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INFORMATION SHARING IN CARTEL CASES -- SUGGESTED ISSUES FOR DISCUSSION AND BACKGROUND MATERIAL

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

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**ROUNDTABLE ON INFORMATION SHARING IN CARTEL CASES --
SUGGESTED ISSUES FOR DISCUSSION AND BACKGROUND MATERIAL**

1. The CLP's 2000 Hard Core Cartel Report stated that: "To make possible the co-operation that would truly make anti-cartel enforcement more effective, the most important task of the Committee will be to assist interested competition authorities and Member countries to find appropriate ways to increase opportunities for information sharing in appropriate circumstances." The Working Party's February 2001 meeting will therefore contain a roundtable with BIAC to discuss the concerns of the business community relating to such information sharing.

2. This is the Working Party's first such roundtable with BIAC, but it will not be the first time in the last few years that the Working Party has benefited from its and other business groups' views on this topic. While the Cartel Recommendation was being prepared and during its June 1999 roundtable on information sharing, the Working Party considered, among other things, the ICC's 1996 policy statement. BIAC then made an oral presentation of its views at the Working Party's October 1999 meeting. The results of this prior work are reflected in the 2000 Hard Core Cartel Report, and the purpose of this roundtable is to build upon that work and obtain a more precise understanding of business' specific concerns and suggestions for resolving them. (Other relevant Working Party work on information sharing is noted in paragraphs 12-13 below.)

3. The purpose of this note is two-fold: to identify the issues whose discussion may yield the greatest benefits and to provide background material that facilitates that discussion by reminding everyone where matters currently stand. The most important background materials, which are included as annexes to this note, are (a) excerpts of the Cartel Report's discussion of relevant information sharing issues, and (b) the paper BIAC/ICC delivered at the October meeting containing questions and comments. The suggested issues for discussion are built upon those documents. The Secretariat's 1995 summary of Members' confidentiality restrictions is attached as Annex C. Although the summary is dated, it should be accurate for most countries, because in response to a more recent survey there were few indications of changes since 1995.

General considerations

4. Although there have been differences between the business community and competition authorities on some information sharing issues, there are also important areas of agreement. Most fundamentally, as noted in the Cartel Report, the CLP has always considered it fundamental that commercially sensitive information should be protected from improper disclosure or use. Thus, there is no need for BIAC to defend the basic proposition that countries should have laws protecting confidential business information or information that is gathered during an investigation. The CLP has said that it sees no reason why information cannot be both shared and protected, and BIAC is invited to focus on the safeguards it views as necessary to protect against improper disclosure or use of shared information.

5. To explore these issues, the Secretariat recommends that the roundtable pursue BIAC's October 1999 suggestion that the most productive approach is to identify ways to provide reasonable assurance that any shared information will receive comparable protection "downstream" by the receiving country. As noted in paragraph 65 of the Cartel Report, BIAC liked this approach

because legal protections are visible and able to be compared. In contrast, a system dependent on competition authorities' assessment of the confidentiality of the requested information would be more subjective, and even an international definition of "business confidential information" would be meaningless in this context.

Thus, BIAC is invited to be as specific as possible in identifying what it considers necessary to provide such assurance. If Member country X were considering a law that would authorise a competition authority to share information with a foreign competition authority if a particular process is followed and results in a finding that certain statutorily defined criteria are met, what processes and criteria would BIAC members consider necessary?

6. The vast majority of the issues raised in this note relate specifically to the downstream protection approach or to matters that are relevant to considering this or any other approach. The note closes by addressing two other topics. One set of questions asks whether a downstream protection approach could usefully be supplemented by an approach that permits different treatment for some categories of information. It is true that the principal benefit of downstream protection is its elimination of the need to make judgements about the confidentiality of materials, but those benefits do come with a price because they require that various non-confidential materials must be treated as confidential. Thus, even if a country wants only a small amount of non-confidential information – e.g., who attended a particular meeting – both countries must go through the same formalities as if business secrets were involved. This result may be justified, but BIAC and delegates may want to whether some categories of non-public, non-confidential could be defined with sufficient specificity and clarity to permit them to be shared using a more streamlined process.

7. Moreover, in one respect the roundtable should extend beyond questions relating to the protection of confidential information. Although business concerns in this area tend to be articulated in terms of the risk of the improper disclosure or use of confidential information, some suggested safeguards and concerns appear to reflect other business interests. Examples include the safeguard on immunity mentioned in Annex B, Question 3 and the concerns about convergence raised in the ICC's 1996 statement. In order to help the Working Party understand and assess the safeguards BIAC considers necessary, there should be some discussion of the extent to which these safeguards relate to the protection of legitimate business interests other than the proper handling of confidential information.

8. Two other preliminary comments may be appropriate. First, BIAC has previously made the point that articulating a position on information sharing in matters involving hard core cartels ("cartels") is complicated to some extent by uncertainty about what kind of horizontal agreements might be characterised as cartels by some Member and non-Member countries. BIAC is invited to expand on this point if it wishes but to focus, as it has in the past, on the protections it considers necessary for cases falling into in the traditional categories of "naked" agreements identified on the Cartel Recommendation.

9. Second, it is well known that the business community considers notice of some kind to be an important element of the necessary protection. This topic is very important, subject to some disagreement, and should of course be discussed during the roundtable. At the same time, this topic has received considerable attention, and it is important that this aspect of the discussion not prevent or obscure discussion of those safeguards that may have received less attention and on which it may be easier to reach consensus.

Comparable downstream protection

10. The Cartel Report (at paragraph 74) describes “comparable downstream protection” as follows:

Under this approach, a country authorises the sharing of confidential information with a foreign agency on the basis of a general finding that the requesting agency’s country provides comparable protections to any shared information and a case-by-case finding that adequate protections exist for the particular information being sought. A binding mutual assistance agreement or treaty may be required to assure the adequacy of the protections. Australia and the U.S. both took such an approach, and BIAC has suggested that this approach may be preferable from a business point of view because it does not depend on fine judgements made in characterising the confidentiality of information.

11. In considering this approach, as suggested by BIAC, discussion may be facilitated by reference to how downstream protection is provided in the Australia/US mutual assistance agreement and the legislative framework on which it was built. The legislative framework of the US law may be easier to consider, because unlike the Australian law it deals exclusively with competition cases.

Issues for discussion

Level of downstream protection

- *What level of downstream protection does BIAC consider necessary?*
- Is “comparable downstream protection” the standard, or is the standard “at least equivalent”(see Annex B, p.3). Does the Australia/US agreement and its implementing legislation provide the required level of protection? If not, what more does BIAC consider necessary?

The need for notice

- *What is BIAC’s current position on the need for notice – prior or after-the-fact?*
- In explaining its position, BIAC is invited to address (i) any changes since the ICC 1996 position statement and (ii) paragraph 68 of the Cartel Report, which contains two statements on the notice issue.
 - First, the Cartel Report states that the ICC’s 1996 recommendation -- prior notice unless it would jeopardise an investigation – “has limited application to investigations of hard core cartels, because secrecy is generally essential in such matters and would often be jeopardised by notice. And it should be recognised that even if the existence and general nature of an investigation may be known to the company in question, notice may well jeopardise the investigation.²⁵”
 - Second, it 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. Nor is notice required in connection with the sharing of confidential information between the EC and a Member State.²⁶”
- BIAC is also invited to address the lack of any notice provision in the Australia/US agreement or its implementing legislation.

Information gathering – no notice issue

- *What is BIAC’s position with respect to the possibility of legislation that merely authorises information gathering on behalf of a foreign authority?*
- Paragraph 72 of the Cartel Report suggests that if a country is concerned that authorising the sharing of file information might seriously harm its ability to gather information, it might enact legislation that merely authorises gathering information on behalf of a foreign authority, using compulsory process if necessary, with disclosure of the purpose for which it is gathering the information. Discussion of the risks and benefits of such an approach is invited.

Appeal/redress

- *What appeal and/or redress provisions does BIAC consider necessary?*
- Again, it is hoped that BIAC’s commentary will consider the implications of the lack of such provisions in MLATs, the Treaty of Rome, and the legislation underlying the Australia/US agreement.

The content of notice

- *What is BIAC’s current position on the required content of notice? (See Annex B, Question 2)*
- In explaining its position, BIAC is invited to focus on the specific types of information that could *only* be in a notice, because they relate to a particular “case” of information sharing, as opposed to the types of information (e.g., the confidentiality laws of the requesting country) that would not vary on a case-by-case basis and would or could be publicly available.
- Do the Australia/US agreement and process provide sufficient information about the two countries’ confidentiality laws?
- What is BIAC’s position on the need for notice with respect to:

The recipient of the information

(See Annex B, Question 4: “All people entitled to have access to or request access to the information exchanged should be explicitly stated.”)

