

Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings

As approved by Council on 16 September 2014
[C(2014)108]

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to the fact that international co-operation among OECD countries in competition investigations and proceedings has long existed and evolved over time, based on the implementation of the 1995 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade [C(95)130/FINAL] and its predecessors [C(67)53(Final), C(73)99(Final), C(79)154(Final) and C(86)44(Final)], which this Recommendation replaces;

HAVING REGARD to the Recommendation of the Council concerning Effective Action Against Hard Core Cartels [C(98)35/FINAL], to the Recommendation of the Council on Merger Review [C(2005)34], and to the Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations [DAF/COMP(2005)25/FINAL] developed by the Competition Committee, as well as its analytical work on international co-operation, including the 2013 Report on the OECD/International Competition Network (ICN) Survey on International Enforcement Co-operation [DAF/COMP/WP3(2013)2/FINAL];

RECOGNISING that anticompetitive practices and mergers with anticompetitive effects may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Adherents to this Recommendation;

RECOGNISING that review of the same or a related practice or merger by multiple competition authorities may raise concerns of costs and the potential for inconsistent analyses and remedies;

RECOGNISING that co-operation based on mutual trust and good faith between Adherents plays a significant role in ensuring effective and efficient enforcement against anticompetitive practices and mergers with anticompetitive effects;

RECOGNISING that the continued growth of the global economy increases the likelihood that anticompetitive practices and mergers with anticompetitive effects may adversely affect the interests of more than one Adherent, and also increases the number of transnational mergers that are subject to the merger laws of more than one Adherent;

RECOGNISING that investigations and proceedings by one Adherent relating to anticompetitive practices and mergers with anticompetitive effects may affect, in certain cases, the important interests of other Adherents;

RECOGNISING that transparent and fair processes are essential to achieving effective and efficient co-operation in competition law enforcement;

RECOGNISING the widespread adoption, acceptance and enforcement of competition law as well as the concomitant desire of Adherents' competition authorities to work together to ensure efficient and effective investigations and proceedings and to improve their own analyses;

RECOGNISING that co-operation should not be construed to affect the legal positions of Adherents with regard to questions of sovereignty or extra-territorial application of competition laws;

RECOGNISING that effective co-operation can provide benefits for the parties subject to competition investigations or proceedings, reducing regulatory costs and delays, and limiting the risk of inconsistent analysis and remedies;

CONSIDERING therefore that Adherents should co-operate closely in order to effectively and efficiently investigate competition matters, including mergers with anticompetitive effects, so as to combat the harmful effects of both cross-border and domestic anticompetitive practices and mergers with anticompetitive effects, in conformity with principles of international law and comity;

CONSIDERING Adherents' desire to enhance the existing level and quality of international co-operation and to consider new forms of co-operation that can make international competition enforcement more effective and less costly for competition authorities and for businesses alike;

CONSIDERING that in light of the increasing globalisation of business activities and the increasing number of competition laws and competition authorities worldwide, Adherents are committed to working together to adopt national or international co-operation instruments to effectively address anticompetitive practices and mergers with anticompetitive effects, and to minimise legal and practical obstacles to effective co-operation;

CONSIDERING that when Adherents enter into bilateral or multilateral arrangements for co-operation in the enforcement of national competition laws, they should take into consideration the present Recommendation:

On the proposal of the Competition Committee:

- I. **AGREES** that, for the purpose of the present Recommendation, the following definitions are used:
- “Adherents” refers to Members and non-Members adhering to this Recommendation;
 - “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.

Commitment to Effective International Co-operation

- II. RECOMMENDS that Adherents commit to effective international co-operation and take appropriate steps to minimise direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities.**

To this end, Adherents should aim inter alia to:

1. minimise the impact of legislation and regulations that might have the effect of restricting co-operation between competition authorities or hindering an investigation or proceeding of other Adherents, such as legislation and regulations prohibiting domestic enterprises or individuals from co-operating in an investigation or proceeding conducted by competition authorities of other Adherents;
2. make publicly available sufficient information on their substantive and procedural rules, including those relating to confidentiality, by appropriate means with a view to facilitating mutual understanding of how national enforcement systems operate; and
3. minimise inconsistencies between their leniency or amnesty programmes that adversely affect co-operation.

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.

- IV. RECOMMENDS that an Adherent that considers that one or more enterprises or individuals situated in one or more other Adherents are or have been engaged in anticompetitive practices or mergers with anticompetitive effects that substantially and adversely affect its important interests, may request consultations with such other Adherent or Adherents.**

1. Entering into such consultations is without prejudice to any action under the competition law and to the full freedom of ultimate decision of the Adherents concerned.
2. Any Adherent so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting Adherent and, in particular, to the nature of the alleged anticompetitive practices or mergers with anticompetitive effects in question, the enterprises or individuals involved and the alleged harmful effects on the interests of the requesting Adherent.

