

# Competition co-operation and enforcement

## INVENTORY OF CO-OPERATION AGREEMENTS



### PROVISIONS ON ENFORCEMENT CO-OPERATION AND INVESTIGATIVE ASSISTANCE

This document contains the text of the provisions on enforcement co-operation and investigative assistance taken from the 2021 Inventory of Co-operation Agreements prepared by the OECD Competition Committee. This document includes:

- A short description of the provision which clarifies similarities and differences between agreements, as well as any innovative or unique features in a particular agreement.
- Relevant language from the 2014 OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings.
- A list of the relevant provisions in co-operation agreements. The agreements are listed in reverse chronological order, so that readers can see if wording has changed between agreements.

The full inventory, the OECD Recommendation and accompanying documents can be found online at [www.oecd.org/competition/inventory-competition-agreements.htm](http://www.oecd.org/competition/inventory-competition-agreements.htm).

Competition authorities face an increasing number of cases with an international dimension where they need to access to information or evidence located outside their jurisdiction. In these circumstances, enforcement co-operation can contribute to efficient competition law enforcement. Thus, co-operation agreements often include a provision allowing a competition authority in one jurisdiction to take an enforcement action in another jurisdiction.

Most of the co-operation agreements reviewed have sections related to enforcement co-operation (including information exchange). Some co-operation agreements include information exchange in the enforcement co-operation section, whereas others have a separate section dedicated to information exchange as it is particularly important for various enforcement co-operation activities. Sections on enforcement co-operation generally consist of:

- general principles; and
- lists of actions which might be provided as enforcement co-operation.

Some agreements provide further investigative assistance, such as obtaining testimony/statements or conducting searches on behalf of another authority.

## Relevant provisions in the 2014 OECD Recommendation on international co-operation

### 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.

## Relevant provisions in co-operation agreements

### Nordic Co-operation Agreement (2017)

#### Article 5 Inspections

The competition authority of a Party may in its own territory carry out any inspection or other factfinding measure under its national law on behalf of and for the account of the competition authority of another Party in order to establish whether there has been an infringement of competition rules governed by the requesting Party. Any exchange or use of the information collected shall be carried out in accordance with Article 3.

The officials of the competition authority who are responsible for conducting the inspection as well as those authorized or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the competition authority in whose territory the inspection is to be conducted, officials and other accompanying persons authorized by the competition authority requesting the inspection may assist the officials of the authority concerned.

### EU-Korea (2009)

#### Article 3 Enforcement Cooperation

1. The competition authority of each Party shall render assistance to the competition authority of the other Party in its enforcement activities to the extent consistent with the laws and regulations of the Party rendering the assistance and the important interests of that Party, and within its reasonably available resources.

2. The competition authority of each Party shall, to the extent consistent with the laws and regulations of the Party, and the important interests of that Party:

- (a) inform the competition authority of the other Party with respect to its enforcement activities involving anti-competitive activities that the informing competition authority considers may also have an adverse effect on competition within the territory of the other Party;
- (b) provide the competition authority of the other Party with any significant information, within its possession and that comes to its attention, about anti-competitive activities that the providing competition authority considers may be relevant to, or may warrant, enforcement activities by the competition authority of the other Party; and
- (c) provide the competition authority of the other Party, upon request and in accordance with the provisions of this Agreement, with information within its possession that is relevant to the enforcement activities of the competition authority of the other Party.

### Canada-Japan (2005)

#### Article III

1. The competition authority of each Party shall render assistance to the competition authority of the other Party in its enforcement activities to the extent consistent with the laws and regulations of the country of the assisting competition authority and the important interests of the Party of the assisting competition authority, and within its reasonably available resources.

2. The competition authority of each Party shall, to the extent consistent with the laws and regulations of its country and the important interests of that Party,

- (a) inform the competition authority of the other Party with respect to its enforcement activities involving anticompetitive activities that the informing competition authority considers may also have an adverse effect on competition within the territory of the country of the other Party;
- (b) provide the competition authority of the other Party with any significant information, within its possession and that comes to its attention, about anticompetitive activities that the providing competition authority considers may be relevant to, or may warrant, enforcement activities by the competition authority of the other Party; and
- (c) provide the competition authority of the other Party, upon request and in accordance with the provisions of this Agreement, with information within its possession that is relevant to the enforcement activities of the competition authority of the other Party.

