

Competition co-operation and enforcement

INVENTORY OF INTERNATIONAL CO-OPERATION MOUs BETWEEN COMPETITION AGENCIES



PROVISIONS ON CO-ORDINATION OF INVESTIGATIONS AND PROCEEDINGS

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 co-ordination of investigations and proceedings 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.

Provisions on co-ordination of investigations and proceedings require the parties to co-ordinate their enforcement activities in parallel investigations. They are increasingly important as competition authorities often investigate the same or related matters. Agencies may co-ordinate with each other:

- before opening formal investigations/proceedings, to discuss 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.

The 2014 OECD Recommendation on International Co-operation recommends co-ordinating parallel investigations or proceedings and lists examples of possible co-ordination arrangements.

More than half of the MoUs that the Secretariat reviewed do not include a provision on co-ordination of investigations and proceedings. This can be due to the fact that MoUs focus on establishing general co-operation, a good relationship or communications between competition authorities rather than co-ordination in specific cases. Some MoUs [e.g. Australia-Japan (2015), Korea-Mexico (2004), Australia-Korea (2002), Australia-Papua New Guinea (1999), and Australia-Chinese Taipei (1996)] have detailed clauses on co-ordination. Others provide just a general statement on co-ordination, such as “(w)here the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, each intends to consider co-ordination of their enforcement activities as appropriate” (Section I-2 of Korea-US (2015)).

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 MoUs:

(i) those having a general statement on enforcement co-ordination

Japan-Singapore (2017)

Paragraph 6 Coordination of Enforcement Activities

6.1 Where the competition authorities are pursuing enforcement activities with regard to the same matter or matters that are related to each other, the competition authorities will consider coordination of their enforcement activities.

6.2 Each competition authority may at any time, subject to appropriate notification to the other competition authority, limit or terminate the coordination of enforcement activities and pursue its enforcement activities independently.

Korea-US (2015)

Section 1 Cooperation and coordination

2. Where one of the U.S. antitrust agencies and the KFTC are both pursuing enforcement activities with regard to related matters, each intends to consider coordination of their enforcement activities as appropriate.

China (NDRC and SAIC)-EU (2012)

2. Content of the cooperation and coordination activities between the two Sides

2.3 Should the two Sides pursue enforcement activities concerning the same or related matters, they may exchange non-confidential information, experiences views on the matter and coordinate directly their enforcement activities, where appropriate and practicable.

Colombia-US (2015)

Article III Coordination with regard to related matters

1. Where one of the U.S. antitrust agencies and the SIC are both pursuing enforcement activities with regard to related matters, they shall consider coordination of their enforcement activities.

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

(ii) examples of relatively detailed provisions

Australia-Japan (2015)

Paragraph [*05] Coordination of Enforcement Activities

5.1. Where the competition authorities are pursuing enforcement activities with regard to matters that are related to each other:

(a) the competition authorities will consider coordination of their enforcement activities; and

(b) each competition authority will consider, upon request by the other competition authority and where consistent with the respective important interests of the competition authorities, inquiring whether persons who have provided confidential information in connection with the enforcement activities will consent to the sharing of such information with the other competition authority.

5.2. In considering whether particular enforcement activities should be coordinated, the competition authorities will 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 to obtain information necessary to conduct the enforcement activities;

(c) the extent to which either competition authority can secure effective relief against the anticompetitive activities involved;

(d) the possible reduction of cost to the competition authorities and to the persons subject to the enforcement activities; and

(e) the potential advantages of coordinated relief to the competition authorities and to the persons subject to the enforcement activities.

5.3. Each competition authority may at any time, after notifying the other competition authority of its decision, limit or terminate the coordination of enforcement activities and pursue its enforcement activities independently.

Korea-Mexico (2004)

Paragraph IV Coordination with regard to related matters

1. Where both Agencies 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, either in whole or in part, the Agencies will take into account the following factors, among others:
 - (a) the effect of such coordination on the ability of both Agencies to achieve their respective enforcement objectives;
 - (b) the relative abilities of the Agencies to obtain information necessary to conduct the enforcement activities;
 - (c) the extent to which either Agency can secure effective relief against the anticompetitive practices involved;
 - (d) the possible reduction of cost to the Agencies and to the persons subject to enforcement activities; and
 - (e) the potential advantages of coordinated remedies to the Agencies and to the persons subject to the enforcement activities.
3. In any coordination arrangement, each Agency will seek to conduct their enforcement activities consistently with the enforcement objectives of the other Agency.
4. In the case of concurrent or coordinated enforcement activities, each Agency will consider, upon request by the other Agency and where consistent with the important interests of the requested Agency, ascertaining whether persons that have provided confidential information in connection with those enforcement activities will consent to the sharing of such information between the Agencies.
5. Either Agency may at any time notify the other Agency that they intend to limit or terminate coordinated enforcement and pursue their enforcement activities independently and subject to the other provisions of this Arrangement.