

Waivers of Confidentiality in Cartel Investigations

– Explanatory Note

I. Introduction

Given the increasingly international nature of cartels, closer cooperation among competition agencies in cartel cases is growing in importance¹. At the same time, the expansion of leniency world-wide during the past few years has proven to be a cornerstone for effective cartel detection. In order to efficiently destabilise multi-jurisdictional cartels, information exchange among the involved competition agencies is paramount. Where a company has applied for leniency with at least two jurisdictions, a waiver of confidentiality allows the concerned competition agencies to share information and thus conduct investigations in an efficient and expeditious manner.

In this context, Sub Group 1 of the ICN Cartel Working Group has undertaken a project concerning the use of waivers of confidentiality in cartel investigations and has produced the present Explanatory Note that complements the respective Waiver Templates (*see Annex*).² Nevertheless, the relevance, and therefore likelihood of adoption by jurisdictions, of the Waiver Templates outlined in this Explanatory Note will be influenced by a jurisdiction's competition policy and legal system. In some cases, certain practices will not be appropriate due to the legal, legislative or political regimes in which those competition agencies operate.

The present Explanatory Note and Waiver Templates will be supplemented and revised in light of further experience.

A. Definition

A waiver of confidentiality in a cartel investigation is consent from a leniency applicant³ to waive, within the limits set out in the consent, the confidentiality protections afforded to it by the applicable confidentiality rules in the jurisdiction of the investigating competition agency.

In multi-jurisdictional cartel investigations, a waiver of confidentiality enables a competition agency to share a variety of confidential information submitted by a leniency applicant in the context of a cartel investigation with another competition agency dealing with the same cartel.

¹ See ICN Anti-Cartel Enforcement Manual Chapter on International Cooperation and Information Sharing (2013), available at: http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/icn_chapter_on_international_cooperation_and_information_sharing.pdf.

² In some jurisdictions, leniency applicants typically prefer to orally communicate the granting of a waiver to the competition agency and orally receive confirmation of the waiver from the competition agency.

³ Any reference in this Explanatory Note to a "leniency applicant" shall mean any applicant under any given leniency programme, irrespective of whether the applicant seeks amnesty, immunity from penalties or a reduction of such penalties.

In jurisdictions where the waivers are granted in writing, the competition agencies with which this confidential information can be shared are listed in the waiver.

When dealing with a leniency application, when applicable, it is good practice that competition agencies encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred and encourage a leniency applicant to provide a waiver (whether written or oral) that allows a competition agency to discuss the application with relevant counterpart agencies and cooperate on parallel investigative processes.⁴ Providing a waiver, whether written or oral, is a matter of trust between the competition agency and the leniency applicant.

In the absence of a waiver, competition agencies are obviously not precluded from sharing publicly available information and competition agency “non-public” information or from cooperating pursuant to formal and informal bilateral and multilateral arrangements within the limits of the jurisdiction of the respective competition agency (*see* Section III).

B. Purpose

Waivers of confidentiality, whether written or oral, allow information sharing between competition agencies and thus enable more effective cooperation from both the competition agencies' and leniency applicant's perspective, leading to better coordination of investigatory measures, expediting the review and decision-making process, whilst minimising the risks of conflicting outcomes.

The Waiver Templates may reduce the time and resources competition agencies and leniency applicants will need to invest in negotiating them. The Waiver Templates and this Explanatory Note will dispense lengthy explanations by counsel to leniency applicants on the scope of the waiver and the use of the provided information in question.

The Waiver Templates are intended to address standard situations. However, specific circumstances may require amendments as to whether specifically identified information may be shared pursuant to the waiver. This may be the case, for instance, when there is a significant asymmetry between competition agencies in terms of protection of individuals. In such cases, close cooperation between the leniency applicant and the concerned competition agencies is recommended in order to make such efficient and effective exchange of information possible, both in terms of timing and scope. For example, the leniency applicant may seek to “carve out,” as not covered by the waiver, information which the leniency applicants considers could be used as evidence for the prosecution of specific individuals, unless the receiving competition agency has provided non-prosecution assurance for these individuals.