## EU-Japan (2003)

### Article 3

1. The competition authority of each Party shall render assistance to the competition authority of the other Party in its enforcement activities to the extent consistent with the laws and regulations of the Party rendering the assistance and the important interests of that Party, and within its reasonably available resources.

2. The competition authority of each Party shall, to the extent consistent with the laws and regulations of the Party, and the important interests of that Party:

(a) inform the competition authority of the other Party with respect to its enforcement activities involving anti-competitive activities that the informing competition authority considers may also have an adverse effect on competition within the territory of the other Party;

(b) provide the competition authority of the other Party with any significant information, within its possession and that comes to its attention, about anti-competitive activities that the providing competition authority considers may be relevant to, or may warrant, enforcement activities by the competition authority of the other Party; and

(c) provide the competition authority of the other Party, upon request and in accordance with the provisions of this Agreement, with information within its possession that is relevant to the enforcement activities of the competition authority of the other Party.

## Canada-Mexico (2001)

### Article III Enforcement cooperation

1.

(a) The Parties acknowledge that it is in their common interest to cooperate in the detection of anticompetitive activities and the enforcement of their competition laws to the extent compatible with their respective laws and important interests, and according to their reasonably available resources.

(b) The Parties further acknowledge that it is in their common interest to share information which will facilitate the effective application of their competition laws and promote better understanding of each other's enforcement policies and activities.

2. The Parties will consider adopting further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of their competition laws.

3. Each Party's competition authority will, to the extent compatible with that Party's laws, enforcement policies and other important interests,

(a) assist the other Party's competition authority, upon request, in locating and obtaining evidence and witnesses, and in obtaining voluntary compliance with requests for information, in the requested Party's territory;

(b) inform the other Party's competition authority with respect to enforcement activities involving conduct that may also have an adverse effect on competition within the territory of the other Party;

(c) provide to the other Party's competition authority, upon request, such information within its possession as the requesting Party's competition authority may specify that is relevant to the requesting Party's enforcement activities; and

(d) provide the other Party's competition authority with any significant information that comes to its attention about anticompetitive activities that may be relevant to, or may warrant, enforcement activity by the other Party's competition authority.

4. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements or practices between them.

## Mexico-US (2000)

### Article III Enforcement Cooperation

1.

a. The Parties acknowledge that it is in their common interest to cooperate in the detection of anticompetitive activities and the enforcement of their competition laws to the extent compatible with their respective laws and important interests, and within their reasonably available resources.

b. The Parties further acknowledge that it is in their common interest to share information which will facilitate the effective application of their competition laws and promote better understanding of each other's enforcement policies and activities.

2. The Parties will consider adopting such further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of their competition laws.

3. Each Party's competition authorities will, to the extent compatible with that Party's laws, enforcement policies and other important interests:

a. assist the other Party's competition authorities, upon request, in locating and obtaining evidence and witnesses, and in obtaining voluntary compliance with requests for information, in the requested Party's territory;

b. inform the other Party's competition authorities with respect to enforcement activities involving conduct that may also have an adverse effect on competition within the territory of the other Party;

c. provide to the other Party's competition authorities, upon request, such information within its possession as the requesting Party's competition authorities may specify that is relevant to the requesting Party's enforcement activities; and

d. provide the other Party's competition authorities with any significant information that comes to their attention about anticompetitive activities that may be relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements or practices between them.

## **Japan-US (1999)**

### **Article III**

1. The competition authority of each Party shall render assistance to the competition authority of the other Party in its enforcement activities to the extent consistent with the laws and regulations of the country of the assisting Party and the important interests of the assisting Party, and within its reasonably available resources.

2. The competition authority of each Party shall, to the extent consistent with the laws and regulations of its country and the important interests of its Party:

(a) inform the competition authority of the other Party with respect to its enforcement activities involving anticompetitive activities that the informing competition authority considers may also have an adverse effect on competition within the territory of the other country;

(b) provide the competition authority of the other Party with any significant information, within its possession and that comes to its attention, about anticompetitive activities that the providing competition authority considers may be relevant to, or may warrant, enforcement activities by the competition authority of the other Party; and

(c) provide the competition authority of the other Party, upon request and in accordance with the provisions of this Agreement, with information within its possession that is relevant to the enforcement activities of the competition authority of the other Party.

