

Competition co-operation and enforcement

INVENTORY OF INTERNATIONAL CO-OPERATION MOUs BETWEEN COMPETITION AGENCIES



PROVISIONS ON EXCHANGE OF INFORMATION

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 exchange of information 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.

Information exchange is one form of investigative assistance and the ability to exchange information, particularly confidential information, is crucial for competition authorities to co-operate effectively. Exchange of confidential information may take place either through confidentiality waivers or through the so-called “information gateway” provisions (i.e. legal provisions allowing for the exchange of confidential information between competition authorities without the need to obtain prior consent from the source of the information).

Most MoUs concluded to date are first generation agreements which allow only the exchange of non-confidential information, usually in the enforcement co-operation section. Some second generation MoUs contain information gateway provisions, which cover ways of information exchange (i.e. the ability to discuss, transmit or obtain information, etc.) and include confidentiality safeguards, limitations on use or further disclosure of the information.

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

Exchange of Information in Competition Investigations or Proceedings

VII. RECOMMENDS that in co-operating with other Adherents, where appropriate and practicable, Adherents should provide each other with relevant information that enables their competition authorities to investigate and take appropriate and effective actions with respect to anticompetitive practices and mergers with anticompetitive effects.

1. The exchange of information should be undertaken on a case-by-case basis between the competition authority of the Adherent that transmits the information (“the transmitting Adherent”) and the competition authority of the Adherent that receives the information (“the receiving Adherent”), and it should cover only information that is relevant to an investigation or proceeding of the receiving Adherent. In its request for information, the receiving Adherent should explain to the transmitting authority the purpose for which the information is sought.

2. The transmitting Adherent retains full discretion when deciding whether to transmit information.

3. In order to achieve effective co-operation, Adherents are encouraged to exchange information that is not subject to legal restrictions under international or domestic law, including the exchange of information in the public domain and other non-confidential information.

4. Adherents may also consider the exchange of information internally generated by the competition authority that the authority does not routinely disclose and for which there is no statutory prohibition or restriction on disclosure, and which does not specifically identify confidential information of individual enterprises. In this case, the transmitting Adherent may choose to impose conditions restricting the further dissemination and use of the information by the receiving Adherent. The receiving Adherent should protect it in accordance with its own legislation and regulations and should not disclose the views of the transmitting Adherent without its consent.

5. When the exchange of the above information cannot fully meet the need for effective co-operation in a matter, Adherents should consider engaging in the exchange of confidential information subject to the following provisions.

Exchange of confidential information through the use of confidentiality waivers

6. Where appropriate, Adherents should promote the use of waivers, for example by developing model confidentiality waivers, and should promote their use in all enforcement areas.

7. The decision of an enterprise or an individual to waive the right to confidentiality protection is voluntary.

8. When receiving confidential information pursuant to a confidentiality waiver, the receiving Adherent should use the information received in accordance with the terms of the waiver.

9. The information should be used solely by the competition authority of the receiving Adherent, unless the waiver provides for further use or disclosure.

Exchange of confidential information through “information gateways” and appropriate safeguards

10. Adherents should consider promoting the adoption of legal provisions allowing for the exchange of confidential information between competition authorities without the need to obtain prior consent from the source of the information (“information gateways”).

11. Adherents should clarify the requirements with which both the transmitting and receiving authorities have to comply in order to exchange confidential information and should establish sufficient safeguards to protect the confidential information exchanged, as provided in this Recommendation. Adherents might differentiate the application of the provisions, e.g., on the basis of the type of investigation or of the type of information.

12. The transmitting Adherent should retain full discretion whether to provide the information under the information gateway, and may choose to provide it subject to restrictions on use or disclosure. When deciding whether to respond positively to a request to transmit confidential information to another Adherent, the transmitting Adherent may consider the following factors in particular:

(i) The nature and seriousness of the matter, the affected interests of the receiving Adherent, and whether the investigation or proceeding is likely to adequately safeguard the procedural rights of the parties concerned;

(ii) Whether the disclosure is relevant to the receiving authority’s investigation or proceeding;

(iii) Whether competition authorities of both the transmitting and receiving Adherents are investigating the same or related anticompetitive practice or merger with anticompetitive effects;

(iv) Whether the receiving Adherent grants reciprocal treatment;

(v) Whether the information obtained by the transmitting Adherent under an administrative or other non-criminal proceeding can be used by the receiving Adherent in a criminal proceeding; and

(vi) Whether the level of protection that would be granted to the information by the receiving Adherent would be at least equivalent to the confidentiality protection in the transmitting Adherent.

13. The transmitting Adherent should take special care in considering whether and how to respond to requests involving particularly sensitive confidential information, such as forward-looking strategic and pricing plans.

14. Before the transmission of the confidential information can take place, the receiving Adherent should confirm to the transmitting Adherent that it will:

(i) Maintain the confidentiality of the exchanged information to the extent agreed with the transmitting Adherent with respect to its use and disclosure;

(ii) Notify the transmitting Adherent of any third party request related to the information disclosed; and

(iii) Oppose the disclosure of information to third parties, unless it has informed the transmitting Adherent and the transmitting Adherent has confirmed that it does not object to the disclosure.