Uses of the information.

(See Annex B, Question 5)

- BIAC is invited to expand on its comment regarding:
 - companies’ need to know “what would happen in the case of conflicting legislation and to what extent and under what circumstances the home authority will condition or refuse co-operation”; and
 - privileges for solicitor/client communications and workproduct. (Annex B, Question 3)

Other safeguards

- *What other safeguards does BIAC consider necessary?*
- Are the safeguards in the Australia/US agreement and related legislation adequate? (Safeguards in the agreement are summarised in n.21 of Annex A, and one of the safeguards in the legislation is mentioned in n.22.)
- In particular, is it BIAC's position 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? (Annex B, Question 4) If so, please explain the need for such safeguards. Do any countries provide such safeguards for the information they collect or receive directly from business firms?
- When a firm provides information to an OECD country's competition authority, the firm receives protections against *improper* disclosure or use of its information. However, under the country's laws, the authority's *proper* use of most information it receives may result in its being (i) publicly disclosed in a trial or (ii) lawfully used by the authority or some other part of the government for a purpose other than that for which it was provided.
 - Assuming that a requesting country has been found by the requested country to provide comparable downstream protection, does BIAC consider it necessary to restrict a receiving country's ability to disclose the information in accordance with its own laws? To what extent?
 - Is it BIAC's position that a country should be able to share information only if the receiving country is able to use the information only for purposes of investigating the cartel, or are more limited restrictions on use adequate? (Annex B, Question 5) Does BIAC regard the more limited safeguards in the Australia/US agreement as inadequate?¹ If so, please explain the need for such a safeguard. Do any countries provide this safeguard for information they collect or receive directly from business firms?
- Does BIAC consider the Australia/US agreement and legislation adequate with respect to the return of information (Annex B, Question 6)?

Risk of improper disclosure or use

12. The Working Party shares BIAC's belief in the importance of protecting firms' confidential information. In considering possible safeguards in this (or any other) area, it is important to take into account both the nature and the extent of the risk. In this regard, it has been observed that competition authorities cannot expect business concerns to be removed merely by general statements about their good record in protecting confidential information. Competition authorities accept that some risk exists and that adequate safeguards are needed. At the same time, as is discussed in paragraphs 57 and 62 of the Cartel

¹ Under that agreement, as described in more detail in n.21 of Annex A, shared information may be used only for law enforcement purposes. With respect to antitrust enforcement, it may be used only in the investigation and for the purpose specified in the request, except with prior written consent by the country that provided the information. The information may be used to enforce other laws only if it is "essential to a significant law enforcement objective" and the country that shared the information has provided prior written consent.

Report, many competition authorities have shared confidential information on many occasions and do appear to have a good record in protecting such information. Despite the large amounts of confidential information that various Member countries can share in particular circumstances (usually as a result of treaties), all competition authorities are subject to general bans on sharing any confidential information and any non-public, non-confidential information they acquire in investigations. In this connection, delegates are reminded that their responses to an extensive questionnaire -- issued in 1994 -- were analysed [DAFFE/CLP/WP3(94)4/REV1], summarised [DAFFE/CLP/WP3(95)2/REV1], and discussed [DAFFE/CLP/WP3(95)4].

13. The Working Party has on two occasions attempted to assess the risk of improper disclosure or use by assessing the experience of information sharing among enforcement authorities in other areas of law. The Secretariat prepared a note on this topic in 1993 [DAFFE/CLP/WP3(93)3]. More recently, the Working Party held a substantial roundtable discussion in February 1997 on these issues. That roundtable included the presentation of a comprehensive report, prepared for (then) DGIV, concerning information exchanges in securities enforcement, criminal law, customs enforcement, tax law, and competition law. It also included presentations by French, UK, and US officials concerning the information exchange programs in their fields [See DAFFE/CLP/WP3/M(97)1/ADD1]. The Cartel Report notes in paragraphs 61-62 that safeguards appear to have worked well in these other fields, but that the record of protecting information in these fields is sometimes claimed not to be meaningful when considering competition law on the grounds that the information in competition matters is "more confidential" than that in other areas because it is prospective -- i.e., relates to firms' plans for the future. The Report concludes that those claims are flawed for reasons that are noted below.

Nature of the risk

- *What risks are of major concern to BIAC?*
- BIAC is invited to discuss the extent to which its concerns relate to the possibility that business information may inadvertently be publicly disclosed or be 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.
- Is it BIAC's position that the success of information sharing regimes in other fields is not an indication that a similar regime would likely be successful in competition law enforcement because competition cases involve prospective information that is more confidential than that which is shared in other fields?
 - In explaining its position, BIAC is invited to comment on the Cartel Report's statement that there is no reason to believe that information in competition cases is more confidential than that in the other fields, because
 - Prospective information is not necessarily more confidential than historical information; indeed, business secrets, as opposed to business plans, are historical.

- Whether prospective or not, the information shared in the securities, tax, and criminal areas is sometimes highly confidential and may often be as or more confidential than that involved in competition cases.
- Most requests for information sharing in hard core cartel cases are likely to relate to establishing the fact of an agreement; such information is historical and not confidential.

Extent of the risk

- *How significant is the risk of improper disclosure or use?*
- In explaining its position BIAC is invited to address paragraphs 57 and 62 in the Cartel Report, which point out that considerable confidential information has been and is being shared *in competition cases* (i) within the EU, (ii) pursuant to MLATs, and (iii) through use of letters rogatory.
- BIAC is also invited to address the implications of another aspect of paragraph 62 – the statement that in merger cases, firms are increasingly willing to waive the confidentiality protections that prevent information sharing.
- BIAC is invited to comment on the Cartel Report’s observation (paragraph 62) that “[E]ven if the information in competition matters were more confidential than securities or tax information, the excellent record of these other programs in preventing improper disclosure or use would be a powerful indication that international information sharing programs are able to protect against improper disclosure or use.”

Utility of distinguishing confidential from other information

14. As noted above, the advantage of an approach that focuses on the comparability of the protection provided “downstream” by a receiving country is that it avoids judgements about the confidentiality of materials, which among other things facilitates the gathering of information. Certainly, making such judgements imposes costs, but there are also costs to treating non-confidential information as if it were confidential.

Confidential and non-confidential information

- *Does BIAC believe that there are some categories of non-public but non-confidential information that can be defined with enough certainty that information in those categories could be shared using a more streamlined process than may be necessary for confidential information?*
- *How would BIAC define the categories of information that are commercially sensitive enough to warrant being treated as confidential for international information sharing purposes? (Annex B, Question 1) What if any categories of information does BIAC consider to deserve protection for reasons other than commercial sensitivity?*

Business interests other than protecting confidential information

Other legitimate business interests

- *What legitimate interests other than protecting commercially sensitive information does the business community consider threatened by information sharing?*
- BIAC is invited to elaborate its views on the immunity issue (Annex B, Question 3).

Applicable safeguards

- *Which of the safeguards BIAC suggests are related in whole or in part to a legitimate interest other than protecting commercially sensitive information?*

Annex A

**NEW INITIATIVES, OLD PROBLEMS:
A REPORT ON IMPLEMENTING THE HARD CORE CARTEL RECOMMENDATION
AND IMPROVING CO-OPERATION**

[...]

13. To make possible the co-operation that would truly make anti-cartel enforcement more effective, the most important task of the Committee will be to assist interested competition authorities and Member countries to find appropriate ways to increase opportunities for information sharing in appropriate circumstances. The Committee considers it very important that confidential business information – including business secrets and other commercially sensitive information -- should be protected from improper disclosure or use, but most countries impose restrictions that go well beyond providing such protection.

- Most competition agencies are prevented from sharing any non-public, non-confidential information they acquire in a law enforcement investigation.
- Through vagueness or overbreadth, existing laws intended to protect confidential business information often restrict access to information that is not a business secret or commercially sensitive.
- When information obtained in an investigation indicates that illegal conduct is occurring in another country, some competition authorities are barred from providing any warning to their foreign counterparts, even through a “tip” that would not reveal the bases of the tip or any other potentially confidential information.
- With respect to actual confidential business information, most competition agencies are denied the authority, granted to a few competition agencies and to many agencies in other fields, to gather and exchange such information in appropriate circumstances.

14. In its 1994 Convergence Report, the CLP stated that:

“If Member countries wish to facilitate action against [hard core cartels], they would need to focus on developing for competition officials the legal mechanisms for co-operation in international cartel investigations and especially for the sharing of information among national offices.”

