Review and Comment on the positions of BIAC, ABA and ICC on Recommended Principles for Information Exchange in International Cartel Investigations

Presented by BIAC to the OECD Competition Committee
Working Party 3 on International Co-operation

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We have set out below a brief summary of the respective positions of BIAC, the ABA and the ICC on recommended principles for information exchange in international cartel investigations. The ABA and ICC positions are as set out in their respective papers recently submitted to the OECD. The BIAC position is as set out in its Draft Summary of Suggested Core Principles for Information Exchanges in International Cartel Investigations, which was submitted to the OECD in May 2003 (the “May 2003 Draft”). In respect of each issue discussed below, BIAC has indicated where it proposes to adhere to the position set out in the May 2003 Draft and where it proposes some addition to, or modification of, that position. We attach for ease of reference a copy of BIAC’s May 2003 Draft together with the BIAC Working Group on Information Exchange in Cartel Investigations UPDATE, presented to the OECD by Calvin Goldman and James Rill in October 2003. We have also attached, for ease of reference only, a draft table summarizing the positions of BIAC, the ABA and the ICC as described in greater detail below.

1. **Requests for Assistance**

BIAC’s Position

- The Requesting Party should provide the Requested Party with:

  - an explanation of how the subject matter of the request concerns a possible violation of the antitrust laws in question and relevance to the investigation or proceeding to which the request relates;

  - a description of procedural or evidentiary requirements bearing on the manner in which the Requesting Party desires the request to be executed, which may include any legal privileges that may be invoked under the law of the Requesting Party that the Requesting Party wishes the Executing Authority to respect in executing the request, together with an explanation of the desired method of taking the testimony or providing the evidence to which such privileges may apply; and
• the requirements, if any, for confidential treatment of the request or its contents.

ABA’s Position

• The Requesting Party should provide the Requested Party with:
  • an explanation of how the subject matter of the request for confidential business information in the territory concerns the investigation of a violation of the Requesting Party’s competition laws.

ICC’s Position

• The Requesting Party should:
  • explain the links between the subject matter of the request, a possible violation of the antitrust laws of the Requesting Party and the investigation, as well as a description of the procedural or evidentiary requirements bearing on the manner in which the Requesting Party desires the request to be executed;
  • describe how such information will be protected by the Requesting Party; and
  • only request the information if it has exhausted all reasonable possibilities to obtain the information by its own means and should demonstrate this to the Requested Party.

Comment

The positions of BIAC and the ICC are quite close on this point; the ABA’s position is not inconsistent with that of either BIAC or the ICC, although not as detailed. The key difference in the ICC’s submission is its requirement that the Requesting Party must have exhausted all reasonable possibilities to obtain the information by its own means as a necessary precondition to a request. There is merit to the ICC’s position insofar as a Requested Party may be resistant to a request if it believes that the Requested Party is simply transferring the cost of investigation from the Requesting Party to the Requested Party. There can, however, be instances where the Requesting Party has perhaps not “exhausted its owns means”, but it is more practical and reasonable for it to obtain the information from the Requested Party, either because of the relative cost or difficulty of obtaining the information otherwise, or because of timing considerations. BIAC’s recommendation on this point is that Requesting Party should be required to briefly describe as part of its information request why the information is being sought from the Requested Party. The Requested Party could then evaluate such information as part of its assessment of whether or not the request is contrary to its interests.
BIAC reiterates its position on this point as set out in the May 2003 Draft. BIAC further recommends that the Requesting Party be required to include in its request a brief description of why the requested information is being sought from the Requested Party.

2. Limitations on Assistance

BIAC’s Position

- BIAC’s position is that the Requested Party should have discretion to deny a request for assistance where:
  - a request is not made in accordance with the provisions of the Agreement;
  - execution of a request would exceed the Executing Authority’s reasonably available resources;
  - execution of a request would not be authorized by the domestic law of the Requested Party;
  - execution of a request would be contrary to the public interest of the Requested Party; or
  - where the matter in respect of which information is sought by the Requesting Party relates to a criminal offence in the Requesting Party’s jurisdiction, but to a civil or administrative matter in the Requested Party’s jurisdiction.

ABA’s Position

- The ABA’s position is that the Requested Party should have the discretion to decline a request where compliance would be contrary to the public interest of the Requested Party. Presumably, this could include cases where execution of the request would not be authorized by the domestic law of the Requested Party and where execution of a request would exceed the Requested Party’s reasonably available resources.

