Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

02-Oct-2014

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3(2013)4
Unclassified

Cancels & replaces the same document of 03 June 2013

Working Party No. 3 on Co-operation and Enforcement

NATIONAL AND INTERNATIONAL PROVISIONS FOR THE EXCHANGE OF CONFIDENTIAL INFORMATION BETWEEN COMPETITION AGENCIES WITHOUT WAIVERS

-- Note by the Secretariat --

18 June 2013

The note by the Secretariat was elaborated to serve as background materials for a discussion held on 18 June 2013 during the 116th meeting of the Working Party No. 3 of the OECD Competition Committee.

Please contact Mr. Antonio Capobianco, if you have any questions regarding this document [antonio.capobianco@oecd.org].

JT03362911

Complete document available on OLIS in its original format

English - Or. English

1. Introduction

1. The ability to exchange information is crucial for co-operation among competition authorities conducting parallel investigations. However, while the exchange of non-confidential information is usually possible, exchange of confidential information with agencies from other jurisdictions remains an area where most agencies find limitations. In fact the inability to share confidential information has been identified as one of the main limitations to effective co-operation, especially with respect to cartels where the use of waivers is less widespread than it is in merger cases.[1] The recent Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation identified legal protections of *confidential information* which restrict the ability of competition agencies to exchange such information as one of the most important limitations to international co-operation.[2]

2. Most jurisdictions have no formal mechanism allowing the competition agency to exchange confidential case information with other competition authorities. For this reasons co-operation between enforcers generally comes to a stall when there is a need to exchange confidential information. Exceptions to this general principle exist:

- The first one is when the agencies wishing to exchange information have obtained a confidentiality waiver by the interested party(ies), allowing for the exchange to take place.

- The second, is when national legal provisions or international agreements explicitly empower the enforcement agency to exchange confidential information with other competition authorities in other jurisdictions, under certain conditions. These provisions allow the transmission of the confidential information even if the interested parties have not consented to the transmission. This paper will refer to these provisions as "information gateways".

3. This Note will review the information gateways that exist in some OECD jurisdictions and describes the conditions required for their enforcement. The last section of this Note describes two examples where information gateways were used to transmit information to other agencies investigating the same case.

2. Information gateways

4. To the Secretariat's knowledge, only four OECD jurisdictions (UK, Australia, Canada and Germany) have provisions in their domestic legislation enabling them to exchange confidential information with other competition agencies without having to require the consent of the interested parties, or the need to enter into specific co-operation agreement with the other agency. Competition agencies from other OECD jurisdictions have entered (or are about to enter) into international co-operation agreements which include information gateways (the United States with Australia; New Zealand and Australia; and the European Union with Switzerland). Provisions allowing the exchange of confidential information without the parties consent also exist in multilateral co-operation platforms, such as the European Competition Network (ECN).

---

1 See Discussion on Limitations to Co-operation and Scoping Discussion in October 2012 (See DAF/COMP/WP3(2012)8) and Secretariat Report on the OECD/ICN Survey on international enforcement co-operation [DAF/COMP/WP3(2013)2/FINAL].

2 Seventeen respondents identified restrictions on the exchange of confidential information as a limitation on co-operation in the qualitative sections of the Survey (Report on OECD-ICN Survey on International Enforcement Co-operation p. 79).

5. A cursory review of the provisions discussed in more detail in the next section indicates a degree of diversity in the approach that different jurisdictions have taken to the design of information gateways. For example:

- The discretion of the transmitting agency to use the gateway in specific cases ranges from being quite broad in the Canadian and Australian domestic legislations to the narrower scope for transmission in the EU/Swiss co-operation agreement, which only allows the exchange when the two agencies are investigating the same conduct or transaction. The German gateway is limited to antitrust cases and it excludes the possibility to exchange information received in a merger control proceeding without the prior consent of the interested parties.

- Similarly, some gateways leave ample discretion to the agency in deciding when to make use of the gateway. This is for example the case in Australia, Canada and Germany. Other gateways regulate in detail the conditions that must be met before the agency can transmit the information to another agency. This is for example the case in the UK.

- Some of these provisions are very specific about the use that the receiving agency can make of the information received. For example, the provision which allows a tight co-operation between agencies in the ECN is quite specific in determining under which circumstances the information received can be used as evidence. Other gateways leave the transmitting agency to decide whether to subject the transmission of the information to limitations on use (e.g. Australia).

- Some gateways exclude explicitly certain types of information from the scope of the gateway, or subject the exchange to tighter conditions. This is usually the case of information received through the leniency program (Canada and EU/Swiss agreement), self-incriminating information (UK and EU/Swiss agreement) and privileged information (Australia and New Zealand/Australian agreement). Other leave this decision to the transmitting agency depending on the safeguards granted in the receiving jurisdiction.

- Some gateways do not require reciprocity as a condition for the use of the gateway. Conversely, the United States and the UK gateways can only be used if the other jurisdiction assures reciprocal treatment to the US or UK enforcement agencies.

2.1 Information gateways in national legislation

2.1.1. Australia

6. In Australia, Section 155AAA of the Competition and Consumer Act 2010 provides that the ACCC and its officers must keep protected third party information confidential (protected information)[3] and a failure to do so in accordance with the section can attract criminal charges for the officers involved. However, the section also permits disclosure of protected information, in limited circumstances. These include allowing the ACCC to co-ordinate competition investigations with its counterparts and complying with information requests from its counterparts.

