

Competition co-operation and enforcement

INVENTORY OF CO-OPERATION AGREEMENTS



PROVISIONS ON CONSULTATION

This document contains the text of the provisions on consultation taken from the 2015 Inventory of Co-operation Agreements prepared by the OECD Competition Committee. This document includes:

- A short description of the provision which clarifies similarities and differences between agreements, as well as any innovative or unique features in a particular agreement.
- Relevant language from the 2014 OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings.
- A list of the relevant provisions in co-operation agreements. The agreements are listed in reverse chronological order, so that readers can see if wording has changed between agreements.

The full inventory, the OECD Recommendation and accompanying documents can be found online at www.oecd.org/competition/inventory-competition-agreements.htm.

Competition authorities frequently consult each other, but consultations are mostly done informally. Formal consultations are less frequent. Nevertheless most (13 out of the 15) co-operation agreements have consultation provisions.

Relevant provisions in the 2014 OECD Recommendation on international co-operation

Consultation and Comity

III. RECOMMENDS that an Adherent that considers that an investigation or proceeding being conducted by another Adherent under its competition laws may affect its important interests should transmit its views on the matter to, or request consultation with, the other Adherent.

1. To this end, without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision, the Adherent so addressed should give full and sympathetic consideration to the views expressed by the requesting Adherent, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding.

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.

Relevant provisions in co-operation agreements

EU-Switzerland (2013)

Article 11 Consultations

1. The Parties shall consult with each other, upon request of either Party, on any matter which may arise in the implementation of this Agreement. Upon request of either Party, the Parties shall consider reviewing the operation of this Agreement and examine the possibility of further developing their cooperation.

2. The Parties shall as soon as possible inform each other of any amendment to their competition laws, as well as of any amendment to other laws and regulations and of any change in the enforcement practice of their competition authorities that may affect the operation of this Agreement. Upon request of either Party, the Parties shall hold consultations in order to assess the specific implications of such amendment or change for this Agreement, and in particular to determine whether this Agreement should be amended pursuant to paragraph 2 of Article 14.

EU-Korea (2009)

Article 8 Consultation

1. The Parties shall consult with each other, upon request of either Party, on any matter which may arise in the implementation of this Agreement.

Canada-Japan (2005)

ARTICLE VII

1. The Parties shall consult with each other, upon request of either Party, through the diplomatic channel on any matter which may arise in connection with this Agreement.

2. The competition authorities of the Parties shall consult with each other, upon request of the competition authority of either Party, on any matter which may arise from the implementation or operation of this Agreement.

3. Any request for consultations under this Article shall be made in writing and indicate the reasons for the request.

4. Each Party or the competition authority of each Party, as the case may be, shall consult as promptly as practically possible when so requested.

EU-Japan (2003)

Article 7

1. The Parties may hold, as necessary, consultations through the diplomatic channel on any matter which may arise in connection with this Agreement.

2. A request for consultations under this Article shall be communicated through the diplomatic channel.

Article 8

1. The competition authorities of the Parties shall consult with each other, upon request of either Party's competition authority, on any matter which may arise in the implementation of this Agreement.

Canada-Mexico (2001)

ARTICLE VIII Consultations

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.

2. Consultations under this Article shall take place at the appropriate level as determined by each Party.

3. During consultations under this Article, each Party shall provide to the other as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of the matter that is the subject of consultations. Each Party shall carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain the specific results of its application of those principles to the matter that is the subject of consultations.

Mexico-US (2000)

Article VIII Consultations

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.

2. Consultations under this Article shall take place at the appropriate level as determined by each Party.

3. During consultations under this Article, each Party shall provide to the other as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of the matter that is the subject of consultations. Each Party shall carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain the specific results of its application of those principles to the matter that is the subject of consultations.

Japan-US (1999)

Article VII

1. The Parties may hold, as necessary, consultations through the diplomatic channel on any matter which may arise in the implementation of this Agreement.

2. A request for consultations under this Article shall be communicated through the diplomatic channel.

Article VIII

1. The competition authorities of the Parties shall consult with each other, upon request of either Party's competition authority, on any matter which may arise in connection with this Agreement.

Brazil-US (1999)

Article VI Avoidance of Conflicts; Consultations

2. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with a view to reaching a conclusion that is consistent with the purpose of this Agreement.

Canada-EU (1999)

III. Consultations

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party undertakes to consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.

2. During consultations under paragraph 1, the competition authority of each Party shall carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the matter under discussion.

VII. Exchange of information

4. During consultations pursuant to Article III, each Party shall provide the other with as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of a particular transaction.

Israel-US (1999)

Article VII CONSULTATIONS

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.

2. Consultations under this Article shall take place at the appropriate level as determined by each Party.

3. During consultations under this Article, each Party shall provide to the other as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of the matter that is the subject of consultations. Each Party shall carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain the specific results of its application of those principles to the matter that is the subject of consultations.

Canada-US (1995)

Article VIII Consultations

1. Either Party may request consultations regarding any matter relating to this Agreement. The request for consultations shall indicate the reasons for the request and whether any procedural time limits or other constraints require that consultations be expedited. Each Party shall consult promptly when so requested with the view to reaching a conclusion that is consistent with the principles set forth in this Agreement.