## **Brazil-US (1999)**

### **Article III Enforcement Cooperation**

1. The Parties agree that it is in their common interest to cooperate in the detection of anticompetitive practices and the enforcement of their competition laws, and to share information that will facilitate the effective application of those laws and promote better understanding of each other's competition enforcement policies and activities, to the extent compatible with their respective laws and important interests, and within their reasonably available resources.

2. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements or practices between them.

## **Canada-EU (1999)**

### **IV. Coordination of enforcement activities**

1. The competition authority of each Party shall render assistance to the competition authority of the other Party in its enforcement activities to the extent compatible with the assisting Party's laws and important interests.

## **Israel-US (1999)**

### **Article III Enforcement Cooperation**

1. The Parties acknowledge that it is in their common interest to cooperate in the detection of anticompetitive activities and the enforcement of their competition laws to the extent compatible with their respective laws and important interests, and within their reasonably available resources. The Parties further acknowledge that it is in their common interest to share information which will facilitate the effective application of their competition laws and promote better understanding of each other's enforcement policies and activities.

2. The Parties will consider adopting such further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of their competition laws.

3. Each Party's competition authorities will, to the extent compatible with that Party's laws, enforcement policies and other important interests,

a. assist the other Party's competition authorities, upon request, in locating and securing evidence and witnesses, and in securing voluntary compliance with requests for information, in the requested State;

b. inform the other Party's competition authorities with respect to enforcement activities involving conduct that may also have an adverse effect on competition within the other State;

c. provide to the other Party's competition authorities, upon request, such information within its possession as the requesting Party's competition authorities may specify that is relevant to the requesting Party's enforcement activities; and

d. provide the other Party's competition authorities with any significant information that comes to their attention about anticompetitive activities that may be relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements or practices between them.

## **Canada-US (1995)**

### **Article III Enforcement cooperation**

1.

a. The Parties acknowledge that it is in their common interest to cooperate in the detection of anticompetitive activities and the enforcement of their competition laws to the extent compatible with their respective laws and important interests, and within their reasonably available resources.

b. The Parties further acknowledge that it is in their common interest to share information which will facilitate the effective application of their competition laws and promote better understanding of each other's enforcement policies and activities.

2. The Parties will consider adopting such further arrangements as may be feasible and desirable to enhance cooperation in the enforcement of their competition laws.

3. Each Party's competition authorities will, to the extent compatible with that Party's laws, enforcement policies and other important interests,

a. assist the other Party's competition authorities, upon request, in locating and securing evidence and witnesses, and in securing voluntary compliance with requests for information, in the requested Party's territory;

b. inform the other Party's competition authorities with respect to enforcement activities involving conduct that may also have an adverse effect on competition within the territory of the other Party;

c. provide to the other Party's competition authorities, upon request, such information within its possession as the requesting Party's competition authorities may specify that is relevant to the requesting Party's enforcement activities; and

d. provide the other Party's competition authorities with any significant information that comes to their attention about anticompetitive activities that may be relevant to, or may warrant, enforcement activity by the other Party's competition authorities.

4. Nothing in this Agreement shall prevent the Parties from seeking or providing assistance to one another pursuant to other agreements, treaties, arrangements or practices between them.

## EU-US (1991)

### Article IV Cooperation and Coordination in Enforcement Activities

1. The competition authorities of each Party will render assistance to the competition authorities of the other Party in their enforcement activities, to the extent compatible with the assisting Party's laws and important interests, and within its reasonably available resources.

## Australia-US (1982)

### Article 5 Cooperation in Antitrust Enforcement

I. When a proposed investigation or enforcement action under the antitrust laws of one nation does not adversely affect the laws, policies or national interests of the other, each Party shall cooperate with the other in regard to that investigation or action, including through the provision of information and administrative and judicial assistance to the extent permitted by applicable national law.

2. The mere seeking by legal process of information or documents located in its territory shall not in itself be regarded by either Party as affecting adversely its significant national interests, or as constituting a basis for applying measures to prohibit the transmission of such information or documents to the authorities of the other Party, provided that in the case of United States legal process prior notice has been given of its issuance. Each Party shall, to the fullest extent possible under the circumstances of the particular case, provide notice to the other before taking action to prevent compliance with such legal process.