[3] Examples of protected information are: information provided by an immunity applicant or information in relation to a cartel; information provided in writing or verbally, in confidence, in relation to a merger; information provided pursuant to the exercise of the ACCC's coercive powers; and information obtained from a foreign government body in confidence.

Section 155AAA
Protection of certain information

(1) A Commission official must not disclose any protected information to any person except:

(a) when the Commission official is performing duties or functions as a Commission official; or

(b) when the Commission official or the Commission is required or permitted by:

(i) this Act or any other law of the Commonwealth; or

(ii) a prescribed law of a State or internal Territory;

to disclose the information.

[...]

Disclosure to certain agencies, bodies and persons

(12) If the Chairperson is satisfied that particular protected information will enable or assist any of the following agencies, bodies or persons:

[...]

(n) a foreign government body;

to perform or exercise any of the functions or powers of the agency, body or person, an authorised Commission official may disclose that protected information to the agency, body or person concerned.

(13) The Chairperson may, by writing, impose conditions to be complied with in relation to protected information disclosed under subsection (12).

7. [...]

8. Section 155AAA provides the ACCC with the discretion to decide to provide or not provide requested information and impose conditions on any disclosure to counterpart agencies.[4] The ACCC will notify the information source and/or relevant third parties of the disclosure to a counterpart agency if required by the principles of natural justice or otherwise required by law. Legally professional privileged documents are protected under Australia's legal professional privilege protection regime.

9. Section 155AAA is firstly intended to protect information given to the ACCC in confidence. Section 155AAA provides that an ACCC official must not disclose information given to the ACCC in confidence or obtained using the ACCC's coercive powers and which relate to a core statutory function[5] unless otherwise allowed under section 155AAA. There is a specific prohibition against disclosing information given to the ACCC in confidence by a foreign government or agency where the information relates to a matter arising under the law of a foreign country.[6] A breach of section 155AAA by the ACCC may give rise to a right of action against both the ACCC and the individual staff member or members that disclosed the protected information.

4 See Australia submission to the OECD Discussion on Limitations and Constraints to International Co-operation [DAF/COMP/WP3/WD (2012)49].

5 A 'core statutory provision' is a provision under Part IV, IVA, V, VII, VIII, XIB or XIC of the Act, but not Division 1AA or Part V which relates to Country of Origin Representations (s.155AAA(21)). Part IV of the Act includes the hard core cartel related provisions.

6 Section 155AAA(21)(e).

10. Section 155AAA provides the ACCC Chairman and/or his delegate, the discretion to disclose protected information, in the performance of their duties or functions; or as required or permitted by law (including specific permissions under section 155AAA). Section 155AAA does not compel the ACCC to comply with a request for disclosure of protected information. Whether or not disclose information is for the ACCC to decide. Subsections 155AAA(3) – (18) list circumstances in which the ACCC is specifically permitted to disclose information including other government agencies, bodies and persons; certain Parliament Ministers or their authorised representatives; Royal Commissions; with the consent of the person to whom the information relates; where the information is publically available; and summaries or statistics derived from certain information that are not likely to enable the identification of a person. Subsection 155AAA(12) allows the ACCC Chairman to disclose information to a foreign government body.

11. Where protected information is disclosed to another agency, body or person (including a foreign government or agency),[7] the Chairman (or his delegate) may impose conditions on the disclosure, including any further dealing with the protected information.[8] The conditions that are imposed on the protected information will depend on what the other agency proposes to do with the information and the specific risks relating to the facts and circumstances of the matter.

12. The ACCC generally imposes standard conditions on disclosure including that the receiving agency will:

- Notify the ACCC of any third party request which relates, or may relate, to the protected information;
- Notify the ACCC of any proposed use of the protected information in court proceedings; and
- Not disclose the protected information without the ACCC's prior written consent, unless required to do so by law, in which case the recipient will use best endeavours to meet this requirement.

2.1.2. Canada

13. In Canada, Section 29 of the Competition Act[9] is the key provision dealing with the communication of confidential information in the possession or control of the Bureau. Guidance on the enforcement of this provision is included in Bureau's 2007 Bulletin on the Communication of Confidential Information under the Act.[10]

7 Section 155AAA(12).

8 Section 155AAA(13).

9 http://www.laws.justice.gc.ca/eng/acts/C-34/index.html

10 http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01277.html

Section 29
Confidentiality

29. (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

a. the identity of any person from whom information was obtained pursuant to this Act;

b. any information obtained pursuant to section 11, 15, 16 or 114;

c. whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;

d. any information obtained from a person requesting a certificate under section 102; or

e. any information provided voluntarily pursuant to this Act.

(2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

14. Section 29 protects information provided to or obtained by the Bureau, including the identity of any persons who have provided it. When the Commissioner commences an inquiry, information may be obtained through court-authorized orders (orders for oral examination, production of records or written returns of information) or through court-authorized search warrants (search and seizure). The Bureau also receives information concerning certain proposed transactions under the pre-merger notification process required by Part IX of the Act, pursuant to requests for advance ruling certificates under section 102 and for binding written opinions under section 124.1 of the Act. In the course of preliminary examinations, inquiries and other matters under the Act, individuals will often provide information to the Bureau voluntarily by filing complaints, submissions, or responses to questionnaires and interviews.