II. Terms and use of confidentiality waivers

A. Distinction between procedural and full waivers

⁴ *See* ICN Anti-Cartel Enforcement Manual Chapter on Drafting and Implementing and Effective Leniency Policy (2014).

Procedural waivers allow competition agencies to coordinate on the procedural aspects of a cartel investigation. Full waivers allow competition agencies, in addition, to exchange substantive information on the submissions made by a leniency applicant. Some jurisdictions, however, do not make the distinction between full and procedural waivers, whether written or oral.

1. General principles

The following general principles apply for both procedural and full waivers:

- Leniency applicants may submit waivers either orally or in writing.
- A waiver of confidentiality is voluntary and it is the leniency applicant's decision to provide a waiver. Recent experience has shown that leniency applicants involved in multi-jurisdictional cartel investigations have, upon request by the competition agency, or even on their own initiative, routinely granted waivers. Some competition agencies may, however, strongly encourage or even require that a leniency applicant provides a waiver. A waiver is provided very soon after making the application to avoid unreasonable delays in the investigation.
- Unless specified otherwise, the waivers of confidentiality will have unlimited duration. However, the waivers are linked to a specific cartel investigation and can only be used for the purpose of that investigation and for no other purpose.
- The waivers of confidentiality do not constitute a general waiver with respect to third parties of the confidentiality treatment afforded to the information submitted by the leniency applicant, but apply only with respect to the exchange of confidential information between the competition agencies specified in the waiver.
- The waivers do not apply to the exchange of confidential information that, according to the applicable rules in the jurisdiction of the receiving competition agency, is considered "privileged information," such as information subject to legal professional privilege. It is up to the leniency applicant to identify which information it considers to be privileged under the rules of the receiving competition agency and therefore should not be exchanged pursuant to the waiver. If privileged information is inadvertently disclosed, the receiving competition agency will return, sequester or destroy the privileged information in accordance with their rules.
- Typically the information disclosed under a waiver will be granted in the receiving jurisdiction the protection which is provided to any confidential information received directly by the receiving competition agency. As different jurisdictions may have different rules regarding the protection of confidential information, where appropriate and necessary, and in consultation with the respective competition agencies, leniency applicants may insert specific language in the waiver referring to the rules in question.
- Exchange of information between competition agencies pursuant to the waiver of confidentiality will take place in the form of oral or written communication.
- Information obtained by competition agencies through the exchange of information pursuant to the waiver of confidentiality normally does not adversely impact the leniency applicant's cooperation credit evaluation/leniency status. However, it is the responsibility of the leniency applicant to ensure that information and evidence which it considers important for its

leniency application is provided in a timely manner to the receiving competition agency, prior to any disclosure by another competition agency pursuant to a waiver granted.

- The Waiver Templates do not preclude the exchange of documents between competition agencies. However, in practice it is most exceptional.

2. Scope and usage of procedural and full waivers

Leniency applicants may opt to submit a procedural and/or a full waiver at the outset.

a) Procedural waiver

The purpose of the Procedural Waiver Template is the coordination of key investigative steps between competition agencies (searches/raids/inspections/requests for information/document production orders/interviews). A procedural waiver is limited in scope and does not allow for a substantive discussion between the listed competition agencies.⁵

In general, procedural waivers are requested by the competition agency at an early stage of the investigation. Given that the investigation is likely still covert, leniency applicants should act quickly upon any request for a procedural waiver from a competition agency and should provide such waivers in a timely and appropriate manner.

The procedural waiver covers issues such as the identity of the leniency applicant and of the targets of the cartel investigation in a specific sector or the likely location of the main evidence.

A procedural waiver is not required in order for the competition agencies to discuss dates and time of envisaged inspections.

b) Full waiver

As set forth in the Full Waiver Template, a full waiver covers the same elements as a procedural waiver, but, in addition, allows for exchanges of information between competition agencies on the substance of the leniency applicant's submission. Full waivers allow for the discussion between competition agencies of the content of information, evidence, records or statements provided by the leniency applicant.

