

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*

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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.