

Competition co-operation and enforcement

INVENTORY OF INTERNATIONAL CO-OPERATION MOUs BETWEEN COMPETITION AGENCIES



PROVISIONS ON ENFORCEMENT CO-OPERATION AND INVESTIGATIVE ASSISTANCE

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 enforcement co-operation and investigative assistance 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.

Competition authorities face an increasing number of cases with an international dimension, where they need to access information or evidence located outside their jurisdiction; thus, enforcement co-operation can contribute to competition law enforcement.

Many MoUs have provisions on enforcement co-operation, but the level of detail varies. A few MoUs have detailed provisions requiring the parties to endeavour to assist each other or listing the activities that might be part of enforcement co-operation. Most MoUs only lay down a general principle of enforcement co-operation, without listing activities or providing details. Some MoUs only refer to exchange of information in general terms, and allow *ad hoc* consultation and communication to enable enforcement co-operation. Some second generation MoUs [e.g. Model Agreement attached to Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities signed by competition authorities from Australia, Canada, New Zealand, the United Kingdoms and the United States (2020), New Zealand-Australia on compulsorily-acquired information and investigative assistance (2013) and Australia-Japan (2015)] provide for enhanced investigative assistance, such as obtaining testimony/statements or conducting searches on behalf of the other authority.

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

Investigative Assistance to another Competition Authority

VIII. RECOMMENDS that regardless of whether two or more Adherents proceed against the same or related anticompetitive practice or merger with anticompetitive effects, competition authorities of the Adherents should support each other on a voluntary basis in their enforcement activity by providing each other with investigative assistance as appropriate and practicable, taking into account available resources and priorities.

1. Without prejudice to the applicable confidentiality rules, investigative assistance may include any of the following activities:

(i) Providing information in the public domain relating to the relevant conduct or practice;

(ii) Assisting in obtaining information from within the assisting Adherent;

(iii) Employing on behalf of the requesting Adherent the assisting Adherent's authority to compel the production of information in the form of testimony or documents;

(iv) Ensuring to the extent possible that official documents are served on behalf of the requesting Adherent in a timely manner; and

(v) Executing searches on behalf of the requesting Adherent country to obtain evidence that can assist the requesting Adherent country's investigation, especially in the case of investigations or proceedings regarding hard core cartel conduct.

2. Any investigative assistance requested should be governed by the procedural rules in the assisting Adherent and should respect the provisions and safeguards provided for in this Recommendation. The request for assistance should take into consideration the powers, authority and applicable confidentiality rules of the competition authority of the assisting Adherent.

3. Adherents should take into account the substantive laws and procedural rules in other Adherents when making requests for assistance to obtain information located abroad. Before seeking information located abroad, Adherents should consider whether adequate information is available from sources within their territory. Requests for information located abroad should be framed in terms that are as specific as possible.

4. When the request for assistance cannot be granted in whole or in part, the assisting Adherent should inform the requesting Adherent accordingly, and consider providing the reasons why the request could not be complied with.

5. The provision of investigative assistance between Adherents may be subject to consultations regarding the sharing of costs of these activities, upon request of the competition authority of the assisting Adherent.

Relevant provisions in MoUs:

(i) examples of simple provisions

Canada-Korea (2006)

III Cooperation and coordination

1. The Participants acknowledge that it is in their common interest to cooperate and share information where appropriate and practicable.

Australia-New Zealand-Chinese Taipei (2002)

Paragraph III Coordination of enforcement activities

1. Each Participant will endeavor to render assistance to another Participant in its enforcement activities to the extent compatible with the laws and important interests of the jurisdictions of the assisting participant.

(ii) provisions on technical co-operation

Indonesia-Chinese Taipei (2020)

Article 6 Technical co-operation

The Parties agree that it is in their common interest to work together in capacity building activities related to strengthening of competition policy and implementation of the competition law of each Party, through their competition authorities. The forms of such activities shall be mutually agreed upon by the competition authorities of the Parties, subject to their available resources.

Japan-Philippine (2013)

VI. Technical Cooperation

6.1. The competition authorities recognize that it is in their common interest to work together in technical cooperation activities related to strengthening of competition policy and implementation of the competition law of each country.

6.2. The technical cooperation activities may include, within the reasonably available resources of the competition authorities, the following:

- (a) exchange of personnel of the competition authorities for training purposes;
- (b) participation of personnel of the competition authorities as lecturers or consultants at training courses on the implementation of competition law and policy organized or sponsored by either or both competition authorities; and
- (c) any other form of technical cooperation as the competition authorities may decide.

