BIAC Working Group on Information Exchange in International Cartel Investigations

UPDATE

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

by

Calvin S. Goldman and James F. Rill

Vice Chairs, BIAC Competition Committee

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Background

On May 13, 2003, BIAC’s Competition Committee presented to the OECD’s Working Party #3 on International Co-operation a revised draft paper prepared by the BIAC Working Group on Information Exchange on the challenging area of core principles in information exchange in international cartel investigations.

The revised draft paper, entitled Summary of Suggested Core Principles for Information Exchanges in International Cartel Investigations, (“Draft Suggested Core Principles”) is the most recent step in a process that began in the late-1990’s. Since that time, both BIAC and the ICC have addressed the issue of co-operation in international information exchange on several occasions. In January 2002, the OECD Secretariat asked BIAC to focus on a number of questions related to stated business concerns related to the exchange of confidential information. In February 2002, BIAC tabled its draft discussion points on information exchange in international cartel investigations at the Global Forum, reflecting an initial effort to address the questions posed by the OECD Secretariat.
Following the February 2002 Global Forum, BIAC formed a Working Group to look more closely at these issues and in February 2003, the Working Group presented to Working Party #3 of the OECD’s Competition Law and Policy Committee (“WP3”) its Draft Best Practices Framework (the “Draft Framework”), which represented the Working Group’s first attempt to address the issues in a systematic way. It became apparent, however, from the pointed comments at both the February 2003 Meeting of the WP3 in Paris and thereafter that the Draft Framework was not going to be a bridge for further constructive discussions with WP3. Endeavouring to draft an overly detailed “best practices” type of paper or framework, in a manner analogous to the BIAC/ICC Merger Best Practices Framework was not practical at this stage and it became apparent that such an approach would not constructively advance the discussion.

Following the February 2003 meeting, the Chairman of WP3 invited BIAC to endeavour to develop a revised approach that would be better able to bridge the gap between the concerns of the business community with the protection of confidential information and the interests of the antitrust authorities in ensuring effective co-operation in the investigation of hard core cartels.

In preparing the Draft Suggested Core Principles (which was presented to WP3 in May/03), we consulted informally not only with members of the BIAC Working Group, but with others, including representatives of the U.S. and Canadian antitrust enforcement agencies. We adopted what we considered to be the constructive suggestion of endeavouring to build on existing international documents; hence, we looked carefully at the U.S.A/Australia Agreement on Assistance in Antitrust Matters negotiated pursuant to the IAEAA and the U.S.A. Canada MLAT (and related enabling legislation). We also looked at the provisions in respect of information exchange in the EU modernisation regulation. Not surprisingly, the revised draft paper focuses on many of the same core principles (albeit in a different way) that were addressed in the Draft Framework. These include:

- No use of confidential information for purposes other than antitrust enforcement;
- No transfer of information to third parties and an obligation to oppose requests for information by third parties; and
- Protection of legal privilege.
Key differences between the Draft Suggested Core Principles and the Draft Framework included:

- The Draft Suggested Core Principles do not insist on reciprocity as a condition of exchange;

- The Draft Suggested Core Principles do not stipulate that confidentiality protections be “comparable” or “at least as effective”, as those provided in the cooperating jurisdiction. Instead, it is recommended that each party would confirm that the protection of confidential information is ensured by its national laws and procedures and that such laws and procedures (which would be set out in an annex to the cooperation agreement) are sufficient to provide protection that is adequate to maintain the confidentiality of antitrust evidence exchanged under the agreement.

- The Draft Suggested Core Principles do not require that there be substantial convergence or similarity of laws between the co-operating jurisdictions as a necessary prerequisite to information sharing, as was recommended in the Draft Framework.

- The Draft Suggested Core Principles do not deal expressly with the opportunity for independent review of adverse decisions, although a right of review at an appropriate stage is implicit in the recommendations in respect of notice.

- The Draft Suggested Core Principles take a substantially different approach on the difficult issue of notice, which is addressed more fully below. The Draft Framework proposed that notice be provided unless notice would prejudice an investigation, with the issue of prejudice to be determined by an independent arbiter. The Draft Suggested Core Principles propose notice unless there would be prejudice to an investigation, but leaves the determination of prejudice to the agencies themselves.

Following BIAC’s presentation of the Draft Suggested Core Principles in May, it was suggested that comments on the paper should be sought from a broader array of business and legal organisations, with a view to trying to determine if there is a broader consensus in the private sector on the core principles governing information exchange in international cartel investigations. Comments on the Draft Suggested Core Principles were also received from the UK, Canada and Switzerland.
Comments from the UK, Canada and Switzerland

Both the OFT and Canada have raised similar points in respect of the Draft Suggested Core Principles. Both suggest that their current arrangements for international information exchange in cartel investigations are working effectively and they are reluctant to endorse the BIAC proposals which they regard as imposing greater restrictions on information exchange than the current rules under which they operate impose. Both question what incentives there are for the antitrust agencies to endorse the BIAC principles.