The Recommendation provides an affirmative answer to the question asked in 1994; Member countries do want to facilitate anti-cartel action. However, since most competition agencies still cannot share even non-confidential investigatory information, the need to focus on legal mechanisms for information sharing still exists and indeed is becoming more pressing. The Committee’s statements in prior work concerning the benefits of such co-operation have consistently been accompanied by acknowledgements of the need to protect confidential information, and the Committee has never found any reason why confidential information could not be protected and shared. Nor has it ever found any reason to ban the sharing of information that is not confidential but is given confidentiality protection simply because it was obtained in a law enforcement investigation. In the few situations -- but many instances -- in which confidential information has been shared in competition cases, the record is one of improved enforcement and proper protection of confidential information. Moreover, in at least the securities, tax, customs, and criminal areas, it is common for enforcement authorities to be able to use compulsory process on behalf of foreign

authorities and to share highly confidential information, and there too the record indicates that confidential information can be both protected and shared.

[...]

Obstacles to Effective Co-operation

44. Competition authorities' responses to a questionnaire by the Secretariat and delegates present during a May 1999 roundtable identified the major obstacle to effective co-operation as being the legal restrictions on sharing information with, and gathering information on behalf of, foreign competition authorities. . . .

45. . . .

- Today, confidentiality restrictions continue in almost all circumstances to stand as an absolute bar to providing foreign competition authorities (1) any of the non-public, non confidential information that is acquired during an investigation, or (2) any confidential business information. The laws of almost all Members prohibit the sharing of almost all of the information described in the 1995 Recommendation, except for information in the public domain. Moreover, with exceptions involving sharing between Australia and New Zealand, the EC and its Member States, and Australia and the US, no competition authorities are authorised to use compulsory process on behalf of foreign authorities except in criminal cases.

[...]

General Observations Regarding Benefits and Costs

56. Since requests to provide confidential information can be turned down if they impose undue direct costs or raise other policy concerns, the main potential costs of authorising information sharing are (a) the risk that some confidential information will be disclosed or used improperly, and (b) the risk that having such authority will make it more difficult for a competition authority to obtain the information it needs for its needs in its purely domestic cases. After a brief discussion of some preliminary matters, each of these risks will be discussed.

Past Record of Sharing Confidential Information in Competition Cases

57. Sharing confidential information in competition cases is currently authorised only in very limited situations, but there have been many instances of sharing such information in those situations. A number of general observations are possible.

- EC Member States are not only permitted but required in various circumstances to share confidential information with the EC, and confidential information collected by the EC can in some situations be shared with Member States. Competition enforcement in the EU has been built on this system, and its benefits are obvious and substantial. The EC and its Member States have in fact protected the confidentiality of the shared information, and the fact that this information sharing exposes enterprises to additional charges and penalties does not appear to be an impediment to any authority's ability to gather information.
- Pursuant to MLAT agreements, confidential information may be shared in criminal competition cases, and although the process for use of letters rogatory has some disadvantages, it does provide a means of obtaining confidential information in some cases. Most MLAT-based co-operation has been between Canada and the US, and the US reports that it has successfully obtained confidential

information through MLATs or letters rogatory from close to a dozen different countries. Again, the benefits to effective enforcement against hard core cartels are well known. Moreover, the Committee is not aware of either significant problems in protecting the confidentiality of the shared information, or harm to the authorities' ability to gather information.

- Confidential information may also be shared between Australia and New Zealand, and between Australia and the U.S. There has been little co-operation, in part because the agreement needed to permit it between Australia and the US was signed only recently.

[...]

The Risk of Improper Disclosure or Use of Confidential Information

60. It is perhaps axiomatic that sharing confidential information to some extent increases the possibility that it may be improperly disclosed or used. However, in competition law enforcement and in other fields, the sharing of confidential information has been authorised and practised subject to many safeguards. In general, a country's most important safeguard is the right to decline assistance on a case-by-case basis, which can be exercised whenever there appear to be unacceptable risks and can also be used to impose any conditions on assistance that are considered necessary to ensure adequate protection. This ability to condition assistance provides not only protection but flexibility, which could be particularly useful for a competition authority that is just beginning an information-sharing regime. For example, although information sharing is most valuable when the information can be used as evidence, a requested authority could -- at the outset of its program or in a particular case -- decide that information may be read but not copied, or may not be used as evidence in a criminal (or any) case. Moreover, enabling legislation and/or implementing agreements providing for such co-operation also typically contain additional safeguards, such as definitions of "covered offences" and mandatory descriptions of "permitted uses." The recent Australia/US mutual assistance agreement, for example, contains a variety of these kinds of safeguards, which have been used for many years by many Member countries to protect confidential information.²¹

61. As noted above, the applicable safeguards appear to have worked very well in the field of competition law enforcement. Moreover, they appear to have worked well in the securities, tax, customs, and criminal areas, where sharing confidential information is commonplace. In the securities area, where the program for sharing confidential securities information began in 1982 as a means to prevent conflict over "extraterritoriality," the program has not only promoted effective enforcement while protecting confidential information, but contributed to substantive harmonisation of securities law.

62. It is sometimes suggested that the record of proper protection of confidential information in the past is not meaningful to assessing the risks of improper disclosure or use of confidential information in competition investigations. The usual basis for this argument is that confidential information in competition matters is "more confidential" than that in other areas because it is prospective -- i.e., relates to firms' plans for the future. The argument is flawed in several important respects.

- First, the argument ignores the fact that a great deal of confidential information has been shared in the past in competition cases. Such sharing is routine between the EC and its member States, common under MLATs in criminal cases, and sometimes viable through letters rogatory. There is no evidence that there have been significant problems in protecting confidential information in those situations.
- Second, even if the information in competition matters were more confidential than securities or tax information, the excellent record of these other programs in preventing improper

disclosure or use would be a powerful indication that international information sharing programs are able to protect against improper disclosure or use.

- Third, prospective information is in general more likely than historical information to be confidential, but there is no logical or other basis for the assertion that information in competition cases is more confidential than that in the other fields -- either because it is prospective or for any other reason.
 - Prospective information is not necessarily more confidential than historical information; indeed, business secrets, as opposed to business plans, are historical.
 - Whether prospective or not, the information shared in the securities, tax, and criminal areas is sometimes highly confidential and may often be as or more confidential than that involved in competition cases.
 - Most requests for information sharing in hard core cartel cases are likely to relate to establishing the fact of an agreement; such information is historical and not confidential.

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 cooperate. 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.

63. In terms of available protections, the only comparative information of which the Committee is aware relates to the protections available from the US securities agency and US competition authorities. The International Antitrust Enforcement Assistance Act clearly permits the US competition agencies to provide much greater assurances of protection than the securities agency can provide.²²

The Need and the Means to Protect Confidential Information

64. Despite the Committee's disagreement with some arguments concerning the risks of improper disclosure or use and about the relative confidentiality of information in competition cases, the Committee has consistently agreed with the business community concerning the importance of protecting confidential information in any information sharing system. Moreover, a great deal of the business community agrees that confidential information can be protected and shared, and as discussed below it appears that most of the protections desired by the business community are present in the laws of, and the agreement between, Australia and the US.

65. In the Committee's consultation with BIAC, the main thrust of the BIAC presentation was the central importance of providing comparable "downstream protection" for confidential information. In other words, any requested information -- regardless of how confidential it may or may not be -- should be shared only if there is adequate assurance that it will be subject to comparable protection in the requesting country. The BIAC representative considered this approach -- essentially, the approach taken by Australia and the U.S. -- to be the most promising approach because legal protections are visible and able to be compared. In contrast, a system dependent on competition authorities' assessment of the confidentiality of the requested information would be more subjective, and even an international definition of "business confidential information" would be meaningless in this context. . . .

[...]

67. The consultation also contained some discussion of the International Chamber of Commerce's March 1996 statement on sharing confidential information, as well as its May 1999 statement on sharing confidential information in merger cases. The ICC's 1996 statement noted that its European members felt that convergence in competition law was not sufficient for enforcement co-operation to include sharing confidential information, whereas other members, especially in North America, did not regard further convergence as a precondition for such co-operation. The statement went on to express the unanimous view of its members that any legislation providing for such co-operation should contain specified procedural safeguards, and as noted above most of these safeguards appear to exist in the Australian and U.S. systems.

68. The ICC's principal recommendation was that confidential information be shared only after notice to its submitter unless doing so would jeopardise an investigation.²⁴ This recommendation has limited application to investigations of hard core cartels, because secrecy is generally essential in such matters and would often be jeopardised by notice. And it should be recognised that even if the existence and general nature of an investigation may be known to the company in question, notice may well jeopardise the investigation.²⁵ Moreover, 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. Nor is notice required in connection with the sharing of confidential information between the EC and a Member State.²⁶

The Risk that Authority to Share Information May Make it More Difficult to Collect Information

69. One issue that has concerned some Member countries is whether and to what extent being granted the authority to share confidential information would make it more difficult for them to collect information. The source of concern, in general, are warnings by business groups that their members are less likely to co-operate with investigations if the information they provide may be shared with other law enforcement authorities. The Committee considers this risk to be less substantial than some may have thought, particularly if one focuses the potential effects of authorising a competition agency to share information in hard core cartel cases.

