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INFORMATION SHARING IN CARTEL INVESTIGATIONS

-- Note by the Secretariat -- (Session IV)

This note is submitted as the basis FOR DISCUSSION during Session IV of the Global Forum on Competition, to be held on 14 and 15 February 2002.

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INFORMATION SHARING IN CARTEL INVESTIGATIONS

Introduction

1. In the meeting of Working Party No. 3 on 13 February 2001 there was an extended discussion with representatives of BIAC on standards for protecting the confidentiality of information exchanged among national competition agencies in cartel investigations. As background, the Secretariat had circulated a note that annexed both an October 2000 BIAC paper and relevant excerpts from the 2000 Hard Core Cartel Report. DAF/CLP/WP3(2001)2. During the meeting, BIAC presented some "talking points" that did not necessarily reflect a consensus position but served as a basis of discussion. While there was no disagreement about some of the safeguards BIAC proposed, there were doubts or disagreement about others. It was agreed that the discussion would continue in a later meeting.

2. This subject is highly relevant for the Global Forum. As markets expand beyond national borders, more cartels are international, and many recent cartels have been truly global. Without enhanced international co-operation, which includes the exchange of confidential information in appropriate circumstances, it will be increasingly difficult to successfully prosecute this conduct. Both the cartels' harm and the need for co-operation extend to the many non-Member economies that will attend the February Forum meeting. Moreover, BIAC will again be present, as will other non-government organisations whose views can contribute to discussion of this important topic.

3. As background for the 15 February Forum discussion, the Secretariat note for last year's discussion will be placed on the Forum website (and OLIS). After a very brief summary of the current situations in which information is banned or authorised, this note will set forth some general issues that are suggested for discussion at the February Forum meeting. The presentation will refer to BIAC's position during the 2001 meeting where doing so helps to clarify the issues.

4. The current rules on information sharing in cartel cases may be summarised as follows.

- Two sets of laws protect "confidential information," as that term is used in this note.
- General confidentiality laws protect generally against disclosure or misuse of business secrets and other such confidential business information.
- In addition, laws governing government agencies' treatment of company information generally regulate the handling of both (a) confidential business information, such as business secrets, and (b) any non-public information acquired in an investigation, even if it is not inherently confidential. In general, these laws prevent the improper disclosure or use of such information, but they sometimes authorise sharing such information with other domestic agencies that are also required to protect it.
- With very few exceptions, laws establishing the investigation powers of competition authorities do not provide for the use of compulsory process to gather information on behalf of foreign authorities.
- Competition authorities are normally permitted, but not required by law, to limit access to internal information such as the nature or status of their investigations, their investigation theories, or their preliminary conclusions. This note does not refer to such "internal agency information" as confidential information.

- Authorisation for foreign co-operation in information sharing or information gathering:
 - Some general international treaties provide for sharing confidential information. For example, letters rogatory have been used to obtain confidential information in competition cases. Pursuant to MLAT agreements, confidential information may be shared in criminal competition cases, and competition authorities can use compulsory process on behalf of a foreign authority. Member States share confidential information with the EC, and confidential information collected by the EC can in some situations be shared with Member States.
 - An increasing number of competition-specific bilateral treaties and laws also provide for sharing confidential information -- e.g., between Australia and New Zealand, between Australia and the U.S., and by France, the Netherlands, and some Nordic countries.
 - Authorisation for the sharing of confidential information has been much more common in the securities, tax, customs, and criminal areas than for competition law.
- Safeguards:
 - Where authorisation exists for such co-operation with foreign authorities, it contains requirements that the requested authority take steps aimed at ensuring that the confidentiality of any shared information will be protected. In general, the authority must determine that the requesting economy provides substantially equivalent protection for confidential information. Also, the authority may need to find that sharing the information would be consistent with the national interest. None of the current authorising provisions requires prior or after-the-fact notice to the firm whose information is to be shared.

Requirements relating to the nature of the case

5. In the international context, it is generally agreed that a requested authority should be authorised to share information only when the requesting authority is conducting an investigation under its competition law. If a requested authority considers that the alleged conduct would not be anticompetitive even if it did take place, it can turn down the request and would be required to do so if it considers the investigation so flawed that co-operation would not be in its national interest. BIAC has taken this a step further, suggesting 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.

