

COMPETITION COMMITTEE



International Enforcement Co-operation

Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation

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on International Enforcement Co-operation

2013



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

In 2012, the OECD Competition Committee decided to focus its future work on two strategic themes: International Co-operation in Competition Enforcement and Evaluation of Competition Interventions. The work on international co-operation remains at the core of the activities of the Committee and its working parties and will contribute to shaping new models for co-operation for the benefits of enforcers and businesses alike.

As part of the project on international co-operation the OECD Competition Committee decided to survey national practices on international co-operation. The primary objective of the Survey was to understand the experiences of competition agencies with international co-operation in case-related enforcement activities. In order to avoid duplication with the work on international co-operation of the International Competition Network (ICN), the Competition Committee decided to launch a single questionnaire that would support the needs of both the OECD's long-term project and the ICN Steering Group project on International Enforcement Co-operation.

This publication presents the key findings resulting from the Survey. The Report was prepared by the OECD Secretariat. A group of representatives from six ICN enforcement agencies worked closely with the OECD Secretariat during the drafting process of this report to ensure consistency in the review and analysis of the responses to the Survey.

More information about the OECD work on international co-operation can be found at <http://www.oecd.org/daf/competition/internationalco-operationandcompetition.htm>

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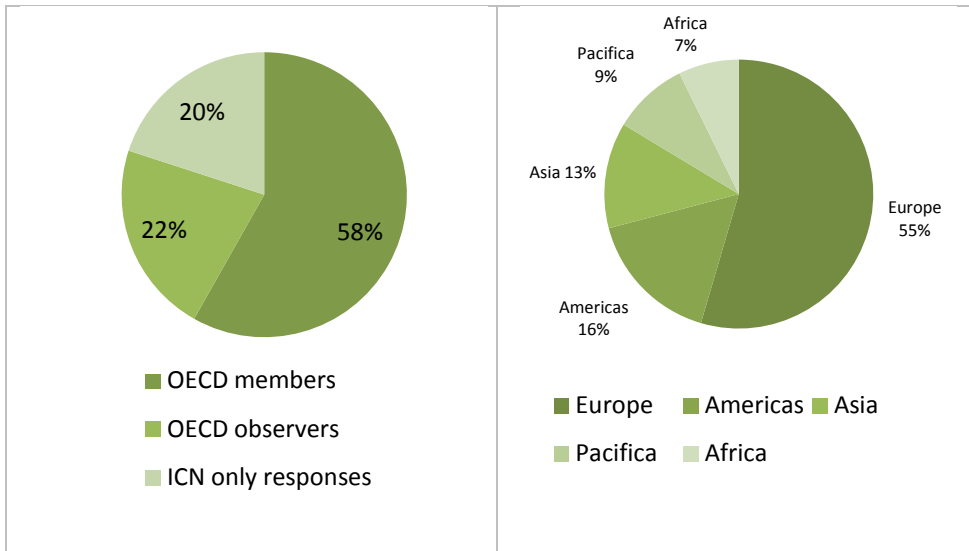
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EXECUTIVE SUMMARY

- (1) *The OECD/ICN Survey on International Enforcement Co-operation – Status Quo and Areas for Improvement (the Survey) was addressed to 120 competition agencies from around the world, including agencies from the 34 OECD member countries, the 15 OECD observer countries, and all other member agencies of the International Competition Network (ICN). The response rate among OECD members and observers was around 90%.*

A total of fifty-seven (57) responses were sent to the OECD Secretariat in response to the Survey. Of these, fifty-five (55) responses were used in the data set to produce the results presented in this Report. Thirty-two (32) responses came from agencies of thirty-one (31) OECD member countries (58% of the sample); thirteen (13) responses came from agencies of OECD observer countries (twelve [12] of these are included in the sample, 22% of the sample), and eleven (11) responses came from ICN-only agencies (20% of the sample). The response rate among OECD members is 91%; the response rate among OECD observers is 87%. Since all respondents are ICN members, the response rate for ICN respondents is 47%. The majority of responses (thirty (30) – 55% of the sample) were received from agencies of European countries. Nine (9) responses were received from agencies of countries in the Americas, seven (7) from agencies of Asian countries, five (5) from agencies of countries in the Pacific region, and four (4) from agencies of African countries.

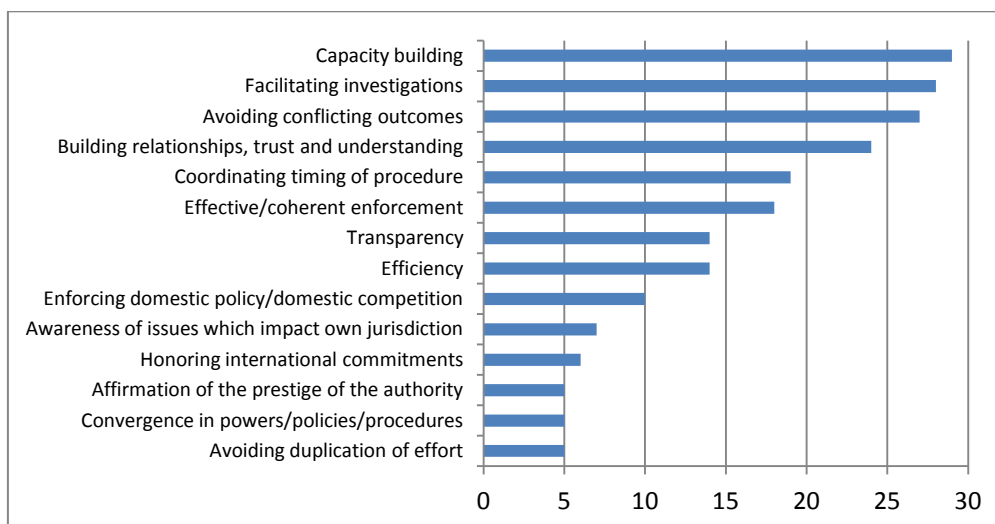
Distribution of responses



- (2) *International co-operation is a policy priority for a vast majority of competition agencies; respondents emphasized that the globalization of markets, and consequently of anti-competitive activity, requires increasing and enhanced co-operation in enforcement.*

Many agencies, especially newer ones, tend to see co-operation broadly, as a way to build enforcement capacity, exchange experiences, and share methodologies and not just in a case-specific, enforcement context. In this respect, building relationships based on trust is seen as an essential element of international co-operation, and international *fora* like the OECD and ICN play an important role in forging these relationships. More experienced agencies pursue international co-operation in enforcement in order to facilitate investigations, by exchanging case-specific information and evidence and providing each other with investigatory assistance. The responses to the Survey demonstrate that agencies, through co-operation, achieve high-quality decision-making, overcome jurisdictional obstacles, and, in some cases, try to maintain the availability of evidence. Responses also indicate that they share the objective of avoiding conflicting outcomes and, when possible, coordinating remedies.

Objectives pursued in international co-operation, by number of respondents



- (3) *Most agencies find international co-operation to be useful for their enforcement strategies. Informal co-operation has proven particularly valuable in investigations, and might be sufficient in-and-of itself in many cases. Benefits from co-operation overall outweigh the costs.*

Of the forty-five (45) agencies that reported having had sufficient experience with international co-operation to address the question, 98% found that international co-operation had been useful to their enforcement strategies. In particular, many highlighted benefits from informal case co-operation. These informal contacts often occur at an early stage of a case and include consultation among agencies on matters such as the timeline of the investigation, the theory of harm, and potential remedies in the case of merger reviews.

Agencies underscored how even exchanging non-confidential information and general views on a case can be very useful in an investigation, and might be sufficient in many cases; however, when instruments are available for the exchange of confidential information, this is perceived as extremely beneficial. Even non-OECD agencies, which may in general have less experience with international enforcement co-operation, mentioned that exchanges with other agencies are very beneficial, and that experience-sharing helps them to develop strategies to approach cases and strengthen enforcement even at the national level.

The overall assessment of experiences with international co-operation¹ is in fact extremely positive for almost all respondents. Even if agencies face some costs (especially in terms of resource and time constraints) in relation to international co-operation, respondent thought that overall the benefits of co-operation outweigh the costs. Many agencies suggested that the effectiveness of co-operation should be assessed from a long-term perspective and that, although immediate costs might be perceived as high, they should be considered as a form of investment.

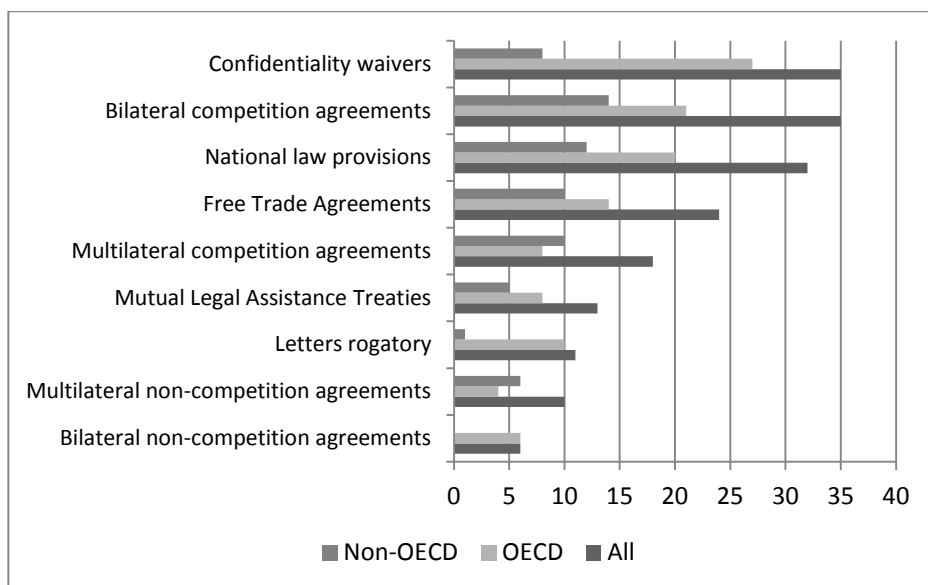
- (4) *Competition agencies can rely on different legal bases for international co-operation. Some are designed specifically for the purposes of competition enforcement. In the absence of a specific competition instrument, other international co-operation instruments can apply.*

Among the various existing legal instruments that can be used by competition agencies to co-operate with other agencies – both competition and non-competition specific – bilateral competition agreements and confidentiality waivers are the instruments available to the largest number of agencies. Co-operation-specific national law provisions closely follow as the next most commonly available legal instrument. The responses to the Survey indicate that confidentiality waivers are availability particularly in OECD countries; less so in non-OECD countries.

Competition-specific instruments such as national law provisions, confidentiality waivers and multilateral competition agreements were indicated as most relevant for co-operation, while non-competition-specific agreements (bilateral or multilateral) were perceived as least relevant by most respondents. In terms of ‘frequency’ of use of the available instruments, national law provisions, confidentiality waivers, letters rogatory and bilateral competition agreements are the instruments that respondents indicated were most frequently used in international co-operation.

¹ For purposes of the Survey, ‘international co-operation’ was defines as co-operation between international enforcement agencies in specific enforcement cases, *i.e.* merger, cartel, unilateral conduct/abuse of dominance, and other (*e.g.*, non-cartel agreement) cases. The Survey did not concern general co-operation on matters of policy, capacity-building, etc.; only international co-operation in the detection, investigation, prosecution and sanctioning of a specific anti-competitive behaviour or the investigation or review of mergers is covered.

Availability of legal bases for international co-operation, by number of respondents



- (5) *Formal instruments for co-operation, such as comity provisions and notification mechanisms, are widely available but used only by a limited number of agencies.*

Comity provisions are available for many agencies in national laws, bilateral or multilateral agreements. However, formal mechanisms associated with comity provisions, such as notifications and requests for investigatory assistance, are used by only a limited number of agencies. There are no great differences in the use of the instruments for different enforcement areas, with only slightly fewer agencies reporting use of formal notifications in unilateral conduct/abuse of dominance cases.

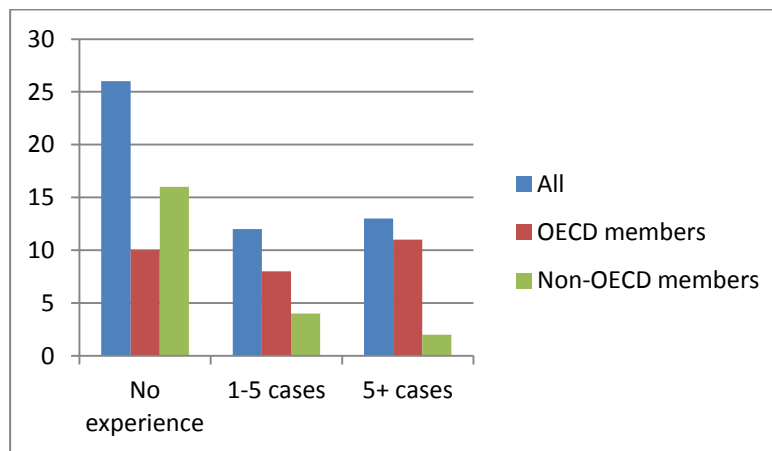
Most agencies that use these formal mechanisms do not give a particularly positive assessment of their usefulness. Agencies emphasize that formal notifications are today less important than in the past, since information on investigations is more easily available, either informally from other agencies or from press coverage, though some agencies assert that notifications may be useful in merger review. Outside of regional platforms, there seems to be limited experience with requests of investigatory assistance, although some of the agencies who have engaged in this type of co-operation are

established agencies accounting for an important share of the overall international co-operation activity. Other agencies stated that their limited experience is due to the lack of available legal basis and to the length and complexity of formal request processes.

- (6) *Outside of regional co-operation, frequent or regular experience in international co-operation appears to be concentrated among a few, more experienced agencies. Experience with international co-operation has, however, increased significantly in the last five years and is expected to keep doing so, since responses indicate that the number of multi-jurisdictional cases is rising over time. Merger review is the enforcement area in which there has been the highest number of cases involving international co-operation.*

About one-half (52%) of the respondents reported some experience in international enforcement co-operation, excluding regional co-operation.

Number of cases/investigations in which agencies have co-operated (2007-2012)



Agencies have increased international co-operation over time, and that expect further increases due to the rising number of multi-jurisdictional cases. The estimated data provided in response to the Survey indicate approximate increases of 15% in cartel cases, 35% in merger review cases and 30% in unilateral conduct cases. It also confirms that merger review is the enforcement area in which respondents have co-operated most over the period 2007-2011; this is

the enforcement area in which there has been the highest number of cases involving international co-operation in each year.

Experience with international co-operation, by enforcement area, (2007-2011)

	Number of agencies with any experience	Number of cases reported by agencies				
		2011	2010	2009	2008	2007
Cartel	19	55	51	49	47	48
Merger	21	116	101	106	96	86
Abuse of Dominance	13	29	26	22	22	22

- (7) *Regional co-operation (i.e. co-operation through existing, law enforcement co-operation networks relying on special rules and international agreements) is common in many parts of the world. However, actual experiences with case co-operation seem to differ significantly across regional networks. While some regional co-operation platforms (such as the ECN and the Nordic Alliance) provide competition-specific rules for co-operation in enforcement cases, other networks only provide for opportunities for policy discussion and exchanges of experiences.*

Two-thirds of respondents identified themselves as belonging to a regional network. Respondents referred to two broad types of regional networks: i) platforms that provide competition-specific rules for co-operation in enforcement, and ii) *fora* for general policy discussions on common regional issues, and exchanges of experiences.

The European Competition Network (ECN) is the main platform for co-operation in Europe and provides a unique experience in terms of both the number of participating agencies (all EU member countries' agencies), and the availability of formal instruments for co-operation (allowing for exchange of confidential information and investigatory assistance in antitrust and cartel cases). The Survey shows that many ECN respondents think that the ECN provides a unique setting for co-operation, in that its members apply the same substantive rules and the framework provides very powerful instruments for co-operation. Also in Europe, on a sub-regional scale, the Nordic Alliance has emerged as an enhanced network of co-operation and a platform where participating countries co-operate closely in enforcement.

In other geographical areas (Latin America, Africa and Asia) there are several regional networks that have adopted or are about to adopt regional competition law provisions, including establishment of regional agencies, though experience in case co-operation is still very limited. Other networks mentioned in the responses to the Survey provide a *forum* in which competition policy issues can be discussed at the regional level

- (8) *Participants in regional networks identified specific advantages of regional co-operation, such as the strong legal basis for co-operation, and convergence in national laws and agency procedures, which are seen as contributing to increased effectiveness of competition enforcement. A few disadvantages of regional co-operation were also identified by some respondents.*

Most respondents who participate in regional co-operation networks gave a very positive assessment of their participation the role of regional networks. Specific advantages of regional co-operation networks include: a strong legal basis for co-operation, for example for provision of investigatory assistance and exchange of confidential information; convergence in national law and agency procedures; coherent application and development of overarching regional law; and optimal resource allocation.

Respondents perceive economic similarities across a region, including shared experiences of economic growth, to facilitate co-operation within a regional network. Another perceived benefit stemming from regional co-operation is the establishment, through continuous interaction, of a strong network of personal contacts, facilitating access to other agencies. Cultural and language similarities shared at the regional level were also mentioned as an advantage in regional co-operation.

The most commonly identified element undermining the potential advantages of a regional co-operation network is that agencies within the same region may face the same challenges, such as those related to limited resources, making regional co-operation ineffective and particularly burdensome.

Advantages and Disadvantages of Regional Co-operation

Main Potential Advantages	Main Potential Disadvantages
Strong legal basis, including for exchange of information	Similar resource constraints (increased by obligation to make resources available in the region to regional partners)
Convergence of national laws/procedures	Mutual lack of experience
Economic similarities or shared history of development	Constraints on course of action
Coherent application and development of regional law	Enforcement actions of one agency may affect the others
High relevance of co-operation (similar companies and cases)	Potential delays
Strong network of contacts	Lack of competition law or strong competition institutions in the region

- (9) *Legal limitations, due to differences in legal systems and to restrictions in domestic legislation, appear to be one of the more important limitations on international co-operation. Addressing these limitations could be beneficial to international co-operation, despite the costs associated.*

Limitations to co-operate can be of a legal nature, for example due to divergence in the national and/or international legal frameworks in which agencies operate; or they can be of a practical nature, such as lack of available resource, time constraints and language barriers. The existence of legal limitations to international co-operation was identified as the most important and one of the most frequently encountered limitations by respondents. Practical limitations appear to be relatively less important but more frequently encountered in the enforcement practice of responding agencies. With regard to the frequency, on average, respondents ranked their experience with limitations as ranging between 'never' and 'seldom'. Respondents also felt that practical difficulties with co-operation can usually be overcome, while limitations of a legal nature tend to bring co-operation to a halt. Limitations and constraints often appear to be relatively less important for OECD agencies than for non-OECD agencies. Non-OECD countries generally find these constraints more difficult to overcome.

Ranking of limitations and constraints, all respondents

Rank	By “importance”	By “frequency”
1	Existence of legal limits	Existence of legal limits
2	Low willingness to co-operate	Lack of resources/time
3	Absence of waivers	Different legal standards
4	Lack of resources/time	Different stages in procedures
5	Different legal standards	Low willingness to co-operate
6	Dual criminality requirements	Absence of waivers
7	Other differences/inconsistencies between legal systems	Other differences/inconsistencies between legal systems
8	Different stages in procedures	Language/cultural differences
9	Lack of knowledge of involvement	Lack of knowledge of involvement
10	Lack of trust	Lack of trust
11	Language/cultural differences	Different time zones
12	Different time zones	Dual criminality requirements

Some limitations have a general impact on all enforcement areas. Lack of prior interaction between agencies and lack of trust, for example, affect the willingness of enforcers to co-operate with each other, and limit effective co-operative relationships to a small group of agencies which regularly engage in co-operation, regardless of whether the co-operation under consideration is in the context of a cartel, merger or unilateral conduct case. Other limitations are specific to one enforcement area; dual criminality requirements, for example, affect co-operation in cartel cases between agencies operating under different legal regimes for cartel prosecution/investigation.

Respondents were willing to work to address existing limitations and maximise benefits from international co-operation. Respondents, however, noted that addressing these limitations may entail costs. These costs relate to: an increased administrative burden from increased co-operation; implementing the reforms required to address some of the restrictions, especially the limitations related to existing legal constraints; and the impact of these reforms on other enforcement policies.

- (10) *Effective co-operation of agencies' enforcement actions is enhanced by the ability of enforcers to exchange information (confidential and non-confidential) about cases they are investigating. The exchange of information remains a core feature of international co-operation.*

Legal protection on the disclosure of information often is a constituent part of the authority of agencies to compel information in competition investigations. As such, confidentiality rules are fundamental components of an agency's ability to obtain information and ultimately are key underpinnings that facilitate international co-operation. National and international legal frameworks, however, often do not allow agencies to exchange confidential information. This may impact the effectiveness of international co-operation.

