

Competition co-operation and enforcement

INVENTORY OF INTERNATIONAL CO-OPERATION MOUs BETWEEN COMPETITION AGENCIES



PROVISIONS ON NOTIFICATIONS

The OECD has put together an inventory of provisions of international co-operation MoUs (Memoranda of Understanding) between competition agencies. This document includes:

- a description of provisions on notifications found in these MoUs
- a selection of typical and atypical relevant provisions
- relevant language from the 2014 OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings.

The full inventory, the OECD Recommendation and relevant OECD work can be found online at www.oecd.org/competition/inventory-competition-agency-mous.htm.

Provisions on notifications of competition investigations and proceedings help to establish effective co-operation among competition authorities. Notifications make the notified party aware of the notifying party's enforcement activity and may trigger subsequent co-operation activities, such as co-ordination or consultations. In practice, notifications on enforcement activities are typically made when a competition authority initiates investigation of an international activity or makes important progress in the investigation, or when a competition authority issues a request for information in cross-border investigations.

Most MoUs have provisions on notifications, generally limited to the basic structure of notification and requiring only few formalities. Other MoUs simply lay down a general principle that parties will notify each other of enforcement activities that may affect their important interests, without specifying anything else. Only a few MoUs, such as Australia-Japan (2015) and Korea-Mexico (2004), define all notification requirements, like the circumstances requiring notifications, timing, content and modality. Some MoUs do not have provisions on notifications at all, although each party can notify the other party of its enforcement activities through *ad hoc* consultation or communication.

Relevant provisions in MoUs:

Brazil-Japan (2014)

Paragraph 4 Notification

4.1. Each competition authority will notify the other of the enforcement activities of the notifying competition authority that the notifying competition authority considers may affect the important interests of the other competition authority.

4.2. Provided that it is not contrary to the laws and regulations of the country of the notifying competition authority and does not affect any investigation or proceedings being carried out by the notifying competition authority, notification under subparagraph 4.1 will be given as promptly as possible when the notifying competition authority becomes aware that its enforcement activities may affect the important interests of the other competition authority.

Australia-Korea (2002)

Paragraph 5 Scope of Cooperation

2. Notification of enforcement and related activities

(a) In respect of investigations by the Agencies, each Agency will notify the other whenever an investigation, enforcement or a related activity may affect the essential interests of the other. Each Agency will, in particular, notify the other when it makes inquiries of persons located in the other's jurisdiction.

(b) Notifications will include sufficient information to facilitate a proper evaluation by the recipient Agency of any effect on its interests. The recipient Agency may request from the notifying Agency any further information it deems necessary for such evaluation.

Panama-Chinese Taipei (2013)

II. Notifications

1. If one of the Parties establishes that actions of enterprises in its own territory may have a negative impact on competition in the territory of the other Party, the former shall notify the latter.

2. If one of the Parties establishes that competition in its own territory may be negatively affected by the actions of enterprises taking place in the territory of the other Party, the former shall notify the latter.

3. Notifications shall be sent in written form and shall contain a brief account of the essence of the case, references to relevant legal norms, and related information which the sending Party considers necessary.

4. The Party receiving notification shall study the possibility of taking appropriate measures pursuant to the requirements of laws enforced by the Parties and inform the other Party of the results.

Canada-UK (2003)

II Notification

1. Subject to Section VI, a Participant will notify another Participant with respect to its enforcement activities which may affect the other Participant's interests in the application of its competition and consumer laws, including those that:

a. are relevant to the enforcement activities of the other Participant;

b. involve any conduct or transaction that may be subject to penalties or other relief under the competition and consumer laws administered and enforced by the Participants, other than mergers or acquisitions, carried out in whole or in part in the other Participant's territory, except where those activities are insubstantial;

- c. involve mergers or acquisitions in which one or more of the parties to the transaction carries on a business activity in the other Participant's territory, or is under the control of a body which is incorporated or organized under the laws of the other Participant's territory;
- d. involve remedies that expressly require or prohibit conduct in the other Participant's territory or are otherwise directed at conduct in that territory;
- e. involve the seeking of information located in the other Participant's territory, whether by personal visit by officials of a Participant or otherwise, except with respect to telephone contacts with a person in the other Participant's territory where that person is not the subject of investigation and the contact seeks only an oral response on a voluntary basis.

2. Notification will ordinarily be given as soon as it becomes evident that notifiable circumstances are present.

3. Once a particular matter has been notified, subsequent notifications on that matter need not be made unless the notifying Participant becomes aware of new issues bearing on the interests of the other Participant in the application of its competition and consumer laws, or unless the notified Participant requests otherwise.

4. Notifications will include the nature of the activities under investigation and the competition and consumer law provisions concerned and will be sufficiently detailed to enable the notified Participant to make an initial evaluation of the effect of the activities on its interests in the application of its competition and consumer laws.

