Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on the Competition Bureau (Canada) Information Bulletin on the Communication and Treatment of Information under the Competition Act (Draft for Consultation August 2005)

The Section of Antitrust Law and the Section of International Law (together, the "Sections") of the American Bar Association appreciate the opportunity to present their views on the Canadian Competition Bureau's (the "Bureau") August 2005 draft Information Bulletin on the Communication and Treatment of Information Under the Competition Act ("Information Bulletin"). The views expressed herein are being presented on behalf of the Sections. They have not been approved by the House of Delegates of the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Summary of Comments

It is necessary to balance the general desirability of increased cooperation between and among antitrust enforcement agencies with the need to protect confidential business information. The Sections commend the Bureau for setting out in the Information Bulletin its approach to the treatment of confidential information. The Sections believe, however, that the information Bulletin could go further in delineating more clearly the safeguards the Bureau will seek from foreign authorities as a condition of the exchange of confidential information and greater clarity on issues such as the use of waivers and the protection of confidentiality in the context of the Bureau's immunity program. The Sections also believe that the Information Bulletin could go further in providing protection against the disclosure of confidential information to potential third party civil litigants. The Sections also note that there is some controversy whether section 29 of the Competition Act (the "Act") (the Act's key confidentiality provision) should be interpreted as allowing the Bureau to disclose confidential information to foreign enforcement agencies for the purposes of the administration or enforcement of the Act

Comments

The membership of the Sections includes over 22,000 lawyers from over 45 countries, although most are based in the United States. The Sections have substantial familiarity with the issues surrounding the collection, protection and use of confidential information in the competition law context. The Sections hope and intend that these comments, from the perspective of the Sections and grounded in the historical development of the U.S. antitrust law practice regarding similar issues, will assist the Competition Bureau in its development of guidelines in respect of the communication and treatment of information under the Act. In addition, these comments also draw upon the experience of many members of the Sections with competition law and practice experience in Europe, and elsewhere, including Canada.

The Sections have considered on many occasions the complex issues surrounding the protection and use of confidential information in the hands of competition law enforcement agencies and the exchange of such information between and

among enforcement agencies, principally in the merger and cartel enforcement contexts. Two underlying principles have consistently informed the Sections' consideration of these issues in the past. First, the Sections recognize that the protection of a private organization's right to confidentiality for its sensitive business information is of critical importance. Second, the Sections have long supported in principle the need for competition law enforcement agencies to exchange information in aid of effective enforcement efforts in an increasingly international economic environment. For example, in 1994, the Section of Antitrust Law's NAFTA Task Force observed that, " [t]he most significant obstacle to effective cooperation and coordination among competition authorities is the restriction on information sharing imposed by statutory confidentiality requirements."[1]

At the same time, while acknowledging the benefits of cross-border information exchanges, the Section have also long emphasized that any sharing of information must be accompanied by appropriate safeguards to protect the confidentiality of shared information. The Task Force of the Antitrust and International Sections on the International Antitrust Enforcement Assistance Act ("IAEAA"), observed in 1994 that " [a]dequate safeguards to protect the confidentiality of sensitive business information are of paramount concern … Th[e] overriding need for confidentiality in any international exchange program cannot be overstated."[2]

The Sections support the Bureau's efforts in setting out its policy with regard to the treatment of information which it obtains in the course of the administration and enforcement of the Act and its interpretation of the Act's key confidentiality provision, Section 29. The Sections further recognize as helpful the Bureau's statement that:

> Confidentiality is fundamental to the Bureau's ability to administer and enforce the Act and to obtain information from a number of different sources including complainants, industry participants, suppliers and customers. The Bureau recognizes that the proper control of information, regardless of type, medium or location is essential to its integrity as an efficient and respected law enforcement agency. The Bureau ensures the proper handling of information through stringent security policies and procedures.

The Sections recognize that the Bureau has a well deserved reputation for protection of confidential information and has no reason to believe that there are any deficiencies in the Bureau's policies and procedures designed to protect against the unintended or inadvertent disclosure of confidential information. Accordingly, the focus of the Sections' comments (like the Information Bulletin itself) is on those circumstances in which the Bureau will release confidential information to others outside the Bureau, and, of particular interest to the Sections, to foreign competition law enforcement agencies and possible third party litigants.