## Germany-US (1976)

### Article 2

(1) Each party agrees that its antitrust authorities will cooperate and render assistance to the antitrust authorities of the other party, to the extent set forth in this Agreement, in connection with:

- a. antitrust investigations or proceedings,
- b. studies related to competition policy and possible changes in antitrust laws, and
- c. activities related to the restrictive business practice work of international organizations of which both parties are members.

(2) Each party agrees that it will provide the other party with any significant information which comes to the attention of its antitrust authorities and which involves restrictive business practices which, regardless of origin, have a substantial effect on the domestic or international trade of such other party.

(3) Each party agrees that, upon request of the other party, its antitrust authorities will obtain for and furnish such other party with such information as such other party may request in connection with a matter referred to in Article 2, paragraph 1, and will otherwise provide advice and assistance in connection therewith. Such advice and assistance shall include, but not necessarily be limited to, the exchange of information and a summary of experience relating to particular practices where either of the antitrust authorities of the requested party has dealt with or has information relating to a practice involved in the request. Such assistance shall also include the attendance of public officials of the requested party to give information, views or testimony in regard to any antitrust investigation or proceeding, legislation or policy, and the transmittal or the making available of documents and legal briefs and pleadings of the antitrust authorities of the requested party (or duly authenticated or certified copies thereof).

(4) An antitrust authority of a party, in seeking to obtain information or interviews on a voluntary basis from a person or enterprise within the jurisdiction of the other party, may request such other party to transmit a communication seeking such information or interviews to such person or enterprise. In that event, the other party will transmit such communication and, if so requested, will (if such is the case) notify such person or enterprise that the requested party has no objection to voluntary compliance with the request.

### Article 3

(1) Either party may decline, in whole or in part, to render assistance under Article 2 of this Agreement, or may comply with any request for such assistance subject to such terms and conditions as the complying party may establish, if such party determines that:

- a. compliance would be prohibited by legal protections of confidentiality or by other domestic law of the complying party; or
- b. compliance would be inconsistent with its security, public policy or other important national interests;
- c. the requesting party is unable or unwilling to comply with terms or conditions established by the complying party, including conditions designed to protect the confidentiality of information requested; or
- d. the requesting party would not be obligated to comply with such request, by reason of any grounds set forth in items (a), (b) or (c) above, if such request had been made by the requested party.

(2) Neither party shall be obligated to employ compulsory powers in order to obtain information for, or otherwise provide advice and assistance to, the other party pursuant to this Agreement.

(3) Neither party shall be obligated to undertake efforts in connection with this Agreement which are likely to require such substantial utilization of personnel or resources as to burden unreasonably its own enforcement duties.

### Article 6

(1) The terms of this Agreement shall be implemented, and obligations under this Agreement shall be discharged, in accordance with the laws of the respective parties, by their respective antitrust authorities which shall develop appropriate procedures in connection therewith.

(2) Requests for assistance pursuant to this Agreement shall be made or confirmed in writing, shall be reasonably specific and shall include the following information as appropriate:

- a. the antitrust authority or authorities to whom the request is directed;
- b. the antitrust authority or authorities making the request;
- c. the nature of the antitrust investigation or proceeding, study or other activity involved;
- d. the object of and reason for the request; and
- e. the names and addresses of relevant persons or enterprises, if known.

Such requests may specify that particular procedures be followed or that a representative of the requesting party be present at requested proceedings or in connection with other requested actions.

(3) The requesting party shall be advised, to the extent feasible, of the time, place and type of action to be taken by the requested party in response to any request for assistance under this Agreement.

(4) If any such request cannot be fully complied with, the requested party shall promptly notify the requesting party of its refusal or inability to so comply, stating the grounds for such refusal, any terms or conditions which it may establish in connection therewith and any other information which it considers relevant to the subject of the request.

### Article 7

All direct expenses incurred by the requested party in complying with a request for assistance under this Agreement shall, upon request, be paid or reimbursed by the requesting party. Such direct expenses may include fees of experts, costs of interpreters, travel and maintenance expenses of experts, interpreters and employees of antitrust authorities, transcript and reproduction costs, and other incidental expenses, but shall not include any part of the salaries of employees of antitrust authorities.