The exchange of non-confidential information is generally allowed and occurs frequently. Agencies engage in case discussions on analytical methods for a particular case (*e.g.* product and geographic market definition) or assessment of the competitive effects of the case, and potential remedies which could be accepted. While the exchange of confidential information relies on formal mechanisms for co-operation, the exchange of non-confidential information and internal agency information often occurs on an informal basis. However, practical limitations (such as language, lack of resource, or different timing of the investigations) can limit the effectiveness of these types of exchanges.

Regional co-operation platforms, such as the ECN and the Nordic Alliance, which provide effective mechanisms for exchanging confidential information can facilitate co-operation significantly. National legislation or international agreements (outside regional co-operation platforms) generally do not allow for the transmission of confidential information to other enforcers. Only in some cases national legislation or international agreements make specific provision for the exchange of confidential information, and even when this is possible agencies use these provisions rarely. The procedures and criteria allowing for the exchange can be burdensome and time-consuming and sometimes may not respond to the need of agencies for timely access to the information.

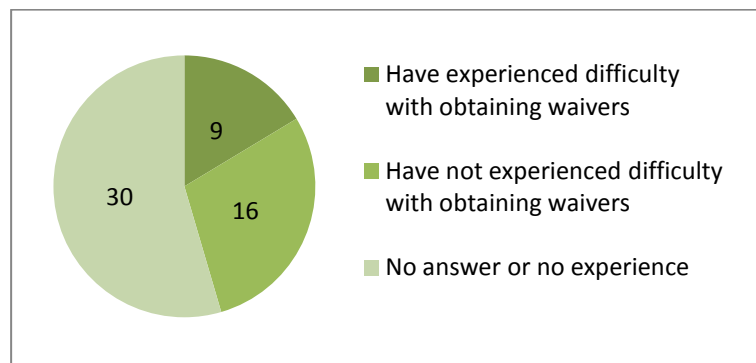
- (11) *Confidentiality waivers are often relied upon by agencies, when possible, to address existing limitations to the exchange of confidential information. Experiences with waivers are generally positive. The use of waivers, however, is not as broad as it might be.*

Agencies rely significantly on waivers to address the statutory limitations preventing them from exchanging confidential information. More than two-thirds of respondents are allowed to use waivers in their enforcement activity and some of them have adopted a standard form for waivers. Most agencies, even those that have a standard waiver form, often negotiate the terms and condition for the parties' consent to the transmission of information and/or documents to another enforcement agency on a case-by-case basis.

The use of waivers, however, is not as broad as it might be. Some agencies (all non-OECD) responded that they are not allowed to use waivers under the provisions of their competition law. Agencies that can rely on waivers cannot mandate waivers, the provision of which remains at the discretion of the parties. Most importantly, parties' incentives to grant waivers differ somewhat between merger and cartel cases; in cartel cases their availability largely depends on whether the party has applied for amnesty/leniency.

With regard to issues encountered by agencies in obtaining waivers, over half of Survey respondents either declined to answer the question or had insufficient experience with waivers to be in a position to answer the question. Of those who responded, only a few had experienced some difficulties.

Experiences with obtaining waivers



- (12) *Responses to the Survey confirm the important role played by the OECD in shaping the current framework for international enforcement co-operation. They also confirmed that the role of the 1995 OECD recommendation on international co-operation was significantly more effective than that of the 2005 Best Practices on the exchange of information in cartel investigations.*

Many respondents reported experiences with the 1995 Recommendation on international co-operation, in particular with three of the co-operation mechanisms provided for by the recommendation: notifications, exchange of information, and coordination of actions. By contrast, fewer respondents reported actual experiences with the 2005 OECD Best Practices for the formal exchange of information between competition agencies in hard core cartel investigations (2005 Best Practices). Many, however, recognised the important role of the 2005 Best Practices as guidance for legislative reforms at the national and international levels, and as a reference document for informal exchanges of information.

Experience with the 1995 Recommendation on International Co-operation

Instruments under the Recommendation	Respondents with experience
Notification of existing investigations (Rec. I.A.1)	14
Co-ordination of actions (Rec. I.A.2)	9
Exchange of information (Rec. I.A.3)	11
Consultation procedure (Rec. I.B.4 and 5)	4
Conciliation procedure (Rec. I.B.8)	1

The Survey also confirmed that the OECD instruments could be amended or revised to reflect the current status and needs of international co-operation. In particular, it was suggested that the notification procedure in the 1995 Recommendation on international co-operation should be modernised in light of technology advances; and that it should be revised to strengthen its provisions on the exchange of confidential information and eliminate the conciliation procedure, which did not have much use over the years.

- (13) *The Survey results suggest that incentives to engage in international enforcement co-operation can be improved through the adoption of a clear legal and institutional setting for co-operation and through an increased awareness of the benefits of international co-operation.*

Several suggestions on how to improve the degree and quality of international co-operation were put forward.

Incentives to co-operation depend on the effectiveness of the international enforcement system. Reforms of the legal and institutional setting for international co-operation can increase incentives for agencies to engage more effectively in case co-operation. Similarly, ensuring a high level of awareness of the benefits of international co-operation and the downside of lack of co-operation was suggested as one priority for the enforcement community.

Suggestions fell into three main categories:

- (i) suggestions on how to maximise the benefits of co-operation within the existing legal and practical constraints;
- (ii) suggestion on how to improve the existing system of co-operation by addressing the effects of legal and practical constraints on co-operation; and
- (iii) a number of suggestions focussed on ways to improve interaction between enforcers, establish contacts, and develop procedures and best practices for more effective relationships.

In general, when asked about their views on the future of international co-operation in 5, or 10, or 15 years time, respondents emphasised that (i) they expect to see more international enforcement co-operation in the future, particularly at regional level; (ii) they hoped to see better provisions for international co-operation and for information sharing in particular; and (ii) globalization is a strong motivation for more co-operation.

- (14) *Exchanges of information, and in particular of confidential information, between enforcers is a key area for improvement. Many respondents suggested that agencies should agree on a clearer legal framework for the exchange of confidential information. Reforms in the area of confidentiality waivers are viewed as a way to foster more valuable co-operation through a more effective exchange of confidential information between enforcers.*

According to many respondents, legal limitations preventing competition agencies from exchanging confidential information and evidence are the primary impediment to international co-operation. Generally, with few exceptions, national legislation, international

agreements and instruments do not allow, or allow only to a limited extent, the exchange of confidential information and data. Respondents identified information exchange as an important area for improvement. Many suggested that agencies should agree on a clear legal framework for the exchange of confidential information.

When asked about possible ways to improve the ability of agencies to exchange confidential information, respondents referred to the need to find structural solutions to what is in some ways a structural problem. In general, the report does not suggest that the way forward to address this issue is non-application of confidentiality rules, or their weakening. Solutions suggested include the adoption of national legislation or of international instruments which would allow exchanges of confidential information under clear conditions and with adequate safeguards. In a number of these answers, reference is made to “*protocols*”, “*instruments*”, “*a model agreement*”, “*an international agreement*”, “*a better system of information sharing*”, “*clear legal instruments*” and more generally to the need to “*develop and introduce a reliable mechanism for the exchange of confidential/sensitive information*”.

Based on the Survey, an effective legal framework for the exchange of confidential information should address the following questions:

- (i) what type of information can be exchanged, and what type of information cannot be exchanged;
- (ii) the conditions for the transmission of confidential information to another enforcement agency, and
- (iii) what use the receiving agency can make of the confidential information received.

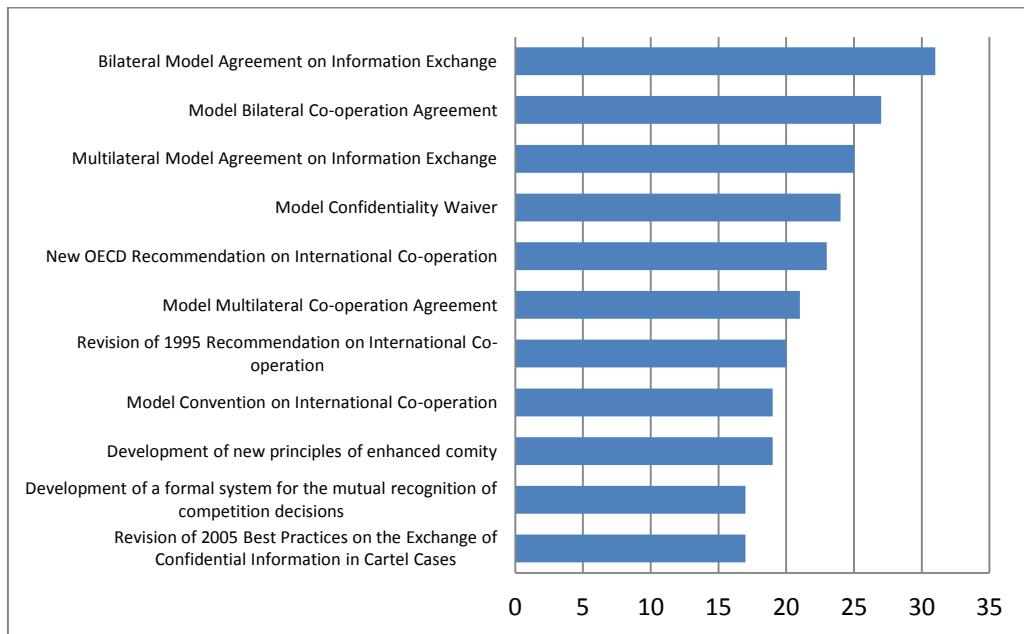
Respondents also identified the use of confidentiality waivers as an area of possible improvement. In this context, suggestions referred to the need to further standardise the scope of and conditions attached to confidentiality waivers to ensure that in practice they do not limit or restrict the ability of agencies to exchange confidential information in a useful manner.

- (15) *OECD instruments could be amended or updated to reflect the current status and needs of international co-operation. Developing a model bilateral or multilateral co-operation agreement and a model bilateral or multilateral agreement for the exchange of information are among the projects which obtained the largest support among respondents, followed by the development of a model confidentiality waiver.*

In general, respondents thought that the OECD could take a leading role as a forum to help member countries shape a new legal framework for international co-operation. Many respondents pointed out that the OECD should focus on its specific strengths (*e.g.* “whole of government” approach) and that it may, in particular, be well placed to deal with obstacles to effective co-operation, in particular those of a national legal nature. For example, many respondents believe that the OECD should encourage national legislators more explicitly to address legal obstacles to co-operation in their current legislation, *e.g.* by facilitating information exchanges and investigatory assistance between enforcers.

More generally, OECD members recognised the important role of the OECD as promoter of effective co-operation through the definition of best practices. Many respondents suggested that the OECD should work on a model bilateral or multilateral co-operation agreement and on a model bilateral or multilateral agreement for the exchange of information. For the same reason, interest was also expressed in a new OECD recommendation on international co-operation, or a revision of the 1995 Recommendation on international co-operation. The development of a model confidentiality waiver also gained a fair amount of consensus, ranking 4th in terms of ‘priority’ among OECD respondents.

Future Work for the OECD by ‘Priority’, based on OECD responses



1. INTRODUCTION

This report presents the main findings from the OECD/ICN Questionnaire on International Enforcement Co-operation – Status Quo and Areas for Improvement (referred to in the report as the Survey).

This initial Chapter provides an overview of the development of the Survey, and summarises the content of the Survey and its objectives. This Chapter also describes general methodological choices made in the analysis of the Survey's responses. The Chapters which follow describe insights gained from the analysis of responses regarding the extent to which agencies can and do co-operate internationally in enforcement activities, and their opinions and recommendations concerning future international co-operation in competition enforcement.¹

1.1 Background and mandate for the Survey

In July 2011, the Chairman of the OECD Competition Committee (the Committee) sent a letter to all delegates concerning long-term strategic planning, and possible themes which could be taken up by the Committee over the course of the next two years.² Key themes which emerged concerned international co-operation, including as an objective a review and possible

¹ The Report was prepared by Antonio Capobianco for the OECD Secretariat, Alessandra Tonazzi of the Italian Competition Authority on secondment to the OECD Competition Division, and by Natasha Menell, a Consultant for the OECD Competition Division. A group of representatives from six ICN enforcement agencies have worked closely with the OECD Secretariat during the drafting process of this report, through a series of regular calls where issues arising from the responses have been discussed. This close co-ordination between the OECD Secretariat and the representatives of the ICN has ensured consistency in the review and analysis of the responses to the Survey by the two organisations.

² See Paper “The Competition Committee’s two strategic themes for 2012-2014: international co-operation and evaluation of competition interventions – Workplans” [DAF/COMP(2012)1].

revision of the 1995 Recommendation of the Council Concerning Co-operation between Member Countries on Anti-competitive Practices Affecting International Trade (the “1995 Co-operation Recommendation”), and identification of other instruments or Committee outputs that could enhance international co-operation between competition agencies. The Chairman emphasised that the Committee would aim to learn from examples of successful international co-operation in other fields, both within and outside of the OECD. Delegates were encouraged to respond in writing with their comments.³

In December 2011, after a review of delegates’ comments, a revised scoping note was issued. The delegates were again requested to respond in writing with their thoughts on more specific questions.⁴ Following the review of these comments, the Secretariat circulated a work plan detailing a strategy and action items under the theme of international co-operation. The proposed objective of this work plan was to study and share experiences and insights on international co-operation among competition agencies with a view to improving co-operative practices. The proposed work plan also included a detailed table summarising specific projects, their titles and projected completion dates.⁵

At the February 2012 Committee meetings, delegates endorsed the project as it had been proposed in the Secretariat scoping paper. It was also decided that, before undertaking any substantive projects set out in the work plan, the Secretariat should complete a ‘stocktaking’ exercise of past work on international co-operation by the OECD Competition Committee,⁶ and should circulate a survey to gather information on current practices of international co-operation between agencies in enforcement cases/investigations, in order to identify examples of effective international co-operation and areas for improvement.

³ See DAF/COMP/WD(2011)70.

⁴ See DAF/COMP(2012)1/ANN1.

⁵ DAF/COMP(2012)1.

⁶ The stocktake exercise was presented to Working Party N. 3 of the Competition Committee at its meeting on 12 June 2012 [DAF/COMP/WP3(2012)5].

In order to avoid duplication with the parallel project on international enforcement co-operation of the International Competition Network (ICN),⁷ the Competition Committee asked the Secretariat to co-ordinate with the ICN on a single questionnaire that would support the needs of both the OECD Competition Committee's long-term project on International Co-operation and the ICN Steering Group project on International Enforcement Co-operation.

The primary objective in designing the Survey was that the responses should provide an understanding of the *experiences of competition agencies with international co-operation in case-related enforcement activities*. In addition to this core purpose, the Survey aims to elicit the opinions of respondents on several related topics and topics which might inform the future work of the OECD and of the ICN in this area, particularly. The Survey aimed to elicit the opinions of respondents on:

- the extent and usefulness of co-operation in their enforcement activities and priorities;
- obstacles to effective co-operation;
- the relative costs and benefits of various types of co-operation;
- the relative difficulties relating to various formal instruments used to provide a legal basis for co-operation;
- desired developments in practice or policy which would enhance co-operation or address obstacles to co-operation; and
- desired future work by the OECD and ICN in the area of co-operation in enforcement of competition law.

The Survey was launched on Friday, 27 July 2012, and was addressed to the more than 120 member agencies of the ICN, which include all agencies of OECD member and observer countries. The deadline for responses was 14 September 2012.

⁷ For more information on the scope of the ICN project, refer to the ICN document available at:
<http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf>.

1.2 Overview of the Survey

The Survey is divided into ten Sections, each with a different focus on and aspect of international co-operation enforcement.⁸

Each section of the Survey contains both qualitative questions – in which respondents were asked to respond to fairly open-ended questions and provide examples – and quantitative questions – in which respondents were asked to provide data regarding the extent of their experience or to quantify the importance and/or frequency of their experience with specific categories of co-operative activities and limitations to co-operation.

In **Section 1**, respondents were asked to *generally reflect on their experiences with international co-operation*, broadly defined, in both a regional and an international context. The questions in this section relate to the priority of co-operation in agency policy, general costs and benefits, extent of overall experience, and assessment of the usefulness of co-operation to enforcement activities. As it turned out, many of the survey respondents had limited experience with case-based enforcement co-operation in an international context, but were still able to contribute to the discussion in this section with reference either to regional co-operation or general enforcement priorities in their own jurisdictions.

Section 2 requested details of the *legal bases* upon which competition agencies rely in order to co-operate internationally in enforcement activities. Respondents were asked to list any national laws, international agreements (both binding and non-binding), and any other legal provisions and tools for co-operation in their jurisdiction.

While the whole Survey does not distinguish between formal and informal co-operation, leaving respondents to specify to which type of co-operation they were referencing, in **Section 3** respondents were asked to provide details of their experience with various *types of formal co-operative activities*. Questions refer to formal notification and other comity provisions, formal requests for investigatory assistance, and enhanced co-operation provisions.

Section 4 requested information about the *frequency of co-operation* in enforcement cases, disaggregated by enforcement area.⁹ As several respondents

⁸ The questionnaire is included in Annex I.

reported limited or no experience of co-operation in case-work, their responses to these sections were also limited, but they were often able to provide insight into their prioritisation decisions and their opinions on the importance of international co-operation in the qualitative questions.

Section 5 of the Survey focused narrowly on the *exchange of confidential information* and *use of confidentiality waivers*. Questions in Section 5 requested information from respondents regarding the terms of confidentiality in their jurisdictions, the conditions for exchange of confidential information, and their experience with using confidentiality waivers from parties to the investigation to facilitate international co-operation.

In **Section 6**, respondents were asked to weigh the *pros and cons* of international co-operation, and to reflect on the costs of co-operative activities compared to the benefits of co-operation for their enforcement priorities. Respondents were also asked to assess limitations to effective co-operation, and consider the benefits and costs which could result from addressing these limitations.

In **Section 7**, the Survey provided respondents with a chance to suggest methods for *improving international co-operation*, and specifically asks that respondents consider methods by which the exchange of information could be facilitated while providing adequate protections for confidentiality.

The experience of respondents with co-operation in *regional networks* was considered separately in **Section 8** in which respondents were asked to provide information on their participation in regional networks. Respondents were also asked here to provide an assessment of the advantages and disadvantages of regional co-operation, and examples of solutions adopted at the regional level which might be useful in the international sphere.

The Survey also included a number of OECD- and ICN-specific questions. **Section 9** asked about experience with OECD work products and suggestions for future work for the OECD Competition Committee. **Section 10** asked about experience with ICN work products, and future work that the ICN might undertake to promote co-operation, both in enforcement case-work and more generally. Section 10 of the Survey (Questions 43 to 48) is the only part of the

⁹ Respondents were asked to reflect on their experience with co-operation in merger review cases, cartel cases, cases of unilateral conduct/abuse of dominance, and ‘other (e.g. non-cartel agreements)’ cases.

Survey which is not covered by this Report. The results from Section 10 are presented in a separate report prepared by the ICN.

1.3 Responses to the Survey – general statistics

The OECD received a total of fifty-seven (57) responses to the Survey. Of these, fifty-five (55) were used in the formal data set to develop the analysis presented in the report. One (1) response was received too late in the process to be included in the compilation of the results; one (1) response came from a member of the judiciary of a jurisdiction whose competition agency had already responded to the Survey, and this response was only considered in its qualitative aspects. Of the fifty-five (55) responses included in the data set used to produce the results presented in this report, thirty-two (32) were from agencies of thirty-one (31) OECD member countries.¹⁰ Responses were also received from thirteen (13) OECD observer countries;¹¹ and from another eleven (11) ICN agencies that are neither OECD members nor observers.¹²

¹⁰ The OECD member countries which responded to the Survey are: Australia, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Portugal, Hungary, Ireland, Israel, Italy, Japan, Korea, Mexico, Netherlands, New Zealand, Norway, Poland, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, and the European Union.

¹¹ Brazil, Bulgaria, Chinese Taipei, Colombia, Egypt, India, Indonesia, Lithuania, Malta, Romania, Russia, South Africa, Ukraine.

¹² Barbados, Croatia, Cyprus, Honduras, Kazakhstan, Kenya, Macedonia, Malaysia, Singapore, Zambia, and CARICOM.

