” (i.e., the untargeted, bulk mailing of unsolicited emails, much of which is not legal, decent, honest or truthful) and also practices such as blocking the deletion of emails.⁹

12. Consistency in enforcement also is important. As the Secretariat observed in the Background Paper, in the antitrust field “in connection with trans-national mergers, competition agencies have discussed how to best coordinate their reviews and proposed enforcement actions to ensure that the remedies they seek are consistent.”¹⁰ Such coordination also is important in consumer protection.

13. Remedies in consumer protection enforcement actions, when appropriate, often include those intended to regulate a party’s future conduct – both injunctions and cease and desist orders against the offending conduct itself and possibly broader “fencing-in” relief against allegedly related conduct.¹¹ For businesses operating in a multinational environment, the obligations imposed by such conduct remedies need to be consistent

⁷ *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commerce Practices Across Borders* at 8 (June 11, 2003).

⁸ See Comments on the OECD Working Group Draft: Recommendation of the Council Concerning Guidelines for Protecting Consumers Across Borders from Fraud and Serious Deception (Nov. 25, 2002).

⁹ See *id.*

¹⁰ See Note by the OECD Secretariat, *Cross-Border Enforcement Cooperation* at 14 (Aug. 26, 2004).

¹¹ See *id.* at 13.

across national borders. Businesses suffer artificial costs and inefficiencies when faced with different and potentially conflicting legal obligations and requirements that vary by jurisdiction.

TRANSPARENCY

14. The final core principle is transparency. Transparency applies to how different jurisdictions define their consumer protection laws, and how these laws are enforced. Stated simply, both definition and enforcement should be, to the greatest extent possible, open processes that take into consideration the views of businesses and consumers.
15. Throughout the years, BIAC and the ICC have advocated the importance of transparency in antitrust, and particularly merger review. The most notable of these statements are the “ICC/BIAC Comments on the Report of the US International Competition Policy Advisory Committee (ICPAC)” (June 5, 2000), the “Recommended Framework for Best Practices in International Merger Control Procedures” (Oct. 4, 2001), and the ICC’s recommendations to the WTO on the Doha Declaration, “Competition Policy on the WTO: Doha Declaration Issues,” Doc. No. 225/580 Rev. 3, (Apr. 9, 2003).
16. The need for transparency applies equally to consumer protection. Like antitrust, transparency in consumer protection “is important as it provides vital information to market participants about the conditions under which commercial transactions can take place.”¹²
 - Transparency in consumer protection enforcement means providing regulations that, as noted above, are clear and consistent. Additionally, transparency requires that these regulations be reasonably accessible to businesses and consumers and applied equally to all. While favouring enforcement efforts against fraudulent and deceptive practices, transparency disfavors enforcement based on perceived and ill-defined notions of public policy, morality, or ethics.
 - As we have stated concerning antitrust, transparency “should apply not only to the laws and regulations of a jurisdiction, but also to the procedures, principles and practices of the [enforcement] agencies, including the issuance of guidelines.”¹³ This means having the relevant laws, regulations, case decisions, guidelines and policy statements in consumer protection available and widely accessible, including available on the Internet. The U.S. FTC’s on-line library of business publications, which provides easy to use guidelines on various areas of enforcement under Section 5, is a good example of such a resource, as is the Australian Competition and Consumer Protection Commission’s information on business rights and obligations.¹⁴ Such information is particularly useful to small businesses trying to discern, and act in accordance with, applicable legal standards. As a general rule, more information available to the business community, not less, is preferable.
17. Transparency also encompasses applying the published standards equally to all actors, regardless of nationality. The business community believes that transparency enhances accountability, reducing the risk of subjective or selective enforcement, and thereby increases the confidence of both consumers and businesses in a jurisdiction’s law enforcement efforts.
18. Finally, transparency is vital in cross-border enforcement efforts. Again, many of BIAC’s views expressed concerning cross-border antitrust enforcement apply equally to

¹² Presentation by Peter Plompen, *supra* note 4.

¹³ Presentation by Calvin Goldman and James Rill, *supra* note 4.

¹⁴ See <http://www.ftc.gov/ftc/business.htm> and <http://www.accc.gov.au/content/index.phtml/itemId/3669>, respectively.

consumer protection. Cooperation among multiple jurisdictions in enforcement should have the goal of “[e]nsuring that related investigations and proceedings ongoing in multiple jurisdictions are handled in a way that is efficient for the agencies and for the businesses involved, to the extent possible avoiding duplicative requirements and costs, and that promotes economically and legally sound and consistent outcomes.”¹⁵

- Such cooperation should include the ability of different enforcement agencies to share documents and information, subject to the views BIAC has expressed concerning the need to protect confidential information received from private parties.¹⁶
- To the greatest extent possible, cross-border enforcement should be an open process, giving the parties under investigation notice of what enforcement agencies are doing, the stage of the investigation, potential theories of harm, and an opportunity to be heard. In short, the lines of communication between private parties and government enforcers should be open.

The principles endorsed in this submission – clarity, consistency, and transparency – are not new. While their consideration and observation has been recognized in antitrust, the business community believes they apply equally to cross-border enforcement in consumer protection. BIAC welcomes the opportunity to work with members to further develop and apply each in the context of consumer protection, for the ultimate benefit of both businesses and consumers.

¹⁵ Summary of Discussion Points Presented by James Rill and Calvin Goldman of the Business and Industry Advisory Committee (BIAC) to the OECD at the OECD Joint Global Forum on Trade and Competition Voluntary Cooperation in Competition Law, May 16, 2003.

¹⁶ See Presentation by Calvin Goldman and James Rill, *supra* note 4 (“There is . . . a need to balance transparency and confidentiality. Appropriate safeguards should be in place to ensure there are adequate and proper protections of confidential proprietary information of the parties[.]”); Summary of Discussion Points Presented by James Rill and Calvin Goldman, *supra* note 15 (“[C]onfidentiality protections should be in place to protect sensitive business information in the jurisdiction where the information is obtained as well as the jurisdiction to which information is provided.”); Presentation by Peter Plompen, *supra* note 4 (“[T]ransparency should apply to the criteria used by national authorities to assess the confidentiality of information.”).