## Relevant provisions in special co-operation agreements providing enhanced investigative assistance

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

#### Purpose of this Arrangement

4. The Participants agree that the mutual sharing of information and investigative assistance will increase the efficiency of their respective investigations and facilitate effective outcomes.

6. Amendments made in 2012 to New Zealand's Commerce Act, Fair Trading Act, Credit Contracts and Consumer Finance Act and Telecommunications Act allow the NZCC to provide compulsorily-acquired information and investigative assistance to overseas regulators with whom a co-operation arrangement is in place (subject to the safeguards set out in those statutes). This Arrangement is intended to give effect to those amendments in relation to the provision of compulsory acquired information and/or investigative assistance to the ACCC.

#### Request for information and/or assistance

9. The ACCC may make a request under this Arrangement by notice in writing sent by post to the following address:

- The Chair
- Commerce Commission
- PO Box 2351 Wellington 6140
- New Zealand

or by email sent directly to the current Chair.

10. Any request under clause 9 will be accompanied by a statement:

10.1 confirming that the ACCC considers that the provision of the compulsorily-acquired information and/or investigative assistance will assist, or will be likely to assist, the ACCC in performing its functions or exercising its powers in relation to its competition and consumer laws; and

10.2 explaining why the ACCC considers that it could not more conveniently obtain the information or assistance from another source.

#### Responding to requests

11. The NZCC will respond to any request in accordance with sections 99B to 99P of the Commerce Act or sections 48B to 48O of the Fair Trading Act (as appropriate) and with any policies, guidelines or practices promulgated by the NZCC in relation to the provision of compulsorily-acquired information and/or investigative assistance.

12. In responding to a request, the NZCC may impose conditions on the provision of such information or assistance, including as to:

- 12.1 the confidentiality of information;
- 12.2 the stage, use of, or access to anything provided;
- 12.3 the copying, returning, or disposal of copies of anything provided; and
- 12.4 the payment of costs reasonably incurred by the NZCC.

13. The NZCC will not provide any communication which:

- 13.1 was intended to be confidential; and
- 13.2 was made in connection with an attempt to settle or mandate a dispute between the parties to the communication;

and

13.3 is protected by a “without prejudice” form of privilege, without the consent of every other party who holds that privilege.

14. The NZCC will not provide copies of statements made by any person in answer to a question put by or before the NZCC that might tend to incriminate the person, unless the ACCC gives a written undertaking:

14.1 that it will not use such statements as evidence in criminal proceedings against the person (other than in respect of the falsity of the person’s testimony) or in proceedings against the person for a pecuniary penalty; and

14.2 that to the extent possible, the ACCC will ensure that such statements are not used by any other person, authority or agency as evidence in such proceedings.

#### Protection and use of information

15. Where the NZCC provide 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 request 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.

## **Australia-US on mutual antitrust enforcement assistance (1999)**

### **Article II Object and Scope of Assistance**

A. The Parties intend to assist one another and to cooperate on a reciprocal basis in providing or obtaining antitrust evidence that may assist in determining whether a person has violated, or is about to violate, their respective antitrust laws, or in facilitating the administration or enforcement of such antitrust laws.

B. Each Party's Antitrust Authorities shall, to the extent compatible with that Party's laws, enforcement policies, and other important interests, inform the other Party's Antitrust Authorities about activities that appear to be anticompetitive and that may be relevant to, or may warrant, enforcement activity by the other Party's Antitrust Authorities.

C. Each Party's Antitrust Authorities shall, to the extent compatible with that Party's laws, enforcement policies, and other important interests, inform the other Party's Antitrust Authorities about investigative or enforcement activities taken pursuant to assistance provided under this Agreement that may affect the important interests of the other Party.

D. Nothing in this Agreement shall require the Parties or their respective Antitrust Authorities to take any action inconsistent with their respective Mutual Assistance Legislation.

E. Assistance contemplated by this Agreement includes but is not limited to:

1. disclosing, providing, exchanging, or discussing antitrust evidence in the possession of an Antitrust Authority;
2. obtaining antitrust evidence at the request of an Antitrust Authority of the other Party, including

(a) taking the testimony or statements of persons or otherwise obtaining information from persons,

(b) obtaining documents, records, or other forms of documentary evidence,

(c) locating or identifying persons or things, and

(d) executing searches and seizures,

and disclosing, providing, exchanging, or discussing such evidence; and

3. providing copies of publicly available records, including documents or information in any form, in the possession of government departments and agencies of the national government of the Requested Party.

