

Competition co-operation and enforcement

INVENTORY OF CO-OPERATION AGREEMENTS



PROVISIONS ON CO-ORDINATION OF INVESTIGATIONS AND PROCEEDINGS

This document contains the text of the provisions on co-ordination of investigations and proceedings taken from the 2021 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 increasingly face situations where they are investigating the same or related transactions. In parallel investigations, it is more effective and efficient for authorities to co-ordinate their actions considering the effects that one enforcement action may have on the other jurisdictions. For example, agencies may co-ordinate with each other:

- before opening formal investigations/proceedings, to discuss the initial theory of the case or co-ordinate dawn raids;
- in the course of the proceedings, to discuss the theory of harm or the likely anti-competitive effects of the investigated conduct/transaction; or
- when the investigation is completed to discuss possible remedies or sanctions.

This is today standard agencies' practice in international cartel investigations and in cross-border merger investigations.

Most of the co-operation agreements reviewed include provisions encouraging the competition authorities to co-ordinate enforcement activities with their counterparts in parallel investigations. Co-ordination provisions typically consist of:

- A general statement which encourages co-ordination in related matters;
- Factors to be considered when deciding whether to co-ordinate actions. These may include the effect of co-ordination on enforcement, the ability to obtain information, the reduction of costs for the parties and persons subject to the enforcement actions, co-ordinated relief and remedies and efficient use of resources.
- How to co-ordinate; and
- A termination clause to allow pursuing enforcement independently.

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

Co-ordination of Competition Investigations or Proceedings

VI. RECOMMENDS that where two or more Adherents investigate or proceed against the same or related anticompetitive practice or merger with anticompetitive effects, they should endeavour to co-ordinate their investigations or proceedings where their competition authorities agree that it would be in their interest to do so.

To this end, co-ordination between Adherents:

4. might include any of the following steps, insofar as appropriate and practicable, and subject to appropriate safeguards including those relating to confidential information:

- (i) Providing notice of applicable time periods and schedules for decision-making;
- (ii) Co-ordinating the timing of procedures;
- (iii) Requesting, in appropriate circumstances, that the parties to the investigation and third parties voluntarily grant waivers of confidentiality to co-operating competition authorities;
- (iv) Co-ordinating and discussing the competition authorities' respective analyses;
- (v) Co-ordinating the design and implementation of remedies to address anticompetitive concerns identified by competition authorities in different Adherents;
- (vi) In Adherents in which advance notification of mergers is required or permitted, requesting that the notification include a statement identifying notifications also made or likely to be made to other Adherents; and
- (vii) Exploring new forms of co-operation.

Relevant provisions in co-operation agreements

EU-Switzerland (2013)

Article 4 Coordination of enforcement activities

1. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, they may coordinate their enforcement activities. They may in particular coordinate the timing of their inspections.

2. In considering whether particular enforcement activities may be coordinated, the competition authorities of the Parties shall take into account in particular the following factors:

- (a) the effect of such coordination on the ability of the competition authorities of the Parties to achieve the objectives of their enforcement activities;
- (b) the relative abilities of the competition authorities of the Parties to obtain information necessary to conduct the enforcement activities;
- (c) the possibility of avoiding conflicting obligations and unnecessary burdens for the undertakings subject to the enforcement activities; and
- (d) the opportunity to make more efficient use of their resources.

3. Subject to appropriate notice to the competition authority of the other Party, the competition authority of either Party may, at any time, limit the coordination of enforcement activities and proceed independently on a specific enforcement activity.

EU-Korea (2009)

Article 4 Coordination of enforcement activities

1. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, they shall consider coordination of their enforcement activities to the extent compatible with their respective laws and regulations.

2. In considering whether particular enforcement activities should be coordinated, the competition authorities of the Parties should take into account the following factors, among others:

- (a) the effect of such coordination on the ability of the competition authorities of both Parties to achieve the objectives of their enforcement activities;
- (b) the relative abilities of the competition authorities of the Parties to obtain information necessary to conduct the enforcement activities;
- (c) the possibility of avoiding conflicting obligations and unnecessary burdens for the persons subject to the enforcement activities;
- (d) the opportunity to make more efficient use of their resources through coordination.