15. When an Adherent transmits confidential information under an information gateway, the receiving Adherent should ensure that it will comply with any conditions stipulated by the transmitting Adherent. Prior to transmission, the receiving Adherent should confirm to the transmitting Adherent the safeguards it has in place in order to:

(i) Protect the confidentiality of the information transmitted. To this end, the receiving Adherent should identify and comply with appropriate confidentiality rules and practices to protect the information transmitted, including: (a) appropriate protection, such as electronic protection or password protection; (b) limiting access to the information to individuals on a need-to-know basis; and (c) procedures for the return to the competition authority of the transmitting Adherent or disposal of the information transmitted in a manner agreed upon with the transmitting Adherent, once the information exchanged has served its purpose; and

(ii) Limit its use or its further dissemination in the receiving Adherent. To this end, the information should be used solely by the competition authority of the receiving Adherent and solely for the purpose for which the information was originally sought, unless the transmitting Adherent has explicitly granted prior approval for further use or disclosure of the information.

16. The receiving Adherent should take all necessary and appropriate measures to ensure that unauthorised disclosure of exchanged information does not occur. If an unauthorised disclosure occurs, the receiving Adherent should take appropriate steps to minimise any harm resulting from the unauthorised disclosure, including promptly notifying and, as appropriate, co-ordinating with the transmitting Adherent, to ensure that such unauthorised disclosure does not recur. The transmitting Adherent should notify the source of the information about the unauthorised disclosure, except where to do so would undermine the investigation or proceeding in the transmitting or receiving country.

Provisions applicable to information exchange systems

17. The Adherent receiving confidential information should protect the confidentiality of the information received in accordance with its own legislation and regulations and in line with this Recommendation.

18. Adherents should provide appropriate sanctions for breaches of the confidentiality provisions relating to the exchange of confidential information.

19. The present Recommendation is not intended to affect any special regime adopted or maintained by an Adherent with respect to exchange of information received from a leniency or amnesty applicant or an applicant under specialised settlement procedures.

20. The transmitting Adherent should apply its own rules governing applicable privileges, including the privilege against self-incrimination and professional privileges, when transmitting the requested confidential information, and endeavour not to provide information deemed privileged in the receiving Adherent. The transmitting Adherent may consider working with the parties to identify privileged information in the receiving Adherent in appropriate cases.

21. The receiving Adherent should, to the fullest extent possible:

(i) not call for information that would be protected by those privileges, and

(ii) ensure that no use will be made of any information provided by the transmitting Adherent that is subject to applicable privileges of the receiving Adherent.

22. Adherents should ensure an appropriate privacy protection framework in accordance with their respective legislation.

Relevant provisions in MoUs:

(i) provisions on exchange of non-confidential information

Japan-India (2021)

Paragraph II. COOPERATION

(3) The competition authorities would, to the extent consistent with the laws and regulations of each country and the important interests of each competition authority, and within its reasonably available resources, exchange information on: -

- (a) each other's laws, regulations and competition policy and developments of enforcement in their respective jurisdictions;
- (b) experience in improving legal framework of competition policy;
- (c) experience in conducting investigations of anti-competitive activities in their respective jurisdictions;
- (d) improvement of competition conditions in markets; and
- (e) development of research in the field of competition law.

Japan-Viet Nam (2013)

Paragraph 4 Exchange of Information

Each competition authority will, as appropriate, provide the other competition authority with information that is relevant to the enforcement activities of the other competition authority to the extent consistent with the laws and regulations of the country of the providing competition authority and the important interests of the providing competition authority, subject to its reasonably available resources.

Panama-Chinese Taipei (2013)

Article 6. Transparency and Exchange of Information

2. Where it does not contravene the legislation or an undergoing investigation, at the request of any of the Parties, the other Party shall provide information related to the activities of application of its legislation.

EU-India (2013)

II. COOPERATION

3. Cooperation between the Sides under the present Memorandum of Understanding will be subject to the respective laws of the Sides, and in particular the protection of confidential information and business secrets as provided under relevant competition laws of the Sides.

4. The Sides acknowledge that it will be in their mutual interest to exchange non-confidential information, experiences and views with regard to:

- a) Competition policy and enforcement developments in their respective jurisdictions, including with regard to

investigations of competition law infringements;

b) Operational issues affecting the efficiency and/or effectiveness of the respective Sides;

c) Multilateral competition initiatives, such as interactions with the International Competition Network, the Organization for Economic Cooperation and Development, the World Intellectual Property Organization and the United Nations Conference on Trade and Development.

d) Competition advocacy including raising awareness of companies and the wider public about competition legislation and enforcement,

e) Technical cooperation initiatives in the area of competition law and its enforcement.

Australia-Papua New Guinea (1999)

4.1 Exchange of information

4.1.1 The agencies agree that it is in their common interests to share information that will:

- facilitate effective application for their respective competition and consumer laws;
- avoid unnecessary duplication;
- facilitate co-ordinated investigations, research and education;
- promote a better understanding by each of economic and legal conditions and theories relevant to their respective competition and consumer law enforcement and related activities; and
- keep each other informed of developments in their respective countries or companies based in that country.