Note by Turkey: The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

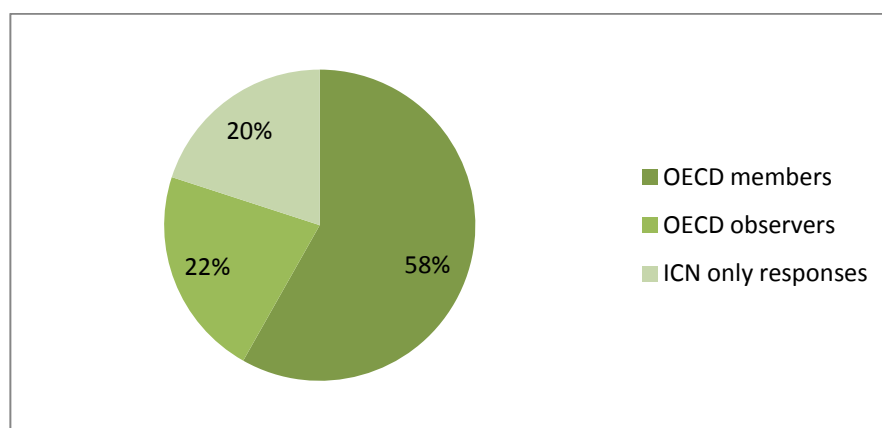
Note by all the European Union Member States of the OECD and the European Commission: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

Table 1: Response rate

	#	Response rate
OECD members	31 ¹³	91%
OECD observers	13	87%
Non-OECD respondents	11	--
<i>Total ICN members</i>	57 ¹⁴	47%
<i>Total respondents</i>	57	--

Taking into account the fact that two responses were received from distinct agencies of the same OECD member country, the sample of fifty-five (55) responses included in the dataset is comprised of:

- Responses from agencies of OECD member countries (58% of the sample);
- Responses from agencies of OECD observer countries (22%);
- Responses from ICN only member agencies (20%).

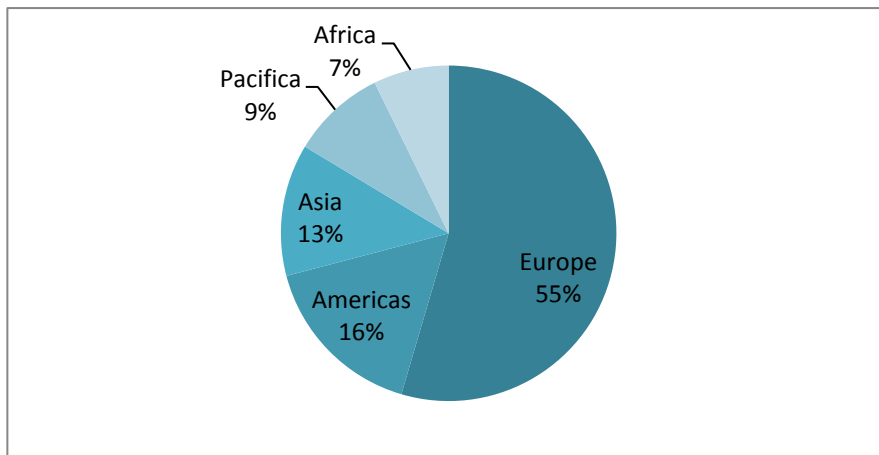
Table 2: Distribution of responses

¹³ Two distinct competition agencies of a single OECD member country each submitted responses to the Survey.

¹⁴ Two distinct competition agencies of one OECD member country submitted a joint response to the Survey. Both agencies, however, are members of the ICN.

As reported in the Table below, the majority of responses (thirty [30] – 55% of the sample) were received from agencies in Europe. Nine (9) responses were received from agencies of countries in the Americas, seven (7) from agencies of Asian countries, five (5) from agencies of countries in the Pacific region, and four (4) from agencies of African countries.

Table 3: Geographical distribution of responses



1.4 Treatment of the responses

In order to draw conclusions from the responses to the Survey, a data set was constructed which facilitated comparison of the results for both the qualitative and quantitative questions. Annex II to this report includes a Methodological Note explaining in detail the analysis from which the results presented in this report were produced.

Before addressing a few general methodological remarks, a cautionary note is in order. The results presented in this report have to be read and interpreted exclusively in the context of the Survey. Views and opinions summarised in the report represent only the views of the sample of respondents considered for the analysis, and may not necessarily reflect the views of all the competition authorities around the world. Statements and quotations in the report are used to illustrate specific points, and should not be read as reflecting the views of all the respondents to the Survey. Where views differed, the report endeavours to reflect in the text and in the quotations all the different views expressed.

A few general methodological remarks are necessary at this stage:

- The results of the *quantitative questions* – tables which respondents were asked to complete – were compiled into comprehensive spread sheets. Where discrete categories of responses were the only possible responses, and where these categories were clearly ordinal in nature, ordinal scores were assigned to categories of responses and their sum and/or average was taken across the sample (and often across OECD and non-OECD respondents subsets of the sample) in order to gain insight and draw conclusions.¹⁵
- The *qualitative questions* were treated with particular care; as many of these questions were fairly open-ended, responses varied widely and revealed differences in approaches adopted by competition agencies. However, in most cases key themes could be extracted from the compilation of responses to each question. In order to draw conclusions from these questions, key concepts were identified from the responses themselves; the relative importance and frequency of these concepts were compared by counting the number of agencies who mentioned them in their responses to a particular question. Often a distinction was also drawn in the analysis of these questions between OECD member countries and non-OECD member countries. In a limited number of cases, the number of times that a concept was mentioned by respondents across the entirety of a Section of the Survey was also recorded.
- Respondents were asked throughout the Survey to provide *examples of positive and negative experiences* with attempted co-operation in competition enforcement. Where concrete examples of co-operation – or attempted co-operation – were provided, case studies were constructed with available details. In total, case studies of one hundred and sixty-six (166) examples (of varying degrees of detail) were compiled from the responses. Some of these have been used as illustrative examples in the report, with the permission of the relevant respondent where applicable.

¹⁵ For example, in Table 7 of the Survey, agencies were asked to assign a score for the ‘frequency’ with which they encountered each of a pre-determined list of possible limitations to effective co-operation. Responses were compiled in spreadsheet, and ordinal scores were assigned to each of the possible answers (‘never’, ‘seldom’, ‘occasionally’ and ‘frequently’). The averages of these ordinal scores among respondents who had completed the table were used to compare the frequency with which the various categories of limitations have been encountered. See Chapter 6 for further details and results of this question.

- In sections 2 to 7 of the Survey, respondents were asked to limit their responses to *experience with co-operation in the international sphere* excluding co-operation within regional networks. Regional co-operation for the purpose of the Survey was defined as co-operation within a regional network, *i.e.* an existing co-operation platform (such as the ECN, CARICOM, COMESA, WAEMU, or the Nordic Alliance). This is different from co-operation within geographically neighbouring countries which is done on a bilateral basis. Section 1 of the Survey asked respondents to refer to co-operation both within and outside regional networks, while sections 2 to 7 solicited information about co-operation outside regional networks. Section 8 was specifically intended to cover only experiences with regional networks. Several respondents that participate in these networks had limited or no experience with co-operation outside of a regional network, and their responses were therefore also limited in these sections, but a few were able to provide opinions regarding the advantages of a formal legal framework in the context of various co-operative activities. A number of respondents failed to distinguish between international and regional co-operation in their responses; wherever possible, these agencies were contacted for clarification and their responses were amended in line with their clarifications.¹⁶

Where possible, the *analysis also distinguishes between groups of respondents*. For the purposes of the analysis presented in the remainder of this report, where ‘OECD respondents’, ‘OECD agencies’ or ‘OECD countries’ are referred to, these include only responses from the thirty-two (32) respondents from OECD member countries. The twelve (12) OECD observers are included in the ‘non-OECD respondents’, ‘non-OECD agencies’ or ‘non-OECD countries’ category together with the other eleven (11) responses received from agencies which are ICN members only.

¹⁶ In particular, given the existence of a comprehensive legal framework for regional co-operation within the European Competition Network (ECN) – and because the choice was made to exclude data on regional co-operation from sections 2 to 7 of the Survey – great care was taken to ensure that the data provided by the predominance of agencies from EU member countries was specifically related to co-operation outside of the regional legal framework. Where this was unclear in the response, the agency was contacted and asked to clarify what portion of the data they had provided was in relation to international (non-regional) co-operation. See Chapter 5 for further details of the comprehensive legal framework for co-operation within the ECN.

2. QUALITATIVE ASSESSMENT OF INTERNATIONAL CO-OPERATION

The first section of the Survey was broad in scope: agencies were asked to assess their experiences in international co-operation qualitatively, including both international and regional co-operation. The questions touched upon the objectives and importance of international co-operation, and an assessment of its costs, benefits, and usefulness.

More specifically, the questions sought information about agencies' objectives when engaging in international co-operation (Question 1), and agencies' views on the importance of co-operation with other agencies and whether it is a policy priority (Question 2). Respondents were asked to assess their practical experiences in international co-operation, indicating the most and least beneficial experiences (Question 3), and the usefulness of international co-operation to their enforcement strategy (Question 4). Agencies were also asked to assess how costs and benefits are weighed when deciding to co-operate with other agencies (Question 5).

Most of the questions asked for "qualitative" and narrative replies rather than quantitative data. The replies, while challenging to summarize in numbers or statistics, provide interesting information. For the qualitative questions, this chapter of the report gives an overview of the patterns and trends emerging from the answers, providing statistical information where possible. Some of the key points touched upon in this section will be explored in more depth in other chapters of the report.¹⁸

¹⁸ For example, experience with regional networks will be discussed in Chapter 5, and experience with information exchange in Chapter 7.

2.1 Objectives of international co-operation

Co-operation is a priority for a vast majority of the respondents to the Survey. Forty six (46) agencies (84% of respondents) indicated that international co-operation is a policy priority. Seven (7) responding agencies indicated that they do not consider international co-operation to be a policy priority; among these seven, two (2) agencies explained that they were young agencies still in the process of building capacity, two (2) reported that they had found regional co-operation to be sufficient for their needs, and five (5) asserted that they prioritize co-operation only when it is relevant to specific cases.¹⁹

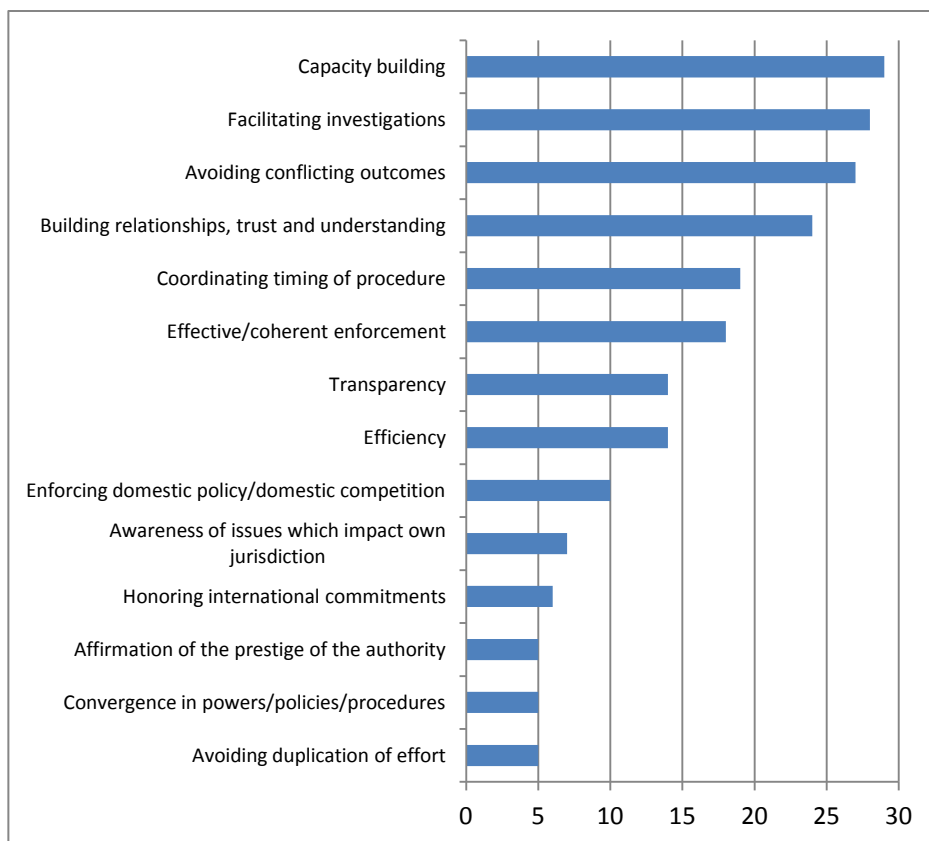
In explaining why they consider co-operation to be a policy priority, twenty-eight (28) respondents (51%) mentioned facilitation of case investigations as an objective of international co-operation, including exchange of case-related evidence or background information, investigatory assistance, technical assistance with analysis, prevention of destruction of evidence, and (in one response) overcoming ‘jurisdictional obstacles’. Twenty-seven (27) respondents (49%) mentioned that co-operation aids in avoiding conflicting outcomes and facilitates co-ordination of remedies. Eighteen (18) agencies stated that co-operation is a necessity in order to promote effective or coherent enforcement; fourteen (14) agencies emphasized that globalization of markets, and consequently of anti-competitive activity, requires increasing and enhanced co-operation in enforcement.

The objectives of international co-operation indicated in the replies show that many respondents interpret international enforcement co-operation not just as a means to coordinate action in parallel investigations, but also as a way to improve their enforcement action by learning from the experience of others²⁰.

¹⁹ Some of the agencies indicating that they did not consider international co-operation to be a priority gave more than one explanation.

²⁰ Respondents could indicate more than one objective.

Table 4: Objectives pursued through international co-operation, by number of respondents



The objective of international co-operation identified in the most responses was capacity building (twenty-nine [29] respondents, 53%), including exchange and development of best practices, exchange of experience and expertise, and sharing of methodologies (non-case specific). Key enforcement related objectives indicated frequently in responses included: facilitating investigations and avoiding conflicting outcomes, identified by twenty-eight (28) respondents (51%) and twenty-seven (27) respondents (49%) respectively.

A qualitative analysis of the replies confirms that many agencies tend to see co-operation in enforcement not just in a case-specific context, but also in a broader co-operative framework, as a way to build capacity, exchange

experiences, and share methodologies.²¹ One agency, for example, said that “*international co-operation regarding competition law enforcement by way of experience sharing on substantive issues*” had helped the agency “*in developing strategy for approaching [...] competition cases.*” Another agency reported that “[...] *international co-operation has kept our agency’s work up-to-date and sharp to follow the international know-how on handling and classifying important cases. The mechanism of learning from the experience of others is well appreciated.*” One agency underlined that “[...] *international co-operation increases the expertise of the agency’s personnel and hence creates new possibilities for the boosting of national competition control and advocacy. [C]o-operation ensures that the agency knows the latest trends of international competition law and economics when implementing national competition policy.*”

Twenty-four (24) respondents (44%) emphasized the importance of building relationships based on trust as an essential element of international co-operation; they reported that they devoted significant resources to this purpose. In this context, the role of international organizations is also emphasized in many of the replies. Many respondents cited participation in international *fora* like the OECD and/or ICN as very important in forging relationships and understanding common issues.

The second most commonly identified objective of co-operation is facilitating investigations (twenty-eight [28] respondents, 51%), including exchange of information on related issues (analytical approaches), exchange of case-specific information and evidence, investigatory assistance, prevention of destruction of evidence, high-quality decision-making, and overcoming jurisdictional obstacles. Avoiding conflicting outcomes and coordination of remedies were indicated in 49% of the replies (twenty-seven [27] respondents).

Other enforcement-related objectives of co-operation identified in many of the replies were:

- co-ordinating timing of procedures or investigative action (nineteen [19] respondents, 35%),
- effective enforcement (eighteen [18] respondents, 33%), including a broad approach to investigating and designing coherent remedies in international cases,

²¹ For additional details on qualitative responses relating to the benefits of international co-operation in a broader, non-case specific context, see the complementary ICN Report.

- efficiency in enforcement and regulation (fourteen [14] respondents, 25%), including reducing the administrative burden for businesses, reducing regulatory costs, and reducing obstacles to cross-border transactions; and
- transparency in enforcement (fourteen [14] respondents, 25%), both in terms of informing other agencies of their actions and priorities, and of promoting legal certainty for businesses.

Other objectives indicated by less than 10% of respondents include avoiding duplication of efforts and convergence in powers, policy, and/or procedures.

Some differences emerge between the responses of OECD and non-OECD respondents in the emphasis placed on enforcement-related objectives. While 84% of the OECD respondents (twenty-seven [27] respondents) identified enforcement-related objectives among their first two objectives for international co-operation, 39% of the non-OECD respondents (nine [9] respondents) did so.

2.2 Benefits of international enforcement co-operation

Of the forty-five (45) agencies that reported having had sufficient experience with international co-operation to address the question, 98% (forty-four [44] respondents) found that international co-operation had been useful to their enforcement strategies.²²

Benefits of informal case co-operation were highlighted in forty (40) responses (twenty-five [25] OECD and fifteen [15] non-OECD respondents). These informal contacts often occur at an early stage of a case and might include consultation among agencies on matters such as the timing of the investigation, the theory of harm, and potential remedies in the case of merger reviews.

²² The number of agencies reporting experience with international co-operation with respect to this part of the Survey is higher than the number indicated in Chapter 4. There are two explanations for this apparent inconsistency: one is that respondents considered international co-operation in a broader context – one that includes non-enforcement co-operation such as capacity building – when answering the first section of the Survey; the second explanation is that this part of the Survey included both regional and international co-operation, while Chapter 4 covers a part of the Survey related only to international co-operation outside regional networks.

Respondents indicated that a key element in informal co-operation is “trust”. Since informal co-operation does not rely on explicit rules protecting the confidentiality of exchanged information, agencies have stressed that this kind of co-operation can work only if they trust that the other agency will use the information appropriately.

Agencies underscored how even exchanging non-confidential information and general views on a case can be extremely beneficial in an investigation, and might be sufficient in-and-of itself in many cases.

Formal co-operation, when possible, was also perceived as very beneficial, especially when instruments are available for the exchange of confidential information. The inability to exchange confidential information was indicated, in fact, in many of the replies as one of the main limitations that agencies encounter in cases requiring deeper co-operation. Many agencies mentioned waivers of confidentiality by parties to investigations as an effective way to overcome this limitation, while some agencies stated that the use of formal instruments, such as diplomatic channels, proved time consuming and were often ineffective.²³

Case prioritization, including the decision not to open a case or to accept the remedies of another agency as sufficient, were mentioned in twenty (20) replies (seventeen [17] OECD respondents and three [3] non-OECD respondents).²⁴ Respondents indicated that they might decide not to take action when they know that other agencies are dealing with a parallel case, as long as the proposed remedies also address competition issues in their own jurisdiction. In this manner, they rely on information about the case work of other agencies to better focus their interventions.

Twenty-six (26) responses (nineteen [19] OECD, seven [7] non-OECD) underlined regional co-operation as the primary sphere of international co-operation.²⁵ A few agencies stated that they are specifically interested in

²³ For a discussion on limitations to the exchange of confidential information and on waivers see Chapter 7.

²⁴ This figure includes the responses of EU member states which may allocate cases within the European framework, as respondents were asked to refer also to regional experience in this section. This might also explain the predominance of OECD replies in this area.

²⁵ Again, this response may be skewed towards OECD membership by the European co-operation framework.

regional co-operation more than in international co-operation, as they have found regional co-operation to be sufficient for their enforcement priorities.

In particular, twenty-five (25) responses (nineteen [19] OECD and six [6] non-OECD) highlighted participation and co-operation in the European Competition Network (ECN) as especially relevant to their enforcement activities, asserting that the majority of their co-operation experience took place within this framework. These agencies emphasized the benefits of a common legal framework, instruments, and powers that allow for coordination of investigations. The possibility to rely on the resources of another agency – for example, through dawn raids performed in that country – is perceived as promoting extremely effective co-operation. The unique benefits of the exchange of information within the ECN were mentioned in twenty-one (21) responses (seventeen [17] OECD members, four [4] non-OECD members). Those EU members which did not raise this particular aspect of European co-operation seem to have less experience in cases which transcend their domestic jurisdiction.

Countries belonging to the Nordic Alliance also highlighted that co-operation within this group has been particularly beneficial, and proved extremely valuable in the exchange of important, confidential, and sensitive information.

Twenty-one (21) responses mentioned the specific benefits of co-operation between neighbouring countries, which share similar histories of economic and policy development, language, culture, and common industries and firms, even in the absence of a regional platform.

Seventeen (17) non-OECD respondents indicated that they have no or very little experience in co-operating on cases.²⁶ This may in some cases be because the agencies from these countries are still young and have limited experience with enforcement, even at the national level. The countries that have little experience with enforcement co-operation nevertheless mentioned the benefits they received in discussions with other agencies, and the benefits of experience-sharing in developing enforcement strategies to approach their cases.

A few younger agencies indicated that they have encountered problems in receiving assistance on cases from more experienced agencies, but they nevertheless assessed their overall experience with international co-operation as

²⁶ See Chapter 4 for further discussion.

useful. Only one agency indicated that international co-operation had not been useful, having encountered “*insurmountable difficulties*” in receiving assistance from other agencies in a cartel case. Several other agencies have given examples of unsuccessful attempts at co-operation, though they either felt they did not have sufficient experience to weigh the overall usefulness of these attempts, or they felt that successful examples outweighed the unsuccessful examples.