F. Assistance may be provided whether or not the conduct underlying a request would constitute a violation of the antitrust laws of the Requested Party.

G. Nothing in this Agreement shall prevent a Party from seeking assistance from or providing assistance to the other pursuant to other agreements, treaties, arrangements, or practices, including the Agreement Between the Government of Australia and the Government of the United States of America Relating to Cooperation on Antitrust Matters of June 29, 1982, either in place of or in conjunction with assistance provided pursuant to this Agreement.

H. Except as provided by paragraphs C and D of Article VII, this Agreement shall be used solely for the purpose of mutual antitrust enforcement assistance between the Parties. The provisions of this Agreement shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request made pursuant to this Agreement.

I. Nothing in this Agreement compels a person to provide antitrust evidence in violation of any legally applicable right or privilege.

J. Nothing in this Agreement affects the right of an Antitrust Authority of one Party to seek antitrust evidence on a voluntary basis from a person located in the territory of the other Party, nor does anything in this Agreement preclude any such person from voluntarily providing antitrust evidence to an Antitrust Authority.

### **Article III Requests for Assistance**

A. Requests for assistance under this Agreement shall be made by an Antitrust Authority of the Requesting Party. Such requests shall be made in writing and directed to the Central Authority of the Requested Party. With respect to the United States, the Attorney General, acting as the Central Authority, will upon receipt forward a copy of each request to the Federal Trade Commission.

B. Requests shall include, without limitation:

1. A general description of the subject matter and nature of the investigation or proceeding to which the request relates, including identification of the persons subject to the investigation or proceeding and citations to the specific antitrust laws involved giving rise to the investigation or proceeding; such description shall include information sufficient to explain how the subject matter of the request concerns a possible violation of the antitrust laws in question;

2. The purpose for which the antitrust evidence, information, or other assistance is sought and its relevance to the investigation or proceeding to which the request relates. A request by the United States shall state either that the request is not made for the purpose of any criminal proceedings or that the request is made for a purpose that includes possible criminal proceedings. In the former case, the request shall contain a written assurance that antitrust evidence obtained pursuant to the request shall not be used for the purposes of criminal proceedings, unless such use is subsequently authorized pursuant to Article VII. In the latter case, the request shall indicate the relevant provisions of law under which criminal proceedings may be brought;

3. A description of the antitrust evidence, information, or other assistance sought, including, where applicable and to the extent necessary and possible:

(a) the identity and location of any person from whom evidence is sought, and a description of that person's relationship to the investigation or proceeding which is the subject of the request;

(b) a list of questions to be asked of a witness;

(c) a description of documentary evidence requested; and

(d) with respect to searches and seizures, a precise description of the place or person to be searched and of the antitrust evidence to be seized, and information justifying such search and seizure under the laws of the Requested Party;

4. Where applicable, a description of procedural or evidentiary requirements bearing on the manner in which the Requesting Party desires the request to be executed, which may include requirements relating to:

(a) the manner in which any testimony or statement is to be taken or recorded, including the participation of counsel;

(b) the administration of oaths;

(c) any legal privileges that may be invoked under the law of the Requesting Party that the Requesting Party wishes the Executing Authority to respect in executing the request, together with an explanation of the desired method of taking the testimony or provision of evidence to which such privileges may apply; and

(d) the authentication of public records;

5. The desired time period for a response to the request;

6. Requirements, if any, for confidential treatment of the request or its contents; and

7. A statement disclosing whether the Requesting Party holds any proprietary interest that could benefit or otherwise be affected by assistance provided in response to the request; and

8. Any other information that may facilitate review or execution of a request.

C. Requests shall be accompanied by written assurances of the relevant Antitrust Authority that there have been no significant modifications to the confidentiality laws and procedures described in Annex A hereto.

D. An Antitrust Authority may modify or supplement a request prior to its execution if the Requested Party agrees.

#### **Article IV Limitations on Assistance**

A. The Requested Party may deny assistance in whole or in part if that Party's Central Authority or Executing Authority, as appropriate, determine that:

1. a request is not made in accordance with the provisions of this Agreement;

2. execution of a request would exceed the Executing Authority's reasonably available resources;

3. execution of a request would not be authorized by the domestic law of the Requested Party;

4. execution of a request would be contrary to the public interest of the Requested Party.

