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9<sup>th</sup> ASCOLA Conference Warsaw 2014 on  
PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS

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CENTRE FOR ANTITRUST AND REGULATORY STUDIES, UNIVERSITY OF WARSAW  
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# **When can competition agencies share confidential information with other governmental entities and when should they do so?**

by

Piotr Semeniuk<sup>1</sup>

## **1. Introduction**

This paper discusses various contexts in which antitrust enforcers can disclose confidential information to other public bodies. Generally, confidential information in the context of antitrust enforcement (and not only there) refers to business secrets and, rarely, to other types of confidential information. For example, under the competition law regime of the European Union, confidential information falls into following two categories: business secrets and other confidential information. European courts have generally defined "business secrets" as information "of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter's interest<sup>2</sup>". The category "other confidential information" includes information other than business secrets, which may be considered as confidential, insofar as its disclosure would significantly harm a person or undertaking (for example, information provided by third parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers).

The paper is divided into two parts. The first part discusses the most common patterns and examples in which competition agencies can share confidential information with other governmental bodies to facilitate the exercise of the competition agency's own investigative function. The second part discusses the most common patterns and examples in which competition agencies disclose confidential information to other authorities in order to assist these authorities in carrying out their statutory functions. At the end the paper offers some conclusions and recommendations.

This paper builds upon a Report that was presented at the International Competition Network ("ICN") Annual Conference on April 23 – 25, 2014 in Marrakech<sup>3</sup>. The author of the paper was part of the drafting team of the above Report on behalf of the European

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<sup>2</sup> Judgment of the Court of First Instance from 18 September 1996, T-353/94 (*Postbank NV v. Commission*).

<sup>3</sup> *ICN AGENCY EFFECTIVENESS PROJECT ON INVESTIGATIVE PROCESS*, Competition Agency Confidentiality Practices, April 2014. Document available at: [http://www.icnmarrakech2014.ma/pdf/ICN\\_Confidentiality\\_Practices\\_Report.pdf](http://www.icnmarrakech2014.ma/pdf/ICN_Confidentiality_Practices_Report.pdf).

Commission. Yet, the paper, and even more so its conclusion, neither represent the views of the ICN, nor the position of the European Commission.

## **2. Disclosure of confidential information to facilitate the exercise of the competition agency's own investigative function**

It seems that the majority of competition agencies can disclose confidential information to other governmental agencies for the purpose of facilitating the competition agency's investigative functions. In this context disclosure can occur to: police (Chile), prosecutors (criminal prosecutor in Denmark, state prosecutors in Germany, Public Prosecutor Office in Japan), law enforcement agencies assisting the competition authority in its investigations (Sweden, Latvia, European Union –the European Commission can disclose confidential information to law enforcement authorities of the EU Member States during inspections), or, generally, to another government agency (UK). Interestingly, under the Japanese law, the Japanese Fair Trade Commission has to deliver material (containing confidential information) to the prosecutor's office after it was retained or seized. In the United Kingdom, under one of the statutory gateways, the authorities can disclose confidential information to facilitate their functions.

The right to share confidential information in context of the competition agency's own investigative function stems either explicitly from the statute or from inter-agency agreements (i.e. in Mexico).

Most agencies have discretion whether or not to make the discussed disclosure. Usually the disclosure to governmental bodies assisting the competition agency in carrying out its investigatory functions can be made pursuant to legal standards which stress the interests of the investigation (in Chile disclosure can be made without compromising investigation and in Latvia the disclosure must be objectively necessary for the investigation).

Minority of agencies provide a notice whenever they make the above type of disclosure. Agencies seem to feel that if they provided a notice, this could hamper the effectiveness of investigation. Some jurisdictions provide a general *ex ante* notice which informs the parties that the gathered information can be shared with other governmental agencies.

Even among agencies which foresee a right to seek a review of the discussed disclosure, most agencies limit this right to rather exceptional circumstances (i.e. in Australia, only if the review would be required by natural justice).

### **3. Disclosure in order to assist other authorities in carrying out their statutory functions**

Among agencies which can share confidential information with other authorities for the purposes of carrying out these authorities' functions, most agencies do so in the context of crime prevention. In some countries officials working for a competition agency have an explicit duty to report crimes (e.g. European Union).

Most agencies can disclose confidential information only to criminal prosecutors (e.g. Denmark, Sweden, Chile) and other law enforcement bodies. In some agencies the confidential information can be disclosed to investigative authorities only if these authorities have a permission of the prosecutor.