70. Canada's experience is particularly relevant on this issue. Canada has always relied to a great extent on voluntary submissions of information in its competition investigations. Because of its MLAT with the US, Canada already can share confidential information with the jurisdiction that (a) has the severest sanctions and (b) is important to many Canadian businesses. In these circumstances, Canada's continuing ability to obtain information on a voluntary basis is an indication, with respect to Canada and more generally, that authorising information-sharing in hard core cartel cases may not hinder competition authorities' ability to collect information. It is also noteworthy that neither Australia nor the U.S. has reported any increased difficulty in obtaining information as a result of their mutual assistance legislation and agreement, and this has not been a significant issue either within the EC or in the international information programs that exist in other fields. Finally, the Nordic competition authorities have clearly concluded that any risks are outweighed by the benefits.

71. To some degree, assessing the likely impact of confidential information sharing on authorities' ability to collect information is a function of the risk, discussed above, that sharing information to a wider group inevitably increases the risk of improper disclosure or use to some extent. Since the available evidence suggests that in practice confidential information has been able to be shared and protected, the Committee believes that if Member countries incorporate confidentiality protections into an information sharing program, the theoretical increase in the risk of improper disclosure or use is generally unlikely to have a substantial impact on businesses' co-operation with competition authorities.

72. Moreover, the Committee notes that there has been a great deal of convergence with respect to hard core cartels, some of which is reflected in the Hard Core Cartel Recommendation itself. This convergence relates to competition laws' substantive and remedial provisions, and it appears that the differences that do remain can be dealt by competition authorities on a case-by-case basis. Under these circumstances, and given global integration that is increasing enterprises' multinational presence, the differences in Member countries' laws appear increasingly less likely to lead enterprises to resist co-operation with one authority because the information may be shared with another. However, to the extent that this risk is perceived as being a substantial barrier in any country that would otherwise desire to engage in deeper co-operation, it appears that there may be a simple way to eliminate this risk while making a significant step towards greater co-operation -- retain the ban on sharing confidential information in its agency's files, but authorise the agency to use compulsory process on behalf of foreign competition authorities, provided that the agency gives prior notice of the purpose for which it is gathering the information.

[. . .]

Future Work On Information Sharing

74. Despite recent actions in some Member countries, there is no reason to expect a swift and universal end to bans on sharing non-confidential information, or to exchanging confidential information in appropriate circumstances. The Committee's future work will, to the extent possible, focus more closely on the benefits and costs of various alternatives. In the past, there has been a tendency in many quarters to discuss information sharing in bi-polar terms: should there or should there not be exchanges of confidential information? In fact, there are degrees of information sharing, degrees of confidentiality, and there are different ways to address the relevant issues. Since the Committee is focused on voluntary co-operation, **all of the possible models discussed below assume that confidential information cannot be shared unless there is some sort of finding that doing so is in the national interest.**

- **Comparable downstream protection.** Under this approach, a country authorises the sharing of confidential information with a foreign agency on the basis of a general finding that the requesting agency's country provides comparable protections to any shared information and a case-by-case finding that adequate protections exist for the particular information being sought. A binding mutual assistance agreement or treaty may be required to assure the adequacy of the protections. Australia and the U.S. both took such an approach, and BIAC has suggested that this approach may be preferable from a business point of view because it does not depend on fine judgements made in characterising the confidentiality of information.
- **Violation-based co-operation.** Under this approach, a country might authorise the sharing of confidential information only in hard core cartel cases. Again, there would need to be a test for the adequacy of protections for confidential information, which could be the "downstream protection" test or a modification thereof. In effect, this would be similar to an MLAT but for non-criminal and criminal cases. Of course, competition authorities are generally interested in information sharing for their investigations of mergers and other conduct that does not constitute a hard core cartel, but a violation-based approach might be attractive to some countries as a moderate enhancement of co-operation.
- **Confidentiality-based co-operation.** Under this approach, a country would authorise exchanges of all but information that meets whatever standard of confidentiality it considers appropriate. Confidentiality risks and protections would be minimal. Of course, competition

authorities are generally interested in receiving confidential information as well, but a confidentiality-based approach might be attractive as a modest enhancement of co-operation.

- **Common standards co-operation.** The downstream protection model requires that similar protections be available in both countries, but none of the foregoing approaches would require that countries adopt common standards with respect to what is confidential or the elements of a particular competition violation. An alternative would be to agree to share information in cases that met commonly defined standards or to share only information that meets a common definition of “sharable information.” However, agreeing to common standards could be very difficult, and the resulting system apparently be less flexible.

75. The Committee intends to give further consideration to these and any other options, and notes that even if a particular option seems impractical, discussion of the underlying issues may have value. For example, even if an OECD definition of “business or trade secrets” would not be useful in establishing an information sharing program, consideration of different countries’ confidentiality definitions and procedures could have educational value.

NOTES

[...]

21. The safeguards in the Australia/US co-operation agreement begin in Article I, which defines the covered laws. In this agreement the definition is a broad one, but the definition of covered laws (or covered offenses) could be used by a Member to exclude a controversial legal provision from the agreement. Article III, Requests for Assistance, has two main requirements. First, there must be a general description of the subject matter and nature of the investigation, with an identification of the persons being investigated and citations to the applicable laws; the description must be detailed enough to explain how the subject matter of the request relates to the violation. Second, there must be an explanation of the purpose for which the information is sought and its relevance to the investigation. A request by the US must state whether criminal proceedings are contemplated and, if not, provide written assurance that the information will not be used in criminal proceedings. The request must also provide a written assurance that there have been no significant modifications to the requesting party's confidentiality laws.

Additional safeguards are contained in Article IV, Limitations on Assistance, which provides for denial of assistance for public interest and other specified reasons, and Article VI, Confidentiality, which provides for confidential treatment of shared information. Article VII, Limitations on Use, is clearest if one begins with paragraph B, which governs the use and disclosure of shared information for antitrust enforcement purposes. In antitrust cases, shared information may be used only in the investigation and for the purpose specified in the request, except with prior written consent to a different disclosure or use. Paragraph A states that shared information may be used or disclosed only for antitrust enforcement purposes, except as provided in paragraphs C and D. Paragraph C provides that shared information may be used or disclosed to enforce other laws only if it is "essential to a significant law enforcement objective" and the requested party has provided prior written consent. Paragraph D covers evidence that is introduced at trial. There is also a provision, Article XI, that requires return of shared information after the conclusion of the investigation or case.

22. The IAEEA authorises US competition authorities to use compulsory process to collect information on behalf of, and share confidential information with, foreign authorities that can and do enter into binding and reciprocal agreements that meet statutory requirements protecting the legitimate interests of enterprises and of the US. The IAEEA flatly forbids any disclosure of information in violation of an IAEEA agreement, whereas the securities agency may be obliged to provide information in its possession to other government entities in some circumstances.

[...]

24. The statement also raised a number of more technical suggestions dealing with issues of solicitor-client privilege and enforcement immunity, as well as a list of the information and assurances the requesting authority should be required to provide in its request. The identified issues are legitimate, and the recommended assurances are quite similar to rules in existing co-operation agreements, with the most significant difference being that the ICC recommended that competition authorities be denied authority to disclose shared information to anyone outside the receiving authority, even with the consent of the requested authority. Existing bilateral agreements usually take a more flexible approach, permitting disclosure outside the requesting agency with the consent of the requested agency.
25. The relevant issues are clearer, perhaps, in a somewhat similar suggestion the US Council recently made to the International Competition Policy Advisory Committee. The Council called

for notice “in all cases except those involving (a) certain types of cartel behaviour, (b) the national security of the United States, or (c) other identified circumstances where the enforcement interests of the United States would be specifically and substantially compromised by notification.” In discussing this suggestion, the Council suggested that notification should occur, for example, “when the existence and general nature of an investigation may be known to the company in question.” Competition officials do not believe that such knowledge would necessarily mean notice would not jeopardise an investigation.

26. The lack of a notice requirement in MLATs is very relevant to analysis of whether there should be such a requirement in connection with the transmittal of information between two countries in non criminal investigations, but the lack of a notice requirement in the context of the EC and its Member States is less so.

Annex B**BIAC/ICC QUESTIONS FROM BUSINESS REGARDING THE PROTECTION OF
CONFIDENTIAL INFORMATION IN THE CONTEXT OF INTERNATIONAL ANTITRUST
COOPERATION**

*Prepared by the Business and Industry Advisory Committee to the OECD (BIAC) jointly with the ICC
Commission on Law and Practices relating to Competition
October 23, 2000*

The Business and Industry Advisory Committee (BIAC) to the OECD, together with the International Chamber of Commerce (ICC), appreciate the opportunity to submit the following questions and comments to the OECD Committee on Competition Law and Policy, outlining concerns of business with regard to protection of confidential information in the context of international co-operation between antitrust authorities.