3. In any coordinated enforcement activities, the competition authority of each Party shall seek to conduct its enforcement activities with careful consideration to the objectives of the enforcement activities by the competition authority of the other Party.

4. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, the competition authority of each Party shall consider, upon request by the competition authority of the other Party and where consistent with the important interests of the requested Party, inquiring whether companies/persons who have provided confidential information in connection with those enforcement activities will consent to the sharing of such information with the competition authority of the other Party (waiver of confidentiality).

5. Subject to appropriate notification to the competition authority of the other Party, the competition authority of either Party may, at any time, limit the coordination of enforcement activities and proceed independently on a specific enforcement activity.

Canada-Japan (2005)

Article IV

1. Where the competition authorities of the Parties are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities.

2. In considering whether particular enforcement activities should be coordinated, the competition authorities of the Parties shall take into account the following factors, among others:

- (a) the effect of such coordination on their ability to achieve the objectives of their enforcement activities;
- (b) the relative abilities of the competition authorities of the Parties to obtain information necessary to conduct the enforcement activities;
- (c) the extent to which the competition authority of either Party can secure effective penalties or relief against the anticompetitive activities involved;
- (d) the possible reduction of cost to the Parties and to the persons subject to the enforcement activities; and
- (e) the potential advantages of coordinated relief to the Parties and to the persons subject to the enforcement activities.

3. In any coordinated enforcement activity, the competition authority of each Party shall seek to conduct its enforcement activities with careful consideration to the objectives of the enforcement activities by the competition authority of the other Party.

4. Where the competition authorities of the Parties are pursuing enforcement activities with regard to related matters, the competition authority of each Party shall inquire, upon request by the competition authority of the other Party and where consistent with the important interests of the Party of the requested competition authority, where appropriate, whether persons who have provided information, other than information made available to the public, in connection with those enforcement activities will consent to the sharing of such information with the competition authority of the other Party.

5. Subject to appropriate notice to the competition authority of the other Party, the competition authority of either Party may, at any time, limit or terminate the coordination of enforcement activities and pursue its enforcement activities independently.

EU-Japan (2003)

Article 4

1. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, they shall consider coordination of their enforcement activities.

2. In considering whether particular enforcement activities should be coordinated, the competition authorities of the Parties should take into account the following factors, among others:

- (a) the effect of such coordination on their ability to achieve the objectives of their enforcement activities;
- (b) the relative abilities of the competition authorities of the Parties to obtain information necessary to conduct the enforcement activities;
- (c) the extent to which the competition authority of either Party can secure effective relief against the anti-competitive activities involved;
- (d) the opportunity to make more efficient use of resources;
- (e) the possible reduction of cost to the persons subject to the enforcement activities; and
- (f) the potential advantages of coordinated relief to the Parties and to the persons subject to the enforcement activities.

3. In any coordinated enforcement activities, the competition authority of each Party shall seek to conduct its enforcement activities with careful consideration to the objectives of the enforcement activities by the competition authority of the other Party.

4. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, the competition authority of each Party shall consider, upon request by the competition authority of the other Party and where consistent with the important interests of the requested Party, inquiring whether persons who have provided confidential information in connection with those enforcement activities will consent to the sharing of such information with the competition authority of the other Party.

5. Subject to appropriate notification to the competition authority of the other Party, the competition authority of either Party may, at any time, limit or terminate the coordination of enforcement activities and pursue their enforcement activities independently.

Canada-Mexico (2001)

Article IV Coordination with regard to related matters

1. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities. In such matters, the Parties may invoke such mutual assistance arrangements as may be in force from time to time.

2. In considering whether particular enforcement activities should be coordinated, either in whole or in part, the Parties' competition authorities shall take into account the following factors, among others:

- (a) the effect of such coordination on the ability of both Parties to achieve their respective enforcement objectives;
- (b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;
- (c) the extent to which either Party's competition authority can secure effective relief against the anticompetitive activities involved;
- (d) the possible reduction of cost to the Parties and to the persons subject to enforcement activities; and
- (e) the potential advantages of coordinated remedies to the Parties and to the persons subject to the enforcement activities.

3. In any coordination arrangement, each Party's competition authority shall seek to conduct its enforcement activities consistently with the enforcement objectives of the other Party's competition authority.

