

Competition co-operation and enforcement

INVENTORY OF INTERNATIONAL CO-OPERATION MOUs BETWEEN COMPETITION AGENCIES



PROVISIONS ON CONFIDENTIALITY

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 confidentiality 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.

Adequate protection of information exchanged is key to the success of co-operation in investigations. Divulging sensitive information may undermine the incentive of private parties to co-operate with the agency and affect the integrity and credibility of the investigations, as well as co-operation between competition authorities.

Most MoUs also have provisions on confidentiality of the information exchanged, including an obligation to maintain the confidentiality of information exchanged, and the sending party's discretion to set terms and conditions on the use and disclosure of the confidential information exchanged.

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.

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

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.

Relevant provisions in MoUs:

(i) typical examples

Canada-Korea (2006)

VI. Existing laws and confidentiality of information

2. Notwithstanding any other provision in this Arrangement, no Participant is required to communicate information to the other Participant if such communication is prohibited by the laws of the Participant possessing the information or would be incompatible with the interests of that Participant in the application of its competition and consumer laws.

3. The degree to which one Participant communicates information to the other pursuant to this Arrangement may be subject to, and dependent upon, the acceptability of the assurances given by the other Participant with respect to confidentiality and with respect to the purposes for which the information will be used.

4. Unless otherwise decided by the Participants, each Participant will, to the fullest extent possible, maintain the confidentiality of any information communicated to it in confidence by the other Participant. Each Participant will oppose, to the fullest extent possible, any request by a third party for communication of such confidential information, unless the Participant providing the confidential information consents in writing to its communication.

France-Chinese Taipei (2014)

Article 5 - Confidentiality

Each Party recognises the necessity to ensure confidentiality of all information communicated by the other Party in the framework of the Memorandum in accordance with their national legislations.

Each Party commits to complying with all applicable legal rules including, but not limited to, business confidentiality, professional secrecy and the protection of personal data.

EU-India (2013)

VI. Existing legislation and confidentiality of information

16. Neither Side will be required to communicate information to the other Side if communication of such information is prohibited by the legislation of the Side possessing this information or if it would be incompatible with the interests of that Side in its application of the competition law.

Korea-US (2015)

SECTION II Confidentiality

1. Notwithstanding any other provision of this Memorandum, the U.S. antitrust agencies and the KFTC commit not to communicate information to the other if such communication is prohibited by the laws governing the agency possessing the information or would be incompatible with that agency's interest.

2. Insofar as information is communicated between competition authorities pursuant to this Memorandum, the recipient should, to the extent consistent with any applicable domestic laws, maintain the confidentiality of any such information communicated to it in confidence. Each competition agency should oppose, to the fullest extent possible consistent with applicable domestic laws, any application by a third party for disclosure of such information.

Japan-Korea (2014)

Paragraph 11 Confidentiality

11.1. Each Side will, in accordance with the laws and regulations of its country, maintain the confidentiality of any information provided to it in confidence by the other Side under this Memorandum.

11.2. Information, other than publicly available information, provided by a Side to the other Side under this Memorandum, will be used by the receiving Side only for the purpose of the effective enforcement of the competition law and will not be disclosed by the receiving Side to other authorities or to any third party.

11.3. Notwithstanding any other paragraphs of this Memorandum, neither Side is required to provide information to the other Side if it is prohibited from providing the information by the laws and regulations of its country or if it finds providing the information incompatible with its important interests.

11.4. Information, other than publicly available information, provided by a Side to the other Side under this Memorandum, will not be used by the receiving Side in criminal proceedings carried out by a court or a judge of the country of the receiving Side.

11.5. This paragraph will not preclude the use or disclosure of information provided under this Memorandum to the extent such use or disclosure is required by the laws and regulations of the country of the receiving Side. In such case, the receiving Side will, wherever possible, give advance notice of any such use or disclosure to the providing Side.

(ii) confidentiality provisions in second generation MoUs

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

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

11. Confidentiality

11.1. Each Party represents that the confidentiality of Investigative Information communicated and received under this Agreement is protected by its law and procedures, that its law and procedures are sufficient to securely maintain the confidentiality of Investigative Information provided under this Agreement, and that the Parties are themselves subject to the confidentiality restrictions imposed by their respective law and procedures.

11.2. Except as otherwise provided by this Section and Section 12, each Party shall, to the fullest extent possible and consistent with its law, maintain confidentiality of any Investigative Information communicated and received under this Agreement, including the fact that a request for Investigative Information has been communicated or received.

11.3. Each Party shall protect Investigative Information received under this Agreement from disclosure to the fullest extent possible under its law, as determined by the Party, except as outlined in Sub-section 11.4 and Sub-section 11.5.

11.4. This Agreement does not prevent disclosure of Investigative Information received under this Agreement:

a) to Persons that are subject to an enforcement proceeding brought by a Requesting Party if such disclosure is required by its law as determined by the Requesting Party;

b) to courts and tribunals in the course of a judicial or administrative proceeding; or

c) when the Requesting Party advises the Responding Party it is required to do so under its law.

11.5. Investigative Information received pursuant to this Agreement that has been disclosed by virtue of Sub-section 11.4 and that has been made public consistent with the terms of this Section may thereafter be used by the Requesting Party for any purpose consistent with its law.

11.6. The Requesting Party shall notify the Responding Party at least 14 calendar days in advance of any proposed disclosure under Sub-section 11.4, or, if such notice cannot be given because of a court or tribunal order, then as promptly as possible.

Australia-Japan (2015)

Paragraph [*10] Confidentiality of Information

10.1. Each competition authority will, in line with the laws and regulations of its country, maintain the confidentiality of any information communicated by the other competition authority that is not publicly available, and will protect such information against disclosure in response to a request by a third party, unless the competition authority providing the confidential information otherwise consents in writing.

10.2. Information, other than publicly available information, provided by a competition authority to the other competition authority under this Arrangement, will only be used by the receiving competition authority for the purpose of effective enforcement of its competition law, and will not be communicated by the receiving competition authority to other authorities or a third party except when the information is communicated in line with paragraph 4 of Article 15.8 of the Agreement.

10.3. Notwithstanding subparagraph 10.2, information shared pursuant to subparagraph 4.3 will, unless otherwise decided in writing, only be used by the receiving competition authority for its current or future enforcement activities with regard to:

- (a) the conduct or transaction; and/or
- (b) the goods or services of one or more of the enterprises,

which are, or were, the subject of the enforcement activities of the competition authority sharing the information, or other conduct or transaction and/or goods or services related thereto.

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

Protection and use of information

15. Where the NZCC provides the ACCC with compulsorily-acquired information in response to a request, the ACCC will:

15.1 use the information only in accordance with any conditions imposed by the NZCC under clause 12.2 of this Arrangement and in accordance with section 155AAA of the CCA;

15.2 keep the information secure in accordance with the ACCC's standard evidence handling procedures, and in accordance with any conditions imposed by the NZCC under clause 12.2 of this Arrangement; and

15.3 protect to the fullest extent possible confidential information provided in accordance with this Arrangement, including in response to requests made by third parties under the Freedom of Information Act 1982.

16. Where the NZCC provides any information or communication which is protected by privilege under New Zealand law:

16.1 the NZCC is not to be regarded as having waived that privilege; and

16.2 the ACCC will treat that information or communication as being subject to the analogous privilege under Australian law.

Commencement, amendment and termination

18. All understandings created under the section entitled "Protection and use of information" will remain in effect despite any termination of this Arrangement.