15. Section 29 of the Competition Act provides a clear framework for the protection of confidential information. Section 29 forbids any person who works, or has worked, at the Bureau, from communicating or allowing to be communicated, information that has been provided to, or obtained by the Bureau, including the identity of any person who has provided such information. Section 29 provides the Bureau with the discretion to communicate information in four limited circumstances: (i) Communication of information to a Canadian law enforcement agency; (ii) Communication of information for the purposes of the administration or enforcement of the Act; (iii) Communication of information that has been made public; or (iv) Communication of information that has been authorized by the person who provided the information.

16. The second exception allows information that is considered confidential under the Act to be communicated to a foreign counterpart where the purpose is for the administration or enforcement of the Act (i.e., where the communication of this information would advance a specific investigation). While this framework allows the sharing of information with a foreign counterpart, even in the absence of a confidentiality waiver, or when no formal agreement is in place, the Bureau takes rigorous steps to maintain the confidentiality of the information, prior to communicating with a foreign agency. The Bureau will not proceed unless it is certain that the confidentiality of the information will be maintained, and that the use of the information will be limited to the purpose for which it was communicated.[11]

[11] See Section 4.2.2 (Foreign Authorities) of the Bulletin on Communication of Confidential Information under the Competition Act (http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01277.html).

17. In assessing whether to communicate confidential information to other agencies, the Bureau will consider the laws protecting confidentiality in the requesting country, the purpose of the request, and any agreements or arrangements with the country or the requesting authority. If the Bureau is not satisfied that the information will remain protected or only used for its intended purpose, the information will not be communicated. However, it is the Bureau's policy that the Bureau will not disclose the identity or information obtained from an immunity or leniency applicant to any foreign law enforcement agency without the consent of the applicant. Absent compelling reasons, the Bureau will expect a waiver authorizing the communication of information with those jurisdictions to which an applicant has made similar requests for immunity or leniency.

2.1.3. Germany

18. In Germany, Sections §50a and §50b of the Act against restraint of competition[12] describe the conditions under which the Bundeskartellamt (BKA) can co-operate, including by exchanging confidential information, with other agencies. Section 50a deals with co-operation activities with ECN agencies. Section 50b deals with co-operation with other agencies.

§ 50a
Cooperation within the Network of European Competition Authorities

(1) Article 12(1) of Regulation No 1/2003 authorizes the cartel authority to provide, for the purpose of applying Articles 81 and 82 of the EC Treaty, the Commission of the European Community and the competition authorities of the other Member States of the European Community with any matter of fact or of law, including confidential information and in particular operating and business secrets, to transmit to them appropriate documents and data, to request these competition authorities to transmit such information, and to receive and use in evidence such information. § 50(2) shall apply *mutatis mutandis*.

(2) The cartel authority shall use in evidence the information received only for the purpose of applying Article 81 or Article 82 of the EC Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, information exchanged under paragraph 1 may also be used for the application of this Act if provisions of this Act are applied in accordance with Article 12(2) sentence 2 of Regulation (EC) No 1/2003.

(3) Information received by the cartel authority pursuant to paragraph 1 can only be used in evidence for the purpose of imposing sanctions on natural persons where the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the EC Treaty. Where the conditions set out in sentence 1 are not fulfilled, a use in evidence shall also be possible if the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the rules of the receiving cartel authority. The prohibition to use evidence pursuant to sentence 1 shall not exclude using the evidence against legal persons or associations of persons. However, compliance with prohibitions to use evidence which are based on constitutional law remains unaffected.

12 http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/GWB-Stand_August_2011-_E.pdf

§ 50b
Other Cooperation with Foreign Competition Authorities

(1) The Bundeskartellamt shall have the powers pursuant to § 50a(1) also in other cases in which it cooperates with the Commission of the European Community or with the competition authorities of other States for the purpose of applying provisions of competition law.

(2) The Bundeskartellamt shall forward information pursuant to § 50a (1) only with the proviso that the receiving competition authority:

1. uses the information in evidence only for the purpose of applying provisions of competition law and in respect of the subject-matter for which it was collected by the Bundeskartellamt,
2. respects the protection of confidential information and will transmit such information to third parties only if the Bundeskartellamt agrees to such transmission; this shall also apply to the disclosure of confidential information in legal and administrative procedures.

Confidential information, including operating and business secrets, resulting from merger control proceedings shall only be transmitted by the Bundeskartellamt with the consent of the undertaking which has provided this information.

(3) Provisions concerning legal cooperation in criminal matters as well as Treaties on administrative and legal cooperation shall remain unaffected.

19. Under the German competition act, when the BKA co-operates with the European Commission and other European competition agency in the enforcement of the EU Treaty provisions on competition, it can transmit and receive confidential information without any particular preliminary assessment. Restrictions, however, exist with regard to the use of the information by the receiving agency: it can only be used for the enforcement of EU competition rules or of national competition rules only if in conjunction with European rules. Moreover the BKA can use the confidential information received from another agency to impose individual sanctions only if those sanctions can also be imposed in the jurisdiction of the transmitting agency.