The Section of Antitrust Law most recently commented on issues of this kind in its February 2004 submission to the OECD's Competition Committee Working Party 3 in respect of the latter's consideration of the principles regarding

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[1] American Bar Association Section of Antitrust Law, NAFTA Task Force Report (July 18, 1994).
[2] Report of the Section of Antitrust Law and the Section of International Law and Practice of the American Bar Association on the Proposed International Antitrust Enforcement Assistance Act (August 1, 1994), at 19.

information exchange in international cartel investigations.[3] In that submission, the Section of Antitrust Law summarized its position on the exchange of information between and among competition law enforcement agencies in the following terms:

> Competition law enforcement authorities must be free to exchange certain types of information informally. However, the exchange of information obtained from private sources through compulsory process should be governed by formal instruments, treaties, intergovernmental agreements or domestic statutes, that contain clear minimum requirements that offer reasonable protections to the source of the information, including confidentiality protections, respect for privileges, limitations on access and downstream use and appropriate notice. Finally, any information exchange regime also must contain provisions that address the consequences of unauthorized disclosure of non-public information.[4]

The Sections' comments herein consider the Information Bulletin in light of these standards.

1. Section 29 of Competition Act

The Sections' view is that the authority to exchange information with a foreign enforcement agency should (except in those circumstances, described below, where informal exchange may be appropriate) derive from express authority provided in a formal instrument, treaty, intergovernmental agreement or other domestic statute. The Sections understand that it has long been the position of the Bureau that section 29 of the Act (in particular, the provision that permits communication "for the purposes of the administration or enforcement of this Act") authorizes the Bureau to disclose information to foreign enforcement agencies for the purposes of advancing a Bureau investigation. The Sections also understand that there is some controversy in Canada whether the language of section 29 of the Act properly supports such an interpretation.[5]

2. Information Sharing with Foreign Authorities

The Information Bulletin provides little guidance with respect to the circumstances in which information will be communicated to and from foreign authorities and the safeguards applicable to any such communication. The Information Bulletin provides (in section 4.2.1) that "[a]ny information communicated to a foreign authority under the provisions of a bilateral or multilateral cooperation instrument will be subject to specific confidentiality safeguards contained in that instrument." The Information Bulletin further provides that where there is no cooperation agreement, the Bureau will consider communicating information "only after it is fully satisfied of the assurances provided by the

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[3] Submission to the OECD Competition Committee Working Party 3 Concerning Information Exchange in International Cartel Investigation, American Bar Association Section of Antitrust Law (February, 2004). In September 2005, the OECD Competition Committee released its Best Practices for the Formal Exchange of Information Between Competition Authorities in Hardcore Cartel Investigations.

[4] Submission to the OECD Competition Committee Working Party 3 Concerning Information Exchange in International Cartel Investigation, American Bar Association Section of Antitrust Law, *supra* note 3, at p.2.

[5] *See* Commentary on the Draft Information Bulletin (July 22, 1994) of the Director of Investigation and Research Respecting Confidentiality of Information Under the Competition Act, December 1994, National Competition Law Section of the Canadian Bar Association (December, 1994).

foreign authority with respect to the confidentiality and use of the communicated information." The Information Bulletin, however, provides no detail or examples of the kinds of assurances that the Bureau will require as a condition for the communication of information to a foreign agency.

The Sections note that the Information Bulletin draws no distinction between the informal and formal exchange of information. The Section of Antitrust Law has previously recognized that the informal exchange of information between foreign agencies may be appropriate in certain circumstances. Informal information exchange occurs where the exchange does not take place pursuant to a formal instrument between authorities or domestic law providing for such exchange and the information has not been obtained from private sources through compulsory process. Such informal exchange may include (i) exchange of public information; (ii) exchange of information regarding the nature, status, theories and strategy of parallel investigations; and (iii) the exchange of information obtained from a covert operation or from an amnesty applicant, with its permission. The Sections believe that competition law enforcement authorities should be free to engage in such informal information exchange and that this is a subject that could be usefully addressed in the Information Bulletin.

The formal exchange of information deals with information obtained from private sources through compulsory process and typically takes place pursuant to the specific requirements of a formal instrument between the authorities or domestic law providing for such exchanges. The Sections' view is that the Information Bulletin should clearly set out the Bureau's minimum requirements with respect to (i) the authority of the requesting and requested jurisdictions to exchange information, (ii) the protection of the confidentiality of the exchanged information, (iii) limitations on access to and use of the exchanged information, (iv) protection of legal privileges applicable sources of information, and (v) notice to the sources of the information. The Sections' further comments and recommendations in each of these areas are set out below.

i) Limitations on Authority to Exchange Information

The Information Bulletin should provide that:

- the requesting jurisdiction be required to confirm that the information is required in connection with an investigation under its own domestic competition laws and explain how the request concerns that investigation.

