



COMPETITION COMMITTEE

**BEST PRACTICES FOR THE FORMAL EXCHANGE OF INFORMATION BETWEEN
COMPETITION AUTHORITIES IN HARD CORE CARTEL INVESTIGATIONS**

OCTOBER 2005

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1. These Best Practices for the formal exchange of information¹ between competition authorities in hard core cartel investigations² (“Best Practices”) have been developed under the sole responsibility of the OECD’s Competition Committee.

2. The OECD gives high priority to effective competition law enforcement, particularly against hard core cartels.³ This has been recognised in recent acts by the OECD Council, which also encouraged member countries to cooperate in their law enforcement activities:

- The Council’s Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade [C(95)130/FINAL] recommended that, when permitted by their laws and consistent with their interests, Member countries should co-ordinate competition investigations of mutual concern and should comply with each other’s requests to share information.
- Furthermore the Council's Recommendation Concerning Effective Action Against Hard Core Cartels [C(98)35/FINAL] recognised that member countries’ mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process, to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information.
- The latter Recommendation also encouraged member countries to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

3. The Best Practices are based on these two Council Recommendations and draw from the Committee’s previous work on the fight against hard core cartels, and in particular the subject of information exchanges in hard core cartel investigations.⁴

¹ Throughout this document “exchanging information” and “providing information” are meant to refer to situations in which one competition authority shares information with, or otherwise makes information available to, another competition authority, including reciprocal exchanges of information between two competition authorities and the provision of information which one competition authority has obtained at the request of another competition authority.

² Throughout this document “investigation of a hard core cartel” is meant to include all steps related to the enforcement of competition laws against hard core cartels.

³ Throughout this document "hard core cartel" is meant to refer to hard core cartels as defined in the Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL.

⁴ The Committee’s previous work on the subject of information exchanges in hard core cartel investigations has been documented in reports by the Committee to the Council on the implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels. The Committee also held

4. Consistent with these Council Recommendations and in light of the Competition Committee's work on the topic of information exchanges in cartel investigations, the Committee believes that member countries should generally support information exchanges and should, in accordance with their laws, seek to simplify and expedite the process for exchanging information in order to avoid imposing unnecessary burdens on competition authorities and to allow an effective and timely information exchange.

5. The Competition Committee also recognises that:

- a member country may decline to comply with a request for information, or limit or condition its co-operation;
- the exchanging of confidential information presupposes effective safeguards (i) to protect against improper disclosure or use of exchanged information; and (ii) for privileged information, in particular information subject to the legal profession privilege, as well as for other rights under the laws of member countries involved in the exchange of information, which may have to take into account differences in the nature of sanctions for violations of competition laws concerning hard core cartels in different jurisdictions;
- information exchanges should not inadvertently undermine hard core cartel investigations, including the effectiveness of amnesty programs, and that, to that end, most member countries have adopted policies pursuant to which they do not exchange information obtained from an amnesty applicant without the applicant's prior permission;
- member country authorities should seek to ensure that information exchanges do not have negative consequences for informants, for example by deciding not to disclose their identities in certain cases;
- regional organisations and regional agreements may imply a very close cooperation which requires less safeguards than set out in these Best Practices.

6. Based on the above, the Competition Committee believes that member countries should take note of the following Best Practices when they enter into international agreements, or adopt domestic legislation, authorising the exchange of confidential information in investigations of hard core cartels under their competition laws, and in their policies and practices applicable to such exchanges:

I. Information Exchanges Covered by These Best Practices

A. These Best Practices apply to situations where (i) for the purposes of the investigation of hard core cartels under the competition laws of the requesting jurisdiction a competition authority in one jurisdiction provides information obtained from private sources to a competition authority in another jurisdiction; (ii) the competition authority would normally, under domestic law, be prohibited from disclosing such information to other competition authorities; and (iii) the disclosure of such information can occur only because it is authorised in certain circumstances by an international agreement or domestic law. International agreements and domestic laws authorising such disclosure, as well as policies and practices of competition authorities applicable to such exchanges, should provide for the safeguards identified in these Best Practices.

roundtable discussions on various issues related to cooperation and information exchanges in hard core cartel investigations. Representatives of the business community contributed to the Committee's discussions, and their views have been taken into account in developing these Best Practices.

B. The Best Practices should apply to exchanges of information that has been obtained on behalf of a foreign competition authority following a request for assistance as well as information already in the possession of the requested jurisdiction.

C. These Best Practices do not apply to:

- (i) Exchanges of information not subject to domestic law restrictions and which competition authorities therefore are free to exchange without authorisation by international agreement or domestic law;
- (ii) Information exchanges among members of a regional organisation or parties to a regional agreement that have adopted specific rules governing information exchanges among competition authorities, unless such exchanges involve information originating from a jurisdiction that is outside the regional organisation or not party to the regional agreement; and
- (iii) Information exchanges in the context of private litigation.