20. When co-operating with other competition agencies, the BKA has similar powers. However, it must ensure that the receiving agency uses the information only for the enforcement of competition rules and only for the purpose for which the information was collected by the BKA. It must also ensure that the receiving agency guarantees the protection of confidential information and that it would seek the BKA's agreement if it wishes to transmit the information to third parties. Information concerning merger proceedings are excluded from these provisions, and can be transmitted by the BKA only if the party(ies) have consented to the transmission.

2.1.4. United Kingdom

21. In the United Kingdom (UK), the Enterprise Act provides for statutory information 'gateways', including an overseas information gateway allowing the Office of Fair Trading (OFT) and the Competition Commission (CC) to voluntarily disclose information obtained under their statutory powers of investigation, in order to facilitate the exercise by an overseas authority of any function relating to the purposes of civil or criminal antitrust cases in those jurisdictions.

22. The key provisions are contained in Part 9 of the UK Enterprise Act 2002 (the EA02). The framework allows the OFT/CC to disclose specified information where a 'gateway' exists in the EA02 or where disclosure is permitted under other legislation. The key provisions are: (i) the general power to disclose for the purpose of facilitating the authority's functions under the Act and other legislation (section 241); (ii) specific gateways allowing disclosure of certain information to an overseas public authority if certain criteria are met (see section 243 of the EA02) or where consent to disclosure is given by the

information providers and owners (section 239 EA02); (iii) other legislation, including the EU Modernisation Regulation (Reg. 1/2003) and any relevant Mutual Legal Assistance Treaties (MLATs).

Section 243
Overseas disclosures

(1) A public authority which holds information to which section 237 applies (the discloser) may disclose that information to an overseas public authority for the purpose mentioned in subsection (2).

(2) The purpose is facilitating the exercise by the overseas public authority of any function which it has relating to (a) carrying out investigations in connection with the enforcement of any relevant legislation by means of civil proceedings; (b) bringing civil proceedings for the enforcement of such legislation or the conduct of such proceedings; (c) the investigation of crime; (d) bringing criminal proceedings or the conduct of such proceedings; (e) deciding whether to start or bring to an end such investigations or proceedings.

(3) But subsection (1) does not apply to any of the following (a) information which is held by a person who is designated by virtue of section 213(4) as a designated enforcer for the purposes of Part 8; (b) information which comes to a public authority in connection with an investigation under Part 4, 5 or 6 of the 1973 Act or under section 11 of the Competition Act 1980 (c. 21); (c) competition information within the meaning of section 351 of the Financial Services and Markets Act 2000 (c. 8); (d) information which comes to a public authority in connection with an investigation under Part 3 or 4 or section 174 of this Act.

(4) The Secretary of State may direct that a disclosure permitted by this section must not be made if he thinks that in connection with any matter in respect of which the disclosure could be made it is more appropriate (a) if any investigation is to be carried out, that it is carried out by an authority in the United Kingdom or in another specified country or territory; (b) if any proceedings are to be brought, that they are brought in a court in the United Kingdom or in another specified country or territory.

(5) The Secretary of State must take such steps as he thinks are appropriate to bring a direction under subsection (4) to the attention of persons likely to be affected by it.

(6) In deciding whether to disclose information under this section a public authority must have regard in particular to the following considerations (a) whether the matter in respect of which the disclosure is sought is sufficiently serious to justify making the disclosure; (b) whether the law of the country or territory to whose authority the disclosure would be made provides appropriate protection against self-incrimination in criminal proceedings; (c) whether the law of that country or territory provides appropriate protection in relation to the storage and disclosure of personal data; (d) whether there are arrangements in place for the provision of mutual assistance as between the United Kingdom and that country or territory in relation to the disclosure of information of the kind to which section 237 applies.

(7) Protection is appropriate if it provides protection in relation to the matter in question which corresponds to that so provided in any part of the United Kingdom.

[...]

(10) Information disclosed under this section (a) may be disclosed subject to the condition that it must not be further disclosed without the agreement of the discloser, and (b) must not otherwise be used by the overseas public authority to which it is disclosed for any purpose other than that for which it is first disclosed.

[...]

23. Disclosure under section 243 is limited by the need for the OFT/CC to have regard to a number of considerations, such as:

- Whether the matter is sufficiently serious
- Whether there are adequate safeguards in the recipient country against the disclosure of personal information.
- Whether there are reciprocal arrangements for the exchange of information

- The need to exclude information that might significantly harm the commercial interests of an undertaking – balanced against the extent to which that information is necessary for the purposes for which disclosure is permitted.

24. Where disclosure is permitted, the OFT/CC must nonetheless have regard to three further considerations when making disclosure (section 244 of the EA02). Broadly speaking these are:

- the need to withhold documents whose disclosure the OFT/CC considers would be contrary to the public interest (so far as practicable);
- the need to withhold commercial information whose disclosure might cause significant harm an undertaking's legitimate business interests and information relating to the private affairs of an individual that might cause significant harm to the individual's interests (so far as practicable); and
- the extent to which the disclosure of information mentioned in (ii) is necessary for the purpose for which the disclosure is being made.