In what kinds of cases should competition authorities be authorised to share information? Assuming that a competition authority determines that the alleged conduct would be anticompetitive if proved and that sharing information would serve its national interest, should it be forbidden to co-operate merely because for one reason or another the alleged conduct would not violate its national law?

The need for "downstream protection" of confidential information

6. It is also generally agreed that before a requested authority furnishes confidential information to a requesting authority, it should assure itself that the latter has adequate means of protecting the information. This is referred to as assuring adequate "downstream protection" for the information. Somewhat differing standards have been mentioned, with some referring to protections in the requesting economy that are "comparable" or "substantially equivalent" to those in the requested economy, while BIAC has proposed that "at least equivalent" protection should be the standard. This distinction may not be significant. Literally, "at least equivalent" is not a higher standard than "equivalent." Moreover, whether a law refers to protections that are "substantially" or are "at least" equivalent, it seems unlikely that a law would be interpreted to mean that insubstantial differences in protection would prevent information sharing.

What should be the applicable standard in determining whether there are adequate protections for confidentiality in the requesting economy? If a requested authority has made a general determination that the laws and policies of a requesting economy are equivalent, to what extent should it need to revisit that issue in the context of reviewing a specific case?

Limitations on use of information in other matters -- other protections beyond equivalency

7. The Australia/US agreement provides that in the absence of the requested authority's specific consent, the requesting competition authority may use the shared information only in the investigation that is specified in the request.¹ BIAC, however, has taken the position that even with the consent of the requested authority, the requesting authority should not be able to use the information in any other way or matter. Thus the requesting authority would need to file another formal request if it wanted to, for example, (a) use the information in any other matter or (b) make the information available to another agency that is investigating the same cartel under a different law.

In general, what restrictions should be placed on the requesting authority's use of confidential information? To what extent, and in what circumstances, should those restrictions be removed if the requested authority consents to such use? Are there other protections BIAC is seeking that go beyond equivalency?

Notice to the providing party

8. One of BIAC's most strongly held positions is that the requested authority should give notice of a request for confidential information from a foreign agency to the provider of that information prior to the exchange. The provider should have the opportunity to oppose or discuss modifying the exchange and, if necessary, to appeal a decision to provide the information to an independent authority, such as a court. BIAC would not require prior notice if it "would jeopardise an investigation into a naked hard core cartel," but in that event there should be a retroactive right of review and appeal.

¹ In general, the Australia/U.S. agreement limits the use of the information to the investigation or proceeding specified in the request, but provides that the information can be used in other competition and non-competition cases upon the prior written consent of the requested economy, and in the case of a non-competition case, upon a showing by the requesting economy that such use is "essential to a significant law enforcement objective."

9. In the discussion of this topic in last February's meeting some delegates voiced disagreement with that position. It was said that there none of the existing laws and treaties that authorise information sharing have such a requirement, that there is no evidence of misuse or unauthorised disclosure of confidential information by competition agencies that would justify such a restrictive rule, and that such a notice requirement, even after the fact, could seriously interfere with the investigatory process.

10. There seems to be broader agreement that if confidential information is disclosed in an unauthorised manner by the requesting authority, it should notify the requested competition authority of the breach, and that competition authority should notify the providing party.²

Under what circumstances, if any, should the requested competition agency be required to notify the provider of confidential information that it may share or has shared the information with a foreign authority? Of an unauthorised breach of confidentiality in the receiving economy?

Requirement for a co-operation agreement

11. The United States law governing information sharing by its competition authorities requires that they first enter into a co-operation agreement with the foreign authority setting out the conditions under which they will share confidential information, as well as the applicable procedures. The law does not require that the agreement constitute an international treaty, though in at least some circumstances a treaty may be needed in order for the parties to meet their statutory obligation to protect downstream information. BIAC has argued that binding international treaties should always be required on the ground that they are needed to ensure adequate downstream protection and other safeguards.

12. The recently enacted laws of a few Members -- Denmark, France, Iceland, the Netherlands and Norway -- require finding of equivalent downstream protections and generally contain standards similar to those in U.S. law, but do not require that their national authorities incorporate their findings and the applicable procedures into formal co-operation agreements. In some instances, information has been shared under a law shortly after the law went into effect, and some of that co-operation might not have been possible had formal agreements been required. Denmark, Iceland and Norway have entered into a formal agreement regarding such exchanges, even though no agreement is required.