Panama-Chinese Taipei (2013)

Article 7. Technical Assistance

1. The Parties agree to share technical assistance so as to benefit from their experiences and reinforce the application of their competition laws.
2. All activities related to the exchange of experiences concerning technical assistance to be held under this Agreement are subject to the availability of funds budgeted by each Party:
 - (a) The Party benefiting from the technical assistance shall assume the necessary expenses for the carrying out of the technical assistance, to include such items as the cost of airfare and travel expenses for the expert providing the assistance, materials, and availability of installations necessary for the execution of the Program.
 - (b) The Party that offers the technical assistance shall maintain the salaries and benefits the expert enjoys in his home country.

(iii) those relatively detailed

Brazil-Japan (2014)

Paragraph 5 Cooperation in Enforcement Activities

- 5.1. Each competition authority will render assistance to the other competition authority in its enforcement activities to the extent consistent with the laws and regulations of the country of the assisting competition authority and the important interests of the assisting competition authority, and within its reasonably available resources.
- 5.2. Each competition authority will, to the extent consistent with the laws and regulations of its country and its important interests:
 - (a) inform the other competition authority on its enforcement activities involving anti-competitive activities that the informing competition authority considers may also have an adverse effect on competition in the country of the other competition authority;
 - (b) provide the other competition authority with any significant information, within its possession and that comes to its attention, about anti-competitive activities that the providing competition authority considers may be relevant to, or may warrant, enforcement activities of the other competition authority; and
 - (c) provide the other competition authority, upon request and in accordance with this Memorandum, with information within its possession that is relevant to the enforcement activities of the other competition authority.

Chile-US (2011)

Article II Enforcement cooperation

1. The U.S. antitrust agencies and the FNE agree that it is in their common interest to cooperate in the detection of anticompetitive practices and the enforcement of their competition laws, and to share information that will facilitate the effective application of those laws and promote better understanding of each other's competition enforcement policies and activities, to the extent compatible with their respective laws and important interests, and within their reasonably available resources.
2. Nothing in this Agreement shall prevent the U.S. antitrust agencies or the FNE from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements, or practices applicable to them.

(iv) *investigative assistance in second generation MoUs*

Australia-Canada-New Zealand-UK-US (2020)

**Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities
Annexure A: Model Agreement**

3. Scope of Investigative Assistance

3.1. The Parties intend to provide Investigative Assistance to each other on a broadly reciprocal basis in facilitating the administration and enforcement of their Competition Laws. If there are limitations on a Party's ability to reciprocate or restrictions on the assistance that a Party can provide under its law, that Party shall explain such limitations or restrictions.

3.2. The Parties shall provide timely Investigative Assistance to the fullest extent permissible under their respective law.

3.3. Investigative Assistance contemplated by this Agreement includes:

a) disclosing, providing or discussing Investigative Information in the possession of a Party;

b) obtaining Investigative Information at the request of a Party, including:

i. taking the testimony or statements of Persons or otherwise obtaining Investigative Information from Persons;

ii. obtaining documents, records, or other forms of Investigative Information;

iii. locating or identifying Persons or things; and

iv. executing searches and seizures; together with disclosing, providing or discussing any such Investigative Information obtained.

3.4. This Agreement does not prevent a Party from seeking Investigative Assistance from or providing Investigative Assistance to the other Party pursuant to other agreements, arrangements, or practices, either in place of or in conjunction with Investigative Assistance that may be provided pursuant to this Agreement.

3.5. Investigative Assistance may be provided whether or not the conduct underlying a request would constitute a violation of the Competition Laws of the Responding Party, unless a Party is prevented from doing so under its law.

3.6. This Agreement does not authorise a Party to compel a Person to provide Investigative Information in violation of a legally applicable right or privilege.

3.7. This Agreement does not affect the ability of a Party to seek information on a voluntary basis from a Person located in the territory of the other Party and does not preclude any such Person from voluntarily providing information to a Party.

Australia-New Zealand on compulsorily-acquired information and investigative assistance (2013)

Definitions

8. In this Arrangement, these terms will have the following definitions:

8.3 “investigative assistance” includes the provisions of assistance by way of the NZCC exercising any of its search and notice powers under or in relation to its competition and consumer law and any power express or implied that is incidental to those powers;

Australia-Japan (2015)

Paragraph [*04] Cooperation and Information Exchange in Enforcement Activities

4.1. Each competition authority will endeavour to render assistance to the other competition authority in the other’s enforcement activities to the extent consistent with the laws and regulations of the country of the assisting competition authority and the important interests of the assisting competition authority, and within its reasonably available resources. Such assistance may include supporting the other competition authority in the application for approval of a separate governmental body of the country of the assisting competition authority if such approval is required to obtain information or evidence from enterprises or individuals of the country of the assisting competition authority.