BIAC’s response is that the Draft Suggested Core Principles (like all “best practices”- type recommendations) are necessarily aspirational in nature. Conformity with the Draft Suggested Core Principles of a jurisdiction’s current rules governing information exchange ought not, in and of itself, to be determinative of a jurisdiction’s willingness to endorse the principles in general terms. The principles represent a possible model that jurisdictions establishing rules governing international information exchange in cartel cases for the first time might look to for guidance in framing their rules and which jurisdictions with existing information exchange processes may use to “benchmark” their own standards and processes and which they may choose to adopt or move toward as they deem appropriate. Endorsement of the principles (in whole or in part) by a particular jurisdiction does not automatically render its current laws or practices ineffective or void to the extent of their inconsistency with the principles.

BIAC further believes that the adoption of core principles governing international information exchange in cartel investigations will have two principal benefits for the antitrust enforcement agencies. First, more national authorities are likely to participate in international information exchange agreements if they consider that rules governing the exchange process have the support of their national business communities. Since the US Congress adopted the IAEAA almost 10 years ago, only one International Antitrust Assistance Agreement with Australia has been executed. There are other bilateral operating relationships such as the US/Canada MLAT and similar bilateral arrangements but no other IAEAA’s covering international cartel investigations, and especially none yet between the US and the EU or any similar instrument between Canada and the EU. This reflects a continuing gap in achieving even more effective international enforcement in this area. Second, members of the business community are likely to be more willing to take advantage of available immunity/leniency programs, and more forthcoming in terms of the information they provide to the agencies in connection with such applications if they are confident that the information provided will be subject to adequate protections. Canada suggests that there is a need for clear examples why safeguards of the kind proposed by BIAC are necessary. In reply,
BIAC points to the combined effect of the *Empagran* and *Kruman* decisions in the US (which allow for broader global damages recovery in US class actions) as a key source of business concern. There are also the recent decisions of the US District Court in the choline chloride class actions allowing for broader discovery of documents arising from leniency applications in the US and elsewhere. The fundamental concern is that there is no guarantee at this time that a US or other court will not order that information provided to the antitrust agencies in confidence in the context of a leniency/immunity application will not find its way into the hands of plaintiffs seeking treble damages recovery. Orders of disclosure have already been made against parties connected with civil actions even though the documents arose in the context of either leniency or amnesty negotiations; the U.S. courts are currently split on this point with divergent orders issued in the choline chloride and methonine cases.

The comments from Switzerland are more in line with the BIAC position than those of the OFT and Canada. Indeed, Switzerland generally favours greater protection for businesses and confidential business information than that provided in the BIAC paper. The Swiss comments emphasise that a legal basis is needed for exchange of information with a foreign authority and that a request for mutual assistance must “unequivocally come under cartel law”. Investigation methods must be consistent with domestic law. The Swiss agree that there should be a ‘public interest’ ground for refusing to execute a request. Switzerland also emphasises that the resources of the requested state should be a ground for denial of mutual assistance, particularly for small countries with limited resources like Switzerland. The Swiss support heavy penalties for breaches of secrecy – Switzerland does not consider, for example, that the repercussions for violation of confidentiality in the US/Australian IAEAA are strong enough.

**Notice**

The question of notice remains an area of controversy. There is still no consensus on this point within BIAC. Some in BIAC continue to endorse the approach to notice set out in the February Draft Framework (i.e. notice to be provided unless there would be prejudice to an investigation, with the issue of prejudice to be determined by an independent arbiter). While others endorse the approach set out in the Draft Suggested Core Principles (delivered in May/03). The latter builds upon the ICPAC (International Competition Policy Advisory Committee to the US Attorney General) principle that notice should be provided only where there is no longer any risk of jeopardy to an investigation, but moves away from the recommendation in the February Draft Framework that the determination of prejudice to an investigation would be made, in every case, by an independent arbiter. The Draft Suggested Core Principles recommend that the determination of
prejudice would be left to the antitrust agencies. While some of the OECD delegates argue that even this notice requirement goes too far, some in the business community argue that the notice provision set out in the Draft Suggested Core Principles does not go far enough. This is because they believe that Notice and an independent arbiter is essential given the ever growing importance of protection of documentary submissions in view of the recent cases such as Empagran. A further point made in the Draft Suggested Core Principles is that the exchange between the agencies of their work product should not trigger any notice requirement. Notice would only be triggered where there is an exchange of a business enterprise’s documents or records. This proposal has also proven controversial; some within the business community argue that exchanges of work product ought also to trigger notice where such exchanges involve the transfer of confidential business information in whatever form.

