

Competition co-operation and enforcement

INVENTORY OF INTERNATIONAL CO-OPERATION MOUs BETWEEN COMPETITION AGENCIES



PROVISIONS ON POSITIVE COMITY

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 positive comity 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.

“Positive comity” allows one party (requesting) to request the other party (requested) to take appropriate enforcement actions with respect to anti-competitive activities occurring in the territory of the requested party that adversely affect important interests of the requesting party. It is aimed at effective allocation of enforcement resources by allowing the better-placed party to deal with the problem (for example, it avoids difficulties of obtaining evidence in a foreign jurisdiction) and minimises conflicts that may be caused by enforcement actions against activities occurring in another jurisdiction. Positive comity provisions can, for example, set forth the conditions for a request for positive comity, and how the requested party should respond to the request.

Most MoUs do not have provisions on positive comity. Only a few MoUs [e.g., Brazil-Japan (2014) and Japan-Korea (2014)] have detailed positive comity provisions.

Relevant provisions in MoUs:

(i) those similar to the co-operation agreements at the government level

Japan-Korea (2014)

Paragraph 7 Cooperation Regarding Anti-competitive Activities in the Country of a Side that Adversely Affect the Interests of the Other Side

7.1. If a Side believes that anti-competitive activities carried out in the country of the other Side adversely affect its important interests, that Side, taking into account the importance of avoiding conflicts resulting from its enforcement activities with regard to such anti-competitive activities and taking into account that the other Side may be in a position to conduct more effective enforcement activities with regard to such anti-competitive activities, may request that the other Side initiate appropriate enforcement activities.

7.2. The request made under subparagraph 7.1 should be as specific as possible about the nature of the anti-competitive activities and their effect on the important interests of the requesting Side, and should include an offer of such further information and other cooperation as the requesting Side is able to provide.

7.3. The requested Side will carefully consider whether to initiate enforcement activities, or whether to expand ongoing enforcement activities, with respect to the anti-competitive activities identified in the request made under subparagraph 7.1. The requested Side will inform the requesting Side of its decision as soon as practically possible. If enforcement activities are initiated, the requested Side will inform the requesting Side of their outcome and, to the extent possible, of significant interim developments.

7.4. Nothing in this paragraph limits the discretion of the requested Side under the competition law of its country and its enforcement policies to determine whether or not to undertake enforcement activities with respect to the anti-competitive activities identified in the request, or precludes the requesting Side from withdrawing its request.

Brazil-Japan (2014)

Paragraph 7 Cooperation Regarding Anti-competitive Activities in the Country of a Competition Authority that Adversely Affect the Interests of the Other Competition Authority

7.1. If a competition authority believes that anti-competitive activities carried out in the country of the other competition authority adversely affect the important interests of the former competition authority, the former competition authority, taking into account the importance of avoiding conflicts resulting from its enforcement activities with regard to such anti-competitive activities and taking into account that the other competition authority may be in a position to conduct more effective enforcement activities with regard to such anti-competitive activities, may request that the other competition authority initiate appropriate enforcement activities.

7.2. The request made under subparagraph 7.1 will be as specific as possible about the nature of the anti-competitive activities and their effect on the important interests of the requesting competition authority, and will include an offer of such further information and other cooperation as the requesting competition authority is able to provide.

7.3. The requested competition authority will carefully consider whether to initiate enforcement activities, or whether to expand ongoing enforcement activities, with respect to the anti-competitive activities identified in the request made under subparagraph 7.1. The requested competition authority will inform the requesting competition authority of its decision as soon as practically possible. If enforcement activities are initiated, the requested competition authority will inform the requesting competition authority of their outcome and, to the extent possible, of significant interim developments.

7.4. Nothing in this paragraph limits the discretion of the requested competition authority under the competition law of its country and its enforcement policies as to whether or not to undertake enforcement activities with respect to the anti-competitive activities identified in the request, or precludes the requesting competition authority from withdrawing its request.

(ii) relatively unique provision; not requesting an action but requesting consultation

Australia-Japan (2015)

Paragraph [*06] Cooperation Regarding Anticompetitive Activities in the Country of a Competition Authority that Adversely Affect the Interests of the Other Competition Authority

6.1. If a competition authority believes that anticompetitive activities carried out in the country of the other competition authority substantially and adversely affect the important interests of the former competition authority, the former competition authority may request consultation with such other competition authority.

6.2. The request made pursuant to subparagraph 6.1 will be as specific as possible about the nature of the anticompetitive activities and their effect on the important interests of the requesting competition authority.

6.3. The requested competition authority will give full and sympathetic consideration to such views and factual materials as may be provided by the requesting competition authority and, in particular, to the nature of the alleged anticompetitive activities in question, the enterprises or individuals involved and the alleged harmful effects on the interests of the requesting competition authority. Without prejudice to any of their rights, the competition authorities will endeavour to find a mutually acceptable solution in light of the respective interests involved.

6.4. Nothing in this Paragraph (or the withdrawal of the requesting competition authority's request) will limit the discretion of the requested competition authority under the competition law and enforcement policies of its country as to whether or not to conduct enforcement activities with respect to the anticompetitive activities identified in the request. Any request by a competition authority under this Paragraph is without prejudice to its freedom to take any action it may choose to under its own competition laws.

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

Consultation and Comity

IV. RECOMMENDS that an Adherent that considers that one or more enterprises or individuals situated in one or more other Adherents are or have been engaged in anticompetitive practices or mergers with anticompetitive effects that substantially and adversely affect its important interests, may request consultations with such other Adherent or Adherents.

1. Entering into such consultations is without prejudice to any action under the competition law and to the full freedom of ultimate decision of the Adherents concerned.

2. Any Adherent so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting Adherent and, in particular, to the nature of the alleged anticompetitive practices or mergers with anticompetitive effects in question, the enterprises or individuals involved and the alleged harmful effects on the interests of the requesting Adherent.

3. If the Adherent so addressed agrees that enterprises or individuals situated in its territory are engaged in anticompetitive practices or in mergers with anticompetitive effects harmful to the interests of the requesting Adherent, it should take whatever remedial action it considers appropriate, including actions under its competition law, on a voluntary basis and considering its legitimate interests.

4. In requesting consultations, Adherents should explain the national interests affected in sufficient detail to enable their full and sympathetic consideration.

5. Without prejudice to any of their rights, the Adherents involved in consultations should endeavour to find a mutually acceptable solution in light of the respective interests involved.