2.2 Examples of information gateways in international agreements

2.2.1. United States / Australia agreement on Mutual Antitrust Enforcement Assistance

25. In 1994, the United States (US) introduced the International Antitrust Enforcement Assistance Act (IAEAA).[13] The IAEAA authorizes the US Department of Justice (DoJ) and the Federal Trade Commission (FTC) to negotiate bilateral "mutual assistance agreements" with foreign antitrust authorities, under which the agencies would make requests to foreign authorities for evidence located abroad, as well as consider requests from foreign authorities for evidence located in the US. Under these agreements, the Attorney General of the United States and the FTC may provide to a foreign antitrust authority antitrust evidence to assist the foreign antitrust authority (1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or (2) in enforcing any of such foreign antitrust laws.

26. The Act requires that mutual assistance agreements include:

- assurances of reciprocal assistance;
- assurances of confidentiality not less than that provided by U.S. law;
- conditions limiting the use of evidence received to the sole purpose of administering/enforcing the antitrust laws;
- pledges to return evidence received; and,
- terms providing for termination of the agreement if confidentiality is breached and subsequently not cured.

27. Mutual assistance agreements entered under the IAEAA are meant to facilitate assistance to, and information exchange with, foreign authorities in civil or criminal investigations. This type of co-operation would ordinarily be prohibited by U.S. law. However, the IAEAA requires reciprocal commitments from the foreign jurisdiction, including equivalent legislation guaranteeing sufficient protection for any confidential information that is shared. Most countries currently lack the legal framework which would permit them to enter into this type of agreement with the US, either because of the dual criminality requirements, or the explicit exclusion of competition matters from these types of agreements. One

[13] 15 U.S.C. 6201-6212, Public Law No. 103-438, 108 Stat. 4597.

deterrent is the requirement to consent to the use of the information that has been shared for non-competition matters; foreign partners may be legally restrained or simply unwilling to do this.

28. So far, only Australia has taken advantage of the IAEAA, entering into a Mutual Antitrust Enforcement Assistance Agreement with the United States in 1999.[14] Article VI of the US-Australia agreement deals with confidentiality, and allow the exchange of information between enforcement agencies provided that the information is kept confidential by the receiving agency under its confidentiality provisions. Other provisions in the agreement regulate the use of the information (Article VII) and the return of antitrust evidence at the end of the investigation or proceeding (Article XI).

Article VI
Confidentiality

A. Except as otherwise provided by this paragraph and Article VII, each Party shall, to the fullest extent possible consistent with that Party's laws, maintain the confidentiality of any request and of any information communicated to it in confidence by the other Party under this Agreement. In particular:

1. The Requesting Party may ask that assistance be provided in a manner that maintains the confidentiality of a request and/or its contents. If a request cannot be executed in that manner, the Requested Party shall so inform the Requesting Party, which shall then determine the extent to which it wishes the request to be executed; and

2. Antitrust evidence obtained pursuant to this Agreement shall be kept confidential by both the Requesting Party and the Requested Party, except as provided in paragraph E of this Article and Article VII.

Each Party shall oppose, to the fullest extent possible consistent with that Party's laws, any application by a third party for disclosure of such confidential information.

B. By entering into this Agreement, each Party confirms that:

1. The confidentiality of antitrust evidence obtained under this Agreement is ensured by its national laws and procedures pertaining to the confidential treatment of such evidence, and that such laws and procedures as are set forth in Annex A to this Agreement are sufficient to provide protection that is adequate to maintain securely the confidentiality of antitrust evidence provided under this Agreement; and

2. The Antitrust Authorities designated herein are themselves subject to the confidentiality restrictions imposed by such laws and procedures.

3. Unauthorized or illegal disclosure or use of information communicated in confidence to a Party pursuant to this Agreement shall be reported immediately to the Central Authority and the Executing Authority of the Party that provided the information; the Central Authorities of both Parties, together with the Executing Authority that provided the information, shall promptly consult on steps to minimize any harm resulting from the disclosure and to ensure that unauthorized or illegal disclosure or use of confidential information does not recur. The Executing Authority that provided the information shall give notice of such unauthorized or illegal disclosure or use to the person, if any, that provided such information to the Executing Authority.

4. Unauthorized or illegal disclosure or use of information communicated in confidence under this Agreement is a ground for termination of the Agreement by the affected Party, in accordance with the procedures set out in Article XIII.C.

5. Nothing in this Agreement shall prevent disclosure, in an action or proceeding brought by an Antitrust Authority of the Requesting Party for a violation of the antitrust laws of the Requesting Party, of antitrust evidence provided hereunder to a defendant or respondent in that action or proceeding, if such disclosure is required by the law of the Requesting Party. The Requesting Party shall notify the Central Authority of the Requested Party and the Executing Authority that provided the information at least ten days in advance of any such proposed disclosure, or, if such notice cannot be given because of a court order, then as promptly as possible.

14 http://www.justice.gov/atr/public/international/docs/usaus7.htm

2.2.2 New Zealand / Australia co-operation agreement

29. Similarly to what IAEAA provides for in the United States, the 1986 Commerce Act in New Zealand enables the New Zealand Competition Commission (NZCC) to share compulsorily acquired information and provide investigative assistance to overseas authorities.[15] These provisions enable the NZCC to provide, on request, 'compulsorily acquired information' to overseas regulators subject to certain safeguards, if a 'relevant cooperation arrangement' has been entered into. To the Secretariat's knowledge, today only one such agreement has been signed between NZCC and the ACCC, but as yet no request for sharing information under the agreement has been made by the agencies.

