Discussion Points on Information Sharing in International Cartel Investigations

Submitted to the OECD Global Forum on Competition by the Business and Industry Advisory Committee to the OECD (BIAC)\(^1\)

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1. Background

   a. The growing globalisation of trade has spawned calls for greater international antitrust enforcement and greater co-operation between and among competition enforcement agencies, efforts that BIAC supports. International information exchange is often cited as key to the promotion of inter-agency co-operation. BIAC and the International Chamber of Commerce (ICC) have addressed the issue of information exchange in the context of both merger reviews and cartel investigations in past statements. In the ICC Statement on International Co-operation between Antitrust Authorities (no. 225/450 rev. 3 of 28 March 1996), the ICC noted a divergence of views on whether co-operation on the exchange of confidential information must await greater substantive convergence. Some ICC members in Europe believed that such convergence was a necessary pre-condition to information exchange, while other members in North America did not. The ICC noted, however, “the unanimous and grave concern” of all members that any confidential information subject to exchange must be adequately protected and set out basic procedural safeguards to be incorporated in legislative provisions governing information exchange.

   b. The ICC Recommendations to the United States International Competition Policy Advisory Committee (ICPAC) on Exchange of Confidential Information between Competition Authorities in the Merger Context (no. 225/525 of 21 May 1999), focused on information exchange in the context of merger investigations. While this Global Forum discussion focuses on information exchange in the context of cartel investigations, the ICC Recommendations to ICPAC set out basic preconditions for the exchange of information in merger cases that are also relevant to the cartel context, including clear pre-conditions governing the exchange, strict limits on the use of the information, protection from disclosure to third parties and remedies for breach of confidentiality.

   c. The BIAC/ICC Comments on the report of ICPAC (no. 225/554 Rev. 5 June 2000) addressed information exchange in the context of both merger and cartel investigations. BIAC/ICC expressed their full support for increased international co-operation to pursue cartels, but emphasised “the need for legal safeguards and protections for companies under investigation”.
The BIAC/ICC Comments supported ICPAC’s recommendations concerning (1) the need for appropriate safeguards to prevent leaks, (2) greater transparency to improve business confidence, (3) the provision of notice (except in certain limited circumstances) by the U.S. authorities of an intent to disclose information to a foreign authority and (4) the refusal to share information with foreign enforcement authorities who have not enacted appropriate safeguards or demonstrated a commitment to protect confidential information.

d. Information exchange was also addressed in the October 23, 2000 statement to the OECD Committee on Competition Law and Policy, entitled BIAC/ICC Questions from Business Regarding the Protection of Confidential Information in the Context of International Antitrust Co-operation. This statement outlined a framework for the protection of confidential information in the context of international antitrust co-operation, including the definition of confidential information, the provision of notice, remedies for breach of confidence, access to and use of shared information and the return of information upon completion of the investigation. Recommendations with regard to information exchange in the merger context are also set out in the BIAC/ICC Recommended Framework for Best Practices in International Merger Control Procedures, October 4, 2001. In this presentation to the Global Forum, BIAC proposes to incorporate what was said in October 2000 and expand on that in certain respects.

e. We note the thoughtful and detailed comments by the OECD in both its January 24, 2002 note on “Information Sharing in Cartel Cases - Suggested Issues for Discussion and Background Material” (the “OECD Note”) and its January 30, 2002 note on “Information Sharing in Cartel Investigations” and the invitations therein for BIAC to address and expand on a number of issues. BIAC is pleased to try to do so, and will consult with its members with a view to preparing a further detailed response to those papers. In the meantime, the following discussion points respond to some of the questions and invitations in the OECD notes and build upon the prior BIAC/ICC statements and recommendations referred to above with respect to information exchange in the context of cartel investigations. We generally cross-reference our comments to the more detailed January 24 OECD Note except where the January 30 note raises an additional point.

2. Balancing of Interests

a. BIAC supports the essential objective of strengthening co-operation among competition enforcement agencies in detecting and proceeding against hard core cartels, and BIAC further recognises that the exchange of information between enforcement agencies is necessary to accomplish that essential objective in a timely fashion.

b. In this context, however, BIAC believes that it is important to ensure that enforcement authorities are cognisant of:

i. considerations of fairness and due process;

ii. the chilling of voluntary co-operation by private parties when appropriate safeguards are not in place;

iii. the damage that can occur to persons under investigation as a result of improper or premature disclosure of confidential information to:

- plaintiffs or potential plaintiffs in antitrust or other litigation;
- actual or potential competitors (both private and state-owned); and
- other government agencies pursuing matters unrelated to antitrust enforcement.
b. In section 7 of the OECD Note, the Secretariat asks whether interests other than the improper disclosure or use of confidential information are behind the business community's comments. It is fair to say that some of BIAC’s comments on information exchanges relate not only to concerns about the preservation of confidentiality but also to issues such as due process and preservation of privilege. In this context it is important to keep in mind that hard core cartel investigations carry a different risk of sanctions than do merger cases, which should therefore give rise to greater consideration of procedural fairness. Also, in such cartel cases there are the potential disincentives for participation in amnesty and leniency programs in the event of disclosure of confidential information without consent.

c. The lack of appropriate safeguards with respect to either confidentiality or due process imperils the integrity of the investigative process and can have a chilling effect on the willingness of businesses to co-operate with both domestic and foreign enforcement agencies, whether or not the co-operation is part of an amnesty/leniency program. Businesses that might otherwise co-operate may be reluctant to do so, availing themselves of legal means to thwart disclosure out of concern for how their confidential commercial information may be disseminated. Such reluctance could become a hindrance to the enhanced enforcement capability that greater information exchange is intended to promote.

3. Pre-Conditions To Exchange of Confidential Information Required

a. In sections 4 and 5 of the OECD Note, the Secretariat invites BIAC to focus on the safeguards it views as necessary to protect against improper disclosure or use of shared information. This section and section 4 below (with respect to notice) respond to that invitation. BIAC will be pleased to provide more specific input once it has consulted more widely with its membership on the questions and invitations in the OECD Note.

b. In broad terms, BIAC’s position is as follows: Confidential information should not be shared with the enforcement authorities of other jurisdictions who have not legislated appropriate safeguards for the protection of such information under their own laws, or who, having enacted such laws, have failed to demonstrate a commitment to protect confidential information in accordance with such standards. The safeguards should be clearly set out in a treaty or formal intergovernmental agreement. Appropriate safeguards should include the following:

i. The information exchanged should be the minimum necessary for the stated purpose of furthering the investigation of a hard core cartel.

ii. Confidentiality protection available in the receiving jurisdiction should be at least equal to that in the country of origin of the information being shared. For example, loss of solicitor-client privilege should not occur as a result of the sharing of confidential information between antitrust authorities in different jurisdictions.

iii. In section 11 of the OECD Note, BIAC is invited to expand its comments regarding privileges for solicitor/client communications and work product. In BIAC’s view, a receiving jurisdiction should not receive or use information that would be considered privileged under the recipient’s own laws.

iv. Confidential information should not be supplied by the receiving jurisdiction to third parties (including other government agencies or private plaintiffs), unless express waiver is provided by the owner of that information.
v. Compelled testimony should be given the same protections in the receiving jurisdiction as are available in the original jurisdiction.

vi. The receiving jurisdiction should provide for *in camera* hearings where confidential information is used by the receiving agency in a court or tribunal proceeding.

vii. In section 11 of the OECD Note, BIAC is asked whether its position is that a country should be able to share information with another country only if the receiving country identifies in advance all the people who will have access to it and/or requires a "chain of custody" record. BIAC is pleased to clarify its position in this regard by suggesting that all persons within the receiving jurisdiction who will be entitled to have access or request access to exchanged information should be *functionally* identified (but not necessarily by name). BIAC also believes that a chain of custody would be a prudent measure that would both assist the antitrust authorities in maintaining confidentiality and demonstrating such compliance if that were to become necessary.

viii. The same safeguards should apply whether the owner of the information has provided the information voluntarily or by compulsion, subject in either case to express waiver.

ix. Different jurisdictions have different domestic standards, laws and policies with regard to protections available to persons subject to investigation, including requirements for court approval of investigative actions (e.g. search warrants) and the scope of legal privilege. A party ought not to be exposed to jeopardy in its home jurisdiction based on evidence from abroad that would have been held to be unlawfully obtained under the fundamental legal principles of the home jurisdiction.

tax. Provision should be made for the return (or with the consent of the owner of the information, the destruction) of all original information and copies thereof provided to the foreign jurisdiction, once the investigation is concluded. If the authority is entitled to keep copies, the owner should be told of the fate of the copies and there should be a continuing opportunity to apply for the return or destruction of the copies at some later date.

c. In sections 6 and 14 of the OECD Note, the Secretariat invites BIAC to consider whether some categories of non-public, non-confidential information could be defined with sufficient specificity and clarity to permit them to be shared using a more streamlined process – e.g., who attended a particular meeting, as opposed business secrets. BIAC would be pleased to consult with its members on this suggestion, but initially finds it difficult to define categories of information that are inherently less sensitive. It would also be helpful if the Secretariat could amplify on what it means by "non-public, non-confidential information" as any information that is not public would, almost by definition, appear to be confidential.