4. In the case of concurrent or coordinated enforcement activities, the competition authority of each Party shall consider, upon request by the competition authority of the other Party and where consistent with the requested Party's enforcement interests, ascertaining whether persons that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Parties' competition authorities.

5. Either Party's competition authority may at any time notify the other Party's competition authority that it intends to limit or terminate coordinated enforcement and pursue its enforcement activities independently and subject to the other provisions of this Agreement.

Mexico-US (2000)

Article IV Coordination with Regard to Related Matters

1. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities. In such matters, the Parties may invoke such mutual assistance arrangements as may be in force from time to time.

2. In considering whether particular enforcement activities should be coordinated, either in whole or in part, the Parties' competition authorities shall take into account the following factors, among others:

- a. the effect of such coordination on the ability of both Parties to achieve their respective enforcement objectives;
- b. the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;
- c. the extent to which either Party's competition authorities can secure effective relief against the anticompetitive activities involved;
- d. the possible reduction of cost to the Parties and to the persons subject to enforcement activities; and
- e. the potential advantages of coordinated remedies to the Parties and to the persons subject to the enforcement activities.

3. In any coordination arrangement, each Party's competition authorities shall seek to conduct their enforcement activities consistently with the enforcement objectives of the other Party's competition authorities.

4. In the case of concurrent or coordinated enforcement activities, the competition authorities of each Party shall consider, upon request by the competition authorities of the other Party and where consistent with the requested Party's enforcement interests, ascertaining whether persons that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Parties' competition authorities.

5. Either Party's competition authorities may at any time notify the other Party's competition authorities that they intend to limit or terminate coordinated enforcement and pursue their enforcement activities independently and subject to the other provisions of this Agreement.

Japan-US (1999)

Article IV

1. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, they shall consider coordination of their enforcement activities.

2. In considering whether particular enforcement activities should be coordinated, the competition authorities of the Parties should take into account the following factors, among others:

- (a) the effect of such coordination on their ability to achieve the objectives of their enforcement activities;
- (b) the relative abilities of the competition authorities of the Parties to obtain information necessary to conduct the enforcement activities;
- (c) the extent to which the competition authority of either Party can secure effective relief against the anticompetitive activities involved;
- (d) the possible reduction of cost to the Parties and to the persons subject to the enforcement activities; and
- (e) the potential advantages of coordinated relief to the Parties and to the persons subject to the enforcement activities.

3. In any coordinated enforcement activity, the competition authority of each Party shall seek to conduct its enforcement activities with careful consideration to the objectives of the enforcement activities by the competition authority of the other Party.

4. Where the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, the competition authority of each Party shall consider, upon request by the competition authority of the other Party and where consistent with the important interests of the requested Party, inquiring whether persons who have provided confidential information in connection with those enforcement activities will consent to the sharing of such information with the competition authority of the other Party.

5. Subject to appropriate notification to the competition authority of the other Party, the competition authority of either Party may, at any time, limit or terminate the coordination of enforcement activities and pursue their enforcement activities independently.

Brazil-US (1999)

Article V Coordination with Regard to Related Matters

1. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities.

2. In any coordination arrangement, each Party's competition authorities will seek to conduct their enforcement activities consistently with the enforcement objectives of the other Party's competition authorities.

Canada-EU (1999)

IV. Coordination of enforcement activities

2. In cases where both Parties competition authorities have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, either in whole or in part, each Party's competition authority shall take into account the following factors, among others:

- (i) the effect of such coordination on the ability of each Party's competition authority to achieve the objectives of its enforcement activities;
- (ii) the relative ability of each Party's competition authority to obtain information necessary to conduct the enforcement activities;
- (iii) the extent to which either Party's competition authority can secure effective preliminary or permanent relief against the anti-competitive activities involved;
- (iv) the opportunity to make more efficient use of resources; and
- (v) the possible reduction of cost to persons subject to enforcement activities.

3. (a) The Parties competition authorities may coordinate their enforcement activities by agreeing upon the timing of those activities in a particular matter, while respecting fully their own laws and important interests. Such coordination may, as agreed by the Parties competition authorities, result in enforcement action by one or both Parties competition authorities, as is best suited to attain their objectives.

(b) When carrying out coordinated enforcement activity, each Party's competition authority shall seek to maximise the likelihood that the other Party's enforcement objectives will also be achieved.

