



International Chamber of Commerce

The world business organization

Department of Policy and Business Practices

Comments on Information Exchanges in International Cartel Investigations

Prepared by the Commission on Competition, 3 February 2004

for submission to the Working Party on International Co-operation of the Competition Law and Policy Committee of the OECD at its meeting on 11 February 2004.

Introduction

ICC wishes to contribute to the discussions within OECD Working Party Three on exchange of information between antitrust enforcement agencies in the context of international cartel investigations. We understand that the OECD's aim is to work out a number of core principles to be incorporated in treaties or inter-governmental agreements governing the exchange of such information.

ICC agrees on the need for an effective enforcement of antitrust rules against illegal international cartels. ICC also agrees on the means to achieve such enforcement i.a. the exchange of information between antitrust authorities allowing them to detect, investigate and prosecute such cartels.

However, ICC is of the view that the exchange of information must be subjected to adequate safeguards to protect the legitimate interests of the enterprises involved.

ICC notes that there are a number of bi-lateral agreements/treaties on competition rules and bi-lateral agreements/treaties on mutual assistance which also cover antitrust matters. Caution should be exercised when attempting to use clauses of these agreements, relating to information exchange on cartels covering the relevant jurisdictions and the underlying principles, as precedents in elaborating principles for information exchange between other countries. These agreements are entered into between countries that share basic concepts embodied in their antitrust rules. As long as there are no - plurilateral or multilateral - international substantive competition rules, the scope for plurilateral agreements/treaties on information exchange or for that matter for core principles that could be included in many bilateral agreements is rather limited.

Scope

ICC understands that the work is limited to exchange of information relating to hard core cartels as defined in the OECD Recommendation of 25 March 1998. ICC would prefer to define hard core cartels as arrangements by which the parties directly or indirectly fix prices for the purposes of market sharing, limit or prevent supplies, limit or prevent production, divide between the parties the supply of a product or service to customers, divide between the parties customers for the supply of a product or service, or bid-rigging arrangements. Its comments deal exclusively with this topic.

The information to be exchanged should relate to international hard core cartels i.e. cartel activities that are occurring or having an effect in the territory of the Requesting Party and are impermissible under its antitrust laws and under the Requested Party's antitrust laws. The information to be exchanged should be limited to "cartels" as opposed to broader anticompetitive conduct.

Information to be exchanged

According to the BIAAC the information to be exchanged is "information, testimony, statements, documents or copies thereof, or other things that are obtained in anticipation of, or during the course of an investigation or proceeding under the parties' respective antitrust laws, or pursuant to the Parties Mutual Assistance Legislation". ICC understands that the reference by BIAAC to the latter legislation is meant to concern only antitrust matters.

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Any information or evidence relating to conduct giving rise to criminal prosecution in the jurisdiction of the Requesting Party, while such conduct does not qualify as a criminal offense in the jurisdiction of the Requested Party, should be excluded from the information to be exchanged

There are two types of information whose exchange raises concern: on the one hand, business confidential information and, on the other, information collected by competition authorities whose disclosure would expose enterprises to criminal or other sanctions in the Requesting party's jurisdiction. Both types of information are called hereinafter "qualified information".

Procedural aspects

ICC agrees that in some respects clauses on Requests for Assistance under the US/Australia IAEEA provide a good model: they require an explanation from the Requesting Party of the links between the subject matter of the request, a possible violation of the antitrust laws of the Requesting Party and the investigation, as well as a description of the procedural or evidentiary requirements bearing on the manner in which the Requesting Party desires the request to be executed.

In addition, the request should describe how such information will be protected by the Requesting Party.

Moreover, the Requesting Party should only request the information if it has exhausted all reasonable possibilities to obtain the information by its own means and should demonstrate this to the Requested Party.

ICC also considers that the request should be disclosable to the enterprises concerned to enable them to form a view on the legitimacy of the request, account being taken of the procedure suggested below with regard to the protection of qualified information.

Requested Party's obligation

The Requested Party should not be bound to provide information to the Requesting Party if disclosure of that information is prohibited by the laws of the Requested Party or would adversely affect legitimate and other important interests of the Requested Party. Moreover, many countries' laws prohibit the communication to another country of information or evidence relating to conduct giving rise to criminal prosecution in the latter country, while such conduct does not qualify as a criminal offense in the former country: according to ICC, there should be no departure from such rules.

The Requested Party may deny a request if complying with it would exceed the relevant antitrust authority's reasonably available resources. In this connection, it should be made clear that the Requested Party would not be legally bound to seek the information and to amend its legislation or change its policies where the investigation is limited to potential violations of its own antitrust rules.

Protection of qualified information

Rules on the protection of information collected in the course of an antitrust investigation and their enforcement differ among countries. This requires that additional safeguards be introduced.

First, the enterprise concerned should be informed in advance about a contemplated information exchange ('advance warning') and have the opportunity to challenge ex-ante the information exchange in a court of the domicile of the party where information is sought. ICC recognizes that this may hamper an investigation. A derogation from the need to provide advance warning to the enterprise concerned could be provided but it would have to be demonstrated first in a court of the domicile of the party where information is sought that such advance warning would seriously hamper an investigation. In addition, rules should be established under which advance warning is deemed to seriously hamper the investigation

Second, the conditions of protection to which the information exchanged is subjected in the Requesting Party should be substantially equivalent to those applying in the Requested Party. The Requesting Party should undertake to maintain the protection of the information exchanged.

Third, measures should be in place to ensure that the information exchanged be only used for the purpose or procedure for which it was requested. This means i.a. that the information will not be disclosed to other branches of the government except for the purpose of enforcing antitrust rules and will not be used by the Requesting Party for any purpose or procedure other than the one specified in the information request. The Requesting Party should permit enterprises to resist the use of information disclosed to it, where that information was obtained by the Requested Party by compulsion in circumstances that would not be permitted under the law of the Requesting Party.

Fourth, the enterprise concerned should have the possibility to challenge ex-post the information exchange in a court of law of the domicile of the party where the information was sought without advance warning to it. In addition, it should have the possibility to challenge an uncontrolled use of the information exchanged.

Fifth, information obtained by a Requesting Party should not be provided to another Requesting Party without the consent of the original Requested Party. In addition, the same procedural safeguards in relation to the protection of the qualified information which are otherwise available to the enterprise concerned should apply.

Information supplied under "immunity" or "leniency" programs

In practice it is often difficult for enterprises to apply for "immunity" or "leniency" simultaneously to all antitrust authorities that have jurisdiction over a conduct that such authorities are likely to qualify as an international hard core cartel. Information exchange in cases where simultaneous "immunity" or "leniency" applications are impossible or not feasible has to be addressed.

Unless there is a commitment, either of the Requested Party not to exchange information disclosed under "immunity"/"leniency" programs, or of the Requesting Party not to use such information (for the purpose of an investigation or for imposing sanctions and not to provide it to third parties for the purposes of litigation), many enterprises will hesitate to apply for "immunity" or "leniency".

Protection of Legal Privilege

It should be made clear that:

- a. the Requested Party has no duty to compel a person to provide the information in violation of any legal privilege under its own laws and may resist or decline such a request based on this principle; and,
- b. the Requesting Party may not use the information that would be subject to legal privilege under its own laws.

Return of exchanged information

There should be provisions on the return of exchanged information.