II. Safeguards for Formal Exchanges of Information

A. *Authority to Exchange Information*

1. Before making a formal request for information, a requesting jurisdiction should seek to consult with the requested jurisdiction to understand the circumstances under which the requested jurisdiction can act upon the request, in particular, whether it may have any disclosure requirements with respect to the information in the request and/or whether it would have to give notice to the source of the information. The requested jurisdiction should confirm that it will to the fullest extent possible consistent with its laws maintain the confidentiality of the information in the request.
2. The requesting jurisdiction should provide sufficient information as is necessary for the requested jurisdiction to act upon the request. The requesting jurisdiction should explain to the requested jurisdiction in detail how the request for information located in the territory of the requested jurisdiction concerns the requesting jurisdiction's investigation of a violation of the requesting jurisdiction's competition laws concerning hard core cartels.
3. The requested jurisdiction should have discretion to provide or not to provide the requested information. Reasons for declining to provide the requested information might include, but are not limited to: (i) the requesting jurisdiction's investigation relates to conduct that would not be deemed hard core cartel conduct by the requested jurisdiction; (ii) honouring the request would be unduly burdensome for the requested jurisdiction or might undermine an ongoing investigation; (iii) the requested jurisdiction believes that confidential information may not be sufficiently safeguarded in the requesting jurisdiction; (iv) the execution of the request would not be authorised by the domestic law of the requested jurisdiction; or (v) honouring the request would be contrary to the public interest of the requested jurisdiction.
4. The requested jurisdiction may offer to provide the requested information only subject to conditions and/or limitations on use or disclosure. It should at least consider doing so if otherwise it would have to decline the request for information.

B. *Provisions Concerning Confidentiality, Use, and Disclosure in the Requesting Jurisdiction*

1. The requesting jurisdiction should identify its domestic confidentiality laws and related practices so that the requested jurisdiction can consider the requesting jurisdiction's ability to maintain the confidentiality of the exchanged information.
2. The exchanged information should be used or disclosed by the requesting jurisdiction solely for purposes of the investigation of a hard core cartel under the requesting jurisdiction's competition laws in connection with the matter specified in the request and solely by the enforcement authorities in the requesting jurisdiction, unless the laws of the requested jurisdiction provide the power to approve the use or disclosure of the exchanged information in other matters related to public law enforcement, and the requested jurisdiction has granted such approval in accordance with its domestic law requirements prior to the use of the information in such other matter in the requesting jurisdiction.
3. The requesting jurisdiction should confirm that it will to the fullest extent possible consistent with its laws: (i) maintain the confidentiality of the exchanged information; and (ii) oppose the disclosure of information to third parties for the use of such information in private civil litigation, unless it has informed the requested jurisdiction about such third party request for disclosure of the information, and the requested jurisdiction has confirmed that it does not object to the disclosure.
4. The requesting jurisdiction should ensure that its privilege against self incrimination is respected when using the exchanged information in criminal proceedings against individuals.
5. The requesting jurisdiction should take all necessary measures to ensure that an unauthorised disclosure of exchanged information does not occur. In addition, it should make information available about the consequences under its domestic law in the event of such unauthorised disclosure. If, under exceptional circumstances, an unauthorised disclosure of exchanged information occurs, the requesting jurisdiction should take steps to minimise any harm resulting from the unauthorised disclosure, including promptly notifying the requested jurisdiction, and to ensure that such unauthorised disclosure does not recur. The requested jurisdiction should consider whether it is appropriate to notify the source of the information about the unauthorised disclosure.

C. *Protection of Legal Profession Privilege*

1. The requested jurisdiction should apply its own rules governing information subject to and protected by the legal profession privilege when obtaining the requested information.
2. The requesting jurisdiction should, to the fullest extent possible, (i) formulate its request in terms that do not call for information that would be protected by the legal profession privilege under its law; and (ii) ensure that no use will be made of any information provided by the requested jurisdiction that is subject to legal profession privilege protections of the requesting jurisdiction.

D. *Notice to Source of the Exchanged Information*

1. If an information exchange is made consistent with these Best Practices, the requested jurisdiction should not give prior notice of the exchange to the source of the information, unless such notice is required under its domestic laws or an international agreement.
2. If the requested jurisdiction provides notice to the source of the information of the fact that information has been exchanged, it should do so only if such notice does not violate a court order, domestic law, or an obligation under a treaty or other international agreement, or jeopardise the integrity of an investigation in either the requesting or requested jurisdiction.
3. Prior to giving notice to the source of the information in accordance with Sections D.1 or D.2, the requested jurisdiction should, where practicable, consult with the requesting jurisdiction.

III. Transparency

To the extent possible without compromising legitimate enforcement objectives, jurisdictions should ensure that their relevant laws and regulations concerning information exchanges covered by these Best Practices are publicly available.