- the Bureau may decline a request, and indeed, will be required to do so, if it considers that compliance with the request would not be in Canada's public interest.

ii) Confidentiality

The Information Bulletin should provide that the requesting jurisdiction will be required to:

- identify its domestic confidentiality laws so that the Bureau can assess the adequacy of the requesting jurisdiction's ability to maintain the confidence of the exchanged information;

- confirm that it will maintain the confidentiality of the information provided, and will oppose third party applications for disclosure of exchanged information;

- return to the Bureau, at the conclusion of the proceedings for which information was provided, all information that has not properly entered the public domain;

- confirm that it will take all necessary steps to minimize the unauthorized disclosure of the exchanged information, minimize the harm resulting from any unauthorized disclosure, ensure that such unauthorized disclosure does not recur and confirm that it will provide prompt notice to the source of the information in the event that there has been unauthorized disclosure of its confidential business information;

- specify the consequences and sanctions in the event that there is any unauthorized disclosure of the information;

- confirm that a private party whose information is disclosed without authorization will be notified of the unauthorized disclosure;

- confirm that unauthorized disclosure should be grounds for termination of the agreement or treaty or for refusal to engage in further exchanges of confidential information;

iii) Limitations on Access and Use

The Information Bulletin should provide that the requesting jurisdiction will be required to confirm that:

- absent consent of the requested jurisdiction, the exchanged information will be used or disclosed solely for purposes of enforcing the competition laws of the requesting jurisdiction;

- absent consent of the requested jurisdiction, the exchanged information will be used or disclosed solely in connection with the matter identified in the request;

- it will seek prior approval and obtain prior consent from the requested jurisdiction for use or disclosure of the exchanged information other than for the enforcement of the competition law matter identified in its request,

and that such other use or disclosure is essential to a significant public law enforcement objective of the requesting jurisdiction;

- the exchanged information may be used or disclosed for a purpose other than competition law enforcement solely in connection with a matter where the requested jurisdiction has given its consent to such use.

iv) Protection of Legal Privilege

The protection of legal privilege is a matter of key concern to the private sector. The issue of legal privilege takes on added significance in the context of possible international information exchange, because different jurisdictions have different rules with respect to the recognition of legal privilege and other protections. For example, while both the U.S. and Canada recognize a legal privilege attaching to the in-house counsel communication of legal advice, such protection may not be recognized in Europe or elsewhere.

The Information Bulletin makes some reference to the recognition of privilege, but does not clearly set out the Bureau's policy with respect to the protection of privilege generally and in the context of international information exchange, in particular. The Information Bulletin should specify that the Bureau will apply Canadian rules governing privilege and protected information in responding to a request from a foreign agency, and that in requesting information, the Bureau will formulate its request in terms that do not call for information that would be privileged under Canadian rules.

The Section of Antitrust Law has previously noted that the requesting jurisdiction cannot eliminate privilege issues by the language of its request alone. The Sections therefore encourage requesting jurisdictions to explain in their requests their rules on privilege, particularly the attorney-client and attorney work product protections and ask the requested jurisdiction to honor those rules to the greatest extent possible, in responding to the request. The Sections also encourage agencies to establish appropriate screening mechanisms to guard against disclosure to the investigators of privileged information that may be contained in information that is received from a requested jurisdiction and to ensure, to the greatest extent possible, that no use will be made of any information provided by a requested jurisdiction that may be subject to the attorney-client or attorney work product protections recognized by the requesting jurisdiction.

v) Notice

The Information Bulletin is silent on the important issue of whether and under what circumstances notice of a proposed disclosure of confidential information should be provided to the persons who provided that information. This issue was looked at quite extensively in the context of the development of the OECD's recently adopted *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations*. In its February 2004 recommendations to the OECD, the Section of Antitrust Law concluded that prior notice of a proposed exchange should not be required, provided that the information exchange is made pursuant to a formal instrument containing the

downstream confidentiality protections and limitations on access and use outlined above. The Section of Antitrust Law further noted, however, that in those circumstances, competition law enforcement authorities should be required to give after-the-fact notice to the source of the information at such time as such notice would not violate a court order, a domestic statute, a treaty, or an international agreement or jeopardize the integrity of an investigation in either the requesting or requested jurisdiction.