Box 1: Example of an investigation hindered by lack co-operation

One experience with attempted co-operation was reported by a respondent who sought co-operation from other jurisdictions, but found that “*effective results could not be achieved due to [the] national nature of the legislation or to the legal limitations to the exchange of confidential information between enforcers.*” In this particular case, the agency faced specific procedural difficulties regarding companies located outside of its jurisdiction. According to its competition law, failure to notify an inspection decision to the parties under investigation constitutes a legal deficiency which can affect the validity of the whole investigation. Under these circumstances, the agency requested co-operation/consultation with the agencies of those foreign jurisdictions where the companies under investigation were located. It requested that they take the necessary measures against these companies, carry out inspections and send the information and documents obtained during the inspections.

The requested agencies were not able to respond to the request for co-operation. The officials of one agency said that “*they could not share any information and documents about the firms and their activities with any country that is out[side] of the scope of their jurisdiction [...] due to the principle of professional secrecy [...].*” They also argued that “*such requests caused great sensitivity and discussions; the law firms were well-equipped and aggressive, therefore [they] had to have strong legal bases; they also faced similar situations in their [own] requests and could not obtain information from third countries, [while] trade secrets, insiders as the source of the information and other legal barriers complicated the matter [further].*” Competition officials of other requested agencies replied that the request “*did not [have] a sufficient legal basis*” and that “*on the spot inspections could be carried out [only] when there were signs that anti-monopoly rules in [the requested jurisdiction] were violated, therefore they could not initiate any process against the firms that violated anti-monopoly rules in [the foreign jurisdiction]*”; they also added that “*permission of the relevant parties was necessary to send information and documents belonging to [domestic] firms.*”

2.3 Costs and benefits, and how they are weighted

Among the costs of international co-operation identified by respondents resource constraints were mentioned by twenty-five (25) respondents (45%), processing time and restraints in timing of investigations by twenty (20) respondents (36%), and administrative burden of communication and co-ordination by sixteen (16) respondents (29%).

Table 5: Costs of international co-operation by all respondents

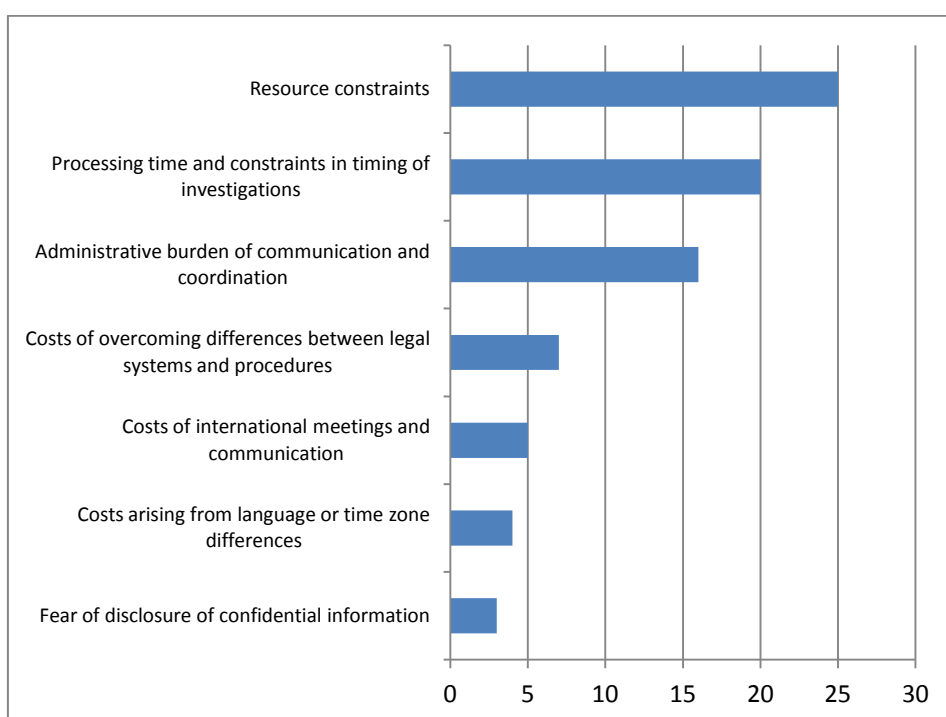
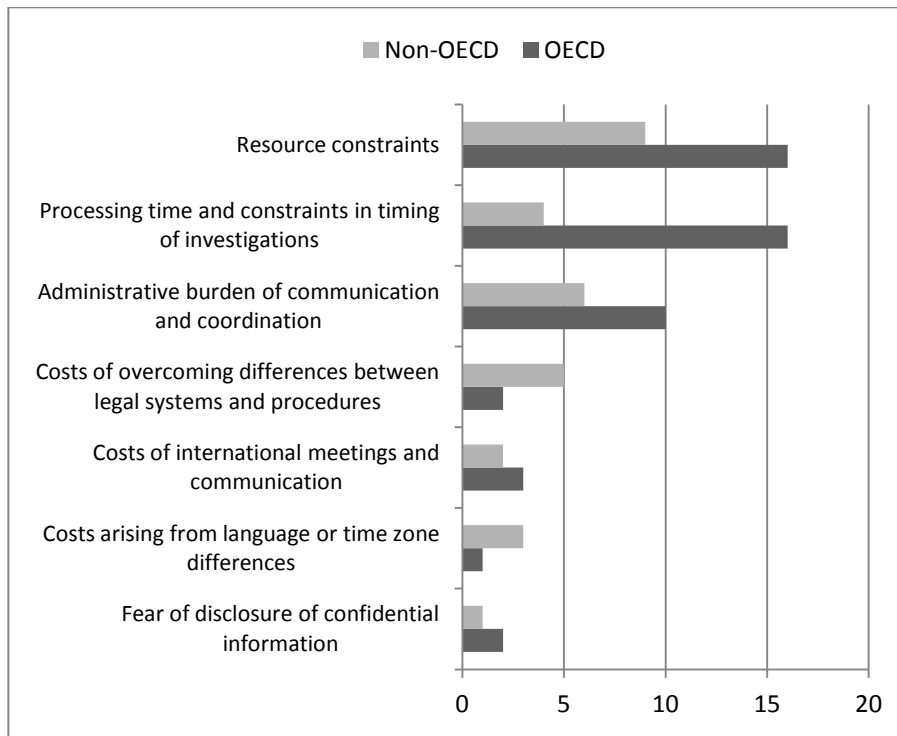


Table 6: Costs of international co-operation, by OECD vs. non-OECD respondents

Twenty-five (25) respondents indicated that they have found the benefits of international co-operation to outweigh its costs.²⁷ In this respect, many agencies suggested that the effectiveness of co-operation should be assessed from a long-term perspective and that, although immediate costs might be perceived as high, they should be considered as a form of investment. One agency pointed out that repeated co-operation usually will result in increased efficiency and reduced time costs (especially in relation to understanding other enforcement regimes and frameworks), as well as deeper relationships and trust which are beneficial for future case discussions.

Eleven (11) agencies said that they might make a cost/benefit assessment on a case-by-case basis, considering the benefits of co-operation to the agencies involved, weighed against the resources required and the need to meet statutory deadlines. A few agencies mentioned the fact that they may need to find ways to prioritize cases where the benefits of co-operation clearly outweigh the costs,

²⁷ Nineteen (19) respondents did not address this aspect of the question.

because they face difficulties in responding to all of the requests for co-operation which they receive.

2.4 Usefulness of international co-operation by enforcement area

As requested in the Survey, twenty-six (26) agencies differentiated between enforcement areas (*i.e.* cartels, mergers, and unilateral conduct cases) in assessing the usefulness of international co-operation. No great differences emerge between the benefits of co-operation in cartel and merger cases, with most agencies giving positive feedback regarding their experiences, while five (5) agencies mentioned experience with international co-operation in unilateral conduct investigations.²⁸

In cartel cases, respondents emphasized the benefits of co-operation in parallel investigations, especially the possibility to coordinate dawn raids. Twelve (12) agencies stated that coordination of dawn raids might be crucial to avoid destruction of evidence. Information sharing is viewed as another important element of co-operation in cartel cases, although seventeen (17) agencies stressed that they encountered limitations on their ability to exchange information. Some agencies cite examples of formal co-operation in cartel investigations which was enabled by provision of waivers.²⁹ Other benefits stemming from co-operation in cartel cases include overcoming delays in accessing witnesses from foreign jurisdictions by coordinating timing of interviews, and using formal tools to access evidence in other jurisdictions.

²⁸ Agencies provided more data on unilateral conduct cases in later parts of the Survey, as reported in Chapter 4.

²⁹ Sixteen of the case studies created on the basis of the responses to the Survey involve cases in which it was specified that a waiver was used. These were reported by seven (7) different respondents. Four (4) of these are cartel cases, reported by three (3) different agencies.

Box 2: The Marine Hose cartel case

A good example of the importance of co-operation to the success of an investigation is provided by a case reported by the Australian Competition and Consumer Commission (ACCC) regarding a cartel in the supply of marine hose to oil and gas suppliers. This case related to conduct which occurred between 2001 and 2006, involving four suppliers of marine hose. The conduct in question involved setting prices, bid rigging and allocating market shares. The cartel was effectively terminated in early 2007 following investigations by the European Commission, Japanese Fair Trade Commission, the UK Office of Fair Trading (UK OFT) and the United States Department of Justice (US DOJ).

The ACCC alleged that four foreign suppliers of marine hose entered into global cartel arrangements by submitting rigged bids to supply marine hose customers in Australia. While the organization of the cartel occurred overseas, Australia's antitrust jurisdiction extends to the dealings of the companies when those arrangements have effects in Australia.

The successful outcome of this case would not have been possible without the assistance of both the US DOJ and the UK OFT, which provided information and documents that were significant to the ACCC's investigation. The information and documents were obtained under a statutory arrangement from the US DOJ, and from the UK OFT via a request by the ACCC under the relevant section of the UK's Enterprise Act 2002.³⁰ As a result, the ACCC was able to maximize the use of information it obtained and successfully prosecute an international cartel.

As for experience with multi-jurisdictional mergers, many respondents replied that they often engage in discussions with other agencies reviewing the same merger, and that this is beneficial in order to better understand the background facts and context underlying the merger.³¹ Some agencies outlined that these exchanges can help to standardise analytical criteria (*e.g.* market definition), understand procedural phases (*e.g.* timing and scope) of other agencies' investigations, and coordinate the timing of the respective reviews. Many agencies also emphasized the benefits of coordinated discussions, including the possibility of ensuring mutually consistent remedies.³²

³⁰ See Chapter 7, Box 10.

³¹ Sixteen (16) respondents reported that general discussions had been useful in merger reviews in Question 4. In Table 6.1, ten (10) respondents reported that they frequently engage in one or more of the more informal categories of consultation in merger cases.

³² In responding to Question 4, nine (9) agencies specifically mentioned coordination of remedies in merger cases. In Table 6.1, three (3) respondents

Box 3: The United Technologies Goodrich Corporation merger

The recent *United Technologies Goodrich Corporation* transaction (“UTC/Goodrich”), the largest merger in the history of the aircraft industry, is a good example of international co-operation among several international enforcement agencies in a case of merger review.

The US Department of Justice (DOJ), the European Commission (EC) and the Canadian Competition Bureau (CCB) co-operated closely throughout this investigation. The DOJ also discussed the acquisition with other international enforcement agencies, including the Federal Competition Commission in Mexico and the Administrative Counsel for Economic Defense in Brazil.

The frequent discussions among the agencies facilitated a successful resolution of competitive concerns, and ensured that the conditions imposed by the agencies were consistent across jurisdictions and did not impose conflicting obligations on the merged entity. The DOJ, EC, and CCB announced their decisions regarding the merger on the same day. The DOJ and the EC approved the merger, subject to certain conditions, and the CCB stated that it would take no action regarding the merger because the US and EC remedies “*appear to sufficiently mitigate the potential anti-competitive effects in Canada.*”

2.5 Stage of case/investigation at which co-operation takes place

In Question 7 respondents were asked to report at what stage of a case/investigation they typically co-operate with competition agencies in other jurisdictions. They were also asked to provide data on the frequency of co-operation at different stages (before, during or after the investigation) indicating whether international co-operation occurs ‘frequently’, ‘occasionally’ or ‘seldom’ at each stage.

Many respondents outlined that it was difficult to give a generalized assessment on this point, since international co-operation can take place at any stage of the investigation and this might differ widely from case to case.

However, a point made by many respondents is that they will try to start co-operation at the earliest possible stage of the investigation, because co-

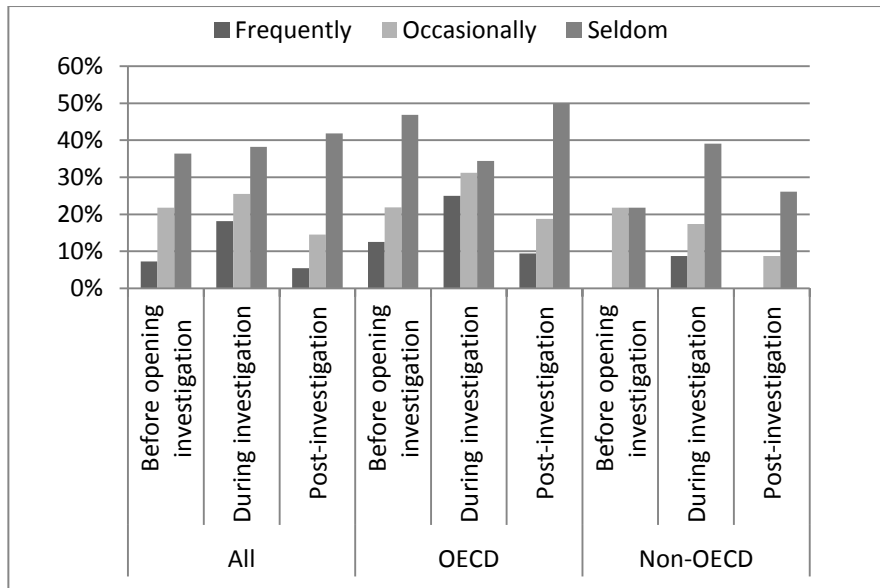
said that they do this ‘frequently’ in merger cases. In responding to Question 16, sixteen (16) respondents specifically mention merger cases when discussing the extent to which they take into account the remedies of other agencies.

operation might be less fruitful at a later stage. Many respondents also stress that they will usually seek informal contacts – by telephone or e-mail – with agencies from other jurisdictions as soon as they are aware that a parallel investigation is taking place.

Respondents stressed that co-operation at a very early stage – even before the opening of the investigation – is particularly crucial in cartel cases where coordinated dawn raids might prevent removal or destruction of relevant evidence.

The data on frequency of co-operation with respect to stage of investigation are reported in the Table below:

Table 7: Frequency of co-operation at stage of investigation³³



The data provided by respondents appear to indicate that co-operation most “frequently” occurs during the investigation (both for respondents from OECD and non OECD countries) possibly suggesting that agencies more frequently become aware of investigations in other jurisdictions after they have been

³³ In Table 1 respondents were asked to indicate the frequency with which co-operation takes place at each stage of the investigation. The available responses were: ‘Frequently (> 60% of relevant cases)’, ‘Occasionally (20% - 60%)’, ‘Seldom (< 20%)’, and ‘Never’. The table below reports the percentage of respondents who indicated each category of ‘frequency’ for each stage of the investigation.

launched. Agencies from non OECD countries indicated that they “occasionally” or “seldom” co-operate before opening an investigation.

2.6 Final considerations

The Survey indicates that international co-operation is a policy priority for a large majority of competition agencies; respondents emphasized that the globalization of markets, and consequently of anti-competitive activity, requires increasing and enhanced co-operation in enforcement.

Many agencies, especially newer ones, tend to see co-operation in enforcement not just in a case-specific context, but also in a broader framework, particularly as a way to build enforcement capacity, exchange experiences, and share methodologies. In this respect, building relationships based on trust is seen as an essential element of international co-operation, and international *fora* like the OECD and ICN play an important role in forging these relationships.

More experienced agencies pursue international co-operation in enforcement in order to facilitate investigations, exchanging case-specific information and evidence and provide each other with investigatory assistance. The responses to the Survey demonstrate that agencies, through co-operation, try to prevent destruction of evidence, achieve high-quality decision-making, and overcome jurisdictional obstacles. Results also indicate that they share the objective of avoiding conflicting outcomes and, when possible, coordinating remedies.

Agencies underscored how even exchanging non-confidential information and general views on a case can be very useful in an investigation, and might be sufficient in-and-of-itself in many cases; though when instruments are available for the exchange of confidential information, this is perceived as extremely beneficial.

The Survey shows that non-OECD agencies, which may in general have less experience with international enforcement co-operation, mentioned that exchanges with other agencies are very beneficial. Experience-sharing may help them to develop investigative strategies and strengthen enforcement even at the national level.

The overall assessment of experience with international co-operation is extremely positive for almost all respondents, who had found that international co-operation had been useful to their enforcement strategies and that, though they faced some costs (especially in terms of resource and time constraints), overall the benefits outweigh the costs.

3.LEGAL BASIS FOR AND EXPERIENCE WITH FORMAL CO-OPERATION

Sections 2 and 3 of the Survey focused on legal instruments for co-operation, and on experience with formal co-operation, in particular, but not limited to, experience with provisions for international comity. This Chapter covers international co-operation outside of regional co-operation.³⁴

In particular this chapter of the report will address the following issues:

- The existing legal bases which agencies use in international co-operation (Question 8)
- The availability, relevance and use of these legal instruments (Table 2)
- Agency experiences with comity provisions (Questions 9 and 13)
- Agency experiences with formal notifications (Question 10 and Tables 3.1 and 3.2; Questions 11 and 12)
- Agency experiences with investigatory assistance (Question 13 and Tables 4.1, 4.2, 4.3 and 4.4)

3.1 The range of legal instruments

Competition agencies can use different legal bases for formal co-operation. Some are designed specifically for competition purposes. This is the case, in particular, for bilateral co-operation agreements entered into by competition agencies to enhance the relationship between the signatories. In the absence of a specific competition instrument, other international co-operation instruments can apply. These are instruments negotiated by governments to allow their respective ministries and agencies to co-operate. They may contain provisions that, although not specifically designed for co-operation in competition cases,

³⁴ Instruments and experience relating to regional co-operation are discussed in Chapter 5.

can be used to seek assistance from an agency in another country. There are also multipurpose instruments, such as Free Trade Agreements, that, although mainly focused on other aspects of economic policy, sometimes contain provisions on co-operation in competition enforcement.³⁵

Box 4: Legal instruments for co-operation

Competition-specific instruments

National statutory provisions. Some national laws provide a direct legal basis for co-operation between agencies or jurisdictions, while others provide a mandate to enter into co-operation agreements with other jurisdictions. In either case, jurisdictions with laws directly permitting co-operation also have bilateral co-operation agreements in place with other jurisdictions, suggesting that bilateral agreements have added utility. National laws may provide statutory “gateways” for voluntary disclosure to foreign law enforcement agencies of information gathered in the course of the requested country’s own investigations.³⁶

Bilateral competition agreements. Bilateral competition agreements are entered into by competition agencies in order to enhance the relationship between the signatories. There are several types of bilateral agreements, allowing more or less intense forms of co-operation. Some are binding international agreements signed by governments, although they may not include dispute settlement provisions. These agreements do not amend domestic laws including those that prohibit the sharing of confidential business information without the provider’s consent.³⁷ Non-binding memoranda of understanding (MOUs) between agencies or countries amount to ‘best endeavours’ agreements between competition agencies. Some of these executive agreements formalise existing working relationships, or they may mark a new level of engagement between competition agencies. Some MOUs go further and are more in line with the bilateral co-operation agreements described above.

³⁵ The OECD 1995 Recommendation on International Co-operation is also an instrument that some respondents indicated as a legal basis for international co-operation – see below for further details. The use of the Recommendation will be discussed in more detail in Chapter 8.

³⁶ On statutory information gateways, see further discussion below in Chapter 7.

³⁷ “Antitrust mutual assistance agreements” are a category of bilateral agreements enabling greater co-operation than traditional bilateral co-operation agreements. The greater level of co-operation is enabled by domestic laws that permit certain assistance to be provided pursuant to the mutual assistance agreement that otherwise could not be provided, particularly in terms of access to foreign-located evidence and information sharing. However, the only example of such an agreement reported in the responses to the Survey is the one between the US and Australia.

Confidentiality waivers. A confidentiality waiver entails the permission granted by a party under investigation or a third party in a case/investigation enabling investigating agencies in different jurisdictions to discuss and/or exchange information, protected by the confidentiality rules of the jurisdiction(s) involved. Today, international co-operation is often based on waivers that companies grant to agencies, particularly in the context of merger review, allowing them to exchange confidential information about the case quickly and at an early stage, and facilitating coordination in an investigation. The granting of waivers may help to avoid the need to use official channels in formal co-operation procedures, and the consequent delay this can entail.