2. Consultations under this Article shall take place at the appropriate level as determined by each Party.

3. During consultations under this Article, each Party shall provide to the other as much information as it is able in order to facilitate the broadest possible discussion regarding the relevant aspects of the matter that is the subject of consultations. Each Party shall carefully consider the representations of the other Party in light of the principles set out in this Agreement and shall be prepared to explain the specific results of its application of those principles to the matter that is the subject of consultations.

EU-US (1991)

Article VII Consultation

1. Each Party agrees to consult promptly with the other Party in response to a request by the other Party for consultations regarding any matter related to this Agreement and to attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions. Any request for consultations shall include the reasons therefor and shall state whether procedural time limits or other considerations require the consultations to be expedited.

These consultations shall take place at the appropriate level, which may include consultations between the heads of the competition authorities concerned.

2. In each consultation under paragraph 1, each Party shall take into account the principles of cooperation set forth in this Agreement and shall be prepared to explain to the other Party the specific results of its application of those principles to the issue that is the subject of consultation.

Australia-US (1982)

Article 2 Consultations

1. When it appears to the Government of Australia through notification pursuant to paragraph 2 of Article 1 that the Department of Justice or Federal Trade Commission of the United States has commenced, or is likely to commence, an antitrust investigation or legal proceeding that may have implications for Australian laws, policies or national interests, the Government of Australia shall communicate its concerns and may request consultations with the Government of the United States. The Government of the United States shall participate in such consultations.

2. When it appears to the Government of the United States through notification pursuant to paragraph I of Article 1 that a policy of the Government of Australia may have significant antitrust implications under United States law, the Government of the United States shall communicate its concerns and may request consultations with the Government of Australia. The Government of Australia shall participate in such consultations.

3. Either Party may seek consultations with respect to potential conflicts which come to its attention other than by notification.

4. Both Parties during consultations shall seek to identify any respect in which;

(a) implementation of the Australian policy has or might have implications for the United States in relation to the enforcement of its antitrust laws; and

(b) the antitrust enforcement action by the Department of Justice or the Federal Trade Commission of the United States has or might have implications for Australian laws, policies or national interests.

5. Both Parties during consultations shall seek earnestly to avoid a possible conflict between their respective laws, policies and national interests and for that purpose to give due regard to each other's sovereignty and to considerations of comity.

6. In particular, in seeking to avoid conflict:

(a) the Government of Australia shall give the fullest consideration to modifying any aspect of the policy which has or might have implications for the United States in relation to the enforcement of its antitrust laws. In this regard, consideration shall be given to any harm that may be caused by the implementation or continuation of the Australian policy to the interests protected by the United States antitrust laws; and

(b) the Department of Justice or the Federal Trade Commission of the United States, as the case may be, shall give the fullest consideration to modifying or discontinuing its existing antitrust investigation or proceedings, or to modifying or refraining from contemplated antitrust investigations or proceedings. In this regard, consideration shall be given to the interests of Australia with respect to the conduct to which the proceedings, or contemplated proceedings, relate, or would relate, including, without limitation, Australia's interests in circumstances where that conduct:

- (1) was undertaken for the purpose of obtaining a permission or approval required under Australian law for the exportation from Australia of Australian natural resources of goods manufactured or produced in Australia;
- (2) was undertaken by an Australian authority, being an authority established by law in Australia, in the discharge of its functions in relation to the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia;
- (3) related exclusively to the exportation from Australia to countries other than the United States, and otherwise than for the purpose of re-exportation to the United States, of Australian natural resources or goods manufactured or produced in Australia; or
- (4) consisted of representations to, or discussions with, the Government of Australia or an Australian authority in relation to the formulation or implementation of a policy of the Government of Australia with respect to the exportation from Australia of Australian natural resources or goods manufactured or produced in Australia.

7. Each Party during consultations shall provide as detailed an account as possible, under the particular circumstances, of the basis and nature of its antitrust investigation or proceeding, or its national policy and its implementation, as the case may be.

Article 4 Procedure after consultations

1. When consultations have been held with respect to an Australian policy notified pursuant to paragraph I of Article I, and the Department of Justice or the Federal Trade Commission of the United States, as the case may be, concludes that the implementation of that policy should not be a basis for action under United States antitrust laws, the Government of Australia may request a written memorialization of such conclusion and the basis for it. The Government of the United States shall, in the absence of circumstances making it inappropriate, provide such a written memorialization. Where a written memorialization has been provided, the Government of the United States shall expeditiously consider requests by persons or enterprises for a statement of enforcement intentions with respect to proposed private conduct in implementation of the Australian policy, in accordance with the Department of Justice's Business Review Procedure or the Federal Trade Commission's Advisory Opinion Procedure, as may be appropriate in the case.

2. If, through consultations pursuant to this Agreement, no means for avoiding a conflict between the laws, policies or national interests of the two Parties has been developed, each Party shall be free to protect its interests as it deems necessary.