99-I
Providing compulsorily acquired information and investigative assistance

(1) Following a request by a recognised overseas regulator made in accordance with a co-operation arrangement, the Commission may do either or both of the following:

(a) provide compulsorily acquired information to the recognised overseas regulator:

(b) provide investigative assistance to the recognised overseas regulator.

(2) Before providing compulsorily acquired information or investigative assistance under subsection (1), the Commission must be satisfied that—

(a) providing the information or assistance will, or is likely to, assist the recognised overseas regulator in performing its functions or exercising its powers in relation to competition law; and

(b) the provision of the information or assistance will not be inconsistent with the co-operation arrangement; and

(c) the provision of the information or assistance will not significantly prejudice New Zealand's international trade interests.

(3) If the Commission considers, after consultation with the Ministry of Foreign Affairs and Trade, that a request for compulsorily acquired information or investigative assistance may have significant trade consequences for New Zealand, the Commission must refer the matter to the Minister of Trade.

(4) If a request is referred to the Minister of Trade, the Commission is deemed to be satisfied for the purpose of subsection (2)(c) only if the Minister of Trade states, in writing, that he or she is satisfied that the provision of the information or assistance will not significantly prejudice New Zealand's international trade interests.

(5) In considering whether to provide compulsorily acquired information or investigative assistance in accordance with a co-operation arrangement, the Commission must also consider—

(a) whether complying with the request will substantially affect the Commission's ability to perform its other functions under this Act or any other enactment; and

(b) whether the recognised overseas regulator could more conveniently obtain the information or assistance from another source; and

(c) whether the request would, in the opinion of the Commission, be more appropriately dealt with under the Mutual Assistance in Criminal Matters Act 1992.

30. If the NZCC provides compulsorily acquired information to a recognised overseas regulator, it can impose conditions, including conditions relating to (a) maintaining the confidentiality of information; and (b) the storage or use of, or access to, anything provided; and (c) the copying, returning, or disposal of copies of anything provided; and (d) the payment of costs incurred by the Commission in providing

[15] See Sections 99B - 99P of the Commerce Act 1986 (http://www.legislation.govt.nz/act/public/1986/0005/latest/whole.html#DLM4854102).

anything or in otherwise complying with a request for information or investigative assistance. The transmission by the NZCC to another agency of information that might tend to incriminate the person who provided the information[16] or is privileged[17] is subject to specific conditions and safeguards. The NZCC can always transmit to other agencies information which has not been compulsorily acquired or information for the transmission of which it has obtained the consent of the parties involved.

2.2.3 European Union / Swiss Confederation co-operation agreement

31. The European Union and Swiss Confederation recently signed a so called 'second generation agreement' (the 'Agreement') which allows closer co-operation between the European Commission and the Swiss Competition Commission.[18] The two jurisdictions were seeking ways to overcome the existing limitations preventing them from sharing confidential information. The challenge was to develop a balanced system that was useful and workable for case teams, and at the same time provided adequate safeguards to protect confidential information, personal data and due process rights of the parties involved in the investigations. The EU and Swiss substantive rules are very similar. This means the authorities are more likely to investigate the same practices and to have information that is relevant to the other authority. Both enforcement systems also have comparable sanctions (they impose administrative sanctions on undertakings only and individuals can neither be prosecuted, nor fined), and recognise similar procedural rights of the parties, and rights of legal privilege and non self incrimination.

16 Section 99-J.

17 Section 99-P.

18 Proposal for a Council Decision on the conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, Brussels 1.6.2012, COM(2012) 245 final. The EU has also signed four first generation agreements with the US (1991), Canada (1999), Japan (2003) and South Korea (2009). However, these agreements expressly exclude the exchange of protected or confidential information.

Article VII
Exchange of information

(1) In order to achieve the purpose of this Agreement as set out in Article I, the competition authorities of the Parties may share views and exchange information related to the application of their respective competition laws as provided for in this Article and in Articles VIII, IX and X.

(2) The competition authorities of the Parties may discuss any information, including information obtained by investigative process, as necessary to carry out the cooperation and coordination provided for under this Agreement.

(3) The competition authorities of the Parties may transmit information in their possession to each other when the undertaking which provided the information has given its express consent in writing. When such information contains personal data, this personal data may only be transmitted when the competition authorities of the Parties are investigating the same or related conduct or transaction. Paragraph 3 of Article IX otherwise applies.

(4) In the absence of a consent as referred to in paragraph 3, a competition authority may, upon request, transmit for the use as evidence, information obtained by investigative process that is already in its possession to the other competition authority, subject to the following conditions:

(a) Information obtained by investigative process may only be transmitted where both competition authorities are investigating the same or related conduct or transaction;

(b) the request for such information shall be made in writing and shall include a general description of the subject matter and nature of the investigation or proceedings to which the request relates and the specific legal provisions involved. It shall also identify the undertakings subject to the investigation or procedure whose identity is available at the time of the request; and

(c) the competition authority receiving the request shall determine, in consultation with the requesting competition authority what information in its possession is relevant and may be transmitted.