Non competition-specific instruments

Mutual Legal Assistance Treaties. Mutual Legal Assistance Treaties (MLATs) are bilateral treaties creating reciprocal international obligations between sovereign governments, and are not specific to competition investigations. An MLAT normally allows the signatories to request various types of assistance from each other, including the use of formal investigative powers and sharing of confidential information. MLATs are therefore potentially powerful tools, but they have traditionally been restricted to criminal matters. MLATs require the underlying offence to be a crime in at least the requesting country's jurisdiction.

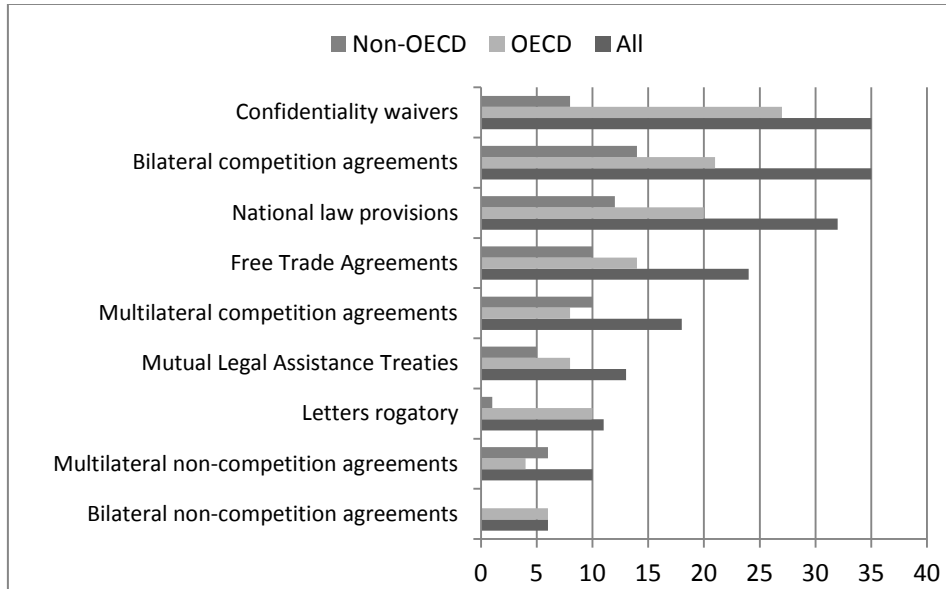
Regional Trade Agreements. Several types of agreements include provisions that can serve as a legal basis for competition enforcement co-operation. There are currently 214 Regional Trade Agreements (RTAs) in force listed on the World Trade Organization's website, of which 98 contain competition provisions. In the competition enforcement sphere, there are a number of well-known RTAs, including the EU, COMESA, WAEMU, CARICOM, ASEAN, NAFTA, MERCOSUR, and the Andean Community. RTAs are no longer strictly based on geographic location, and they can be agreed bilaterally between individual countries (Free Trade Agreements, FTAs), between one country and a group of countries, or within regions or blocs of countries (multilateral agreements).

Letters rogatory. This is a long-established procedure whereby a court formally requests its peer in another jurisdiction to perform a judicial act, such as collecting evidence, overseeing the collection of evidence, or serving a summons or other legal notice. The process can be time-consuming and cumbersome. Some countries insist that the requests be submitted through diplomatic channels.

3.2 Availability, relevance and use of legal instruments for international co-operation

Respondents to the Survey were asked to report on the availability, use and relevance of the main legal instruments for co-operation in their jurisdictions.³⁸

³⁸ Question 8 and Table 2 of the Survey.

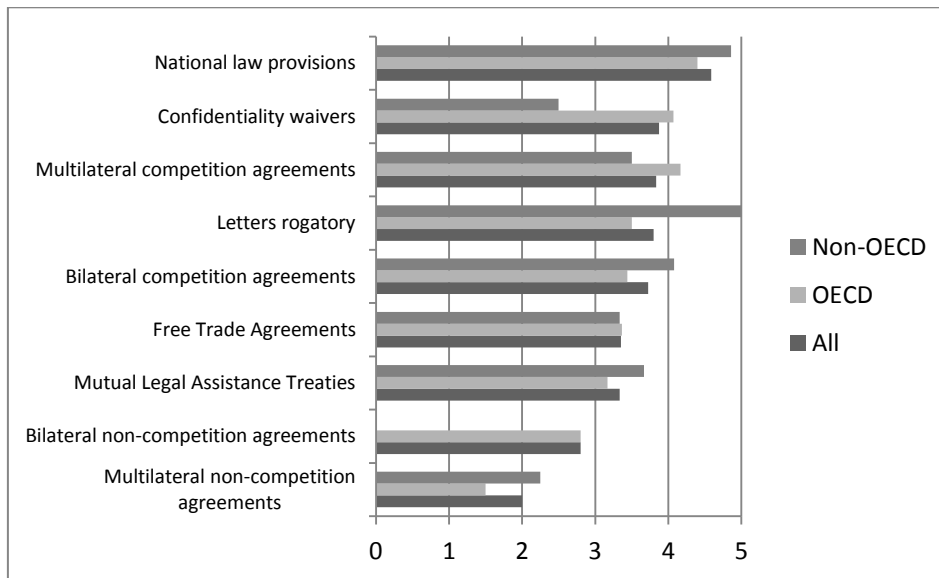
Table 8: Availability of legal bases for international co-operation

Bilateral competition agreements and confidentiality waivers are the instruments that most respondents – thirty-five (35) - indicated as available to them as legal bases for co-operation, closely followed by provisions in national laws (thirty-two [32] respondents). Among the non-competition-specific instruments used as a basis for international co-operation, FTAs were indicated as being available to most respondents (twenty-four [24]). Multilateral and bilateral non-competition agreements were reported as being available to a limited number of agencies (ten [10] and six [6], respectively). The main difference between OECD and non-OECD respondents seems to be with respect to confidentiality waivers, which responses indicate are available to 84% of OECD respondents but 35% of non-OECD respondents.

Respondents were asked to provide an assessment of the relevance of the different legal instruments available to them.³⁹

³⁹ Agencies were asked to assign a score from 1 ('not relevant') to 5 ('very relevant') to each instrument. In order to create a comparative ranking of legal bases for co-operation by scores for 'relevance', an average score was calculated by dividing the sum of scores provided by respondents by the number of respondents who provided a score for each instrument.

Table 9: Average score for ‘Relevance’ of legal bases for co-operation⁴⁰



Competition-specific instruments such as national law provisions, confidentiality waivers and multilateral competition agreements were indicated as most relevant for co-operation, while non-competition-specific agreements (bilateral or multilateral) were perceived as least relevant by most respondents. There appears to be a significant distinction between OECD and non-OECD respondents with regards to confidentiality waivers, which were ranked as the second most relevant instrument by OECD respondents, and seventh by non-OECD respondents.⁴¹

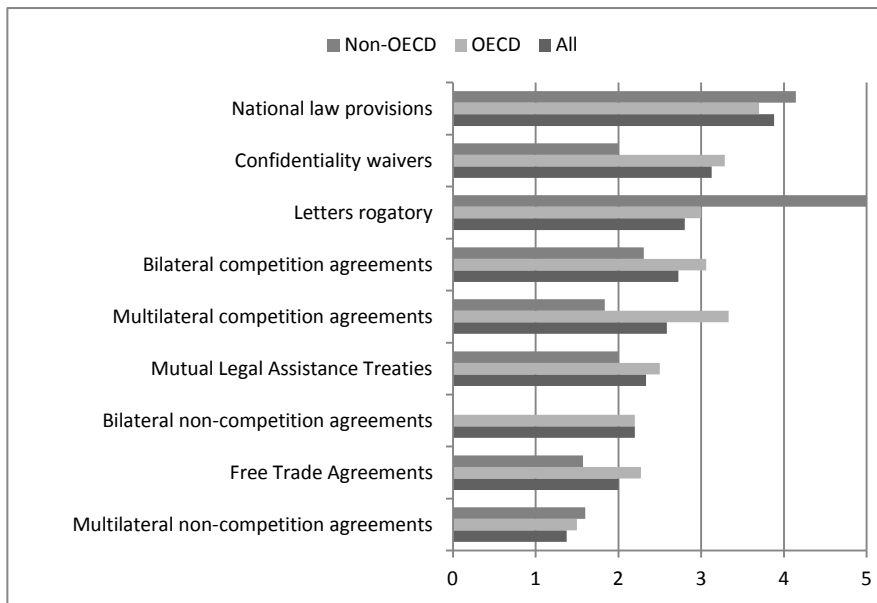
The Survey also asked respondents about the frequency of use of the available instruments, on a scale from 1 (‘never’) to 5 (‘frequently’). National law provisions, confidentiality waivers, letters rogatory and bilateral competition agreements are the instruments that respondents indicated were

⁴⁰ Average score for ‘relevance’ is of those who provided a score on a scale of [1-5]. As respondents did not mark a score for categories of legal instruments which they did not indicate as available to them, the average scores presented in this table therefore represent the relevance of legal instruments to those jurisdictions to which they are available. See Table 8, above, for details of the number of respondents who reported availability of each legal instrument.

⁴¹ Though letters rogatory might appear to be very highly ranked by non-OECD respondents, this reflects the fact that only one non-OECD agency provided a score for ‘relevance’ of letters rogatory, scoring relevance as 5.

most frequently used in international co-operation. The replies are consistent with respondents' assessments of relevance. OECD countries mentioned national law provisions as the instrument most frequently used, while letters rogatory was the instrument most frequently used by non-OECD respondents as a legal basis for co-operation.

Table 10: Average score for „Frequency of Use’ of legal bases of co-operation⁴²



3.3 Experience with different types of formal instruments

3.3.1 Comity provisions

Comity is the legal principle which promotes the mutual consideration of requests that a jurisdiction open or expand a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting the

⁴² Average score for ‘frequency’ is of those who provided a score, on a scale of [1-5]. As respondents did not mark a score for categories of legal instruments which they did not indicate as available to them, the average scores presented in this table therefore represent the frequency of use of legal instruments in those jurisdictions to which they are available. See Table 8, above, for details of the number of respondents who reported availability of each legal instrument.

requesting jurisdiction's important interests.⁴³ The Survey (Question 9) asked respondents whether their national laws, bilateral or multilateral agreements contain comity provisions.

Box 5: Comity

For well over 100 years, public international law has acknowledged comity as a means of tempering the effects of the unilateral assertion of extraterritorial jurisdiction. Comity is therefore a horizontal, sovereign state-to-sovereign state concept, as laid down by the United States Supreme Court in *Hilton v Guyot* in 1895. It is not the abdication of jurisdiction; instead, it is the exercise of jurisdiction with an accompanying understanding of the impact that the exercise of jurisdiction may have on the law enforcement activities of other countries.

International co-operation in the competition field may involve two types of comity: traditional (or "negative") comity and positive comity. **Traditional comity** involves a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interests. **Positive comity** involves a request by one country that another country undertake enforcement activities in order to remedy allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the referring country.

Positive comity provisions are included in many bilateral co-operation agreements between competition agencies. The first wave of co-operation agreements was limited to the principle of traditional comity of avoiding harm to other countries' interests. This changed with the 1991 EC-US Agreement, the first bilateral agreement on co-operation in antitrust matters to include a provision for positive comity. The principle laid down in Article V of the 1991 EC-US Agreement was further refined in the Positive Comity Agreement signed by the then European Community and the US in 1998. The United States and Canada entered into a similar agreement in 2004.

Thirty-two (32) respondents indicated they have comity provisions available to them. In particular, eleven (11) respondents reported comity provisions in national laws, twenty-four (24) in bilateral agreements and ten (10) in multilateral agreements.⁴⁴

⁴³ See definition provided in the Survey.

⁴⁴ Some respondents indicated they had comity provisions for more than one category.

One agency provided an example of negative and positive comity provisions available in Free Trade and Bilateral Competition Co-operation Agreements. According to these provisions, the agencies involved should take into account the interests of other parties in enforcement activities, including decisions to initiate an investigation, the scope of an investigation, and the nature of remedies or penalties sought. Provisions include:

- notification of activities that may impact important interests of others;
- minimizing adverse effects of activities (particularly remedies),
- requesting that the other agency initiate enforcement activities if anti-competitive practices in another jurisdiction affect their own markets, and
- the requested agency must consider whether to initiate or expand activities with respect to identified problems.

Some national laws provide that, with the authorization of government, the agency may provide investigative assistance if consistent with the principle of comity, or may take steps to enforce criminal investigation decisions on behalf of overseas agencies (no dual criminality restrictions apply).⁴⁵

3.3.2 *Formal notifications*

Comity provisions are often associated with formal notifications of enforcement actions to other jurisdictions.⁴⁶ In order to assess the frequency of notifications, the Survey requested agencies to indicate how many formal notifications of enforcement action they had made/received in the last 5 years for cartels, mergers and unilateral conduct/abuse of dominant position cases.⁴⁷

Outside regional platforms, experience with making formal notifications in one or more enforcement area are reported by a limited number of agencies:

⁴⁵ This is the case, for example, with the national law of New Zealand.

⁴⁶ This is envisaged, for example, in the OECD's successive Recommendations on co-operation in competition matters (the most recent in 1995), which recommend that in seeking to implement negative or traditional comity a country should: "(1) notify other countries when its enforcement proceedings may affect their important interests, and (2) give full and sympathetic consideration to ways of fulfilling its enforcement needs without harming those interests." OECD (1995), at I.A1 and I.B.4.b.

⁴⁷ See Question 10 and Tables 3.1 and 3.2 of the Survey.

eleven (11) OECD agencies and four (4) non-OECD agencies. Experiences with receiving formal notifications are reported by fourteen (14) OECD agencies and by five (5) non-OECD agencies. The recourse to formal notification appears to be concentrated in very few agencies, especially when looking at the number of notifications. Six (6) agencies reported making more than five formal notifications a year, and four (4) reported sending more than twenty formal notifications a year.

Looking at responses by area of enforcement, twelve (12) respondents had made and fourteen (14) had received formal notifications in cartel case; eleven (11) had made and fifteen (15) had received notifications in merger cases; and seven (7) had made and six (6) had received formal notifications in unilateral conduct/abuse of dominance cases.

With regards to the legal basis for formal notifications, ten (10) respondents referred to bilateral agreements, and six (6) respondents referred to the 1995 OECD Recommendation.

Respondents reported that, apart from formal notifications, they keep in regular but informal contact with other agencies to inform them about their cross-border investigations or collect information about cases investigated by others. Many agencies said that they routinely check the media to be aware of investigations carried out by other agencies.

When asked to assess the usefulness of formal notification mechanisms, agencies that have made more formal notifications are also the ones that reported finding them least useful. In the words of one of these agencies, “[w]hen notification provisions were first adopted [...] antitrust investigations that implicated interests of multiple jurisdictions were much less common than they are today. Today, many agencies [...] have developed relationships with other agencies. [A]gencies often notify others informally [...] moreover, many cases notified either involve transactions of business conduct which has already been reported by the media or made public by the parties or other agencies, or in some cases they have no reason to be concerned about another jurisdictions’ proceedings.” Another agency observed that “[...] nowadays many of the events which are notified tend to already be in the public domain. By the time the stage of formal notification is reached there is already press coverage and there may have been informal or formal prior contact. In general, notification therefore provides less added value (transparency) than in the past.”

On the other hand, some agencies reported that they had found formal notifications useful, especially in the area of merger review. One agency said

that it had “[...] directly benefited from receipt of formal notifications. In a few cases, formal notifications have resulted in initiation of a domestic investigation. Formal notifications with respect to mergers are particularly useful in identifying transactions which do not require pre-notification under domestic law but may raise competition issues. Formal notifications have also led to further co-operation, such as discussions and coordination on merger review or coordination of evidence gathering in cartel investigations.”

One agency pointed out that “in cartel cases formal notifications are useful, but represent only one type of co-operation. As co-operation increases overall, notifications become less important” and in mergers “[formal notification] is useful for its informative purposes and for analysis coordination. However, not useful so far for coordination of decisions nor applying remedies.”

There seem to be very few examples of positive comity requests in the responses, *i.e.* cases in which agencies requested or were requested to take an enforcement action on behalf of another jurisdiction. Three (3) agencies reported having made requests for assistance on the basis of the principle of positive comity. One agency said that the request, addressed to several foreign agencies, had received a negative reply due to limitations on the investigatory powers and ability to disclose confidential information on the part of the agencies to which the request had been sent.⁴⁸ Another referred to a case of an informal request for positive comity, where it had postponed its investigation and encouraged a foreign agency to intervene against a cartel that affected consumers in its territory.

3.3.3 *Investigatory assistance*

A request for investigatory assistance (*i.e.* gathering information or interviewing witnesses) to another agency which might be better placed to obtain evidence in its own territory is another method agencies might use to enhance their enforcement actions, generally on the basis of co-operation agreements or other legal instruments (MLATs, letter rogatory, etc). Outside of regional platforms, eleven (11) agencies reported having made such requests (six [6] OECD respondents and five [5] non-OECD respondents) and ten (10) having received such requests (five [5] OECD and five [5] non-OECD respondents). For those that reported some experience, the type of investigatory assistance requested or performed concerned the gathering of information, either through dawn raids/searches or by interviewing witnesses.

⁴⁸ See case described in Box 1 in Chapter 2.

Looking at experience by enforcement area, seven (7) respondents reported having made assistance requests in cartel cases, four (4) in merger reviews and six (6) in unilateral conduct/abuse of dominance cases. Five (5) respondents had received requests relating to cartels, five (5) in mergers and four (4) in unilateral conduct/abuse of dominance cases. Many respondents replied that their lack of experience with investigatory assistance may be explained by limitations related to the available legal bases, especially with respect to confidentiality issues. One agency pointed out that even in the presence of MLATs, it might not be able to provide assistance in civil/administrative matters.

One (1) agency referred to the use of a letter rogatory in a cartel investigation in order to request testimony from a jurisdiction with which it did not have a co-operation agreement. Agencies which had had experiences with formal instruments such as MLATs or letters rogatory report that they often required the involvement of courts or foreign affairs offices, which results in a time-consuming and complex process.

3.4 Final considerations

The Survey indicates that among the various existing legal instruments that can be used by competition agencies for formal co-operation with other agencies – both competition and non-competition specific – bilateral competition agreements and confidentiality waivers are the instruments available to the largest number of agencies. Co-operation specific national law provisions closely follow as the next most commonly available legal instrument.

With respect to confidentiality waivers, however, the responses to the Survey highlight that availability is concentrated in OECD countries as opposed to non-OECD countries. This difference is also reflected in the assessment of the relevance of the various instruments, with confidentiality waivers ranked as the second most relevant instrument by OECD respondents and seventh by non-OECD respondents.

The Survey also indicates that comity provisions are available for many agencies in national laws, bilateral or multilateral agreements. However, formal mechanisms associated with comity provisions, such as notifications and requests of investigatory assistance, are used by a limited number of agencies. There are no great differences in the use of the instruments for different enforcement areas, with only slightly fewer agencies reporting use of formal notifications in unilateral conduct/abuse of dominance cases.

The Survey results strongly suggest that most agencies that use these formal mechanisms do not give a particularly positive assessment of their

usefulness. Agencies emphasize that formal notifications are nowadays less important than in the past, since information on investigations is more easily available, either informally from other agencies or from press coverage, though some agencies stated that notifications may be useful in merger review. Outside regional platforms, there seems to be very limited experience with requests of investigatory assistance, as respondents explain that they have experienced limitations related to the available legal basis, especially with respect to confidentiality issues and also with regard to the length and complexity of formal request processes.

4. EXPERIENCE IN INTERNATIONAL CO-OPERATION: FREQUENCY, TYPES AND ASSESSMENT

This Chapter of the report analyzes the quantitative and qualitative data that respondents provided on their experience in international enforcement co-operation. It covers:

- Section 4 of the survey (Questions 17 to 19, Tables 5.1-2, and Tables 6.1-4), where agencies were asked to provide quantitative data, if available, on how frequently they had co-operated internationally in the last five years;
- The qualitative responses to questions on experience with enhanced co-operation and remedies (Question 15 and 16)
- Responses to the questions in which respondents were asked to provide a description of the factors they consider in requesting or receiving a request to co-operate (Question 27), and
- Responses to the questions on advantages and disadvantages of different types of formal co-operation (Question 28).

Concerning the scope of this Chapter, one preliminary note is necessary. This Chapter focuses exclusively on international co-operation outside regional networks.⁴⁹ When respondents reported only experience with regional co-operation, this was not considered relevant for this chapter.⁵⁰

4.1 Frequency of co-operation in general

In Question 17 of the Survey, respondents were asked to report how frequently, in the set of cases/investigations in which international co-operation was feasible, co-operation had taken place. The question did not ask for specific data⁵¹ but for a more general, qualitative assessment of how often the agencies might be involved in international co-operation.

⁴⁹ See Chapter 1 and the Methodological Note in Annex II.

⁵⁰ Experience with regional networks is discussed in Chapter 5.

⁵¹ This was requested in further Tables in Section 4 of the Survey.

