BIAC Comments on the Draft OECD Recommended Practices for the Formal Exchange of Information Between Competition Authorities in International Hardcore Cartel Investigations

September 8, 2004

BIAC recognizes the significant progress achieved by Working Party No.3 of the OECD’s Competition Law and Policy Committee in articulating recommended practices for the exchange of information in international hardcore cartel investigations. BIAC is also gratified that the draft recommended practices incorporate a number of the points that BIAC has advanced in its submissions over the last several years. There is much in the OECD draft with which BIAC is in essential agreement. There do remain, however, some points on which clarification might be helpful,1 and, as requested by Mr. Pate in his letter of June 23, 2004, we have set out below BIAC’s comments on the OECD’s draft Recommended Practices.

I. Information Exchanges Covered by These Recommended Practices

1. The OECD’s recommendation in this regard is consistent with the approach advanced by BIAC, i.e., the recommended safeguards should apply to “formal” rather than “informal exchanges” of information between antitrust agencies in international investigations. The OECD recommendation, however, provides that the safeguards should “apply to situations where one jurisdiction provides evidence to another for the purposes of the investigation…”. BIAC recommends that reference here should be made to “information” rather than “evidence”, unless the term evidence is expressly defined to cover information more broadly2. Whether information that would otherwise be subject to the safeguards will be “evidence” in a proceeding may not be determinable at the point

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1 BIAC notes that information exchange should not be used by jurisdictions as a means of obtaining duplicative relief for the same harm and would welcome a recommendation by Council to this effect.

2 For example, BIAC has cited the definition of “Antitrust Evidence” in Article 1 of the U.S.A./Australia IAEAA:

“Refers to information, testimony, statements, documents or copies thereof, or other things that are obtained, in anticipation of, or during the course of, an investigation or proceeding under the Parties’ respective antitrust laws, or pursuant to the Parties’ Mutual Assistance Legislation”.
of exchange and there should be no suggestion that such information would fall outside of the scope of the safeguards on the basis that it does not constitute “evidence”. Moreover, BIAC recommends that, in addition to amnesty applicants, permission for exchange should also be sought from co-operating witnesses and informants, as the case may be.

II. Safeguards for Formal Exchanges of Information

A. Authority to Exchange Information

2. BIAC is in agreement with the OECD’s recommendation in this regard.3

B. Provisions to Ensure That Confidentiality is Maintained in the Requesting Jurisdiction

3. BIAC is in agreement with the OECD’s recommendation in this regard.

C. Limitations on Use and Disclosure

4. BIAC has previously suggested that exchanged information be restricted in its use. BIAC recognizes, however, that the Council may elect to adopt a recommendation authorizing the use of exchanged information for other purposes. In that case, BIAC would recommend that the Council adopt additional language making clear that such possible other purpose should be specified in the request and any such other use or disclosure be conditioned on a showing of compelling need by the requesting jurisdiction to the requested jurisdiction and be subject to the requested jurisdiction’s prior approval.

D. Consequences in the event of Unauthorized Disclosure

5. BIAC is in essential accord with the OECD’s recommendation, but believes the recommended practice should go further and require that, in the event of unauthorized disclosure, notice should be given to the person who provided the information, unless such notice would violate a court order, a domestic statute, an obligation under a treaty or other international agreement, or jeopardize the integrity of an investigation in either the requesting or requested jurisdiction. It is to be expected that unauthorized disclosure will be a rare occurrence, but where it does occur, the person who provided the information will likely be in the best position to determine how best to ameliorate any harm flowing from the unauthorized disclosure and, as a matter of fairness, should be apprised of the disclosure so that it can take appropriate steps to protect its interests. Also, the suggested modification would harmonize the standard for notifying parties of unauthorized disclosure with the standard for notifying parties of the exchange of information, set forth under part F of the Council Recommendation.

3 BIAC understands the Recommendation would allow the requested jurisdiction to decline where the requesting jurisdiction treats the conduct criminally and the requested jurisdiction does not.
E. Protection of Legal Privilege

6. BIAC is in essential agreement with the OECD’s recommendation in this regard, which follows very closely the position advanced by BIAC in February 2004.

7. However, we suggest that “privileged and protected information” be substituted for “information subject to and protected by the legal profession privilege” in order to ensure that the recommendation applies to protected communications as they may be defined by various national laws.

F. Notice

8. BIAC suggests that this language, as drafted, counsels too heavily against prior notice, including in those situations where prior notice would not result in any adverse consequence to the subjection jurisdictions. For example, in cases where the party(ies) have already been notified of and are subject to the investigation, prior notice of a proposed exchange should normally be provided, unless such notice would violate a court order, a domestic statute, an obligation under a treaty or other international agreement, or jeopardize the integrity of an investigation in either the requesting or requested jurisdiction. BIAC has suggested slight modifications to the language of the recommendation that help avoid unintended inferences in this respect.

III. Transparency

9. BIAC takes no issue with the OECD’s recommendation in this regard.