In Japan when the finding of competition law a violation gives rise to criminal charges, the Japanese Fair Trade Commission and the prosecutorial office will hold together a special Conference of Criminal Accusation.

In some agencies the disclosure of confidential information to other governmental agencies (including prosecutors and law enforcement agencies) is possible only if the competition agency is asked to do so by the court (Brazil, Jamaica). In some countries (e.g. Poland, Hungary and Finland) confidential information can be shared with sectorial regulators such as telecommunication, energy and postal regulatory agencies (yet in Poland disclosure to the sectorial regulators does not pertain to information that is confidential under "international commitments" – most notably information transferred under the European Competition Network framework and to leniency information). In the United States confidential information might be shared with federal or state law enforcement agencies if such agencies certify that the information will be maintained in confidence and used only for law enforcement purposes. In the United Kingdom disclosure is permitted (but not required) under various "statutory gateways" (such as "disclosure to facilitate functions or another UK public authority's", "disclosure to overseas public authorities" and "disclosure for the purpose of bringing criminal or civil proceedings").

Some agencies seem to allow almost unlimited sharing of confidential information with almost every other governmental body (e.g. Germany, Russia). In Germany such a possibility stems from the German constitution, according to which all governmental agencies shall render assistance to one another. Some agencies seem to feel that government as a whole is responsible for keeping the information confidential.

In some jurisdictions sharing of confidential information with another governmental body for purposes of carrying out this body's functions is, in certain circumstances, a legal obligation of a competition agency, hence the competition agency has no discretion in that regard (e.g. it seems to be the case in Poland). In other jurisdictions, competition agencies (e.g. Australia, Chile) possess certain degree of discretion (for example, the Chilean Competition Authority – Fiscalía Nacional Económica – has some discretion: the authority can deny the request to share confidential information with the prosecutor, in such a case the court ultimately decides the matter). The Finnish Competition Agency possesses discretion only regarding the disclosure to certain governmental bodies (e.g. it does not have discretion with regard to disclosure of confidential information to tax authorities). The Italian Competition Authority possesses discretion with regard to any type of disclosure except when the information relates to a commission of a crime. In the United Kingdom, the competition authorities can decline to produce the information if it is more efficient for [another] agency to request information itself.

Some agencies only formally check the validity of other governmental agencies' disclosure requests.

Most agencies don't provide a notice before they share confidential information with other governmental bodies.

In minority of jurisdictions it seems that, in circumstances where notice is provided, the submitter of confidential information has a right to seek a judicial review in the discussed circumstances. However, it seems that such a right is rarely exercised.

Among jurisdictions in which there exist formal agreements between a competition authority and other governmental entities regarding sharing of confidential information, most such agreements are concluded between the competition authority and various prosecutorial bodies (e.g. the Head of National Security Agency in Poland, tax police in Italy). In two countries such agreements have been concluded with several sector regulators (with Financial Supervisory Authority, Energy Authority and Communications Regulatory Authority). In Australia the relevant agreements were entered into by the competition authority with wide variety of Australian government bodies. The UK CMA is a member of the "UK Competition Network" with a number of sectorial regulators within which confidential information might be shared.

Among competition agencies who did not enter into special agreements with other governmental bodies but who nevertheless allow the disclosure of confidential information to other public agencies, the procedure of such a disclosure is governed by general provisions of

law, internal regulations (e.g. according to the Attorney's General procedure in Israel), or according to an administrative practice.

#### **4. Conclusions**

Surprisingly, more often competition agencies seem to be able to disclose confidential information to other governmental entities to facilitate the exercise of these entities' function rather than the agency's own function. The most notable example of the first type of disclosure relates to assisting other governmental bodies in prosecuting crimes. Except from the crime prevention related disclosure, it is often not clear when, to which entities, and in which circumstances confidential information can be disclosed. The reasons for the lack of clear rules may be that some jurisdictions tend to think that the government is responsible as a whole for guaranteeing the confidential status of the information. Such approach should be rethought. Providing confidential information to an competition agency is justified given the specificity and the compelling need for antitrust enforcement. Sharing such information with other governmental bodies can give rise to a further adverse consequences for the submitters of the information, consequences that are not necessarily justified by objectives of antitrust policy. Especially, as opposed to a competition authority, other public institutions might not have in place relevant safeguards that will prevent leaking the information outside of the governmental structure.