I. General

In today's global economy the administrative burden for international businesses to comply with competition law in numerous regimes is becoming increasingly costly and complex. International co-operation between antitrust authorities is increasingly important to address issues such as mergers and co-operation projects that often fall within several jurisdictions. As a result, businesses operating internationally are often confronted with the legal uncertainty of dealing with numerous national competition regimes. In this situation, both business and antitrust authorities stand to gain from improved efficiency, speed of investigation, and cutting of costs to be obtained from co-operation.

For companies there is a real risk that commercially sensitive information such as investment plans or strategic goals, is leaked in the process of information exchange. Addressing the concerns of international business is crucial to achieving the benefits of such collaboration. Authorities may risk their relationship with companies for their own investigations, once companies learn this information may be passed on in the future without proper safeguard of confidentiality. Business confidence in the legal framework on which co-operation is based will facilitate the work of the competition authorities. Companies will be more willing to cooperate and negotiate, allowing proceedings to progress more speedily and efficiently.

It is clear that the benefits of international antitrust enforcement cannot be achieved at the expense of reliable and fair provision of confidentiality for businesses. BIAC and ICC have therefore drafted the following questions and comments to assist national competition authorities with the development of enforcement procedures for the protection of confidential information in the context of international antitrust co-operation.

II. Questions from Business Relating to Protection of Confidential Information in the Context of International Antitrust Cooperation

Question 1: *How is "confidential" information defined?*

Is confidentiality limited to commercially sensitive information? Who decides what is "confidential" and according to what criteria? Will the business(es) concerned have input into these decisions?

Different types of information or information compiled by different means are often distinguished in legislation. It is therefore important that it is made clear how the different categories of information are defined and what their respective treatment will be.

Members of BIAC and ICC believe that no generalised distinction should be made based on the manner in which information has been obtained. Information provided voluntarily should be subject to the same criteria to determine the level of confidentiality, as that obtained as the result of a compulsory process with the same right for companies to review and appeal any decision relating to its confidentiality. To assume that information volunteered is commercially less sensitive will discourage companies from providing information except when formally required to do so.

Question 2: *Will the company be given notice prior to any exchange of information?*

Before any decisions relating to the use of information obtained from a company are made, the company should be given sufficient opportunity to oppose or discuss modifying such a decision, unless this would jeopardise an investigation, in which case there should be a right to retroactive review and appeal. BIAC and ICC respectfully submit that the general rule should be that notice will be given before the fact in all civil matters and whenever possible in criminal investigations to permit companies to take appropriate action to protect their rights. This should apply in all cases, except where prior notice clearly would violate a treaty obligation of the jurisdiction or a court order, or jeopardize 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, and this without exception.

Nevertheless, if prior notice is not given, notice after the fact should be given as promptly as possible, and when information is voluntarily provided to enforcement authorities, restrictions on use or disclosure should be respected. In the absence of consent from the company, there should be a right to independent review of any adverse decisions. This review could be provided by a higher court with the authority to impose sanctions for violations of protective orders and penalties for any breach of confidentiality. The issue of notice has important implications for companies and merits further discussion. In any event, whether notice is provided before or after the fact, it is essential that adequate safeguards are applied to ensure the protection of any confidential information exchanged.

Decisions on all factors affecting confidentiality (which information should be treated as confidential, who should be allowed to see the information, for what purposes the information should be used, the fate of materials provided after an investigation etc.) should all be subject to this right to prior notification to allow appeal to amend decisions.

Question 3. *What are the legal frameworks in force for the protection confidential information in the context of cooperation between Antitrust Authorities? Is the protection afforded similar to that of a business's home country?*

- What provisions for appeal/redress exist? What consequences/sanctions exist for a breach of confidentiality? Are these a sufficient deterrent?
- To what extent should legal privileges that ordinarily attach to communications and work product of a client and its outside counsel also attach to communications and work product of a client and its inside counsel? Should these rules be harmonized internationally?

Substantial divergences in the rules, procedures, and enforcement of different antitrust authorities leave companies uncertain as to how the information that is obtained from them will be treated during a joint investigation or when handed over to a foreign authority. Thus it should be clearly communicated by national authorities under what legal framework an investigation will operate. A clear laying out of all the relevant legislation should be provided. As well as anti-trust legislation this could also involve other laws such as those protecting solicitor-client privilege, ethics codes of government agents, trade secrets and freedom of information acts. Companies need to know what would happen in the case of conflicting legislation and to what extent and under what circumstances the home authority will condition or refuse co-operation.

Members of BIAC and ICC believe that the legal protection provided to a business should be at least equivalent to that of its home country. BIAC and ICC members feel that confidential information should not be shared with the enforcement authorities of other jurisdictions which have not enacted appropriate safeguards for the protection of such information under their own laws or which have not demonstrated a commitment to protect confidential information. In particular, the same immunity should exist. When information is provided to gain immunity in one jurisdiction, this immunity should not be threatened by the possibility of criminal sanctions later being brought in another.

Question 4: *Who will have access to the information handed over? Is it susceptible to further disclosure? To what extent will it be possible for a company to track, step-by-step, the circulation of its confidential information and to determine who was responsible for preserving confidentiality at each step along the way?*

All people entitled to have access to or to request access to the information exchanged should be explicitly stated. Are these people subject to the same requirements to protect confidentiality and the same sanctions for breach of confidentiality? Will any information be placed on a public register? Is it susceptible to use in later court proceedings? Will these be held in camera?

There is a fear among companies that information might be passed on to another agency and even subsequently to private plaintiffs. This again raises the concern that the information might be used in criminal proceedings.

Question 5: *For what purposes is the information liable to be used?*

BIAC and the ICC would like to see an assurance from competition authorities that information will only be used for the purposes for which it was disclosed. Companies very often tailor presentation of information to suit the immediate purpose and this may not be suitable for any subsequent undisclosed

proceedings. It is not appropriate for governments to use information provided to enhance international antitrust enforcement to further their other objectives or policies.

Question 6: *What will happen to the information once the investigation is over?*

Provisions should be made for the return of any original materials at the end of an investigation. If the authority is entitled to keep copies, companies should be told of the fate of these copies.

III. Conclusion

Current differences in substance and procedure in national competition regimes will create problems during international cooperation for companies and authorities alike, unless a properly enforced and clearly laid out framework is established. BIAC and ICC hope that the considerations set out above will assist in finding a solution that will maintain confidentiality for companies in a predictable and justified manner, allowing the benefits of cooperation to be achieved without adversely affecting the interests of those involved.

Annex C

**SUMMARY OF RESPONSES TO QUESTIONNAIRE
ON NATIONAL LAWS GOVERNING CONFIDENTIALITY**

The responses to the questionnaire on national laws governing confidentiality issued on 21 October 1994 are summarised country-by-country below. Each question is separately listed, followed by the responses thereto.

1. *Please list each law, regulation, or official policy (collectively referred to as "confidentiality rules") relating to confidential treatment of information possessed by your agency and that imposes a constraint on the ability of your agency to provide the information to a foreign competition agency. For each such confidentiality rule, provide the following information, if applicable:*
- a. *the official citation; and*
 - b. *a brief description of the confidentiality rule, including the type of information to which it applies and the constraints on disclosure that it imposes.*

Austria

Kartellgesetz 1988, BGBl. Nr. 600/1988, in der Fassung Kartellgesetz-Novelle 1993, BGBl. 693/1993 (Austrian Cartel Act), Section 118(3). The confidentiality rule for the Paritary Committee on Competition, an advisory body to the Cartel Court composed of representatives of the Chamber of Commerce, Chamber of Labour, and the Austrian Trade Union. All information acquired by the Committee by way of documents or hearings is confidential and may be used only for fulfilment of the Committee's tasks.

Austrian Cartel Act, Section 100. The confidentiality rule for the Cartel Courts of First and Second Instance. All information acquired by the courts exclusively in their official function is secret unless otherwise provided by law. The president of the court may lift the secrecy obligation in individual cases.

Canada

Competition Act, Section 10(3). Requires that inquiries initiated pursuant to this section be conducted in private. The Director of Investigation and Research does not disclose the fact or existence of an inquiry or any information received in the course thereof except the extent necessary to carry out his mandate investigating the matter under inquiry.

Competition Act, Section 29. Protects: the identity of anyone providing information pursuant to the Act, whether voluntarily or pursuant to compulsory process, including the identity of persons making premerger notifications and requests for an Advance Ruling Certificate; information obtained through compulsory process; the fact that a premerger notification has been made, and information provided by any person relating thereto; information provided in support of a request for an Advance Ruling Certificate.