What are the benefits and costs of entering into co-operation agreements that set forth the details on when a competition authority will share confidential information? Where no such agreements exist, what steps do or should authorities take to ensure that a requesting authority's national laws provide equivalent protection and to communicate their conclusions to the public? Has the absence of such agreements caused any problems? How much information sharing has taken place that would have been impossible if a formal agreement were a requirement? Where there are agreements that were not required by law, what motivated the decision to negotiate agreements, and what benefits have they provided?

Downstream disclosure of information

13. It may be necessary to disclose confidential information in the course of a competition proceeding, for example in a hearing or trial of the matter. National laws differ in their requirements in this

² The U.S. International Antitrust Enforcement Assistance Act contains such a requirement.

area. In many countries the respondent or defendant is entitled to access to the relevant evidence that is in the hands of the competition agency, including confidential information. There are requirements for public trials or hearings in many countries, in which the evidence could be disclosed. The laws in most countries permit the withholding of confidential information from the public record in appropriate circumstances, but at the time a decision to share information is made the requested authority cannot know exactly what information may be disclosed at trial. Moreover, third parties with interests in a competition case, including third party complainants in agency proceedings or third parties seeking compensatory damages, may claim the right to evidence from the agency's file, including confidential evidence. Again, at the time it makes a decision whether or not to share confidential information, the requested agency cannot know with certainty whether such a third party claim may be upheld.

14. The Australia/US agreement provides that the requesting authority may disclose information that it receives to a defendant or respondent in a proceeding if the law of the requesting authority requires it. The agreement also requires the requesting authority to oppose, to the extent possible consistent with its laws, any application by a third party for disclosure of confidential information. BIAC has opposed disclosure outside the competition case for which it was provided, but it is unclear what position it takes on what limits, if any, should apply to disclosure within those case proceedings.

What limits should be placed on disclosure of confidential information in the context of the competition case or proceeding in which it is used? How can requested authorities assure themselves that adequate protections of confidentiality in these circumstances exist in the laws of requesting authority?

Preservation of legal privileges

15. BIAC holds the view that all legal privileges that apply to information in the hands of the requested authority should apply equally to information received by the requesting authority. This includes, in BIAC's view, privileges both for the benefit of the requested competition agency (e.g., investigatory or work product privilege) and of the providing party (e.g., attorney-client). It is not clear why private parties have an interest in protecting privileges held by the disclosing agency, or that the agency could not fully protect itself in this regard. As for privileges protecting private parties, BIAC might elaborate on how, to the extent such privileges continue to apply to information in the hands of investigators of the requested authority, the usual downstream confidentiality protections would not be adequate.

To what extent should legal privileges apply downstream to information that is exchanged?

Downstream leniency applications

16. In last year's meeting BIAC asserted that information exchanges should have no effect on leniency applications in the requesting economy. That is, the eligibility of a providing party for leniency in the requesting economy should not be affected by the fact that the requesting economy has received confidential information about the cartel or about that party from the requested economy. This view generated some controversy, and BIAC was questioned closely by some delegates who clearly did not agree with it. If eligibility for leniency turns on whether an agency already has information about a cartel, it would not seem to matter, on its face, where that information came from. In any event, it should be noted that most, if not all, leniency programmes provide for strict confidentiality of both the identity of and the information provided by a leniency applicant. It is not likely, therefore, that a requesting economy would receive any information that directly results from a leniency application in the requested economy.

What effect, if any, should the fact of an exchange of confidential information between competition agencies have on a leniency application in the requesting economy?

Internal agency information, including "work product" and "tips"

17. As noted above, competition authorities are normally permitted, but not required bylaw, to limit access to internal information such as the nature or status of their investigations, their investigation theories, or their preliminary conclusions. Additional restrictions may apply in criminal cases, but hard core cartels are not criminal offences in most economies. It appears that, as is known to occur in merger cases, some competition authorities discuss this kind of information with foreign authorities on a fairly frequent basis.

18. On the other hand, if a competition authority has obtained evidence of illegal conduct in a foreign jurisdiction from information it is not authorised to share with its foreign counterpart, some laws may be interpreted as preventing the authority from even giving its counterpart a "tip" suggesting that it investigate the industry in question. This may be the case even if the tip can be conveyed in such away that no actual confidential information is conveyed.

In what circumstances do competition authorities share internal agency information with foreign authorities in cartel cases? What kind of information is shared? How useful are such exchanges? How common is it for authorities to be banned from conveying "tips" that do not contain any confidential information? Have competition authorities been precluded from conveying such tips?