- The ABA would oppose a blanket prohibition against exchange where the matter under investigation was subject to criminal prosecution in the requesting jurisdiction, but subject to civil/administrative treatment in the requested jurisdiction. It is unclear whether the ABA position would allow any discretion in the Requested Party to decline a request based on differences in substantive treatment (e.g. criminal vs. civil) as suggested by BIAC.

ICC’s Position

- ICC’s position (consistent with BIAC) is that the Requested Party should have discretion to deny a request for assistance where:
• disclosure of the information is prohibited by the laws of the Requested Party or would adversely affect legitimate and important interests of the Requested Party; or

• complying with a request would exceed the relevant antitrust authority’s reasonably available resources.

• ICC’s position, however, is that any information or evidence relating to conduct giving rise to criminal prosecution in the Requesting Party should be excluded from the information to be exchanged, while such conduct does not qualify as a criminal offense in the Requested Party. In short, unlike BIAC, ICC would prohibit exchange in these circumstances.

Comment

The key difference among the three submissions in this area relates to exchange between jurisdictions where the requesting jurisdiction accords criminal treatment to the conduct and the requested jurisdiction accords civil/administrative treatment. The ABA position may be read as providing that the Requested Party may never oppose exchange on the basis of criminal treatment by the Requesting Party (although this is not clear); BIAC’s position is that the Requested Party has a discretion in these circumstances; while the ICC’s position is that there can be no exchange from a “criminal” to a “civil” jurisdiction.

BIAC reiterates its position in this regard as set out in the May 2003 Draft. BIAC’s position represents a middle ground and allows the Requested Party to assess each case on its merits and decide whether or not to complete the exchange.

3. Confidentiality

BIAC’s Position

• BIAC has endorsed the provisions regarding confidentiality set out in the U.S.A./Australia IAEAA as suggested elements of a model provision. In particular:

  • By entering into the Agreement, each Party confirms that the confidentiality of Antitrust Evidence obtained under the Agreement is ensured by its national laws and procedures and that such laws and procedures (as set out in an Annex to the Agreement) are sufficient to provide protection that is adequate to maintain securely the confidentiality of antitrust evidence provided under the Agreement;

  • Each Party shall, to the fullest extent possible consistent with that Party’s laws (as Annexed to the Agreement) maintain the confidentiality of any request and of any information communicated to it in confidence by the other Party pursuant to an Agreement.
• Each Party shall oppose any application by a Third Party for disclosure of any Antitrust Evidence provided under the Agreement. In particular, disclosure to third party plaintiffs, others involved in litigation or possible litigation, and to other branches of the Requesting States’ Government (i.e., the tax authorities) should be opposed (except for the sharing of information for the purposes of enforcing the antitrust laws with other government agencies or departments integral to such enforcement, and who will afford the same level of protection to the information as the Party who received it).

• Unauthorized or illegal disclosure or use of information communicated in confidence to a Party pursuant to the Agreement shall be reported immediately. Both Parties shall promptly consult on steps to minimize any harm resulting from the disclosure and to ensure that unauthorized or illegal disclosure or use of confidential information does not recur. The Party that provided the information shall give notice of such unauthorized or illegal disclosure or use to the person, if any, that provided such information to the Party. Such disclosure is a ground for termination of the Agreement.

**ABA’s Position**

• The ABA expressly endorses the approach to confidentiality set out in the U.S.A./Australia IAEAA and is therefore in agreement with BIAC in this regard.

• The ABA takes the position that attempts to define “commercially sensitive information” or “confidential business information” are not productive and recommends that the agreed confidentiality protections should apply to all information obtained from business organizations without trying to draw distinctions between what is or is not “commercially sensitive” or categorized as “confidential business information”.

**ICC’s Position**

• The ICC does not comment extensively on the nature of required confidentiality protections. It states only that the conditions of protection to which the information exchanged is subjected in the Requesting Party should be substantially equivalent to those applying in the Requested Party and that the Requesting Party should undertake to maintain the protection of the information exchanged.

• On the definition or categorization of protected information, the ICC states, “There are two types of information whose exchange raises concern: on the one hand, business confidential information and, on the other, information collected by competition authorities whose disclosure would expose enterprises to criminal or other sanctions in the Requesting Party’s jurisdiction”. The ICC refers to both types of information as “qualified information” for the purposes of its submission.
**Comment**

There is no significant divergence of views on the issue of confidentiality protections. Both BIAC and the ABA agree that the protections afforded should be transparent and acceptable to the Requested Party. It can be assumed that such protections are only likely be acceptable to the Requested Party if they are “comparable” (the term the ABA uses in its submission) to the protections it provides, so there is unlikely to be any practical difference between the ICC, BIAC and ABA positions in this regard. BIAC did not specifically address either in its May 2003 or February 2003 drafts the issue of the definition or categorization of the types of information to which protections should apply. The ABA’s position on this issue, as described above, appears sensible and practical.