Information that is otherwise public may be disclosed. The Director may communicate protected information to a "Canadian law enforcement agency", and otherwise "for the purposes of the administration or enforcement" of the Act, which is interpreted as meaning the advancement of a specific investigation pursuant to the Act.

Non-Section 29 Information. Is not specifically protected by the Act, but is subject to non-statutory constraints such as common law privileges or common law duty of confidentiality. However, the current policy of the Director is to treat non-section 29 information as if it were covered by Section 29.

Denmark

Competition Act, Statute No. 370 of 7 June 1989 as amended by Statute No. 280 of 29 April 1992 ("Competition Act"), Sections 5, 7, 10; Act on Public Access to Documents and Administrative Files, Statute NO. 572 of 19 December 1985 (Act on Public Access to Documents). Agreements and decisions by which a dominant influence is exerted or may be exerted on a market must be notified to the Competition Council (Competition Act, Section 5). Where the Council finds that competition is not sufficiently workable, or where, for other particular reasons, it is necessary to observe the competitive conditions or create transparency of price conditions, the Council may order the submission of information on prices, profits, and other operational and business information (Competition Act, Section 7(1). The Act on Public Access to Documents applies to such Section 5 and Section 7 information, which means generally that the information is public, and can be disclosed to foreign competition agencies. In other respects the Act on Public Access to Documents does not apply to information in the hands of the Council. The Council may not disclose information when such disclosure could cause financial loss to an enterprise, or if other enterprises could derive unjustified competitive advantage there from, or in other special circumstances. Except in cases of Section 5 or Section 7 information, non-public information may not be disclosed except pursuant to a Council decision making such information public (Competition Act, Section 10).

Finland

Publicity of Official Documents Act (9 February 1951/83; amended in 601/1982, 472/1987, 739/1988, 804/1989 and 673/1991). A lengthy law governing public access to official documents. In general, official documents are public. Documents produced internally by an authority, however, such as drafts, reports, and memoranda, are not public. Documents may be ordered by Decree to be kept secret for reasons, among other things, of protection of the commercial activity, legal proceedings or data protection of the State, a self-governing association or a private individual.

Decree on Certain Exceptions to the Publicity of Official Documents (22 December 1951/650; amended in 731/1977). Provides generally that documents collected by authorities in their line of official duty regarding commercial activities of the State or private entities shall be kept secret unless the entity gives permission for publication.

Act on Restrictions on Competition, Section 24. Information acquired by the Office of Free Competition or Provincial State Offices pursuant to the Act relating to business or professional secrets shall not be disclosed without the permission of the entity affected.

Act on the Competition Council, Section 12. Includes rules on publicity and confidentiality of matters treated in the Competition Council.

Germany

Basic Law (Grundgesetz). Protects certain basic rights, including protection of property, including trade and business secrets, and the right of individuals to decide, in principle, themselves on the disclosure and use of their personal data.

Law on Administrative Procedures (Verwaltungsverfahrensgesetz), Section 30. Protects from unauthorised disclosure by the competition authority information relating to the private lives or trade or business secrets of parties.

Federal Data Protection Act (Bundesdatenschutzgesetz). Processing and use of personal data is prohibited in principle, unless expressly allowed by the Act or other statutory provision. No such provision permits the systematic use or disclosure of personal data in the context of cartel and competition law proceedings. Likewise, while under specified conditions the communication of data to foreign countries is permissible, no provision permits such exchanges in the context of cartel and competition law proceedings.

Ireland

Competition Act 1991, Schedule, Paragraph 9. A member of the Authority may not disclose information obtained by compulsory process except in the execution of his functions under the Act. Assisting a foreign authority is not considered as part of the functions under the Act. This rule applies only to information obtained by compulsory process. Information obtained voluntarily is governed by the rule of common law confidentiality.

Common law confidentiality. Obligates the Authority not to disclose information that the giver has designated as confidential or which under the circumstances the Authority should know is confidential. The Authority may publish such information as is necessary to meet its statutory obligation to make public its decisions, however. Otherwise, it is not within the statutory functions of the Authority to assist foreign governments.

Italy

Competition and Fair Trading Act (Law no. 287 of 10th October 1990), Section 14, Par. 3, 4; Regulation no. 461/91, Section 8, par. 1. All information acquired as a result of the enforcement of the Competition Act shall be used only for the purpose of the relevant request and shall not be disclosed even to other government departments. The law does not differentiate between information acquired by compulsory process and information acquired voluntarily. Officials of the Competition Authority are considered "public officials" and are sworn to secrecy.

Law no. 241/90 on Administrative Proceedings. Governs access to administrative documents. Requires each public administration to enact a regulation specifying categories of documents that are to be deemed confidential, according to certain specified criteria. The Italian Competition Authority is in the process of promulgating such a regulation. The regulation is likely to classify as confidential all information on industrial, financial and commercial interests.

Japan

Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, Section 39.

No active or former Chairman, commissioner or other personnel of the Fair Trade Commission shall divulge or make surreptitious use of trade secrets of entrepreneurs which come to their knowledge in the course of their duties.

Government Official Law, Section 100, Subsection 1. Government officials shall not disclose secrets which they come to know in the course of their duties.

These rules operate to prohibit disclosure to foreign competition authorities of all information acquired in the course of enforcement of the competition law.

Mexico

Federal Law of Economic Competition, Articles 31, 34. The information and documents obtained directly by the Federal Competition Commission in connection with its investigation, as well as those submitted to it, are strictly confidential. Unauthorised disclosure of such information may result in civil or criminal sanctions.

Norway

Except as provided in the EEA Agreement, it is not possible for the Norwegian Competition Authority to gather confidential information on behalf of the competition agency of another country.

New Zealand

Official Information Act 1982. Provides generally that information shall be made available unless there is good reason for withholding it, as provided elsewhere in the Act and in other acts.

Section 6. Provides for withholding of information if disclosing it would, among other things, prejudice the prevention, investigation and detection of offenses and the right to a fair trial.

Section 9. Provides for withholding of information (unless the withholding is outweighed by other considerations of the public interest) for purposes of, among other things, protection of privacy of natural persons, protection of trade secrets and commercially sensitive information, protection of the source of supply of information, maintenance of free and frank communication to and between government officials, and prevention of disclosure or use of official information for improper gain or improper advantage.

Section 52. Permits withholding of information if required by another Act or by a court or the House of Representatives.

Commerce Act 1986, Section 100. Permits the Commerce Commission to issue temporary confidentiality orders on information gathered during an investigation. The Commission's policy is to issue such orders relating to nonpublic information that is supplied in confidence and which is commercially sensitive and could be used to the detriment of the supplier. An order will not be issued, however, when it would unduly hamper the Commission's investigation.

Privacy Act 1993. Protects information held about natural persons, generally forbidding disclosure of nonpublic information without the individual's permission unless, among other things, disclosure is necessary for the maintenance of the law by a public agency, the enforcement of a law imposing a pecuniary penalty or the conduct of proceedings before a court or tribunal.

Evidence Act 1908, as amended by the Evidence Amendment Act 1890, Section 48I. Permits the Attorney General to prohibit the production of documents requested by a foreign authority if **(f)** the foreign authority is exercising or proposing to exercise jurisdiction in a manner that infringes or is prejudicial to New Zealand sovereignty; **(g)** it is desirable for the purposes of protection the trading, commercial or economic interests of New Zealand; **(h)** the request is made for purposes other than those of any civil criminal proceedings already instituted overseas; or **(i)** the request is made for the purpose of pretrial discovery of documents other than civil or criminal proceedings already instituted.

Spain

Act 16/1989 of 17 July for the Protection of Competition, Article 52. Information in the files created under the Act is secret, including information contained in voluntary notification of mergers and the fact that such notification was filed. All those taking part in proceedings under the Act are bound to observe such secrecy.

Sweden

The Secrecy Act, Sekretesslagen (1980:100).

Chapter 8, Section 6. Secrecy shall apply within a State authority's activities relating to production, commerce, transport activities, or other commercial and industrial activities, to commercial information which, if disclosed, would cause a person loss, and to other economic or personal circumstances of a person who has entered into a business or similar relationship with a person who is the object of the authority's activities. The government may provide for exemptions from the secrecy requirement in specific cases if it deems it important that the information be provided.

Chapter 1, Section 3. Protects information that is secret according to the Act from disclosure to a foreign authority unless disclosure is permitted by a specific act or decree or unless information in a corresponding case might be given to a Swedish authority and the authority holding the information deems it compatible with Swedish interests to communicate the information to the foreign authority.

Switzerland

Cartel Act, Art. 23; Penal Code, Art. 320. Members of the Cartel Commission and other public officials are bound by official secrecy, and may not reveal information that is acquired in the course of their official duties.