A full waiver will cover not only the information provided in the initial leniency application, but also the information provided by the leniency applicant on an on-going basis.

⁵ As noted above, some jurisdictions do not make the distinction between full and procedural waivers, thus the sharing of additional information with other competition agencies pursuant to a waiver provided by a leniency applicant includes substantive discussions between competition agencies.

III. Information exchange in the absence of a waiver⁶

While providing a procedural or full waiver, either oral or written, presents competition agencies with the above-mentioned advantages, it is by no means the only legal basis for exchanging and sharing information, either confidential or non-confidential, between competition agencies.

A. Exchange of confidential information

Competition legislation may serve as a legal basis for cooperation and information sharing with foreign competition agencies in many jurisdictions. There may be provisions in national legislation, which allow and encourage the exchange of confidential information with foreign competition agencies. Furthermore, bilateral and multilateral agreements may provide grounds for the exchange of confidential information (*i.e.* State-to-State Agreements, Agency-to-Agency cooperation agreements, Mutual Legal Assistance Treaties, Free Trade Agreements, Economic Partnership Agreements, Regional Trade Agreements, Memoranda of Understanding, and domestic provisions). Regional networks, such as the European Competition Network, may also allow for exchange of confidential information.

B. Exchange of non-confidential information

In general, the following information can typically be exchanged between competition agencies without the presence of a waiver of confidentiality from a leniency applicant:

- Competition agency non-public information: opening and/or timing of an investigation, leads and background information, competitive effects, remedies, and internal competition agency's analysis of the case;
- General information: best practices, discussions on common cases, precedents, legal opinions, etc.; and
- Publicly available information: newspapers, figures provided by companies to the public, television, internet, and other media.

⁶ A detailed account of the information competition agencies can exchange in the absence of a waiver can be found in the Anti-Cartel Enforcement Manual Chapter on International Cooperation and Information Sharing (2013), available at: http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/icn_chapter_on_international_cooperation_and_information_sharing.pdf.

Procedural waiver of confidentiality in cartel investigations

[*Name of the applicant*] agrees to a waiver of the confidentiality rules of [Agency A] to [orally] disclose [Applicant's Name] identity, sector of investigation and discuss all procedural aspects with [Agency B] regarding its investigation of [number of file/short description of market/industry].

[For AGENCIES WHERE EXCHANGE OF DOCUMENTS IS PROHIBITED – For the avoidance of doubt, this waiver excludes the transmission by [Agency A] of any hard copy or electronic version of documents or submissions made by [*name of applicant*] including any quotations or extracts of them].

[Agency A] shall make [Agency B] fully aware of the confidentiality of the information disclosed by virtue of this waiver. [Agency A] shall treat information received from [Agency B] in accordance with its own applicable confidentiality rules.

The present waiver does not alter [Agency A] obligation to protect the confidentiality of information submitted by the applicant with respect to parties other than [Agency B] in accordance with the applicable legislation.

Full waiver of confidentiality in cartel investigations

[*Name of the applicant*] agrees to a waiver of the confidentiality rules of [Agency A] to [orally] discuss the submission made by [*name of the applicant*] to [Agency A] with [Agency B] regarding its investigation of [number of file/short description of market/industry].

[For AGENCIES WHERE EXCHANGE OF DOCUMENTS IS PROHIBITED – For the avoidance of doubt, this waiver excludes the transmission by [Agency A] of any hard copy or electronic version of documents or submissions made by [*name of applicant*] including any quotations or extracts of them].

[Agency A] shall make [Agency B] fully aware of the confidentiality of the information disclosed by virtue of this waiver. [Agency A] shall treat information received from [Agency B] in accordance with its own applicable confidentiality rules.

The present waiver does not alter [Agency A] obligation to protect the confidentiality of information submitted by the applicant with respect to parties other than [Agency B] in accordance with the applicable legislation.