*BIAC reiterates its position in this regard as set out in the May 2003 Draft. BIAC further agrees that the protections should apply to all information obtained from business organizations without drawing distinctions between what is or is not “commercially sensitive” or categorized as “confidential business information”.*

4. **Limitations on Use**

**BIAC’s Position**

- BIAC’s position on limitation of use of exchanged information is that:

  - Information obtained pursuant to an Agreement shall be used or disclosed by the Requesting Party solely for the purpose of administering or enforcing the antitrust laws of the Requesting Party; and

  - Information obtained pursuant to an Agreement may be used or disclosed by a Requesting Party to administer or enforce the antitrust laws only (1) in the investigation or proceeding specified in the request in question; and (2) for the purpose stated in the request, unless the Requested Party that provided such information has given its prior written consent to a different use or disclosure, but only in respect of the administration or enforcement of the antitrust laws.

**ABA’s Position**

- The ABA expressly endorses the approach to limitations on use set out in the U.S.A./Australia IAEAA.

- As such, the ABA is in agreement with BIAC, except the ABA would allow the exchanged information to be used for other public law enforcement purposes of the Requesting Party (including other than antitrust or for an antitrust proceeding other than the one specified in the request), provided that prior approval is provided by the Requested Party.

**ICC’s Position**

BIAC ABA ICC COMPARISON_V1.DOC
• ICC’s position is that the information exchanged can only be used for the purpose or procedure for which it was requested. The information must not be disclosed to other branches of the government except for the purpose of enforcing antitrust rules and will not be used by the Requesting Party for any purpose or procedure other than the one specified in the information request.

• The ICC does not support the use of information for other public law purposes, even with consent.

Comment and Recommendation

The BIAC and ICC positions on this issue are quite close, although BIAC would allow the information to be used (with consent) for other antitrust purposes, while the ICC opposes such use. The ABA would allow use for broader public law purposes, with consent. The business community appears to have strongly held views in this area, in favour of greater restrictions on use. BIAC, again occupies a middle ground that would allow more broader use (with consent), but only for antitrust purposes.

BIAC reiterates its position in this regard as set out in the May 2003 Draft.

5. Protection of Legal Privilege

BIAC’s Position

• BIAC’s position is that a Requesting Party should not receive or use any antitrust evidence that would be subject to legal privilege in its jurisdiction, even though such antitrust evidence may not be subject to legal privilege in the Requested Party’s jurisdiction.

ABA’s Position

• The ABA sets out a five-point series of safeguards in relation to the protection of privilege:

  • First, the Requested Party should apply its own rules governing privilege in responding to a request;

  • Second, the Requesting Party should formulate its request in a way that would not seek information that would violate its privilege rules;

  • Third, the Requesting Party should explain its privilege rules to the Requested Party and ask that those rules be honoured to the extent possible in responding to the request;
Fourth, the Requesting Party should establish appropriate screening mechanisms to guard against the disclosure of privileged information of the persons conducting the investigation; and

Fifth, the Requesting Party should establish procedures to ensure that no use will be made of any information provided by the Requested Party that would be subject to attorney-client or attorney work product protections of the Requesting Party.

**ICC’s Position**

The ICC proposes the following provisions to address the protection of legal privilege:

- The Requested Party should have no duty to compel a person to provide information in violation of any legal privilege under its own laws and may resist or decline a request based on this principle; and

- The Requesting Party may not use information that would be subject to legal privilege under its own laws.

**Comment and Recommendation**

All three submissions are to a similar effect, but the ABA position is the most detailed and affords the most specific protections in this area.

*BIAC reiterates its position in this regard as set out in the May 2003 Draft, but further endorses the specific provisions outlined by the ABA as providing a detailed set of reasonable protections.*

**6. Return of Antitrust Evidence**

**BIAC’s Position**

- BIAC’s position is that upon the conclusion of an investigation or proceeding, any antitrust evidence should be returned.

**ABA’s Position**

- The ABA position is to the same effect: all information that has not properly entered the public domain should be returned at the conclusion of the proceedings.