5. Enforcement activities notified pursuant to the Agreement Between the Government of Canada and the European Communities Regarding the Application of Their Competition Laws are not required to be notified pursuant to this Arrangement.

Australia-Japan (2015)

Paragraph [*03] Notification

3.1. Each competition authority will endeavour to notify the other competition authority of the enforcement activities of the notifying competition authority that the notifying competition authority considers are likely to affect the important interests of the other competition authority.

3.2. Enforcement activities of a competition authority that are likely to affect the important interests of the other competition authority are investigations or proceedings that:

- (a) are directly relevant to enforcement activities of the other competition authority;
- (b) are known by the notifying competition authority to be against a national or nationals of the country of the other competition authority, or against an enterprise or enterprises incorporated or organised under the applicable laws and regulations of the country of the other competition authority;
- (c) involve anticompetitive activities, other than mergers or acquisitions, substantially carried out in the country of the other competition authority;
- (d) involve conduct required, encouraged or approved by the other competition authority; or
- (e) involve relief that requires or prohibits conduct in the country of the other competition authority.

3.3. Provided that it is not contrary to the laws and regulations of the country of the notifying competition authority and does not affect any investigation or proceedings being carried out by the notifying competition authority, notification pursuant to subparagraph 3.1 will be given as promptly as possible after the notifying competition authority becomes aware that its enforcement activities are likely to affect the important interests of the other competition authority.

3.4. Notifications provided under this Paragraph need not be formal (email will usually suffice for initial contact, followed by telephone dialogue) but will be sufficiently detailed to enable the notified competition authority to make an initial evaluation of the effect on its important interests.

Mexico-Russia (2010)

Article III Notification

1. Pursuant to the Point 1 of the Article V each Party shall notify the other Party in the manner provided by the present Article and Article VIII with respect to its enforcement activities that:
 - a. may influence the enforcement activities of the other Party;
 - b. involve anticompetitive practices, including abuse of dominant position and anticompetitive agreements, carried out in whole or in substantial part within the jurisdiction of the other Party;
 - c. involve mergers, acquisitions and other actions, where one or more of the parties involved in the transaction, or a company controlling one or more of the parties of the transaction is a person registered or established under the other Party's laws and legislation;
 - d. involve activity of economic entities specified in the laws of the other Party's state;
 - e. involve remedies that expressly require or prohibit conduct in the territory of the other Party's state or are otherwise directed at conduct in the territory of the other country Party's state within the frameworks of ensuring competition law compliance;
2. Notification on actions indicated in Point 1 of the present Article shall be sent in sufficient time to allow the other Party to take appropriate measures.
3. Where notifications pertain to private persons' information, each Party shall observe its domestic legislation on privacy, confidentiality and reserved information.
4. Notification pursuant to the present Article is not required for each subsequent request for information in relation to the same matter unless the Party seeking information becomes aware of new facts, indicated in Point 1 of the present Article, or the other Party requests otherwise in relation to a particular issue.
5. Notification pursuant to the present Article shall be sent in writing and shall be sufficiently detailed to enable the notified Party to make an initial evaluation of the effect of the enforcement activity carried by the notifying Party. The notification shall include information on the nature of the enforcement activities, the legal provisions concerned of the laws of the Parties' states. Where possible, notifications shall include the names and locations of the persons involved in the enforcement procedure.
6. Each Party shall endeavor to immediately notify the other Party on any amendments to its competition law.

Relevant provisions in the 2014 OECD Recommendation on International Co-operation

Notifications of Competition Investigations or Proceedings

- V. RECOMMENDS that an Adherent should ordinarily notify another Adherent when its investigation or proceeding can be expected to affect the other Adherent's important interests.
1. Circumstances that may justify a notification include, but are not limited to (i) formally seeking non-public information located in another Adherent; (ii) the investigation of an enterprise located in or incorporated or organised under the laws of another Adherent ; (iii) the investigation of a practice occurring in whole or in part in the territory of another Adherent, or required, encouraged, or approved by the government of another Adherent; or (iv) the consideration of remedies that would require or prohibit conduct in the territory of another Adherent.
 2. The notification should be made by the competition authority of the investigating Adherent through the channels requested by each Adherent as indicated in a list to be established and periodically updated by the Competition Committee; to the extent possible, Adherents should favour notifications directly to competition authorities. Notifications should be in writing, using any effective and appropriate means of communication, including e-mail. To the extent possible without prejudicing an investigation or proceeding, the notification should be made when it becomes evident that another Adherent's important interests are likely to be affected, and with sufficient detail so as to permit an initial evaluation by the notified Adherent of the likelihood of effects on its important interests.
 3. The notifying Adherent, while retaining full freedom of ultimate decision, should take account of the views that the other Adherent may wish to express and of any remedial action that the other Adherent may consider under its own laws, to address the anticompetitive practice or mergers with anticompetitive effects.