(5) Neither competition authority is required to discuss or transmit information obtained by investigative process to the other competition authority, in particular if it would be incompatible with its important interests or unduly burdensome.

(6) The competition authorities of the Parties shall not discuss nor transmit to each other information obtained under the Parties' leniency or settlement procedures, unless the undertaking which provided the information has given its express consent in writing.

(7) The competition authorities of the Parties shall not discuss, request or transmit information obtained by investigative process if using such information would be prohibited under the procedural rights and privileges guaranteed under the respective laws of the Parties for their enforcement activities, including the right against self-incrimination and the legal professional privilege.

(8) If a competition authority of one of the Parties becomes aware that any document transmitted under this article contains incorrect information, it shall immediately inform the other competition authority which shall correct it or remove it.

32. Under the Agreement, information exchange will only take place when both sides are investigating the 'same or related conduct or transaction.' The Agreement provides for discussion and transmission of information covered by waivers, and information not covered by waivers subject to three conditions: (i) both competition authorities are investigating the same or related conduct or transaction, (ii) the request is made in writing, identifies the undertakings concerned and includes a general description of the subject matter, nature of investigation and specific legal provisions and (iii) the two competition authorities will consult to determine what information is relevant and may be transmitted.[19]

33. The agreement specifies various limits on the discussion, transmission and use of the information.[20] There can be no exchange of leniency or settlement information without waivers, and there can be no exchange of information protected under legal privilege. The information exchanged can only be used for the application of competition laws by the respective competition authorities to the same, or related, conduct. Information exchanged cannot be used to impose sanctions on individuals.

34. Identification and protection of business secrets is carried out by the receiving competition authority. Both competition authorities will oppose any application of a third party or another authority for disclosure of information received, and will ensure the protection of personal data. However, information may be disclosed (i) to obtain a court order in relation to the enforcement of competition laws, (ii) to undertakings subject to the investigation and against whom the information may be used, (iii) to courts in appeal procedures, and (iv) if it is indispensible for the exercise of the right of access to documents under the laws of either country.[21]

2.3 "Multilateral" information gateways – The ECN

35. An example of a "multilateral" information gateway is the provision of EU Regulation 1/2003[22] (Article 12) allowing competition authorities that belong to the ECN to exchange information (including confidential information) collected by them for the purpose of applying EU competition rules.

36. In the ECN, the European Commission and the EU Member States' competition authorities have parallel competences to apply EU competition rules. Therefore a key element in this network is the ability of all the EU competition authorities to exchange and use as evidence information - including documents, statements and digital information - which has been collected by them for the purpose of applying EU competition rules (alone or in conjunction with national competition law).

19 Article VII (4).

20 Article VIII.

21 Article IX.

22 In Official Journal of the European Communities L1/1 of 4.1.2003.

Article 12
Exchange of information

1. For the purpose of applying Articles 81 *[now 101]* and 82 *[now 102]* of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

- the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,
- the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

37. Article 12(1) of Regulation 1/2003 empowers competition authorities to exchange information *as intelligence* irrespective of the (criminal or administrative) nature of the underlying proceedings and irrespective of whether sanctions are imposed on individuals, provided that the exchange occurs for the purpose of applying the EU antitrust rules. Conversely, the use *in evidence* of information received from another competition authority is subject to certain additional conditions, as laid down in paragraphs 2 and 3 of Article 12.

38. Article 12(2) of Regulation 1/2003 assumes a sufficient degree of equivalence of the rights of defence in the different enforcement systems. Information collected in one system can therefore be used in evidence in another system, provided that the general conditions of Article 12(2) are fulfilled, notably that the information may be used only for the purpose of applying the EU antitrust rules and in respect of the 'subject-matter' for which it was collected.

39. Regulation 1/2003 provides for sanctions only against undertakings, some national laws also provide for sanctions against individuals for a breach of EU competition law. Given the difference in the rights of defence between undertakings and individuals, Article 12(3) of Regulation 1/2003 provides that information collected from undertakings cannot be used in a way which would undermine the higher protection given to individuals. Information exchanged within the ECN can thus only be used *in evidence* to impose sanctions on individuals where:

- the law of the transmitting authority foresees sanctions of a similar kind for infringements of EU competition rules (e.g. financial or custodial), in which case the Regulation presumes that there are sufficiently equivalent standards of rights of defence (the qualification of the sanctions or procedures at national level as administrative or criminal is irrelevant); or
- the types of sanctions which may be imposed on individuals are materially different, but the information has been collected in a way which respects the same standard in the protection of the individual's rights of defence, as provided for under the rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sentences.

40. This last provision means that a Member State authority cannot use information which has been collected by the Commission in its administrative procedure against an individual in a criminal proceeding which could result in a prison sentence.

3. Use of "information gateways" in cross-border enforcement cases

41. The use of the legal provisions described in the previous section does not appear to be frequent.[23] One possible reason why these provisions are rarely used is because their enforcement is quite heavily circumscribed by a number of considerations that the disclosing agency must make in relation to each disclosure. This means that disclosure can be burdensome, in particular if this requires balancing whether the disclosure of confidential information is necessary in the context of another agency's case. The potentially long time required to trigger an exchange under these provisions may in practice prevent their use if the information which is meant to be exchanged would not be received in a useful timeframe for the investigation of the receiving agency.