Penal Code, Art, 273. Prohibits the disclosure of economic information, except that in certain circumstances, if only the person furnishing such information has an interest in preserving its confidentiality the decision to release it may be left to that person.

United Kingdom

Fair Trading Act (FTA) 1973, Section 133; Competition Act (CA) 1890, Section 19; Restrictive Trade Practices Act 1976 (RTPA), Section 41. Business information which has been obtained under the relevant Act cannot be disclosed without the consent of the person carrying on the business, except that disclosure may take place for the purposes of facilitating the performance of the functions of the Director General of Fair Trading under the Acts. Under this exception it might be possible to provide confidential information to a foreign competition agency which would further an investigation being carried on in the United Kingdom.

RTPA Section 23. Causes details of agreements restrictive of competition to be placed on a public register and the most significant thereof to be referred to a court. Such information is public unless placed on a special section of the register which is not open to the public. The Secretary of State makes such a determination on a public interest standard, which includes whether publication of the information would substantially damage the legitimate business interests of any person.

United States

Freedom of Information Act, 5 U.S.C. sec. 552 ("FOIA"). Permits any person, including a foreign competition agency, to request disclosure of information possessed by federal government agencies. A series of exemptions, however, routinely permit the withholding of many classes of information.

Hart-Scott-Rodino Act, 15 U.S.C. sec. 18a. Requires the submission of information to the Antitrust Division of the U.S. Department of Justice ("Antitrust Division") and the Federal Trade Commission ("FTC") relating to certain proposed merger transactions. The information submitted is exempt from FOIA disclosure, and may not be disclosed except as relevant to an administrative or judicial proceeding to which either the Antitrust Division or the FTC is a party.

Federal Trade Commission Act, ("FTC Act"), Secs. 6, 9, 20, 21(b),(c),(f) (15 U.S.C. secs. 46, 49, 57b-1, 57b-2(b)). Authorises the FTC to use various forms of compulsory process requiring the submission of documents, reports or answers to written questions, and oral testimony. The FTC Act forbids disclosure of information submitted in a law enforcement investigation pursuant to compulsory process as well as trade secrets and confidential or privileged commercial and financial information obtained from a person unless authorised by:

- i) express statutory language authorising the sharing of information with domestic agencies;
- ii) provisions for disclosure to the U.S. Congress and in judicial and administrative proceedings; or
- iii) bilateral agreements entered into with a foreign antitrust regulator pursuant to the IAEAA (described in response to question 2).

Such authorised disclosures are subject to safeguards designed to maintain confidentiality consistent with the purpose of disclosure.

In addition, pursuant to the FTC Act and its Rule of Practice and Procedure 4.10(d), the Commission has provided the same protection to information submitted voluntarily in lieu of compulsory process (whose disclosure is not otherwise prohibited under the Act, e.g. trade secrets and confidential/privileged commercial and financial information) as is given to information submitted pursuant to compulsory process, provided the information is designated by the submitter as confidential. Other

voluntary submissions designated as confidential by the submitter may be subject to disclosure under the FOIA. All voluntary submissions, whether submitted in lieu of compulsory process or otherwise, are subject to the provisions for authorised disclosure noted above with appropriate safeguards to maintain confidentiality consistent with the purpose of disclosure.

Antitrust Civil Process Act, 15 U.S.C. secs. 1311-1314. Authorises the Antitrust Division to issue civil investigative demands (CIDs) requiring the submission of documents, answers to interrogatories and sworn testimony. Disclosure to anyone other than an authorised official of the Department of Justice without the consent of the person who produced such materials is prohibited, except that disclosure may be made in the course of the taking of oral testimony pursuant to a CID, in the course of a court, grand jury or federal administrative or regulatory proceeding, to the FTC in connection with one of its investigations or proceedings and subject to the conditions that apply to the Department of Justice, to either body of Congress or any authorised committee or subcommittee of Congress, and to defendants in an action based on information obtained by CID pursuant to their rights of discovery. In all such cases the material is disclosed subject to safeguards maintaining confidentiality consistent with the purpose of disclosure.

Rule 6(e), Federal Rules of Criminal Procedure. Prohibits, with few exceptions, disclosure of "matters occurring before a grand jury." Disclosure may be made without a court order only to U.S. Department of Justice attorneys or to other government officials, or to another federal grand jury, for the purpose of prosecuting a criminal violation of U.S. law. Disclosure may be made pursuant to a court order "preliminary to or in connection with a judicial proceeding", upon a showing of "particularized need", or for the purpose of enforcing a state criminal law at the request of a state and after approval by the U.S. Attorney General.

Trade Secrets Act, 18 U.S.C. sec. 1905. Provides criminal penalties for unauthorised disclosure of trade secrets or confidential business information acquired in the course of the official business of a government employee.

Hungary

Act LXXXVI of 1990 on the Prohibition of Unfair Market Practices (Competition Act), Art. 34 par. 3; Art 5 par. 3(a). The competition authority is obliged to keep confidential any business secrets of which it becomes aware. Business secrets are defined as ". . . any fact, information, accomplishment or detail related to economic activity, in the sustaining secrecy of which its holder has a reasonable interest."

Law-decree No. 5 of 1987 on state and office secrets, Art. 10, par. 1, 2. State and office secrets are classified differently from business secrets, which are defined in the Competition Act above. Commercial information created prior to the enactment of the Competition Act may be considered one of these types of secrets. State and office secrets can be disclosed to a foreign entity only with the permission of an authorised person who is entitled to determine the scope of state and office secrets.

Act XLVI on Statistics. Art. 17, par. 2; Art.20; Act LXIII of 1992 on the "Protection of Personal Data and the Publicity of Public-related Data". Results of official statistical surveys and other public-related data are generally public, but state secrets, office secrets and "individual data" may not be disclosed.

Korea

Monopoly Regulation and Fair Trade Act (Section 62); Governmental official's law (Section 60); Criminal law (Section 127). Confidential information acquired in the course of official business shall not be disclosed, including information in the possession of the Fair Trade Commission.

2. *List each (a) national law, (b) treaty, that permits disclosure to a foreign competition agency of information otherwise subject to any confidentiality rule described in response to question 1, and briefly describe the rules that govern such disclosure.*

Only those responses that indicated that such a law or treaty exists are described below. If a country is not listed its response indicated that no such instrument exists.

Australia/New Zealand

Co-operation and Co-ordination Agreement between the Australian Trade Practices Commission and New Zealand Commerce Commission. Provides for co-operation and co-ordination between the competition agencies of the two countries and for, among other things, access upon request to information in the files of the requested agency, including confidential information, unless that information cannot be disclosed because disclosure is prohibited by the law of the requested country or because the information was provided to the requested agency on the basis that it must not be disclosed. The Agreement requires the requesting agency to maintain the confidentiality of the information it receives according to the Agreement and to measures specified by the requested agency.

Canada

Competition Act, Section 29. Protected information may be disclosed by the Director of Investigation and Research when necessary for the purpose of advancing a specific Canadian investigation, and where the foreign agency provides satisfactory assurances regarding the use and confidentiality of the information.

Non-Section 29 Information. May be disclosed in the same circumstances described above relating to Section 29 information.

The Treaty between the Government of Canada and the Government of the United States on Mutual Legal Assistance in Criminal Matters ("Canada/U.S. MLAT"). Competition authorities in each country may obtain information directly from persons in the other country relating to criminal antitrust investigations with the assistance of officials and the courts of the requested country, unless the requested country judges the assistance to be contrary to its public interest.

United States

International Antitrust Enforcement Assistance Act, Pub. L. No. 103-438, 108 Stat. 4597 (1994) (IAEAA). Permits the Antitrust Division and the FTC to furnish confidential information in their files, including that obtained pursuant to FTC compulsory process or CID, to a foreign antitrust authority, pursuant to an "antitrust mutual assistance agreement," which is defined in the statute and which itself must have its own strict confidentiality protections. Hart-Scott-Rodino information may not be disclosed, however, and information constituting matters occurring before a grand jury may be disclosed only if permitted by a court order, subject to a showing of particularised need. National defence or foreign policy information that is classified or for which classification is pending may not be furnished.

Mutual Legal Assistance Treaties ("MLATs"). The United States has entered into MLATs with a number of countries. The MLATs provide for the exchange of confidential information in certain circumstances for criminal investigations, including in some instances criminal antitrust investigations.

Hungary

Law-Decree No. 13 of 1979 on international private law. Provides for bilateral or multilateral legal assistance treaties, pursuant to which the minister of foreign affairs may authorise a Hungarian authority to render legal assistance upon request of a foreign authority, according to the terms of the treaty.

