

# Competition co-operation and enforcement

## INVENTORY OF INTERNATIONAL CO-OPERATION MOUs BETWEEN COMPETITION AGENCIES



### PROVISIONS ON NEGATIVE COMITY

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 negative comity 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](http://www.oecd.org/competition/inventory-competition-agency-mous.htm).

Comity is a legal principle in international law whereby a country should take other countries' important interests into account while conducting its law enforcement activities, in return for their doing the same. Thus, comity is a means for tempering the effects of the unilateral assertion of extraterritorial jurisdiction.

Negative comity, also called "traditional comity", involves a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interests, and avoid conflicts. The principle is based on the recognition that a particular enforcement activity by one jurisdiction may adversely affect important interests of the other jurisdiction and may produce conflicts. For example, competition authorities may arrive at conflicting outcomes after independent proceedings that may undermine the remedial objective of at least one of the authorities involved. Negative comity can consist of obligations on the party taking the enforcement action to notify any activity which may affect important interests of the other party, and take appropriate measures to address the conflict.

More than half of the MoUs reviewed do not have a provision on negative comity. Some MoUs [e.g. Chile-US (2011) and Canada-Korea (2006)] have only a general principle of negative comity. A few MoUs [e.g. Brazil-Japan (2014) and Japan-Korea (2014)] have detailed negative comity provisions.

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

### Notifications of Competition Investigations or Proceedings

V. RECOMMENDS that an Adherent should ordinarily notify another Adherent when its investigation or proceeding can be expected to affect the other Adherent's important interests.

3. The notifying Adherent, while retaining full freedom of ultimate decision, should take account of the views that the other Adherent may wish to express and of any remedial action that the other Adherent may consider under its own laws, to address the anticompetitive practice or mergers with anticompetitive effects.

### Consultation and Comity

III. RECOMMENDS that an Adherent that considers that an investigation or proceeding being conducted by another Adherent under its competition laws may affect its important interests should transmit its views on the matter to, or request consultation with, the other Adherent.

1. To this end, without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision, the Adherent so addressed should give full and sympathetic consideration to the views expressed by the requesting Adherent, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding.

## Relevant provisions in MoUs:

*(i) typical examples*

### Colombia-US (2014)

#### Article IV Avoidance of conflicts; consultations

1. The U.S. antitrust agencies and the SIC shall, within the framework of their own laws and to the extent compatible with their important interests, give careful consideration to the other country's competition authority's important interests throughout all phases of their enforcement activities, including decisions regarding the initiation of an investigation or proceeding, the scope of an investigation or proceeding, and the nature of the remedies or penalties sought in each case.

### Canada-Korea (2006)

#### Article IV. Avoidance of conflicts

1. The Participants acknowledge that it is in their common interest to minimize any potentially adverse effects of one Participant's enforcement activities on the other Participant's interests in the application of its competition and consumer laws.

2. Where one Participant informs the other that a specific enforcement activity by the second Participant may affect the first Participant's interests in the application of its competition and consumer laws, the second Participant will endeavour to provide timely notice of significant developments relating to those interests and an opportunity to provide input regarding any proposed penalty or remedy.

### **Australia-Chinese Taipei (1996)**

#### **Article 9. Avoidance of Conflict**

9.1 Within the framework of its own laws, and to the extent compatible with its own interests, each agency is to seek at all stages in its activities to take into account the important interests of the other. Where there are any instances where the other's interests may be impinged, urgent and immediate consultation should take place.

### **EU-India (2013)/ EU-China (2019)**

#### **Article IV. Avoidance of conflicts/Article 5**

9. The Sides acknowledge that it will be in their common interest to minimize any potentially adverse effects of one Side's enforcement activities on the other Side's interests in the application of their respective competition laws.

10. Should one Side inform the other Side that enforcement activities of the latter may affect the informing Side's interests in its application of its competition law, the other Side will endeavour to provide an opportunity to exchange views and conduct consultations on the issues raised by the informing Side consistent with the interests of the Sides.

*(ii) an example with detailed provisions*

### **Brazil-Japan (2014)**

#### **Paragraph 8 Avoidance of Conflicts over Enforcement Activities**

8.1. Each competition authority will give careful consideration to the important interests of the other competition authority throughout all phases of its enforcement activities, including decisions regarding the initiation of enforcement activities, the scope of enforcement activities and the nature of penalties or relief sought in each case.

8.2. When either competition authority informs the other competition authority that specific enforcement activities of the latter competition authority may affect the important interests of the former competition authority, the latter competition authority will endeavour to provide timely notice of significant developments of such enforcement activities.

8.3. Where either competition authority considers that its enforcement activities may adversely affect the important interests of the other competition authority, the competition authorities will consider the following factors, in addition to any other factor that may be relevant in the circumstances in seeking an appropriate accommodation of the competing interests:

- (a) the relative significance to the anti-competitive activities of conduct or transactions occurring in the country of the competition authority conducting the enforcement activities as compared to conduct or transactions occurring in the country of the other competition authority;
- (b) the relative impact of the anti-competitive activities on the important interests of the respective competition authorities;
- (c) the presence or absence of evidence of an intention on the part of those engaged in the anti-competitive activities to affect consumers, suppliers, or competitors in the country of the competition authority conducting the enforcement activities;
- (d) the extent to which the anti-competitive activities substantially lessen competition in the markets of their respective countries;
- (e) the degree of conflict or consistency between the enforcement activities of a competition authority and the laws and regulations of the country of the other competition authority, or the policies or important interests of the other competition authority;
- (f) whether private persons, either natural or legal, will be placed under conflicting requirements by both competition authorities;
- (g) the location of relevant assets and parties to the transaction;
- (h) the degree to which effective penalties or relief can be secured by the enforcement activities of the competition authority against the anti-competitive activities; and
- (i) the extent to which enforcement activities of the other competition authority with respect to the same persons, either natural or legal, would be affected.