4.1.2 In furtherance of this common interest the agencies will, on a regular basis, exchange and provide information in relation to:

- regular publications, including annual reports, journals and information bulletins;
- investigations and research;
- speeches, research papers, journal articles, etc;
- compliance education programs;
- amendments to relevant legislation; and
- human resource development and corporate resources.

Brazil-Korea (2014)

Paragraph 4 – Exchange of Information

4.1 Each Participant will, to the extent consistent with its laws and regulations of, and its important interests, provide the other Participant, upon request by the other Participant and in accordance with the provisions of this Memorandum of Understanding, with information within its possession that is relevant to the enforcement activities of the other Participant.

4.2 The exchange of information will be made via mail, email or, where appropriate³, via telephone. In order to facilitate communication, the language used should be English.

4.3 It is understood that the Participants do not intend to communicate information to the each other, if such communication is prohibited by the laws governing the Participant that possesses the information or if it is incompatible with that Participant's interests.

4.4 Each Participant will keep confidential the information provided by the other according to this Memorandum of Understanding in line with the laws of its country, unless agreements are reached through negotiations stating otherwise.

4.5 All exchange of information will be conducted in strict confidentiality in line with the Participant's applicable laws unless stated otherwise in agreements reached through negotiations.

(ii) exchange of confidential information in second generation MoUs

Australia-Japan (2015)

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

4.2. Each competition authority will endeavour, to the extent consistent with the laws and regulations of its country and its important interests, to:

(a) provide the other competition authority with any significant information, within its possession and that comes to its attention, about anticompetitive activities that the providing competition authority considers may be relevant to, or may warrant, enforcement activities of the other competition authority; and

(b) provide the other competition authority, upon request and in line with the contents of this Arrangement, with information within its possession that is relevant to the enforcement activities of the other competition authority.

4.3. Each competition authority will, where practicable and to the extent consistent with the laws and regulations of its country, give due consideration to sharing information obtained during the course of an investigation. Each competition authority retains full discretion when deciding whether to share such information or not. The terms of use and disclosure of such information will be decided in writing on a case-by-case basis.

4.4. Where both competition authorities are simultaneously conducting a review of the same merger transaction and one of them becomes aware of the likelihood that the transaction may impact on a market within the jurisdiction of the other competition authority, each competition authority recognises the benefits of contacting one or more of the merging parties to seek approval to disclose confidential information of such merging party or parties to the other competition authority under appropriate conditions in order to facilitate the discussions between the competition authorities on such impact.

4.5. Both competition authorities recognise that this Arrangement is not intended to affect any regulation, policy or practice adopted or maintained by each competition authority with respect to exchange of information including that received from a leniency applicant.

Canada-New Zealand (2016)

Definitions

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

6.2. "information" means:

6.2.1. for the Commissioner of Competition, any information in its possession or control; and

6.2.2. for the NZCC, information that is not in the public domain, and which has been compulsorily-acquired by the NZCC as a result of, or in relation to, the exercise by the NZCC of its search and notice powers under its competition and consumer laws and any power incidental to those powers ("compulsorily-acquired information");

6.4 "request" means:

6.4.1. a request from the Commissioner of Competition to the NZCC for the NZCC to provide information or investigative assistance; or

6.4.2. a request from the NZCC to the Commissioner of Competition for the Commissioner of Competition to provide information and/or assistance under, or in relation to, Canada's competition and consumer laws;

Requests for information and/or assistance

7. The Participants may make a request under this Arrangement:

8. Any request under paragraph 7 will be accompanied by a statement:

8.1. confirming that the requesting Participant considers that the provision of the information and/or assistance will assist, or will be likely to assist, the requesting Participant in performing functions or exercising powers in relation to its competition and consumer laws; and

8.2. explaining why the requesting Participant considers that the information and/or assistance may not be more conveniently obtained from another source.

11. In responding to a request, a Participant may impose conditions (including privacy protections) on the provision of information and/or assistance, including as to:

11.1. the confidentiality of information;

11.2. the storage, use of, or access to any information provided;

11.3. the copying, returning, or disposal of copies of any information provided; and

11.4. the payment of costs reasonably incurred by the responding Participant.

12. The NZCC will not provide any communication or information that is protected by the privilege for settlement negotiations or mediation provided for in section 57 of the *Evidence Act 2006* (New Zealand) (2006 No 69), without the consent of every other party who holds that privilege.

13. In accordance with section 99J of the *Commerce Act 1986*, the NZCC will not provide copies of statements made by any person in answer to a question put by or before the NZCC that might tend to incriminate the person, unless the Commissioner of Competition gives a written undertaking that:

13.1. the Commissioner of Competition will not use the statements as evidence in criminal proceedings against the person (other than in respect of the falsity of the person's testimony) or in proceedings against the person for a pecuniary penalty; and

13.2. to the extent possible, the Commissioner of Competition will ensure that the statements are not used by any other person, authority, or agency as evidence in such proceedings.