The responses show that about one-half (52%) of the respondents reported some experience in international enforcement co-operation, when excluding regional co-operation.⁵² Outside of regional co-operation, frequent or regular experience in international co-operation appears to be concentrated among a few agencies. Seven (7) agencies reported that they have frequent or regular experience in case co-operation,⁵³ while twelve (12) agencies reported occasional experience. Other respondents either reported that co-operating was either seldom or very seldom experienced – ten (10) agencies – or declared that they had no experience – twenty-six (26) agencies. The seven (7) agencies reporting frequent experience with international co-operation are all agencies of OECD member countries.

Many respondents emphasized that they seek co-operation on all cases where it would be feasible and/or necessary, which may indicate that inexperience with co-operation reflects a lack of opportunity (in terms of relevant cross-border cases) more than a lack of willingness to engage in co-operation. For example one agency said that “*co-operation has occurred in almost all cases where it is necessary for case resolution.*”. Another pointed out that co-operation frequently takes place “*in those cases where it is both feasible and likely.*” One agency pointed out that “*frequency depends on [the] stage of investigation; when investigations are parallel, discussions are more frequent.*” In contrast, one non-OECD agency said that they “*refer to international co-operation only as a last resort. This occurs when the agency has exhausted internal resources without getting enough information to allow them to build a case.*”

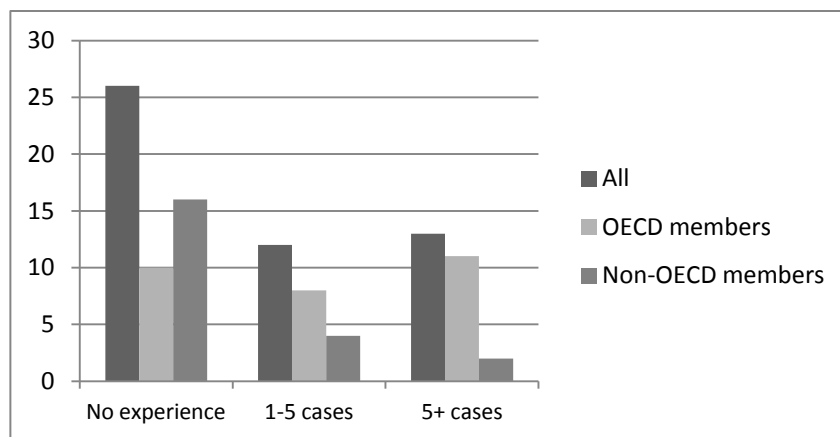
As Table 11 shows, the data submitted by respondents in Table 5.2 of the Survey, in response to the question regarding the number of cases/investigations in which they had co-operated internationally, confirm the qualitative responses:

- 26 respondents (47%) had not co-operated on any investigations,
- 12 respondents (22%) had co-operated on 1-5 investigations, and
- 13 respondents (24%) had co-operated on more than 5 investigations

⁵² If experience with either regional or international co-operation were taken into consideration, this percentage would increase to 82%, as forty-five (45) respondents have reported such experience.

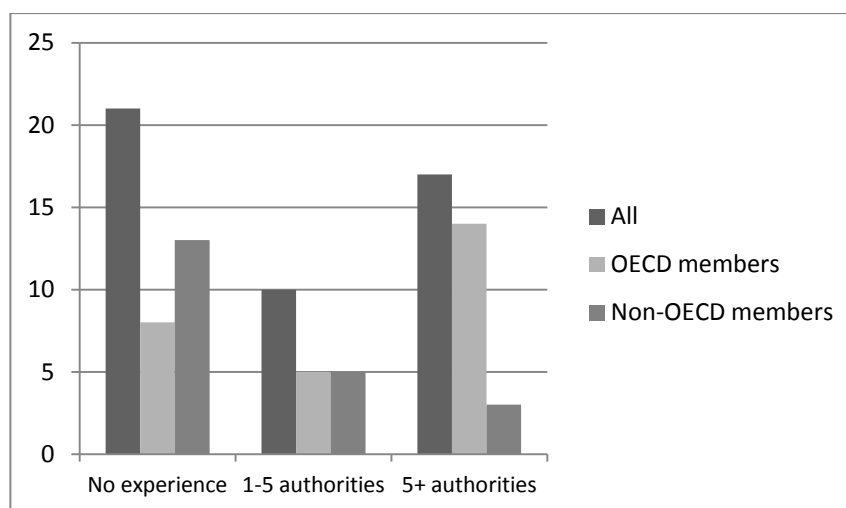
⁵³ And for two (2) of these agencies experience seems to be especially concentrated in merger review cases.

Table 11: Number of cases/investigations in which agencies had co-operated (2007-2012)



In Question 18, respondents were asked to provide figures for the number of international agencies with which they had co-operated on cases/investigations. As the Table 12 shows, the agencies that were involved in co-operation were co-operating with several agencies (more respondents indicated that they had co-operated with more than five authorities than indicated that they had co-operated with between one and five). This seems to be the case especially with agencies from OECD member countries.

Table 12: Number of agencies with which respondents had co-operated (2007-2012)



When asked whether their answers regarding the frequency of international co-operation would be different taking into account a longer timeframe, fifteen (15) agencies said that international co-operation had increased over time. Thirty-two (32) respondents said either that they could not provide an estimate or that they had no relevant experience. No agency reported that co-operation had been decreasing. As for the expected projection of international co-operation in the coming years, seven (7) agencies gave an opinion and all said that they expected international co-operation in enforcement to increase.

The main reason given in the responses for the expected increase in international co-operation was the rising number of multi-jurisdictional cases. Some agencies also indicated increased – and better - relationships with other agencies. One agency said that “*over the last 15 years the agency has invested efforts in developing co-operative relationships with key jurisdictions, resulting in increased and effective co-operation efforts.*” Another reported that “[*m*ore in-depth contacts within the framework of the ICN and OECD have improved knowledge of other jurisdictions and possibilities to co-operate, and built trust”. One respondent observed that “*in the past, divergences between competition regimes were bigger and the level of mutual trust was less developed.*”

4.2 Frequency of co-operation by enforcement area

Respondents were also asked⁵⁴ to report data on the number of cases/investigations on which they had co-operated by enforcement area. Responses are summarized in the following Table:

Table 13: Experience with international co-operation in enforcement, by enforcement area,⁵⁵ (2007-2012)

	Number of agencies with any experience	Number of cases reported by agencies					
		2012 ⁵⁶	2011	2010	2009	2008	2007
Cartel	19	50	55	51	49	47	48
Merger	21	89	116	101	106	96	86
Abuse of Dominance	13	18	29	26	22	22	22

⁵⁴ See responses to Table 5.1 in the Survey.

⁵⁵ While some agencies provided exact numbers, agencies were also permitted to provide an estimated range ([1-5], [5-10], [10-20]). Where these ranges were given by respondents, their mean was used to calculate the figures in this table. Where the estimated value was given as '20+', a conservative estimate was used.

⁵⁶ Figures for 2012 reflect only experiences predating the submission of the Survey response to the OECD. Most responses were received between August and October 2012.

Even though the above figures for the number of cases of co-operation among respondents are estimates - as many respondents emphasized that they do not systematically keep statistics on international co-operation (especially when informal) - the data nevertheless indicate some interesting trends, taking into account the period 2007-2011.⁵⁷

- First of all, the data confirm the qualitative responses and show a clear trend of an increasing use of international co-operation;
- the data also show an estimated increase of approximately 15% in cartel cases, 35% in merger review cases and 30% in unilateral conduct cases;
- finally, the data show, confirming some of the qualitative responses, that the largest number of respondents have engaged in merger review co-operation over the period in question; this is the enforcement area in which there has been the highest number of cases involving international co-operation in each year.

4.3 Frequency of international co-operation by type of assistance

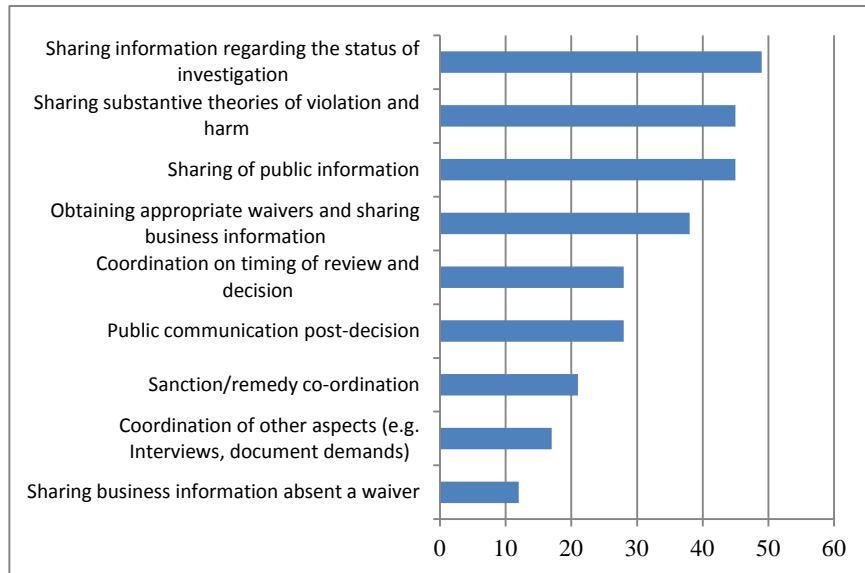
In Question 19 of the Survey, respondents were asked to rank the frequency of their experience in international co-operation by type of assistance requested/provided. Respondents were asked to provide data for each enforcement area (*i.e.* merger, cartel, unilateral conduct) indicating how frequently ('never', 'seldom', 'occasionally', or 'frequently') each type of assistance had occurred in the set of cases where co-operation would be feasible and likely.

4.3.1 Merger review cases

The ranking of types of co-operation, by frequency, for merger review cases is reported in the following table:

⁵⁷ The data for 2012 is incomplete and it is not possible to know exactly to what timeframe they refer.

Table 14: Merger review: ranking of types of co-operation by frequency (all respondents)⁵⁸



Sharing information regarding the status of an investigation is the type of co-operation that was reported as occurring with the greatest frequency in the merger context. The next three top ranked types, in aggregate, were *sharing substantive theories of harm*, *sharing public information/statements*, and *obtaining appropriate waivers and sharing business information and documents with another agency*.

⁵⁸

In Table 6.1-6.4, respondents were asked to indicate the frequency with which they had experienced various categories of co-operative activities in each of the enforcement areas (in cases in which international co-operation could have been relevant). The available responses were: ‘Frequently (> 60% of relevant cases)’, ‘Occasionally (20% - 60%)’, ‘Seldom (< 20%)’, and ‘Never’. In order to aggregate the results of these tables, an ordinal score was assigned to the relative frequencies ([Frequently = 3], [Occasionally = 2], [Seldom = 1], [Never = 0]), and these ordinal scores were summed across the sample of respondents. The sums of these ordinal scores were then used as a basis for comparing the frequency with which each category of co-operation has been encountered by respondents. One additional basis for comparison was also employed; the number of respondents who reported ‘Frequent’ experience with each category of co-operation. See Annexure II for further details of the methodology of the results of quantitative questions in the Survey.

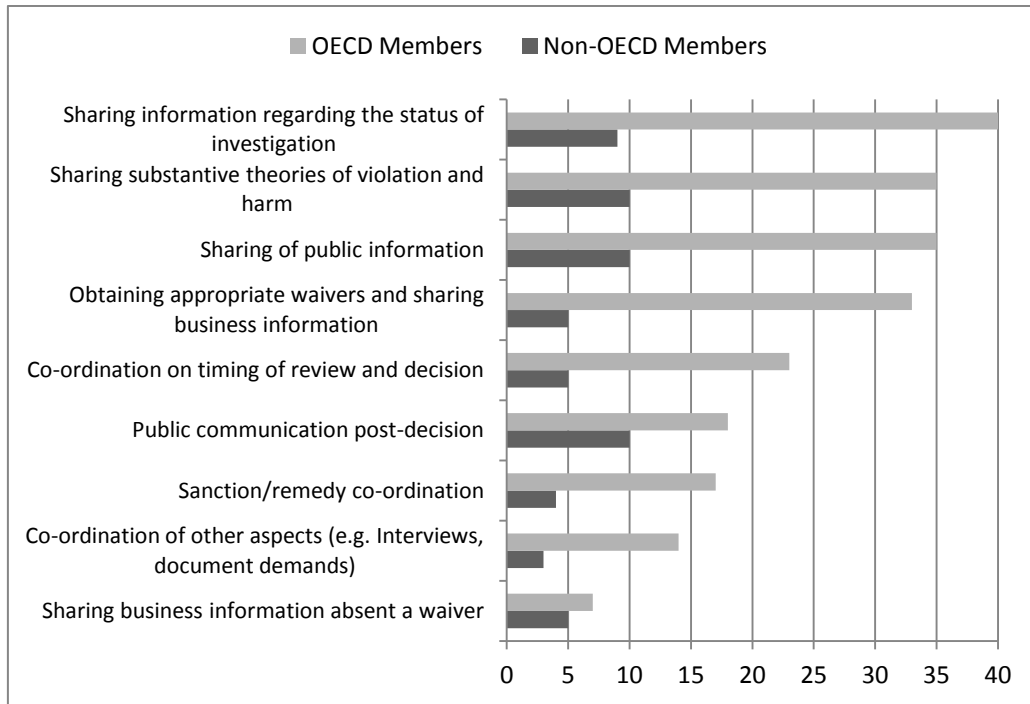
These results appear consistent with qualitative responses to the Survey indicating that agencies – or at least the agencies with regular experience in international co-operation – co-operate closely in multi-jurisdictional merger reviews. International co-operation in merger review appears to extend beyond informing of notifications and investigational updates, to the discussion of analysis and theories of harm. The responses show that agencies not only share public information when co-operating with other agencies but also frequently obtain waivers, as appropriate, that allow for the exchange of business information. In fact, when looking at the numbers of respondents reporting ‘frequent’ experience with each type of assistance, obtaining waivers and sharing business information receives the largest number (eight [8] responses) of reports.

Other types of co-ordination – on the timing of the review, on remedies or other aspects of investigations (*e.g.* timing of interviews and document demands) - are ranked as occurring relatively less ‘frequently’ by the respondents with respect to their experience in co-operation. This may indicate less flexibility with respect to differences in procedures – for example, with respect to modifying the time frame for the review or other procedural aspects – and less ability to achieve coordination than other co-operative measures such as the exchange of information or discussion with other agencies about analysis of the case. Eight (8) agencies reported sharing business information through means other than a waiver,⁵⁹ with four (4) reporting that this is done ‘occasionally’ and four (4) ‘seldom’; no agency reported that this happened ‘frequently’.

The Table below shows frequency of use of the different types of co-operation in merger cases for OECD and non-OECD members:

⁵⁹ One of the alternatives indicated in the questions was “Sharing business information absent a waiver”. This was intended to indicate – as interpreted by respondents – by means other than waivers, which would include sharing on the basis of formal bilateral or multilateral agreements with provisions for exchange of confidential information available to the agencies.

Table 15: Merger review: ranking of types of co-operation by frequency (OECD members v non-OECD respondents)⁶⁰

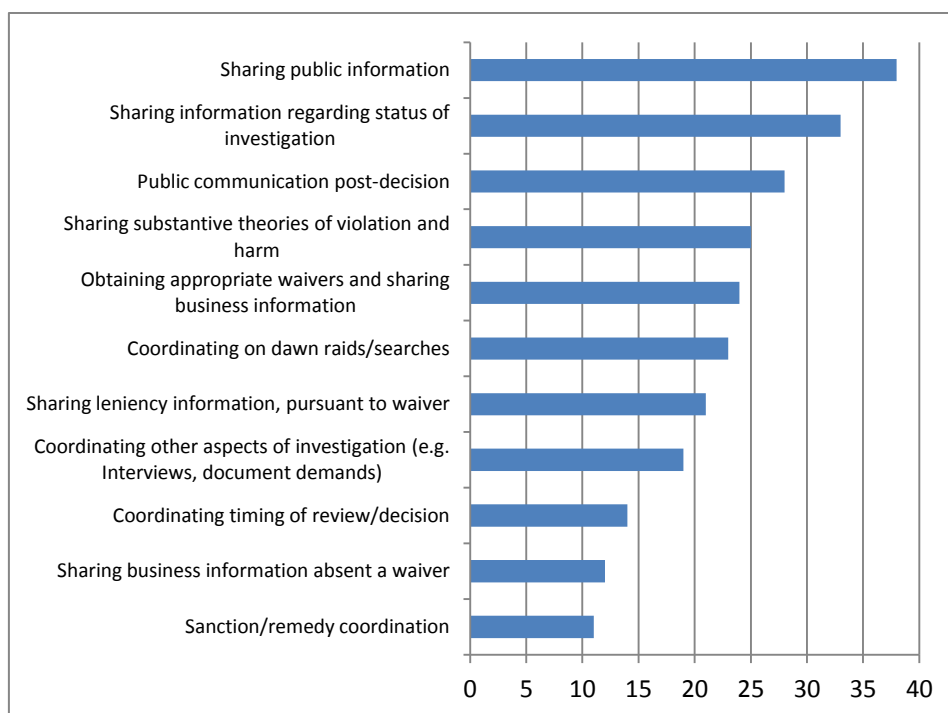


The main difference between OECD and non-OECD respondents is that there seems to be relatively greater reliance on post-decision public communication, and relatively less use of waivers for the non-OECD set.

4.3.2 *Cartel cases*

The ranking of types of co-operation, by frequency, for cartel cases is reported in the following Table:

⁶⁰ The same methodology described in footnote 59 was applied.

Table 16: Cartel cases: ranking of types of co-operation by frequency (all respondents)⁶¹

The ranking of types of assistance by ‘frequency’ with which they are encountered in cartel cases is rather similar to that in merger review cases, with the same types of assistance identified as the top five most ‘frequent’, and a slight difference in the order. In contrast, *co-ordinating the timing of review/decision* is rated noticeably higher for mergers than cartel cases and *coordination of the specific investigatory tool of searches/raids* in cartel cases outranked the coordination of any specific investigatory task in the merger context.

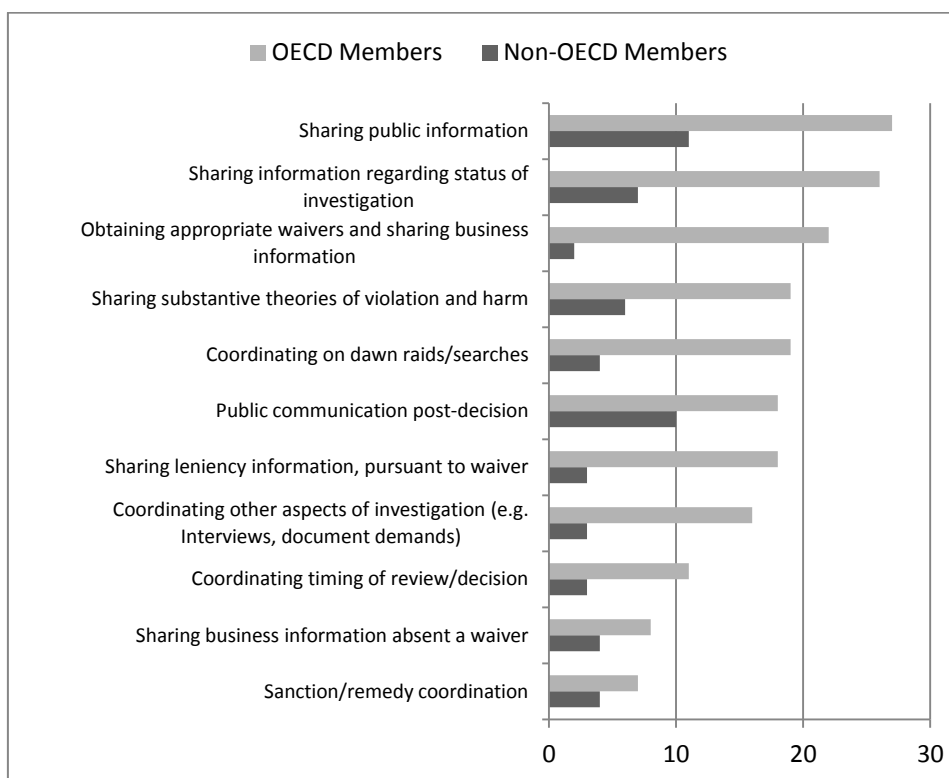
Similar to what was reported on the frequency of co-operation in merger review cases, *co-ordination of the investigations* appears to be less ‘frequent’. Among the different types of coordination, that of *dawn raids and searches* is, unsurprisingly, experienced most ‘frequently’. *Sharing of leniency information with waivers*, although reported by ten (10) agencies overall, does not occur

⁶¹ The same methodology described in footnote 59 was applied.

‘frequently’, while *sharing business information otherwise than through a waiver* and *coordination on sanctions* are seldom experienced.

