

Competition co-operation and enforcement

INVENTORY OF INTERNATIONAL CO-OPERATION MOUs BETWEEN COMPETITION AGENCIES



PROVISIONS ON DEFINITIONS

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 definitions 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.

Many inter-agency MoUs do not have provisions on definitions. When MoUs do have provisions on definitions, these are mostly key terms and concepts, such as “competition laws”, “competition authorities”, “enforcement activities” and “anticompetitive activities” [e.g. Japan-Singapore (2017) , Canada-Colombia (2017) and Colombia-US (2014)]. The second generation MoU between New Zealand and Australia on compulsorily-acquired information and investigative assistance (2013) further provides definitions for “compulsorily-acquired information”, “investigative assistance”, “protected information” and “request”.

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

I. AGREES that, for the purpose of the present Recommendation, the following definitions are used:

- [...]
- “Anticompetitive practice” refers to business conduct that restricts competition, as defined in the competition law and practice of an Adherent;
- “Competition authority” means an Adherent’s government entity, other than a court, charged with primary responsibility for the enforcement of the Adherent’s competition law;
- “Confidential information” refers to information the disclosure of which is either prohibited or subject to restrictions under the laws, regulations, or policies of an Adherent, e.g., non-public business information the disclosure of which could prejudice the legitimate commercial interests of an enterprise;
- “Co-operation” includes a broad range of practices, from informal discussions to more formal co-operation activities based on legal instruments at the national or international level, employed by competition authorities of Adherents to ensure efficient and effective reviews of anticompetitive practices and mergers with anticompetitive effects affecting one or more Adherents. It may also include more general discussions relating to competition policy and enforcement practices;
- “Investigation or proceeding” means any official factual inquiry or enforcement action authorised or undertaken by a competition authority of an Adherent pursuant to the competition laws of the Adherent;
- “Merger” means merger, acquisition, joint venture or any other form of business amalgamation that falls within the scope and definitions of the competition laws of an Adherent governing business concentrations or combinations;
- “Merger with anticompetitive effects” means a merger that restricts or is likely to restrict competition, as defined in the competition law and practice of an Adherent and, for the purpose of this Recommendation, may include a merger that is under review by the competition authority of an Adherent according to its merger laws with a view to establishing if it has anticompetitive effects;
- “Waiver” or “confidentiality waiver” means permission granted by a party subject to an investigation or proceeding, or by a third party, that enables competition authorities to discuss and/or exchange information, otherwise protected by confidentiality rules of the Adherent(s) involved, which has been obtained from the party in question.

Relevant provisions in MoUs:

(i) typical examples of provisions on definitions

Colombia-US (2014)

Article 1 Purpose and definitions

2. For the purposes of this Agreement, the following terms shall have the following definitions:

(a) "Anticompetitive practice(s)" means any conduct or transaction that may be subject to penalties or other relief under the competition laws enforced by the U.S. antitrust agencies or the SIC;

(b) "Competition authority(ies)" means the U.S. antitrust agencies and the SIC;

(c) "Competition law(s)" means

(i) For the SIC, Laws 155 of 1959, 256 of 1996, and 1340 of 2009; Decrees 2153 of 1992 and 4886 of 2011, and specific legislation directly associated with these legal instruments, as well as any amendments thereto;

(ii) For the U.S. antitrust agencies, the Sherman Act (15 U.S.C. §§ 1-7), the Clayton Act (15 U.S.C. §§ 12-27), the Wilson Tariff Act (15 U.S.C. §§ 8-11), and the Federal Trade Commission Act (15 U.S.C. §§ 41-58), to the extent that it applies to unfair methods of competition, as well as any amendments thereto; and

(d) "Enforcement activity(ies)" means any investigation or proceeding conducted by the U.S. antitrust agencies or the SIC in relation to the competition laws they enforce.

Mongolia-Turkey (2010)

Article 1 Purpose and definitions

2. In this MoU:

(a) "competition laws" will mean:

i. for the AFCCP, The Law on Prohibiting Unfair Competition

ii. for the TCA, Act No 4054 on the Protection of Competition

(b) "enforcement activity(ies)" will mean any application of competition laws by way of investigation or proceeding conducted by a Party.

(c) "territory(ies)" will mean the territories in respect of which the competition laws are administered by the Parties.

Japan-Korea (2014)

Paragraph 3 Definitions

3. For the purposes of this Memorandum:

(a) the term “competition law” means:

(i) for Japan, the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54, 1947) and its implementing regulations as well as any amendments thereto; and

(ii) for the Republic of Korea, the Monopoly Regulation and Fair Trade Act (Law No. 3320, 1980) and its implementing regulations as well as any amendments thereto;

(b) the term “enforcement activities” means any investigation or proceeding conducted by a Side in relation to the application of the competition law of its country, but will not include:

(i) the review of business conduct or routine filings; and

(ii) research, studies or surveys with the objective of examining the general economic situation or general conditions in specific sectors; and

(c) the term "anti-competitive activities" means any activities that may be subject to penalties or relief by either Side under the competition law of its country.

(ii) provisions on definitions in second generation MoUs

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

Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities

2. Definitions

In this Framework, terms have the following definitions:

“Agency Confidential Information” means information that is in the possession of a Participant that it is not prohibited from disclosing by law, but normally treats as non-public.

“Competition Laws” means the law of each Participant’s jurisdiction in relation to cartels and other anti-competitive agreements and arrangements, unilateral conduct or monopolistic practices, and merger control, as amended.

"Framework" means this Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities.

“Investigation” means an enforcement matter, inquiry or review conducted by a Participant pursuant to applicable Competition Laws.

"Investigative Information" means information related to an Investigation that is not in the public domain, which has been either compulsorily acquired by, or provided voluntarily to, a Participant and that the Participant is required to protect from disclosure.

"Model Agreement" means the agreement in Annexure A to this Framework.

“Participants” means the competition authorities that are signatories to this Framework as set out on the signature pages.

Canada-New Zealand (2016)

Definitions

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

6.1. "competition and consumer laws" means:

6.1.1. for the Commissioner of Competition, the *Competition Act*, the *Consumer Packaging and Labelling Act* (except as it relates to food), the *Precious Metals Marking Act*, the *Textile Labelling Act* and any regulations made under those Acts; and

6.1.2. for the NZCC, the *Commerce Act 1986* and the *Fair Trading Act 1986*.

as well as any amendments to these Acts;

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");

6.3. "investigative assistance" includes the provision 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;

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;

6.5 "search and notice powers" means any of the NZCC's powers under:

6.5.1. sections 98, 98A and 98H of the *Commerce Act 1986*; and

6.5.2. sections 47 and 47G of the *Fair Trading Act 1986*.