The Sections emphasize, however, that the latter recommendations were made in the context of the investigation of international cartels. The Section of Antitrust Law has previously drawn a distinction between the exchange of information between competition authorities in the context of criminal and non-criminal investigations, and, in particular, in cartel and merger investigations, the two most familiar circumstances in which information is likely to be exchanged. It is well recognized that private parties will often view the exchange of information in the merger context very differently from that in the cartel context. In the merger context, private parties often have an interest in voluntarily facilitating the exchange of information to expedite the multi-jurisdictional review of a business transaction. In contrast with cartel investigations, merger review is unlikely to raise concerns about the protection of due process, exposure to potential criminal sanctions and third party civil damages claims.

The Sections note that the Information Bulletin makes no distinction with respect to the exchange of information with foreign agencies on the basis of whether the investigation is in respect of a criminal or non-criminal matter. Not only may private parties view the issue of exchange differently in these differing contexts, but the agencies themselves may take a different approach in areas such as notice, depending on whether the proposed exchange is in respect of a criminal or non-criminal matter. The Section of Antitrust Law has previously expressed the view that the question of the entitlement to, or desirability of, prior notice of a proposed information exchange may be approached differently in the context of criminal and non-criminal investigations. In its August, 2000 Submission to the Public Policy Forum on the Proposed Amendments to the Competition Act, the Section of Antitrust Law noted that in civil matters, prior notification is less likely to jeopardize an investigation and that therefore, "there may be less compelling reasons for refusing to provide notice to parties before disclosing confidential information to a foreign authority obtained in connection with a civil matter…."[6] This distinction in the Bureau's own approach is apparent, for example, in the Bureau's use of waivers in the merger context. The Bureau may wish to address in the Information Bulletin any differences in its approach to information exchange in the context of criminal and non-criminal investigations, with regard to the issue of the provision of notice, or otherwise.

vi) Waivers

As indicated above, the Sections are aware that the Bureau will typically request a waiver from the parties before sharing information with a foreign agency in the context of a merger investigation. The Sections commend the

[6] Submission to the Public Policy Forum on the Proposed Amendments to the Competition Act, American Bar Association Section of Antirust Law (August, 2000), at p. 6.

Bureau's use of waivers in this context, but note that the Information Bulletin is silent on the use of waivers. The use of waivers is generally appropriate in any case where the consent of a party to the release of its information would not jeopardize the investigation to which the information relates. It would be helpful if the Information Bulletin could confirm the Bureau's practice in this regard, and also indicate any circumstances in which the Bureau would depart from this practice as well as other contexts in which the Bureau will obtain a waiver from a private party before sharing information with a foreign agency.

vii) Immunity

It is well known that immunity and leniency programs in numerous jurisdictions have greatly facilitated the enforcement efforts against international cartels. The successful operation of such programs, however, depends in large measure on the assurance to immunity and leniency applicants that their identities and the information they provide in support of their applications will not be disclosed to other enforcement agencies without consent, or to private litigants. The Information Bulletin should more clearly state the protection that will be afforded to immunity applicants under the Bureau's Immunity Program and the circumstances under which information may be disclosed. The Sections note, for example, that the Bureau's recently released Immunity Program Responses to Frequently Asked Questions includes the statement, "The Bureau will not share the identity of an immunity applicant, or the information provided, with other enforcement agencies or a foreign agency, unless the immunity applicant provides a waiver giving the Bureau permission to do so." This same statement should be included in the Information Bulletin, both as a clearer statement of the Bureau's policy in this regard and in the interests of consistency.

3. Disclosure to Third Party Litigants

The disclosure of information to third party litigants (particularly to US class action plaintiffs in treble damages actions) is a matter of key concern to the private sector. The Sections welcome the Bureau's statement in the Information Bulletin that "the Bureau will not voluntarily provide information to persons contemplating or initiating a private action" (at p. 16). The Information Bulletin further provides that the "Bureau will generally oppose subpoenas for production of documents if compliance with them would potentially impede an examination or inquiry, or otherwise undermine the administration or enforcement of the Act." The Sections believe that this approach does not provide sufficient protection to the privacy interests of the owners of information in the Bureau's possession and may create a chilling effect on the willingness of parties to voluntarily provide information to the Bureau. In the Sections' view the Bureau should adopt as policy that it will oppose all requests for disclosure of confidential information from third party litigants and will only release such information when required by final court order to do so, and after having given the owner of the information notice of the third party request and an opportunity to intervene.

Conclusion

The Sections appreciate the opportunity to submit these comments and hope that they are helpful to the Bureau as it finalizes its Information Bulletin.