The Table below compares frequency of use of the different types of co-operation in cartel cases for OECD and non-OECD agencies:

Table 17: Cartel cases: ranking of types of co-operation by frequency (OECD members v non-OECD members)⁶²



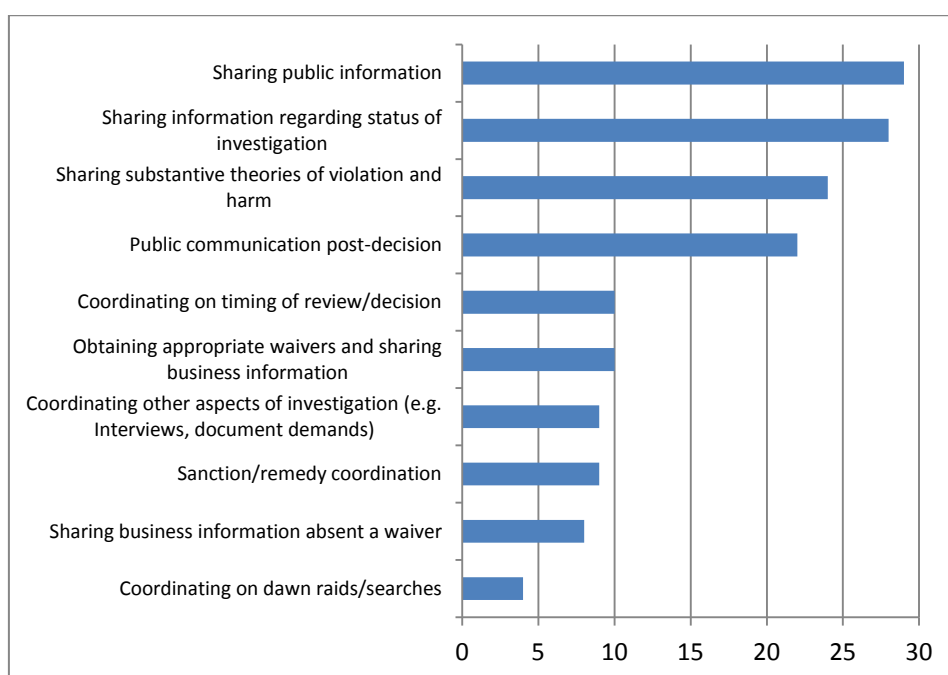
As observed for merger review cases, the most notable differences between agencies from OECD countries and non-OECD countries are: a higher relative reliance on post-decision public communication and a relative lower reliance on obtaining waivers for non-OECD respondents.

⁶² The same methodology described in footnote 59 was applied.

4.3.3 *Unilateral conduct/abuse of dominance cases*

The ranking of types of co-operation by frequency for unilateral conduct/abuse of dominance cases is reported in the following Table:⁶³

**Table 18: Unilateral conduct / Abuse of dominance cases:
ranking of types of co-operation by frequency (all respondents)**

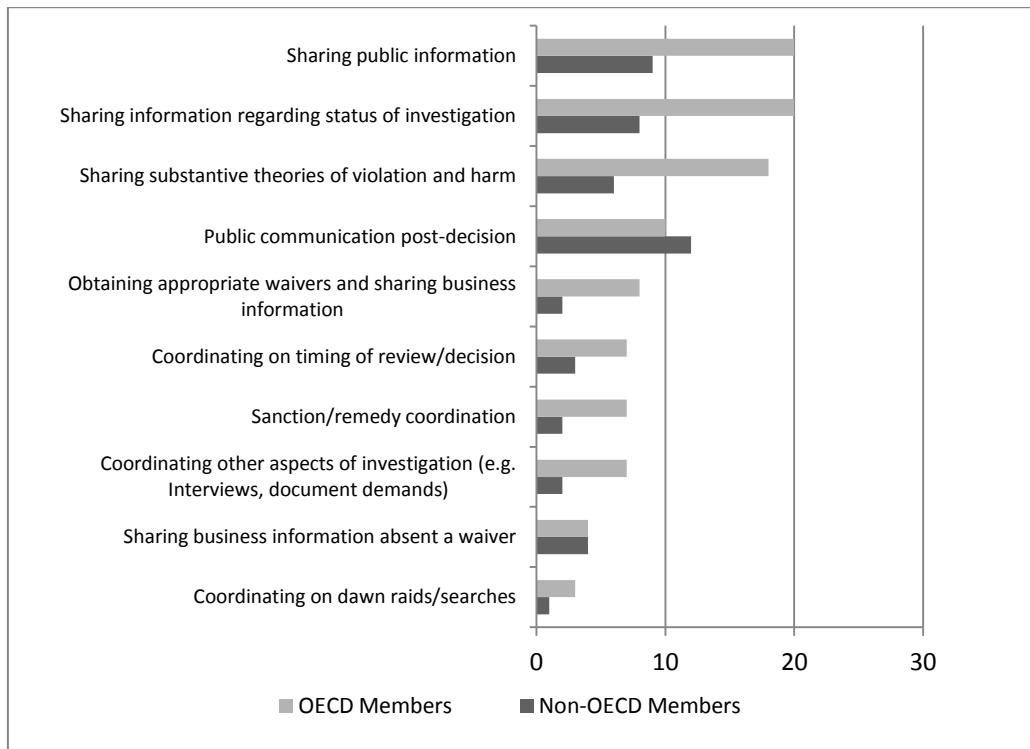


The ranking of types of assistance in unilateral conduct/abuse of dominance cases seems very similar to that observed for merger review cases, with the same top six categories and just a slight difference in the order. *Sharing public information/statements*, *sharing information regarding the status of the investigation* and *sharing substantive theories of violation*, are ranked as the most 'frequently' occurring types of co-operation in the respondents' experience. *Public communication post-decision* follows closely. *Coordinating timing of review/decision* is indicated as occurring more frequently than *obtaining appropriate waivers* and *sharing business information*.

⁶³ The same methodology described in footnote 59 was applied.

The Table below shows frequency of use of the different types of co-operation in unilateral conduct/abuse of dominance cases for OECD and non-OECD members:

Table 19: Unilateral conduct / Abuse of dominance cases: ranking of types of co-operation by frequency (OECD members v non-OECD members)⁶⁴



As observed for merger review and cartel cases, there appears to be higher reliance on post-decision communication and lower use of waivers for the agencies from non-OECD countries. The consistency of these results across all the areas of enforcement suggests that newer agencies may not be fully integrated into the international co-operation system.

4.4 Experience with enhanced co-operation and co-operation on remedies

In Question 15 agencies were asked whether they had experience with ‘enhanced co-operation’. For purposes of the Survey, ‘enhanced co-operation’

⁶⁴ The same methodology described in footnote 60 was applied.

was defined as “*identifying a lead enforcement agency, setting up joint investigative teams, or entering into work sharing arrangements. Enhanced co-operation does not involve a withdrawal of jurisdiction over a case; parallel enforcement action can be taken by more than one agency if one agency is not in a position to safeguard the interests of the other jurisdiction(s) affected.*”

The responses indicated that, outside of formal regional networks, enhanced co-operation is limited to a small number of agencies.⁶⁵ Nine (9) agencies (16%) reported having this kind of experience. These agencies mentioned joint inspections, holding joint interviews and conducting interviews in another agency’s territory, and experience of joint negotiations/design of remedies. Five (5) agencies reported that enhanced co-operation had been successful.

One agency referred to a joint investigation conducted with another agency pursuant to a bilateral co-operation agreement, and outlined how this had allowed not only the agencies but also the parties to save time and costs. The agency emphasized that the good prior relationship between the agencies had been important for success of the initiative.

Question 16 asked agencies about international co-operation in the negotiation and design of remedies in competition cases. Respondents were asked to report the extent to which they take other agencies’ remedies into account when determining their own. Thirty-one (31) agencies, about 56% of the respondents, said that they took into account remedies of other agencies to some extent when designing their own. Twenty-one (21) agencies said they had no relevant experience in this matter and three (3) agencies said that they do not take others’ remedies into account at all. Of the agencies that said they did take others’ remedies into account, nineteen (19) were OECD agencies and twelve (12) were non-OECD agencies. Seven (7) agencies said that they may decide to rely on others’ remedies if they address domestic competition concerns. Seven (7) respondents said that they will try to avoid inconsistent remedies, if possible. Other elements that were mentioned in the responses include using others’ remedies as guidance in remedy design, using them as background information or supplemental analysis, or using them in court for guidance.

One agency reported a merger case in the air transport sector where the remedies implied a slot release that would affect routes in another country. For that reason, the remedies in this case implied some level of coordination between the agencies of both jurisdictions involved.

⁶⁵ Eight (8) agencies reported enhanced co-operation experience in the European Co-operation Network. This will be discussed in Chapter 5.

Another agency said that though they rely on their own analysis in the design of remedies, they have taken into account the remedies on which other relevant competition agencies had already agreed when reviewing the same merger in order to avoid the possibility that the remedies would be a heavy burden for the parties concerned. For example if the sale of alternative assets might address the competition concerns and another agency has already agreed with the parties on the sale of a certain asset, they will take this factor into account and accept the sale already agreed on as a remedy.

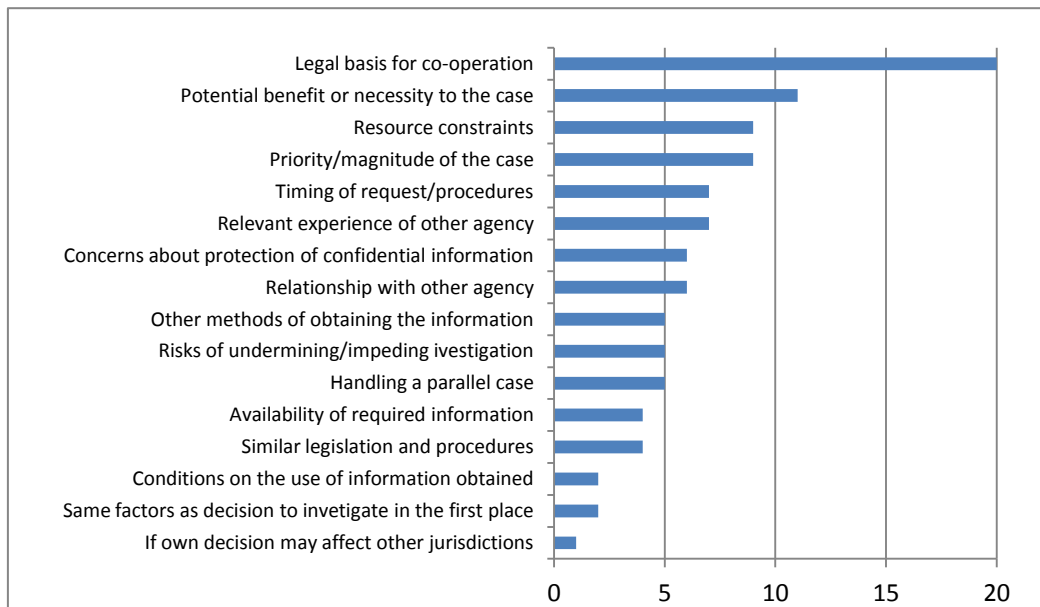
4.5 Assessment of experience in enforcement co-operation

In Question 27 of the Survey, agencies were asked to indicate the most important factors that they take into account in making/responding to requests for co-operation. Forty-one (41) respondents reported sufficient experience with such requests to be able to identify factors.

4.5.1 Factors considered in requesting co-operation

The Table below compares factors considered in requesting co-operation.

Table 20: Factors considered in making a request for co-operation, by number of respondents⁶⁶



⁶⁶ See Annex II for details on the analytical method used to produce results for the qualitative questions.

Among common factors identified by the respondents that are weighed in the decision to request co-operation, the one indicated by most respondents (twenty [20] respondents) was the legal basis for co-operation, including for the use of investigatory powers, the scope for potential co-operation, obstacles to sharing confidential information, and whether a waiver had been granted.

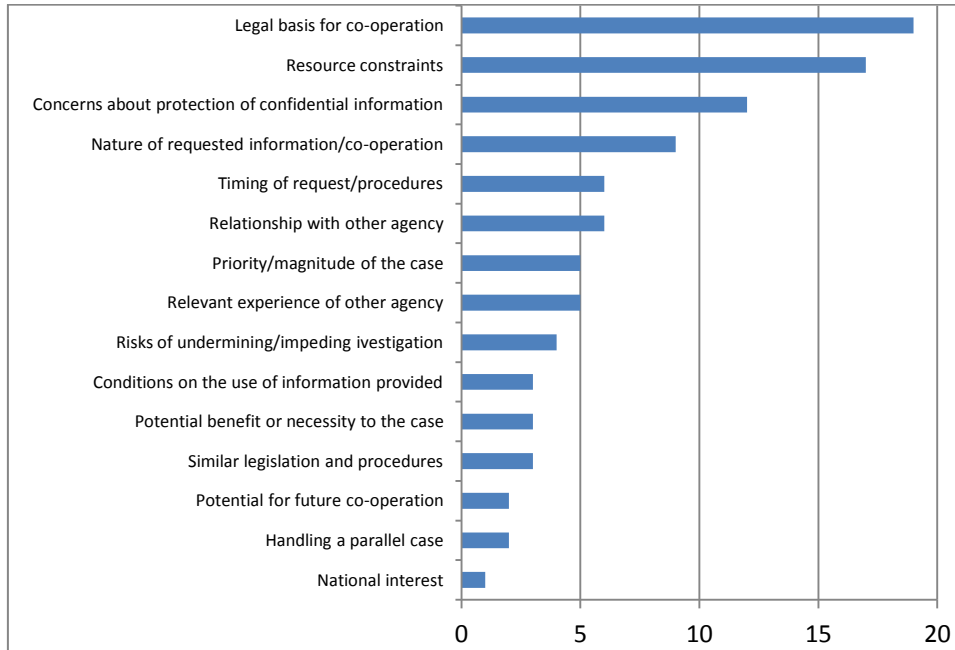
Eleven (11) respondents indicated that they take into account potential benefits or the necessity of co-operation to the particular investigation. Nine (9) respondents consider the priority of the case for competition enforcement, either in own or the other agency's jurisdiction.

Resource constraints were mentioned as a factor by nine (9) respondents, and some respondents said they try to assess costs and benefits of international co-operation with respect to the specific case. Relevant past experience of the other agency is also a factor for seven (7) respondents whether in similar cases or in similar markets (similar competition issues/product markets), while six (6) respondents mentioned the potential relationship of co-operation which could develop with the other agency. Timing of the request or of investigative measures is reportedly taken into consideration by seven (7) respondents, and concerns about the protection of confidential information are mentioned by six (6) respondents as relevant to the decision to co-operate.

Other factors that were mentioned in the responses are whether both agencies are handling parallel cases, risks of undermining or impeding the agency's own investigation – whether related to due process issues, adherence to criminal prosecution standards, or potential exposure of intelligence from uncoordinated investigatory action – and whether information they wish to request can be obtained by other methods.

4.5.2 *Factors considered in providing co-operation*

The Table below compares factors considered in providing co-operation, by number of respondents.

Table 21: Factors considered in providing co-operation⁶⁷

Among common factors identified by the respondents that are weighed in the decision to provide co-operation, the legal basis for co-operation – including use of investigatory powers, obstacles to sharing confidential information and whether a waiver has been granted – are mentioned in the responses of nineteen (19) respondents. Resource constraints play a more relevant role in the decision to provide co-operation, as may be expected; this was mentioned as a factor by seventeen (17) respondents. Also, concerns about the protection of confidential information were mentioned by more respondents as a factor taken into account when providing co-operation than when requesting it; twelve (12) respondents mention such concerns in their responses.

The nature of the requested co-operation, or the confidential nature of requested information was mentioned by nine (9) respondents. Other factors were mentioned by approximately the same number of respondents (five [5] or six [6] respondents) as relevant to decisions to provide and to request co-operation, such as: the existing or potential relationship with the other agency,

⁶⁷ See Annex II for details on the analytical method used to produce results for the qualitative questions.

including history of or likelihood of reciprocity; and relevant experience of the other agency with similar cases, including experience of the other agency with co-operative activities. Timing of the request and stage of the corresponding case, and priority of the case, either in own or the other agency's jurisdiction, were also mentioned as factors that some agencies consider.

4.5.3 Advantages and disadvantages of co-operation

Question 28 offered an open-ended request for respondents to provide a narrative assessment of the advantages and disadvantages of different means of international enforcement co-operation. Twenty-eight (28) respondents gave a response; nineteen (19) respondents said that they did not have sufficient experience to comment, and eight (8) did not respond.

The advantages identified in the responses broadly fall into the following categories: i) advantages that accrue from information obtained about a specific investigation; ii) advantages that contribute to more efficient and better outcomes; and iii) advantages from more generally learning about another agency's practices and system.

Sixteen (16) respondents mentioned the ability to share information, especially obtaining information about cases which might have relevance in their own jurisdiction (eight [8] respondents), but also including learning about the analytical tools, theories of harm, and investigative findings in specific cases.

With respect to outcomes in specific investigations, thirteen (13) respondents mentioned that co-operation can contribute to improved time and resource efficiency (*e.g.* avoidance of duplication). Effectiveness of cross-border enforcement, including application and enforceability of remedies in international cases, was reported as a further advantage of co-operation by seven (7) respondents. Five (5) agencies mentioned capacity building, including learning from more experienced agencies and learning about different legal frameworks/procedures.

Fewer disadvantages than advantages experienced with international co-operation were identified, the most commonly mentioned one being resource constraints (eight [8] respondents), including administrative burden and the costs of translation; and time pressure of filing and processing requests (seven [7] respondents). Difficulties encountered in obtaining confidential information were mentioned as a disadvantage by four (4) respondents, including difficulties of formalizing the internal use of information obtained. Difficulties of

coordinating different legal processes/procedural frameworks were reported as a further disadvantage by four (4) respondents. For more details on the perceived limitations to international co-operation, see Chapter 6.

4.6 Final considerations

The Survey highlighted that about one-half (52%) of the respondents reported some experience in international enforcement co-operation, when excluding regional co-operation. Outside of regional co-operation, frequent or regular experience in international co-operation appears to be concentrated among a few agencies.

The Survey also showed that the agencies which were able to report experience with international co-operation observed that it had increased over time. Some also said that they expected international co-operation in enforcement to increase. The main reason for the expected increase in co-operation was the rising number of multijurisdictional cases.

The data provided in response to the Survey shows an estimated increase of approximately 15% in co-operation in cartel cases, 35% in merger review cases and 30% in unilateral conduct cases. It also confirms that the largest number of respondents have engaged in merger review co-operation over the period in question; this is the enforcement area in which there has been the highest number of cases involving international co-operation in each year.

When looking at the frequency of different types of co-operation by enforcement area, the Survey does not show any significant difference for merger review, cartel or unilateral conduct cases. Sharing information - regarding the status of an investigation or the substantive analysis of the case – is the aspect of co-operation that was reported as occurring most ‘frequently’. Other types of coordination are ranked as occurring relatively less ‘frequently’. This may indicate less flexibility with respect to differences in procedures, and less ability to achieve coordination than other co-operative measures such as the exchange of information or discussion with other agencies about analysis of the case. For agencies from non-OECD countries there appears to be higher reliance on post-decision communication, and lower reliance on waivers, for all enforcement areas.

The Survey highlights advantages and disadvantages identified by respondents. The advantages can broadly fall into the following categories: i) advantages that accrue from information obtained about a specific investigation; ii) advantages that contribute to more efficient and better outcomes; and iii)

advantages from more generally learning about another agency's practices and system.

Fewer disadvantages than advantages experienced in international co-operation were identified, the most commonly mentioned ones being resource constraints, including administrative burden and the costs of translation, and time pressure of filing and processing requests.

5. REGIONAL AND MULTILATERAL CO-OPERATION

In Section 8 of the Survey, respondents were asked to report on their experience with co-operation in regional and multilateral networks. This form of co-operation, for the purpose of the Survey, was distinguished from other forms of international co-operation, as regional co-operation takes place within an existing, legal co-operation network, relying on special rules and international agreements.

When asked about participation in regional networks, thirty-eight (38) agencies— representing 69% of the respondents – identified themselves as belonging to a regional organization or network. The results presented in this Section on the frequency of co-operative activities in regional networks come from the responses of those who identified themselves as participants in a regional network.

This Chapter covers the following issues:

- Existing regional co-operation networks and their role in enforcement co-operation (Question 37 and Table 8); and
- Advantages and disadvantages of regional co-operation, as compared to international co-operation outside of the regional network context (referred to as “international co-operation”). (Question 38).

Respondents referred to different types of regional networks. Some of the co-operation networks identified in the responses, however, do not precisely fall within the working definition of regional co-operation provided in the Survey. They represent *fora* for general discussion on common regional issues, rather than formal platforms for competition-specific rules for co-operation in enforcement cases. This Chapter will cover only the networks that were mentioned in at least one response. Other regional networks might be in place, but will not be included in this Chapter because no respondent provided sufficient information about them. Particular attention will be given to the most significant networks in terms of formal provisions and frequency of co-operative case work, but information on other regional networks reported by respondents is also included for completeness.