B. Before denying a request, the Central Authority or the Executing Authority of the Requested Party, as appropriate, shall consult with the Central Authority of the Requesting Party and the Antitrust Authority that made the request to determine whether assistance may be given in whole or in part, subject to specified terms and conditions.

C. If a request is denied in whole or in part, the Central Authority or the Executing Authority of the Requested Party, as appropriate, shall promptly inform the Central Authority of the Requesting Party and the Antitrust Authority that made the request and provide an explanation of the basis for denial.

#### **Article V Execution of Requests**

A. After receiving a request, the Central Authority shall promptly provide the Requesting Party an initial response that includes, when applicable, an identification of the Executing Authority (Authorities) for the Request.

B. The Central Authority of the United States, the Attorney General of Australia, or, once designated, the Executing Authority of either Party may request additional information concerning the request or may determine that the request will be

executed only subject to specified terms and conditions. Without limitation, such terms and conditions may relate to (1) the manner or timing of the execution of the request, or (2) the use or disclosure of any antitrust evidence provided. If the Requesting Party accepts assistance subject to such terms and conditions, it shall comply with them.

C. A request shall be executed in accordance with the laws of the Requested Party. The method of execution specified in the request shall be followed, unless it is prohibited by the law of the Requested Party or unless the Executing Authority otherwise concludes, after consultation with the Authority that made the request, that a different method of execution is appropriate.

D. The Executing Authority shall, to the extent permitted by the laws and other important interests of the Requested Party, facilitate the participation in the execution of a request of such officials of the Requesting Party as are specified in the request.

#### **Article VI Confidentiality**

A. Except as otherwise provided by this paragraph and Article VII, each Party shall, to the fullest extent possible consistent with that Party's laws, maintain the confidentiality of any request and of any information communicated to it in confidence by the other Party under this Agreement. In particular:

Each Party shall oppose, to the fullest extent possible consistent with that Party's laws, any application by a third party for disclosure of such confidential information.

B. By entering into this Agreement, each Party confirms that:

C. Unauthorized or illegal disclosure or use of information communicated in confidence to a Party pursuant to this Agreement shall be reported immediately to the Central Authority and the Executing Authority of the Party that provided the information; the Central Authorities of both Parties, together with the Executing Authority that provided the information, shall promptly consult on steps to minimize any harm resulting from the disclosure and to ensure that unauthorized or illegal disclosure or use of confidential information does not recur. The Executing Authority that provided the information shall give notice of such unauthorized or illegal disclosure or use to the person, if any, that provided such information to the Executing Authority.

D. Unauthorized or illegal disclosure or use of information communicated in confidence under this Agreement is a ground for termination of the Agreement by the affected Party, in accordance with the procedures set out in Article XIII.C.

E. Nothing in this Agreement shall prevent disclosure, in an action or proceeding brought by an Antitrust Authority of the Requesting Party for a violation of the antitrust laws of the Requesting Party, of antitrust evidence provided hereunder to a defendant or respondent in that action or proceeding, if such disclosure is required by the law of the Requesting Party. The Requesting Party shall notify the Central Authority of the Requested Party and the Executing Authority that provided the information at least ten days in advance of any such proposed disclosure, or, if such notice cannot be given because of a court order, then as promptly as possible.

#### **Article VII Limitations on Use**

A. Except as provided in paragraphs C and D of this Article, antitrust evidence obtained pursuant to this Agreement shall be used or disclosed by the Requesting Party solely for the purpose of administering or enforcing the antitrust laws of the Requesting Party.

B. Antitrust evidence obtained pursuant to this Agreement may be used or disclosed by a Requesting Party to administer or enforce its antitrust laws only (1) in the investigation or proceeding specified in the request in question and (2) for the purpose stated in the request, unless the Executing Authority that provided such antitrust evidence has given its prior written consent to a different use or disclosure; when the Requested Party is Australia, such consent shall not be given until the Executing Authority has obtained any necessary approval from the Attorney General.