42. There is very little information in the public domain about the actual use by agencies of information gateways. This makes it difficult to say how often the provisions are used in that agencies are very cautious in providing details given the sensitivity of the matter. The information below was provided by the Australian Competition and Consumer Commission (ACCC) and illustrates two cases where information gateways were used to transmit information to other agencies investigating the same case. In the first example, the ACCC benefitted from the use of a foreign information gateway (in the Marine Hose case) and, in the second, the ACCC was able to rely on its domestic gateway to transmit information to another agency (in the Fine Paper case).

3.1 The use of the UK overseas information gateway in the Marine Hose case

43. The Marine Hose cartel case is an example of successful international co-operation where the use of the gateways provisions played a crucial role in allowing one agency to collect the relevant information and documents collected by another agency.

44. The case related to conduct which occurred between 2001 and 2006 by four suppliers of marine hose to oil and gas producers. Marine hose is rubber hose used at offshore moorings to transfer crude oil and gas products from production facilities to tankers or buoys. The conduct in question involved controlling prices, bid rigging and allocating market shares. The cartel was effectively terminated in early 2007 following the execution of search warrants and arrests by the European Commission, Japan's Fair Trade Commission, the UK Office of Fair Trading (UK OFT) and the United States Department of Justice (US DoJ).

45. Since all the respondents were foreign and operating outside Australia the ACCC's ability to statutorily demand information was limited. The successful outcome for the ACCC in this case would not have been possible without the assistance of both the US DoJ and the UK OFT, who provided information and documents that were critical to the success of Australia's investigation. In 2009, also thanks to the information obtained from foreign agencies, the ACCC successfully obtained an order from the Federal Court of Australia for a total of AUD$8.24 million against companies participating in a cartel regarding the supply of marine hose to oil and gas suppliers.

46. The ACCC enjoyed close cooperation with the UK OFT and US DoJ throughout the ACCC investigation. This cooperation allowed the ACCC to gain a detailed understanding of the information and

[23] The UK's overseas information gateway, for example, was used in the Marine Hose cartel investigation (ACCC v Bridgestone Corporation & Ors [2010] FCA 584).

documents that were held by the UK OFT and US DoJ and ensure that the subsequent requests were targeted and well received.

47. The ACCC made a formal request under the UK's *Enterprise Act 2002*. This was the ACCC's first formal request under the Enterprise Act. However, because of the prior collaboration between the ACCC and UK OFT the ACCC had a detailed understanding of the formal request processes that ensured the formal process was as efficient as possible. Some of the information provided was used in evidence in the ACCC's proceeding (subject to strict conditions as to its use and non-disclosure) and was critical to the success of the ACCC's litigation and the penalty hearing. The kind of information disclosed included email communications and witness statements.

48. Shortly after the court orders were made, a third-party sought access to some of the UK OFT documents that were attached as exhibits to the Agreed Statements of Fact which had been filed for the purpose of the penalty hearing. This third party request for access created a potential conflict between two competing public interests – first, maintaining the confidence of documents provided by an overseas regulator (in this case, the UK OFT) and secondly, the ability of private litigants to access such documents. The ACCC opposed third party access to the OFT documents on the basis that access would be inconsistent with the conditions on which the OFT had given them to the ACCC. The Federal Court accepted this submission and did not give the third party leave to inspect the OFT documents.

3.2 The use of the Australian information gateway in the Fine Paper case

49. In 2006, the ACCC instituted proceedings against a number of local and foreign companies including two Singapore based companies (APRIL Fine Paper and APP Singapore) and a related Indonesian company (Indah Kiat) and Australian company (APRIL International Marketing), for alleged price fixing in the supply of copy paper to Australian customers. The alleged cartel arrangements were made overseas by foreign corporations and given effect to in Australian pricing.

50. In January 2010, the Federal Court ordered two of the companies to pay penalties totalling $4 million for breaching the price fixing provisions of the Act and Competition Code. In February 2011, the Federal Court ordered the other two companies pay penalties of $4.2 million, bringing the total penalties in the matter to $8.2 million. The penalties involved discounts due to cooperation from the four companies.

51. During its investigation, the ACCC cooperated informally with the Korean Fair Trade Commission (KFTC) and US DoJ and formally with the New Zealand Competition Commission (NZCC). As part of the formal cooperation, the ACCC exercised its powers under section 155AAA of the Act[24] to disclose protected information to the NZCC to assist them in their investigation. The ACCC disclosed information to the NZCC by allowing the NZCC to see, but not take copies of, documents, such as email communication, that the ACCC had obtained. The NZCC later obtained a subpoena from the New Zealand High Court to obtain copies of the documents it required from the relevant parties.

[24] Section 155AAA of Australia's *Competition and Consumer Act 2010* protects certain information held by the ACCC. Under section 155AAA, the ACCC Chairman may, in limited circumstances, disclose protected information to other government bodies, including those overseas, where the Chairman is satisfied that, among other things, the information is provided for the purposes of them performing or exercising their functions or powers.