4. **Notice**

a. Before any decision is made to provide information to a foreign jurisdiction, the owner of the information should be given prior notification and sufficient opportunity to consent, discuss the possibility of modifying such decision, or oppose such decision, before an independent arbiter, unless prior notice would clearly violate a treaty obligation of the jurisdiction or a court order, or jeopardise an ongoing investigation into a hard core cartel. It should be noted however, that this opinion is divided and some BIAC and ICC members believe that prior notice and the opportunity for judicial review should always be provided before exchange. Notice is particularly important where it is proposed to send confidential information from a
jurisdiction in which hard core cartels are not punishable by criminal sanctions to a jurisdiction that may seek criminal sanctions for such conduct.

b. Section 11 of the OECD Note asks BIAC for its current position on the required content of the notice. In BIAC’s view, the notice should set out the specific information proposed to be disclosed, the government and enforcement authority to which the disclosure is proposed to be made, and the approximate timing of when the disclosure is proposed to take place. The notice should also include express confirmation that the applicable safeguards will be adhered to.

c. If prior notice is not given, notice after the fact should be given as promptly as possible (i.e., when the investigation becomes known to the owner of the information).

d. In the absence of consent, there should be a right to independent review of any decisions regarding the information exchange. Such a review could be provided by a court with the authority to impose remedial orders and sanctions for violations of treaty/agreement obligations or protective orders.

e. Section 11 of the OECD Note comments that secrecy is generally essential in cartel investigations and would often be jeopardised by notice. It may be helpful in this discussion if the Secretariat might clarify the circumstances in which notice would jeopardise an ongoing investigation into a hard core cartel were clearly described. For example, it is clear that notice should not be required where agencies are co-ordinating “dawn raids” and disclosure would provide the target with the opportunity to destroy documents (although the extent of information required to be shared for this purpose may be subject to debate). On the other hand, where the target of the investigation is already aware of an investigation in at least one of the relevant jurisdictions, it is not clear how notice of a proposed disclosure of information already obtained from one of the jurisdictions would jeopardise an ongoing investigation. In that case, the target is already aware of an investigation and, in today’s environment, would almost certainly be aware of the risk of investigations in other jurisdictions. BIAC is not suggesting that the notice in the context of a cartel investigation contain an explanation of the particulars of the use to be made of the information, apart from certain fundamental points described above. In any event, based on enforcement experience, the antitrust agencies ought to be able to identify the types of circumstances in which notice has jeopardised or would likely jeopardise their investigation.

5. Limits on Use of Confidential Information

a. In section 11 of the OECD Note, BIAC is asked whether it is BIAC’s position that a country should be able to share information only if the receiving country is able to use the information solely for purposes of investigating the cartel, or whether more limited restrictions on use are adequate.

b. In BIAC’s view, the use of confidential information by the foreign authority should be expressly limited to the purpose of furthering a hard core cartel investigation. The information should not be used for any other types of investigations or to further any other government objectives.

6. Relationship with Immunity/Leniency Policies

a. The provision of immunity/leniency in the home jurisdiction ought not to be conditioned upon consent by the owner of the confidential information to the sharing of that information with foreign jurisdictions.
b. Prior notification should always be given and express consent obtained before confidential information provided in connection with an immunity/leniency arrangement is provided to a foreign jurisdiction.

c. When confidential information is provided to gain immunity in one jurisdiction, this immunity should not be threatened by the possibility of sanctions later being brought in another jurisdiction as a result of information exchanged (without consent of the owner of that information), by the jurisdiction granting immunity.

d. Adoption of these policies would encourage the use of immunity and leniency programs while the absence of these assurances may have a chilling effect that would discourage their use.

7. Enforcing Standards

a. Arrangements under which information is exchanged should include mechanisms to allow monitoring of compliance with, and effective enforcement of, the limitations on the use of the information exchanged. Confidential information ought not to be shared with foreign jurisdictions that do not have and adhere to appropriate monitoring and enforcement mechanisms.

b. The foreign jurisdiction should be required to promptly notify the original jurisdiction and the owner of the information of any breach of confidentiality.

c. There should be ready access to a judicial authority within the foreign jurisdiction empowered to issue orders requiring the return of confidential information improperly disclosed and enjoining further breaches of confidentiality.

d. Provision should be made within the foreign jurisdiction for effective penalties for persons who breach confidentiality undertakings in respect of exchanged information.

e. Consideration should be given to imposing sanctions on the receiving jurisdiction for breach of confidentiality, including, but not limited to, restrictions on further information exchanges.