C. Antitrust evidence obtained pursuant to this Agreement may be used or disclosed by a Requesting Party with respect to the administration or enforcement of laws other than its antitrust laws only if (1) such use or disclosure is essential to a significant law enforcement objective and (2) the Executing Authority that provided such antitrust evidence has given its prior written consent to the proposed use or disclosure. In the case of the United States, the Executing Authority shall provide such consent only after it has made the determinations required for such consent by its mutual assistance legislation.

D. Antitrust evidence obtained pursuant to this Agreement that has been made public consistently with the terms of this Article may thereafter be used by the Requesting Party for any purpose consistent with the Parties' mutual assistance legislation.

#### **Article VIII Changes in Applicable Law**

A. The Parties shall provide to each other prompt written notice of actions within their respective States having the effect of significantly modifying their antitrust laws or the confidentiality laws and procedures set out in Annex A to this Agreement.

B. In the event of a significant modification to a Party's antitrust laws or confidentiality laws and procedures set out in Annex A to this Agreement, the Parties shall promptly consult to determine whether this Agreement or Annex A to this Agreement should be amended.

#### **Article IX Taking of Testimony and Production of Documents**

A. A person requested to testify and produce documents, records, or other articles pursuant to this Agreement may be compelled to appear and testify and produce such documents, records, and other articles, in accordance with the requirements of the laws of the Requested Party. Every person whose attendance is required for the purpose of giving testimony pursuant to this Agreement is entitled to such fees and allowances as may be provided for by the law of the Requested Party.

B. Upon request by the Requesting Party, the Executing Authority shall furnish information in advance about the date and place of the taking of testimony or the production of evidence pursuant to this Agreement.

C. The Executing Authority shall, to the extent permitted by the laws and other important interests of the Requested Party, permit the presence during the execution of the request of persons specified in the request, and shall, to the extent permitted by the laws and other important interests of the Requested Party, allow such persons to question the person giving the testimony or providing the evidence.

D. The Executing Authority shall, to the extent permitted by the laws of the Requested Party, comply with any instructions of the Requesting Party with respect to any claims of legal privilege, immunity, or incapacity under the laws of the Requesting Party.

E. The Executing Authority shall, to the extent permitted by the laws of the Requested Party, permit a person whose testimony is to be taken pursuant to this Article to have counsel present during the testimony.

F. A Requesting Party may ask the Requested Party to facilitate the appearance in the Requesting Party's territory of a person located in the territory of the Requested Party, for the purpose of being interviewed or giving testimony. The Requesting Party shall indicate the extent to which the person's expenses will be paid. Upon receiving such a request, the Executing Authority shall invite the person to appear before the appropriate authority in the territory of the Requesting Party. The Executing Authority shall promptly inform the Requesting Party of the person's response.

G. Antitrust evidence consisting of testimony or documentary evidence provided by the Requested Party pursuant to this Agreement shall be authenticated in accordance with the requirements of the law of the Requesting Party, in so far as such requirements would not violate the laws of the Requested Party.

#### **Article X Search and Seizure**

A. Where a request is to be executed by means of the search and seizure of antitrust evidence, the request shall include such information as is necessary to justify such action under the laws of the Requested Party. The Central Authorities shall confer, as needed, on alternative, equally effective procedures for compelling or obtaining the antitrust evidence that is the subject of a request.

B. Upon request, every official of a Requested Party who has custody of antitrust evidence seized pursuant to this Agreement shall certify the continuity of custody, the identity of the antitrust evidence, and the integrity of its condition; the Requested Party shall furnish such certifications in the form specified by the Requesting Party.

**Article XI Return of Antitrust Evidence**

At the conclusion of the investigation or proceeding specified in a request, the Central Authority or the Antitrust Authority of the Requesting Party shall return to the Central Authority or the Antitrust Authority of the Requested Party from which it obtained antitrust evidence all such evidence obtained pursuant to the execution of a request under this Agreement, along with all copies thereof, in the possession or control of the Central Authority or Antitrust Authority of the Requesting Party; provided, however, that antitrust evidence that has become evidence in the course of judicial or administrative proceedings or that has properly entered the public domain is not subject to this requirement.

**Article XII Costs**

Unless otherwise agreed, the Requested Party shall pay all costs of executing a request, except for the fees of expert witnesses, the costs of translation, interpretation, and transcription, and the allowances and expenses related to travel to the territory of the Requested Party, pursuant to Articles IX and X, by officials of the Requesting Party.