Following the presentation of the Draft Suggested Core Principles paper by BIAC in May, some of the antitrust agency representatives focused on the potential for the proposed notice provisions to allow private sector parties to tie up pre-charge or pre-trial proceedings indefinitely through judicial review proceedings. BIAC had earlier proposed a possible solution to this issue based on the adoption of strict, short time limits for the hearing and final appellate review of any applications arising from a proposed information exchange. A further option that BIAC has recently discussed internally is requiring notice when there is no risk of prejudice to the investigation with the law of the receiving country also not preventing the owner of the confidential information subsequently raising as an issue the use of such information as evidence in a future proceeding, on the basis that the exchange thereof infringed 'the BIAC Principles as reflected in the national laws of the providing and receiving countries'. This would effectively mean that an aggrieved party could apply for injunctive or declaratory relief in the context of the proceeding where the evidence was sought to be used, suggesting notice should have been provided earlier. This proposal would not necessarily establish the express right to raise the issue at trial; however, the proposal would ensure the issue of notice is not precluded from being raised at the time the information is sought to be used as evidence in the course of trial and similar proceedings. There are differing views within BIAC at this time on the merits of this new proposal, and reaching a consensus by February may prove to be a challenge.

Conclusion
BIAC remains firmly of the view that the adoption of core principles governing international information exchange in cartel investigations that balance enforcement interests with the concerns of the business community regarding the protection and use of confidential information, will have tangible benefits for the both the international business community and to the antitrust enforcement agencies. As a consensus organisation, BIAC is continuing to endeavour to develop a set of core principles governing international information exchange in cartel investigations that will have the broad support of its constituents in the business community. Considerable progress has been made in garnering business community support for greater international co-operation, including information exchange, in furtherance of the goal of combating cartel activity. BIAC is now at the stage, however, where, for example, on the issue of notice, it has gone further than some of the national agencies are prepared to go, and yet some of its own members are of the view that BIAC has not gone far enough. Given the significance of these issues both to the business communities and the antitrust agencies, BIAC has sought comments not only from the members of the Working Group, but from all of the BIAC national organisations, making building a consensus even more challenging. It may also be the case that a consensus will be difficult to achieve until the US Supreme Court resolves cases such as those referred to above and provides certainty to the business community that documents provided to the antitrust agencies in connection with leniency applications will be protected from disclosure to private parties in multi-jurisdictional litigation. In any event, BIAC will continue to work (through further consultation and meetings) toward building a consensus that encompasses both BIAC views and the views of the antitrust agencies, as has already been accomplished in the context of Merger Best Practices. BIAC hopes to present a further revised position for the OECD’s consideration in February 2004.
MEMBERS OF THE BIAC WORKING GROUP ON INFORMATION EXCHANGE

Chair: Calvin S. Goldman Q.C., Partner, Blake Cassels & Graydon LLP, Canada (Vice-Chair BIAC’s Competition Committee)

Members:

Robert Baxt
Partner
Allens Arthur Robinson
Australia

Klaus F. Becher
General Counsel,
DaimlerChrysler Services Ag
Germany

John D. Bodrug
Partner
Davies Ward Phillips & Vineberg LLP
Canada

Merit Janow
Professor, Columbia University
U.S.A.

Julian Joshua
Partner
Howrey, Simon, Arnold & White LLP
Belgium

Thomas E. Kauper
Professor
University Of Michigan  Law School
U.S.A.

Donald C. Klawiter
Partner
Morgan, Lewis & Bockius LLP
U.S.A.

Steven M. Kowal, Esq.
Partner
Bell, Boyd & Lloyd LLC
U.S.A.

Robert E. Kwinter
Partner

Tsutomu (Riki) Nakato
Partner
Hibiya Sogo Law Office
Japan

Peter M.A.L. Plompen (Chair BIAC’s Competition Committee)
Senior Vice-President, Corporate Legal Department
Philips International B.V.
The Netherlands

James F. Rill (Vice-Chair BIAC’s Competition Committee)
Partner
Howrey, Simon, Arnold & White LLP
U.S.A.

Ronald A. Stern
Vice-President, Senior Counsel-Antitrust
General Electric Company
U.S.A.

David Tadmor
Partner
Caspi & Co
Israel

Deirdre F. Trapp
Partner
Freshfields Bruckhaus Deringer
England

Debra A. Valentine
Partner
O’Melveny & Myers LLP
U.S.A.

Marc van der Woude
Partner, Nauta Dutilh
Principal Draftsperson: Robert E. Kwinter, Partner, Blake Cassels & Graydon LLP, Canada