(c) Either Party may at any time notify the other Party that it intends to limit or terminate the coordination and pursue its enforcement activities independently and subject to the other provisions of this Agreement.

VII. Exchange of information

3. In the case of concurrent action by the competition authorities of both Parties with a view to the application of their competition law, the competition authority of each Party shall, upon request by the competition authority of the other Party, ascertain whether the natural or legal persons concerned will consent to the sharing of confidential information related thereto between the Parties competition authorities.

Israel-US (1999)

Article IV Coordination with Regard to Related Matters

1. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities. In such matters, the Parties may invoke such mutual assistance arrangements as may be in force from time to time.

2. In considering whether particular enforcement activities should be coordinated, either in whole or in part, the Parties' competition authorities shall take into account the following factors, among others:

- a. the effect of such coordination on the ability of both Parties to achieve their respective enforcement objectives;
- b. the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;
- c. the extent to which either Party's competition authorities can secure effective relief against the anticompetitive activities involved;
- d. the possible reduction of costs to the Parties and to the persons subject to enforcement activities; and
- e. the potential advantage of coordinated remedies to the Parties and to the persons subject to the enforcement activities.

3. In any coordination arrangement, each Party's competition authorities shall seek to conduct their enforcement activities consistently with the enforcement objectives of the other Party's competition authorities.

4. In the case of concurrent or coordinated enforcement activities, the competition authorities of each Party shall consider, upon request by the competition authorities of the other Party and where consistent with the requested Party's enforcement interests, ascertaining whether persons that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Parties' competition authorities.

5. Either Party's competition authorities may at any time notify the other Party's competition authorities that they intend to limit or terminate coordinated enforcement and pursue their enforcement activities independently and subject to the other provisions of this Agreement.

Canada-US (1995)

ARTICLE IV Coordination with regard to related matters

1. Where both Parties' competition authorities are pursuing enforcement activities with regard to related matters, they will consider coordination of their enforcement activities. In such matters, the Parties may invoke such mutual assistance arrangements as may be in force from time to time.

2. In considering whether particular enforcement activities should be coordinated, either in whole or in part, the Parties' competition authorities shall take into account the following factors, among others:

- a. the effect of such coordination on the ability of both Parties to achieve their respective enforcement objectives;
- b. the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;
- c. the extent to which either Party's competition authorities can secure effective relief against the anticompetitive activities involved;
- d. the possible reduction of cost to the Parties and to the persons subject to enforcement activities; and
- e. the potential advantages of coordinated remedies to the Parties and to the persons subject to the enforcement activities.

3. In any coordination arrangement, each Party's competition authorities shall seek to conduct their enforcement activities consistently with the enforcement objectives of the other Party's competition authorities.

4. In the case of concurrent or coordinated enforcement activities, the competition authorities of each Party shall consider, upon request by the competition authorities of the other Party and where consistent with the requested Party's enforcement interests, ascertaining whether persons that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Parties' competition authorities.

5. Either Party's competition authorities may at any time notify the other Party's competition authorities that they intend to limit or terminate coordinated enforcement and pursue their enforcement activities independently and subject to the other provisions of this Agreement.

EU-US (1991)

Article IV Cooperation and Coordination in Enforcement Activities

2. In cases where both Parties have an interest in pursuing enforcement activities with regard to related situations, they may agree that it is in their mutual interest to coordinate their enforcement activities. In considering whether particular enforcement activities should be coordinated, the Parties shall take account of the following factors, among others:

- a) the opportunity to make more efficient use of their resources devoted to the enforcement activities;
- b) the relative abilities of the Parties' competition authorities to obtain information necessary to conduct the enforcement activities;
- c) the effect of such coordination on the ability of both Parties to achieve the objectives of their enforcement activities; and
- d) the possibility of reducing costs incurred by persons subject to the enforcement activities.

3. In any coordination arrangement, each Party shall conduct its enforcement activities expeditiously and, insofar as possible, consistently with the enforcement objectives of the other Party.

4. Subject to appropriate notice to the other Party, the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently.

Germany-US (1976)

Article 2

(5) Each party agrees that, upon the request of an antitrust authority of the other party, its antitrust authorities will consult with the requesting party concerning possible coordination of concurrent antitrust investigations or proceedings in the two countries which are related or affect each other.