8. Other Points

a. Section 8 of the OECD Note invites BIAC to expand on its concerns about the definition of naked hard core cartels. BIAC has suggested that such hard core cartel behaviour means (i) horizontal price fixing agreements, (ii) horizontal bid rigging, and (iii) horizontal market allocation. BIAC would be pleased to expand on this point in the context of the OECD Note given additional time and further consultation with its members. Discussion of exchanges of information for the purposes of other types of conduct are outside the scope of these remarks. Paragraph 5 of the OECD Note of January 30, 2002 refers to BIAC’s position that a requested authority should never be authorised to share confidential information if the conduct specified in the request would not constitute a violation of its own national law. This comment may go beyond the topic at hand of exchanges with respect to hard core cartels since these would likely be a violation of any antitrust law.

b. In section 11 of the OECD Note, the Secretariat states that the discussion of downstream protection would be facilitated by reference to how downstream protection is provided in the Australia/U.S. mutual assistance agreement, (which is an IAEAA and not an MLAT). Section
11 also states that no notice is required under MLATs and it is unclear why there should be additional procedural requirements merely because a hard core cartel is investigated as a non-criminal violation. The Secretariat also points to the absence of notice requirements in connection with the sharing of confidential information between the EC and a member state. BIAC is also specifically invited to address the lack of any notice or appeal/redress provisions in the Australia/U.S. agreement or its implementing legislation. BIAC will be pleased to respond to this point in detail following further consultation. In the meantime, BIAC would note that these issues of confidentiality were not fully vetted at the time of the adoption of many MLATs. More consideration has been given to these issues since that time by legal and business communities, particularly in light of the types of information that have been or can be exchanged under such treaties. We also note that confidentiality issues have been raised in the context of the Canada/US MLAT since the early 1990s and these issues have yet to be fully resolved. In addition, the U.S. Council for International Business specifically raised concerns about notice and safeguards in the course of Congressional Hearings in relation to the IAEAA. The House of Representatives Committee Report suggested that confidentiality restrictions similar to those in the U.S. be required before confidential information is shared under the IAEAA, and that notice be given of any intent to transfer such information, unless the investigation would be compromised. Similar concerns were raised by various persons in the course of submissions made during the ICPAC hearings.

c. In section 13 of the OECD Note, BIAC is invited to discuss the extent to which its concerns relate to the possibility that business information may inadvertently be disclosed or been seen by other business interests: "To what extent is the concern about deliberate "leaks"? Are there other significant concerns regarding the possibility of improper disclosure? About disclosure in accordance with the receiving country's laws?" BIAC is invited to discuss the extent to which its concerns relate to the possibility that business information, although not disclosed to the public or other business interests, may nonetheless be improperly used. BIAC is also asked whether its position is that the success of information sharing regimes in other fields (e.g., tax and securities) is not an indication that a similar regime would likely be successful in competition law enforcement. BIAC will be pleased to consult with its membership including its tax committee on this point. In the interim, BIAC would like to emphasise the immediate competitive concerns that can result from the improper disclosure of the types of confidential information that is often relevant in a hard core cartel investigation, and the fact that the targets of such an investigation sometimes compete with agencies of the same government that is conducting the antitrust investigation.

d. In paragraphs 12 and 14 of the OECD Note of January 30, 2002, the Secretariat asks (1) in the absence of an agreement, what steps authorities should take to ensure that a requesting authority’s national laws provide equivalent protection and to communicate their conclusions to the public and (2) how requested authorities can assure themselves that adequate protections of confidentiality exist in the laws of the requesting authority. BIAC will be pleased to comment on these issues following further consultation with its national committees.

e. In Appendix A, the OECD Note quotes from the CLP’s 2000 Hard Core Cartel Report (paragraph 62) as follows:

“Moreover, delegates to the Committee have pointed out that in merger cases, which typically involve information that is much more confidential than that in hard core cartel cases, businesses increasingly make voluntary waivers of confidentiality protections in order to permit competition authorities to co-operate. This practice
leads some to believe that confidentiality concerns about information sharing in cartel cases are often exaggerated, since businesses typically are viewed as having an economic incentive to expedite merger investigations but to slow down cartel investigations.”

BIAC does not agree with the suggestion in the Report, that confidentiality concerns in these cases, are often exaggerated. The confidentiality concerns outlined above, in sections 2 and 6, are valid. In addition, particularly where confidential information is taken by compulsion, significant issues of fairness and due process arise, as discussed earlier in these comments.