3. If the Adherent so addressed agrees that enterprises or individuals situated in its territory are engaged in anticompetitive practices or in mergers with anticompetitive effects harmful to the interests of the requesting Adherent, it should take whatever remedial action it considers appropriate, including actions under its competition law, on a voluntary basis and considering its legitimate interests.
4. In requesting consultations, Adherents should explain the national interests affected in sufficient detail to enable their full and sympathetic consideration.
5. Without prejudice to any of their rights, the Adherents involved in consultations should endeavour to find a mutually acceptable solution in light of the respective interests involved.

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.**
1. Circumstances that may justify a notification include, but are not limited to (i) formally seeking non-public information located in another Adherent; (ii) the investigation of an enterprise located in or incorporated or organised under the laws of another Adherent ; (iii) the investigation of a practice occurring in whole or in part in the territory of another Adherent, or required, encouraged, or approved by the government of another Adherent; or (iv) the consideration of remedies that would require or prohibit conduct in the territory of another Adherent.
 2. The notification should be made by the competition authority of the investigating Adherent through the channels requested by each Adherent as indicated in a list to be established and periodically updated by the Competition Committee; to the extent possible, Adherents should favour notifications directly to competition authorities. Notifications should be in writing, using any effective and appropriate means of communication, including e-mail. To the extent possible without prejudicing an investigation or proceeding, the notification should be made when it becomes evident that another Adherent's important interests are likely to be affected, and with sufficient detail so as to permit an initial evaluation by the notified Adherent of the likelihood of effects on its 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.

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:

1. should be undertaken on a case-by-case basis between the competition authorities involved;
2. should not affect Adherents' right to make decisions independently, based on their own investigation or proceeding;
3. should aim to:
 - (i) avoid possible conflicting approaches and outcomes among Adherents, including remedies; and
 - (ii) reduce duplication of enforcement costs and make the best use of the enforcement resources of Adherents involved;
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.

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.

Investigative Assistance to another Competition Authority

- VIII. RECOMMENDS that regardless of whether two or more Adherents proceed against the same or related anticompetitive practice or merger with anticompetitive effects, competition authorities of the Adherents should support each other on a voluntary basis in their enforcement activity by providing each other with investigative assistance as appropriate and practicable, taking into account available resources and priorities.**
1. Without prejudice to the applicable confidentiality rules, investigative assistance may include any of the following activities:
 - (i) Providing information in the public domain relating to the relevant conduct or practice;
 - (ii) Assisting in obtaining information from within the assisting Adherent;
 - (iii) Employing on behalf of the requesting Adherent the assisting Adherent's authority to compel the production of information in the form of testimony or documents;
 - (iv) Ensuring to the extent possible that official documents are served on behalf of the requesting Adherent in a timely manner; and
 - (v) Executing searches on behalf of the requesting Adherent country to obtain evidence that can assist the requesting Adherent country's investigation, especially in the case of investigations or proceedings regarding hard core cartel conduct.
 2. Any investigative assistance requested should be governed by the procedural rules in the assisting Adherent and should respect the provisions and safeguards provided for in this Recommendation. The request for assistance should take into consideration the powers, authority and applicable confidentiality rules of the competition authority of the assisting Adherent.
 3. Adherents should take into account the substantive laws and procedural rules in other Adherents when making requests for assistance to obtain information located abroad. Before seeking information located abroad, Adherents should consider whether adequate information is available from sources within their territory. Requests for information located abroad should be framed in terms that are as specific as possible.

4. When the request for assistance cannot be granted in whole or in part, the assisting Adherent should inform the requesting Adherent accordingly, and consider providing the reasons why the request could not be complied with.
5. The provision of investigative assistance between Adherents may be subject to consultations regarding the sharing of costs of these activities, upon request of the competition authority of the assisting Adherent.

IX. INVITES non-Adherents to adhere to this Recommendation and to implement it.

X. INSTRUCTS the Competition Committee to:

1. serve periodically or at the request of an Adherent as a forum for exchanges of views on matters related to the Recommendation;
2. establish and periodically update a list of contact points in each Adherent for purposes of implementing this Recommendation;
3. consider developing, without prejudice to the use of confidentiality waivers, model provisions for adoption by Adherents allowing the exchange of confidential information between competition authorities without the need to obtain the prior consent from the source of the information and subject to the safeguards as provided in this Recommendation;
4. consider developing model bilateral and/or multilateral agreements on international co-operation reflecting the principles endorsed by Adherents in this Recommendation;
5. consider developing enhanced co-operation tools and instruments that can help reduce the overall costs associated with investigations or proceedings by multiple competition authorities, and at the same time avoid inconsistencies among Adherents' enforcement actions; and
6. monitor the implementation of this Recommendation and to report to the Council every five years.

**Help us implement the recommendation and foster
international co-operation on competition**

The Secretariat is strongly committed to support OECD and non-OECD governments with the implementation of this Recommendation.

We invite non-OECD member economies who are interested in adhering to the Recommendation to contact the OECD Secretariat at Antonio.Capobianco@oecd.org.