3. *For each type of competition information listed below that your agency acquires, state whether the confidentiality rules listed in response to question 1 permit your agency to provide the information to a foreign agency. Please provide any further explanation of the application of your confidentiality rules to each type of information that may be necessary to clarify your response.*

Only those responses that indicated that information could be provided in certain circumstances are described below. If a country is not listed its response indicated that information could not be provided.

- a. *Submitted in response to compulsory process in a civil investigation.*
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Canada

Section 29 information. See discussion above under questions 1 and 2 relating to such information.

Denmark

May not be provided unless the Competition Council has by a formal decision made the information public.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case according to the laws described above under question 1.

United Kingdom

Disclosure is subject to the standards described above under question 1.

United States

Disclosure may be made only pursuant to the provisions of the IAEAA described in the response to question 2.

b. Voluntarily submitted at the request of the competition agency in a civil investigation.

Canada

Non-Section 29 information. See discussion above under questions 1 and 2 relating to such information.

Denmark

May not be provided unless the Competition Council has by a formal decision made the information public.

Ireland

May be disclosed if it is not protected by common law confidentiality, discussed above under question 1.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Disclosure is subject to the standards described above under question 1.

United States

There is no general prohibition of the disclosure of such information, but several confidentiality rules may apply. Disclosure ordinarily would not be required by FOIA. The agency ordinarily would honour the terms of any confidentiality commitment made to the person who submitted the information. Disclosure by the FTC also is subject to the standards under the FTC act discussed in the response to question 1.

c. Submitted voluntarily by a person or enterprise complaining about the conduct of another person or enterprise.

Canada

The identity of a complainant is Section 29 information. Information submitted voluntarily in support of a complaint (to the extent that it does not identify the complainant) is non-Section 29 information. See discussion above under questions 1 and 2 relating to such information.

Denmark

May not be provided unless the Competition Council has by a formal decision made the information public.

Ireland

May be disclosed if not protected by common law confidentiality, discussed above under question 1.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Generally disclosure is subject to the standards described above under question 1.

United States

Exempt from disclosure under FOIA. Both the FTC and the Antitrust Division have a policy of not disclosing the identity of an applicant or complainant. See also discussion of information submitted voluntarily in lieu of compulsory process in the response to question 1.

d. Submitted by merging parties pursuant to voluntary or compulsory premerger notification.

Canada

Information submitted pursuant to compulsory premerger notification is Section 29 information. See discussion above under questions 1 and 2 relating to such information. On occasion, merging parties will voluntarily submit information relating to a merger that is not subject to mandatory notification for the purpose of obtaining an advisory opinion. Treatment of that information is discussed below under question 3.e.

Ireland

Information submitted voluntarily may be disclosed if not protected by common law confidentiality, discussed above under question 1.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Disclosure is subject to the FTA 133 standards described above under question 1.

United States

See the answer to question 3.b. with respect to information submitted voluntarily. Hart-Scott-Rodino information may not be disclosed. In the case of the FTC, information that is submitted in an application for prior approval of proposed divestiture, acquisition or other transaction subject to Commission review under an outstanding order and that constitutes trade secrets or confidential or privileged commercial or financial information may not be disclosed.

e. Submitted by parties to a nonmerger agreement pursuant to voluntary or compulsory notification or registration.

Canada

There are no notification requirements relating to nonmerger agreements. Parties to such agreements, and to merger agreements not subject to mandatory notification, may voluntarily submit information about the transaction in connection with a request for an advisory opinion. As such information relates to future transactions the Director of Investigation and Research normally would not disclose it to third parties. If the transaction subsequently becomes the subject of an investigation or inquiry, however, the information may be disclosed according to the rules governing Section 29 and non-Section 29 information, discussed above relating to questions 1 and 2.

Denmark

When the information is submitted pursuant to Sections 5 or 7 of the Competition Act, the information may be disclosed upon request, including to a foreign competition agency.

Ireland

Information submitted voluntarily may be disclosed if not protected by common law confidentiality, discussed above under question 1.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Disclosure is subject to the RTPA 23 standards described above under question 1.

United States

There are no compulsory notification requirements for nonmerger agreements. See the response to question 3.b. relating to information submitted voluntarily. Certain arrangements may be notified to the antitrust agencies in order to benefit from limited statutory antitrust exemptions. These include notifications pursuant to the **National Cooperative Research and Production Act, 15 U.S.C. secs. 4301-06**, the **Webb-Pomerene Act, 15 U.S.C. secs. 61-65**, and the **Export Trading Company Act, pub. L. No. 97-290, 96 Stat. 1234**. Nonpublic information contained in these notifications may not be disclosed.

f. Acquired in the course of a criminal investigation.

Canada

Section 29 and non-Section 29 information. See discussion above under questions 1 and 2 relating to such information.

Denmark

May not be provided unless the Competition Council has by a formal decision made the information public.

United States

Information that is subject to grand jury secrecy rules may be disclosed pursuant to the provisions of the IAEEA, described in the response to question 2.

g. Submitted pursuant to compulsory process in a judicial trial or administrative proceeding.

Canada

Information submitted pursuant to compulsory process during an investigation leading to judicial or administrative proceedings is section 29 information. See discussion above under questions 1 and 2 relating to such information. Information submitted pursuant to subpoena during such proceedings is normally public, unless otherwise ordered by a court of the Competition Tribunal. See discussion under question 3. Public information may be communicated to a foreign agency.

Denmark

In a judicial trial in which the Competition Council is itself a party, the Council has no authority to disclose information. In an administrative proceeding before the Council, information may not be made public unless the Council has by a formal decision made the information public.

Finland

Non-public information on commercial or industrial activity may not be disclosed without the consent of the entity involved or unless specifically ordered by the Competition Council or the Supreme Administrative Court.

New Zealand

Subject to any confidentiality rulings made by the court pursuant to the rules of the court.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

If information acquired during the judicial process is disclosed only for the benefit of the court, and otherwise should not be disclosed, disclosure is prohibited.

United States

The disclosure of such information that is not made part of the public record is governed by the terms of applicable court orders, if any, that had been entered in the particular case.

h. Introduced into evidence or made part of the record in a judicial trial or administrative proceeding.

Canada

Criminal proceedings are usually held in public, and the evidence introduced into the record is usually public. Courts have discretion to exclude the public for good cause, but the test for exclusion is onerous. The public has never been excluded from a criminal trial under the Competition Act. Administrative proceedings before the Competition Tribunal are also usually public and the record therein is public. The Tribunal may for good cause order that non-public hearings be held or that certain documents be excluded from the public record. Such evidence may not be disclosed to foreign competition agencies.

Denmark

In a judicial trial in which the Competition Council is itself a party the Council has no authority to disclose information. In an administrative proceeding before the Council, information may not be disclosed unless the Council has by a formal decision made the information public.

Finland

The Competition Council normally hears all cases in camera unless it specifically decides otherwise. Documents of the Council are not disclosed to the public unless specifically ordered otherwise. Decisions of the Council and the Supreme Administrative Court are normally available to the public, but portions containing business or professional secrets may be specifically ordered to be kept secret.

Ireland

The record in a judicial trial is in the public domain and can be disclosed. When an administrative proceeding is held in public the record can be disclosed.

Mexico

All administrative proceedings are conducted within the Federal Competition Commission and are considered confidential. Judicial trials are open to the public, but documented information obtained for the proceedings is confidential, as is documented information made part of the record.

New Zealand

Subject to any confidentiality rulings made by the court pursuant to the rules of the court.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Information made part of the trial record is generally public.

United States

Information entered into evidence in the proceeding is generally public, unless protected by an order of the court or administrative law judge.

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- i. Studies, analyses or recommendations (collectively, "studies") prepared by employees of the competition agency based on (1) in whole or in part, information subject to one or more of the confidentiality rules listed in response to question 1, or (2) public information only.*
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Canada

Studies containing non-public information are governed by the rules applying to Section 29 and non-Section 29 information, discussed above under questions 1 and 2. Studies based solely on public information may be disclosed at the discretion of the Director of Investigation and Research.

Denmark

Studies containing non-public information are subject to the rules discussed above under question 1. Studies based solely on public information may be disclosed by the Competition Council.

Ireland

Studies based on confidential information could be disclosed in the discretion of the Authority if they did not reveal precise confidential information. For example, market share information that is sufficiently aggregated could be disclosed.

New Zealand

Treated case-by-case according to the laws described above under question 1.

Sweden

Exceptions to the general requirement of secrecy made on a case-by-case basis according to the laws described above under question 1.

United Kingdom

Disclosure is subject to the standards described above under question 1.

United States

Disclosure of information in any such report that is subject to any of the confidentiality rules described in the response to question 1 continues to be subject to those rules. Disclosure of such materials containing only public information is often required under FOIA. If disclosure is not required by FOIA, the agencies would exercise their discretion in responding to a request from a foreign antitrust agency.