**ICC’s Position**

- The ICC states only that, “There should be provisions for the return of exchanged information”.

BIAC ABA ICC COMPARISON_V1.DOC
Comment and Recommendation

There does not appear to be any controversy on this point.

BIAC reiterates its position in this regard as set out in the May 2003 Draft

7. Notice

BIAC’s Position

• BIAC’s position on Notice is as follows:
  
  • Consistent with the ICPAC Report, BIAC endorses the provision of notice, either before or after the fact – unless such notice would violate a treaty obligation, court order or prejudice the integrity of an investigation.

  • BIAC’s view is that it is up to the antitrust agencies themselves to make the determination in regard to prejudice to an investigation.

  • BIAC also makes clear that the notice obligation and other protections do not apply to agencies’ “internal work product”, but only to the exchange of proprietary business information in the form of documents (or records in whatever form).

  • BIAC further supports a provision to the effect that where, under the terms of an agreement, a Requested Party can conduct a search or seizure of information on behalf of a Requesting Party, effected persons should be given notice and an opportunity to be heard before any such information that has been collected is forwarded to the Requesting Party.

  • Unauthorized or illegal disclosure or use of information communicated would also require the Party that provided the information to give notice of such unauthorized or illegal disclosure or use to the person, if any, that provided such information to the Party.

ABA’s Position

• The ABA’s position on notice is as follows:

  • No prior notice is required if the information exchange is made pursuant to a formal instrument containing appropriate downstream confidentiality protections and limitations on access and use.

  • Competition law enforcement authorities would be required to give after-the-fact notice to the source of the information exchanged at such time as such notice would not violate a court order or domestic statute, treaty, an international agreement
obligation or jeopardize the integrity of an investigation in either the requesting or requested jurisdiction.

- After-the-fact notice would give the party concerned an opportunity to protect its interests in the requesting/investigating jurisdiction.

- Antitrust agencies should be free to exchange the following types of information informally: i) public information; ii) information regarding the nature, status, theories and strategy of the investigation; and iii) information obtained from a covert operation or from an amnesty applicant, (but only with the latter’s permission).

- Authorities should be required to provide prompt notice to the source of the information in the event that there has been unauthorized disclosure of its confidential business information.

**ICC’s Position**

- The enterprise concerned should be given prior notice about a contemplated information exchange and have the opportunity to challenge *ex ante* the information exchanged in a court of the domicile of the party where information is sought.

- Derogation from the need to provide prior notice could be obtained where it is demonstrated in a court of the Requesting Party that advance notice would seriously hamper an investigation. The ICC further recommends that rules be established under which advance warning is deemed to seriously hamper an investigation.

- Where an enterprise has not been provided with prior notice, it should have the opportunity to challenge *ex post* the information exchange in a court of law of the Requesting Party. An enterprise should also be permitted to challenge an uncontrolled use of the information exchanged.

- The ICC did not specifically comment on the exchange of agency “work product”.

**Comment and Recommendation**

The ABA makes the point that in the context of cartel investigations, there will always be a legitimate concern that prior notice could jeopardize the investigation. If this is so, there is, as a practical matter, very little difference between the BIAC and ABA positions on this point. BIAC would require prior notice (where there is no prejudice), but if the ABA is correct, such instances will rarely, if ever, occur. If it is accepted that notice ought not to be required where it would prejudice an investigation, a remaining issue is whether the provision of notice (whether before or after the fact) coupled with a right to challenge the exchange for the use of the information exchanged, would result in undue interference with the proceeding as a whole. In its February, 2003 Draft Submission, BIAC proposed strict and fixed time limits on any right of independent review to address concerns about undue
delay arising from the provision of notice. This earlier proposal is set out in a footnote below.

BIAC reiterates its position in this regard as set out in the May 2003 Draft, but further proposes that fixed and strict time limits be imposed for both the initial hearing and appeal of issues related to the exchange of information raised by an affected person.

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1.3.8.2 To address concerns about undue delay arising from the notice, granting of notice or a right of independent review, the process of review should be subject to strict and fixed time limits. For example, procedural rules could be developed that would provide for the application for review, hearing and final determination all to be completed within a total period of 60 or, perhaps, 90 days, with a right to apply to shorten the time required for any step in cases of demonstrable urgency. Consideration could be given to limiting any right of appeal. Where appeal is allowed, strict time limits on that process could be applied as well (so, for example, the rules could provide for the determination of the first stage hearing within 60 days and the final determination of an appeal within a further 30 days, with no further right of appeal).