5.1 European regional networks

5.1.1 *The European Competition Network (ECN)*

In Europe, the main platform for co-operation is the European Competition Network (ECN), established among member countries of the European Union (EU) with the adoption of Regulation 1/2003.⁶⁸ All EU competition agencies co-operate actively within this network.⁶⁹ The ECN provides a platform for extensive formal (based on the instruments provided for in Regulation 1/2003) and informal co-operation in cartel and abuse of dominance cases. Moreover, the ECN Merger Working Group seeks to foster increased consistency, convergence and co-operation among EU merger control regimes and jurisdictions through informal co-operation.

Box 6: The European Competition Network

The European Competition Network consists of the competition agencies of the EU Member States and the European Commission. Its members apply the same competition rules, namely those in the Treaty for the Functioning of the European Union (TFEU), utilizing detailed legal provisions for co-operation.⁷⁰ These rules have been in force since 1 May 2004, when the EU's current antitrust procedural regulation (Regulation 1/2003)⁷¹ entered into force. The ECN is designed to serve as a platform for close co-operation between the European Commission and the EU Member States' competition agencies. The functioning of the ECN is set out in a European Commission Notice on co-operation within the Network of Competition Authorities (so called Network Notice).⁷²

⁶⁸ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Official Journal L 1, 04.01.2003, p.1-25).

⁶⁹ All thirty (30) European agencies which responded to the Survey mentioned their activity in the ECN.

⁷⁰ Articles 101 and 102 TFEU.

⁷¹ Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Official Journal L 1, 04.01.2003, p.1-25).

⁷² Commission Notice on co-operation with the Network of Competition Authorities (Official Journal C 101, 27.04.2004, p. 43-53).

Tools to ensure coherent application. In order to foster the coherent application of EU antitrust rules, Regulation 1/2003 provides for a range of formal tools: EU Member States' courts and competition agencies are obliged to apply EU competition law when there is an effect on trade between EU Member States, in a manner that ensures convergence between national and EU competition law.⁷³ The competition agencies are under an obligation to inform each other of all cases that they investigate under EU competition law.⁷⁴ EU Member States' competition agencies are obliged to inform the European Commission about an envisaged enforcement decision at least 30 days before taking it.⁷⁵ In this context, the European Commission can intervene to take over a case from a national competition agency if there is a serious risk of inconsistency.⁷⁶ Additionally, a practice has developed whereby the European Commission and Member States' competition agencies discuss the proposed course of action where appropriate. The European Commission consults on its draft decisions with an Advisory Committee composed of representatives of the Member States' competition agencies.⁷⁷

Competences and work-sharing. The ECN is based upon a system of parallel competences and flexible work sharing rules built around the principle that a "well placed" agency should take action in a case. Indicative, non-binding principles are set out in the Network Notice. Member States' competition agencies typically deal with infringements that have their main effect in the territory of an EU Member State to which they belong. If the European Commission formally initiates proceedings, the competence of the national agency to deal with the same case ends. By having a flexible system of work allocation, effective enforcement of the EU antitrust rules should not be hindered by a lack of resources available to a particular agency. Likewise, the European Commission is not prevented from dealing with a case that involves important issues for the development of EU competition policy.

Instruments for co-operation. The ECN is also equipped with a number of other formal mechanisms to facilitate close co-operation in the application of EU antitrust rules. Regulation 1/2003 allows ECN members to exchange information, including confidential information, without the consent of the parties and, if legal requirements are met, to use this information as evidence.⁷⁸ Information exchange can take place at all stages of the handling of a case; it is particularly important following

⁷³ Article 3 of Regulation 1/2003.

⁷⁴ Article 11(3) of Regulation 1/2003.

⁷⁵ Article 11(4) of Regulation 1/2003.

⁷⁶ Article 11(6) of Regulation 1/2003. So far the Commission has never used this power.

⁷⁷ Article 14 of Regulation 1/2003.

⁷⁸ Article 12 of Regulation 1/2003. For further details see Box 11 in Chapter 7.

inspections. Member States' competition agencies regularly assist the European Commission when it carries out inspections within their territory.⁷⁹ Moreover, Member States' competition agencies can carry out inspections or fact-finding measures on behalf of each other or for the European Commission.⁸⁰ These tools have been used actively in appropriate cases, such as in the context of inspections.

Informal co-operation that goes beyond Regulation 1/2003. Co-operation within the ECN is not limited to discussions about and assistance in individual cases. The ECN is an active *forum* for the discussion of general policy issues. Horizontal working groups and sector-specific subgroups have been set up, where case-handlers of the different agencies exchange views and learn from each other's experiences with particular issues or with particular sectors. For example, joint working groups deal with horizontal topics (*e.g.* leniency), as well as with key sectors of the economy (*e.g.* energy, financial services). These discussions promote the coherent application of EU antitrust rules. Furthermore, the ECN Merger Working Group was set up in 2010 to identify areas of possible improvements regarding issues arising in relation to mergers with cross-border impact, and to explore possible solutions, focusing on what is feasible within the existing legal frameworks, drawing from agency practices and experience.⁸¹

The European Competition Network has been in place for eight years (since May 2004), and the European Commission has recently published statistics on cases of which the Network has been informed.⁸²

⁷⁹ Article 20 (5)-(8) of Regulation 1/2003.

⁸⁰ Article 22 of Regulation 1/2003.

⁸¹ For example, the 2011 Best Practices on Co-operation between EU National Competition Authorities in Merger Review were adopted with the aim of fostering co-operation and the sharing of information between NCAs in the European Union, in the investigations of mergers that do not qualify for review by the Commission itself ("one-stop shop" review) but require clearance in several Member States ("multiple filing").

⁸² A first assessment of the experience of the ECN is reported in the [Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:0574:FIN:EN:PDF) (especially Chapter 5) (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2009:0574:FIN:EN:PDF>)

Table 22: Data on ECN cases⁸³

	Total 2004	Total 2005	Total 2006	Total 2007	Total 2008	Total 2009	Total 2010	Total 2011	Total 2012
Total number of case investigations of which the Network has been informed ¹⁾	301	203	165	150	159	150	169	163	112
- of which COM cases	101	22	21	10	10	21	11	26	6
- of which NCA cases	200	181	144	140	149	129	158	137	106
Cases in which an envisaged decision has been submitted by NCAs during the period indicated ²⁾	32	76	64	72	60	70	94	88	91

1) Case investigations started whether by a National Competition Authority (NCA) or by the Commission.

2) Cases having reached the envisaged decision stage; only submissions from the NCAs under Article 11(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 TFEU.

Many respondents also mentioned the European Competition Agencies (ECA) network as a platform used for informal co-operation for multi-jurisdictional mergers in Europe.⁸⁴ Within this network members have established an informal notification system for multi-jurisdictional mergers, through which they exchange information on the transaction and the contact information of the relevant case-handler(s) with the other ECA members. The case-handlers in different countries may then exchange non-confidential information on the case.

⁸³ Source: DG Comp website (<http://ec.europa.eu/competition/ecn/statistics.html>).

⁸⁴ The ECA network was established in 2001 in order to provide a *forum* for discussion for European National Authorities. In contrast with the ECN, it has no formal instruments of co-operation. The co-operation which takes place in the network consists of an exchange of information and experience between the agencies on matters of common interest. For example, an ECA Working Group on sanctions developed "*Pecuniary sanctions imposed on undertakings for infringements of antitrust law: Principles for convergence.*"

5.1.2 *The Nordic Alliance*

Competition agencies from Nordic countries reported their participation in an enhanced network of co-operation, often referred to as the Nordic Alliance.⁸⁵ This is an informal network with the purpose of exchanging experiences with legislation, including discussion of cases and issues of mutual interest. The network has been in place for many years and has further developed in the last ten years. In the words of one of the participants, “[t]his co-operation has further developed during the last ten years, due to convergence of the national competition laws, and an increase in the number of antitrust cases and advocacy issues with common denominators. Annual meetings and working groups have contributed to establishing informal and personal contacts between the employees of the competition authorities.”

In particular, in 2000 the Nordic agencies established a model for co-operation between their cartel units, the Nordic Cartel Network (NCN), where the participating agencies co-operate on cases through designated contact persons in the respective cartel units. The NCN meets once a year and also exchanges information on an *ad hoc* basis.

In 2001, some of the participating countries in the Nordic Alliance (Denmark, Iceland and Norway) concluded a formal co-operation agreement, which Sweden also joined in 2003.⁸⁶ This agreement allows for the exchange of confidential information between these competition agencies: “[w]hat is considered [to be] confidential information is regulated by each country’s national secrecy laws. However, the confidential information may only be shared if covered by professional secrecy at least equivalent to that applicable to the disclosing agency. The information may only be used for the purpose specified in the agreement, and may only be passed on by the receiving authority after the express consent of the NCA disclosing the information and then only for the purpose for which such consent is given.”

⁸⁵ The participating countries are Denmark, Finland, the Faroe Islands, Greenland, Iceland, Norway and Sweden.

⁸⁶ The text of the Agreement is available on the Danish Competition Authority’s website.

5.1.3 *Other European regional initiatives*

Besides participation in these two networks, respondents from European countries mentioned that they participate in other regional initiatives which provide an opportunity to discuss and compare competition issues:

- Three (3) respondents mentioned the *Central European Competition Initiative (CECI)*, an informal organisation established in 2003 by the representatives of competition agencies from Central European countries.⁸⁷ Its aim is “*to enhance the exchange of experiences in competition protection between the members and encourage organisation of common initiatives such as conferences and trainings.*”
- Two (2) respondents mentioned participation in the *Marshfeld Competition Forum*, an initiative launched in 2008 by the Austrian Federal Competition Authority and the Czech Office for the Protection of Competition, aimed at “*strengthening regional co-operation and coordination between national competition authorities with regard to cross-border issues of common concern.*”

5.2 Other regional networks

5.2.1 *Latin America*

Respondents from Central and Latin America reported participation in several networks and *fora*, although in this context actual experience in case co-operation seems to be limited.

Two (2) respondents mentioned that under the Revised Treaty of Chaguaramas, the *Caribbean Community (Caricom)*⁸⁸ has established regional competition law and a regional competition agency (the Caricom Competition

⁸⁷ Participating countries include Austria, the Czech Republic, Hungary, Poland, Slovakia and Slovenia.

⁸⁸ CARICOM is a free trade area in the Caribbean region which includes Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago. CARICOM associate members are: Anguilla, Bermuda, British Virgin Islands, Cayman Islands and Turks and Caicos Islands.

Commission). According to one respondent, “*Member states of Caricom are mandated, under the Treaty competition rules, to co-operate with the CCC in competition enforcement. Non-confidential summaries of reports, once agreed by all parties, may be shared. [...] The treaty and the national legislation also give the regional authority the power to conduct investigations in a national territory with all of the investigative powers of search and seizure of information as available to the national authority.*”

One respondent reported participation in the *Andean Community*⁸⁹ which includes provisions in the area of competition law prohibiting and sanctioning behaviours restricting competition that affect the sub-region. The Andean Community General Secretariat can open investigations on its own initiative, or at the request of a Member Country. The respondent reported that in this context there had been just one investigation.

One Central American agency mentioned the *Sistema de la Integración Centroamericana (SICA)*, a regional organisation that provides a platform for co-operation in any commercial and political policy area in the Central America region. The agency reported that: “*[t]o date, there had been no international co-operation between competition agencies through this platform; however the members of this organisation recognize the importance of co-operation in competition enforcement cases/investigations; that is why the members of this organization are working together for the creation of a regional entity to be in charge of competition matters in the region. Hopefully this regional entity would have enough powers to promote co-operation between agencies in the region.*”

One respondent mentioned participation in *Mercosur*,⁹⁰ reporting that “[t]his forum has a competition working group (CT5) that meets [on] a regular basis to exchange experiences and views on different regional economic sectors.”

⁸⁹ Participating countries in the Andean community are Bolivia, Colombia, Ecuador and Peru.

⁹⁰ Mercosur is an economic and political agreement promoting free trade among the participating countries (Argentina, Brazil, Bolivia, Paraguay, Uruguay and Venezuela).

5.2.2 Africa

Respondents from Africa also mentioned several regional networks that have adopted or are about to adopt regional competition law provisions, including the establishment of regional agencies. The experience in case co-operation is, however, still very limited.

For example, three (3) respondents from Africa reported participation in the **Common Market for Eastern and Southern Africa (COMESA)**. According to one respondent “*COMESA Competition Law provides for co-operation in terms of notification, coordination, consultation, conciliation and exchange of non-confidential information.*” One respondent, however, observed that “[i]n this context [...] there is no experience yet since it has not started operating.”

One respondent mentioned the *East African Community (EAC) Competition Act*, enacted in 2006, which prohibits a number of anti-competitive practices in the region and establishes the EAC Competition Authority to enforce the Act in cross-border cases.⁹¹ The Authority, however, is not operational yet.

Another respondent from Africa mentioned that the *Southern African Development Community (SADC)* also provides coordination between the SADC countries.⁹² In 2009 SADC adopted a Declaration on regional co-operation in competition and consumer policies that provides a co-operation framework in the implementation of Member States’ respective laws.⁹³ To facilitate effective co-operation, the SADC Secretariat established a Competition and Consumer Policy and Law Committee, a *forum* that fosters co-operation among competition agencies and aims to encourage convergence of laws, analysis and common understanding.

⁹¹ EAC member states are Burundi, Kenya, Rwanda, Tanzania and Uganda.

⁹² SADC member states are Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁹³ The Declaration encourages Member States to establish a transparent framework that contains appropriate safeguards to protect confidential information of the parties, and appropriate national judicial review.

5.2.3 Asia

No existing regional platform for enforcement co-operation was reported from Asian countries, though some mentioned networks where competition policy issues can be discussed at the regional level.

Two (2) respondents mentioned their participation in the *Association of Southeast Asian Nations (ASEAN)*⁹⁴ and the *ASEAN Experts Group on Competition (AEGC)*, a *forum* in which to discuss and co-operate in the field of competition law, established in 2007 by the ASEAN Economic Ministers to build up competition related policy capabilities and best practices. At the moment, this *forum* does not seem to provide formal instruments for enforcement co-operation, such as notification systems or case related exchange of information.

One agency mentioned participation in the *Asia Pacific Economic Co-operation (APEC)*,⁹⁵ where a *Competition Policy and Law Group (CPLG)* provides a framework for discussion of regional competition policy. There are, however, no co-operation mechanisms for cases or investigations within APEC.

Finally, two respondents mentioned participation in the *Interstate Council for Antimonopoly Policy (ICAP)*, established in 1993, which provides mechanisms allowing competition agencies of the Commonwealth of Independent States (CIS) to co-operate in specific transnational competition infringement cases.⁹⁶

⁹⁴ ASEAN has currently ten member States: Brunei Darussalam, Cambodia, Lao PDR, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

⁹⁵ APEC economies are Australia, Brunei Darussalam, Canada, Indonesia, Japan, Republic of Korea, Malaysia, New Zealand, Philippines, Singapore, Thailand, United States, Chinese Taipei, Hong Kong China, People's Republic of China, Mexico, Papua New Guinea, Chile, Peru, Russia and Vietnam.

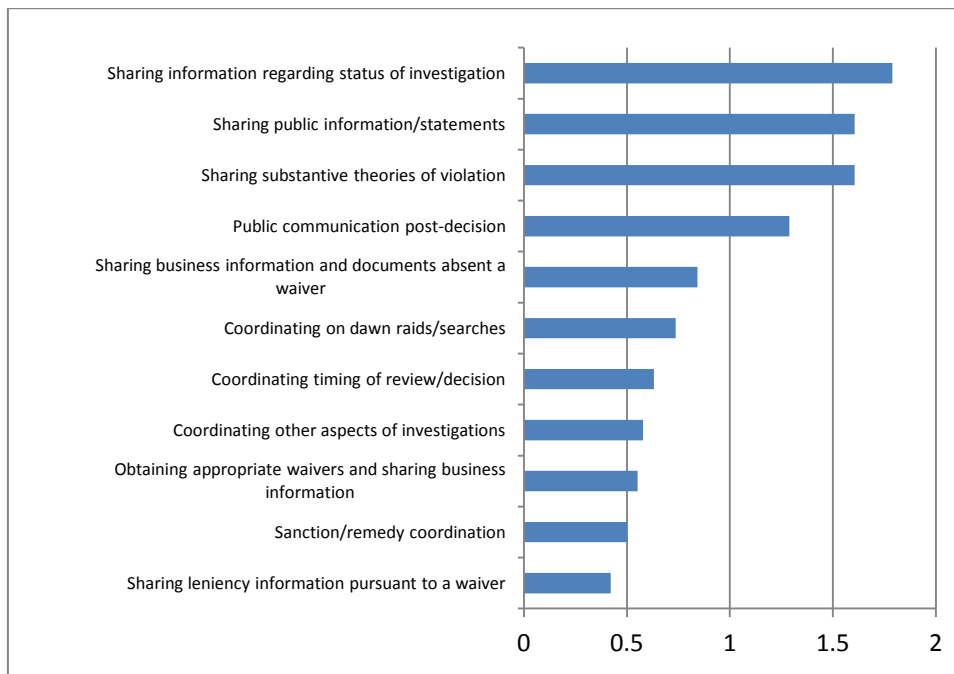
⁹⁶ ICAP includes representatives of 11 CIS Member Countries: Azerbaijan Republic, the Republic of Armenia, the Republic of Belarus, Georgia, Kazakhstan Republic, Kirghiz Republic, the Republic of Moldova, the Russian Federation, the Republic of Tajikistan, the Republic of Uzbekistan and Ukraine.

5.3 Experience of co-operation within regional networks

Respondents who participate in regional networks were asked to provide details on the manner and frequency (‘never’, ‘seldom’, ‘occasionally’, ‘frequently’) with which they co-operated within these networks, including the frequency with which they shared various types of information and coordinated at different stages of the investigation.

The results are reported in the following Table:

Table 23: Frequency of co-operation in regional networks⁹⁷
(Average score for ‘frequency’ on a scale of [0-3])



⁹⁷ This ranking is based on the average scores for ‘frequency’ of those respondents who indicated membership in a regional network. Possible responses were: ‘Never’, ‘Seldom (< 20% of relevant cases)’, ‘Occasionally (20% - 60%)’, and ‘Frequently (> 60%)’. In order to compare the frequency with which different types of co-operation have been experienced within regional networks, ordinal scores were assigned to the possible responses ([never = 0], [seldom = 1], [occasionally = 2] and [frequently = 3]), and the average score was calculated among those who indicated membership in a regional network.

Table 24: Frequency of co-operation in regional networks, by number of respondents

	Frequently (>60%)	Occasionally (20% - 60%)	Seldom (<20%)	Never
Sharing information regarding status of investigation	16	7	6	18
Sharing public information/statements	10	11	9	17
Public communication post-decision	9	5	12	21
Sharing substantive theories of violation	8	14	9	16
Sharing business information and documents absent a waiver	3	6	11	27
Coordinating on dawn raids/searches	2	5	12	27
Obtaining appropriate waivers and sharing business information	1	2	14	28
Coordinating timing of review/decision	1	4	13	29
Sharing leniency information pursuant to a waiver	0	3	10	33
Sanction/remedy coordination	0	1	17	29
Coordinating other aspects of investigations	0	2	18	27

The most frequent type of co-operation identified by respondents within a regional framework is sharing information regarding the status of the investigation, which sixteen (16) respondents indicated as occurring ‘frequently’. Sharing public information and public statements, and sharing substantive theory of violations are reported as occurring ‘frequently’ by, respectively, ten (10) and eight (8) respondents. Public communications post-decision occurs ‘frequently’ for nine (9) of the participants in regional networks. Sharing business information absent a waiver within a regional network occurs ‘frequently’ for three (3) of the respondents, while obtaining appropriate waivers to share the information occurs ‘frequently’ for only one (1) respondent.

While the sharing of information of various types seems to occur relatively often, this does not seem to be the case for coordination, which only three (3) respondents identified as occurring ‘frequently’. Coordination of dawn raids/searches occurs ‘frequently’ for two (2) of the respondents, coordinating timing of review and decision for one (1), while no respondent reported ‘frequent’ coordination on other aspects of the investigation.⁹⁸

It’s worth noting that the top three to four types of assistance indicated with respect to regional co-operation are identical to the top three to four noted in Chapter 4 for international co-operation in each substantive area (mergers, cartels, unilateral conduct).

5.4 Specific advantages and disadvantages of co-operation within regional networks

In Question 38 of the Survey, respondents were asked to comment on the advantages and disadvantages of regional co-operation, especially those that distinguish co-operation within a regional network from co-operation outside the network.⁹⁹

⁹⁸ No respondent reported ‘frequent’ coordination of sanctions/remedies matters and sharing of leniency information with a waiver, which were further categories for which respondents were asked to provide data.

⁹⁹ The results presented on the advantages and disadvantages of regional networks reflect the replies of respondents that participate in regional networks.

5.4.1 Advantages of regional co-operation

Most respondents gave a very positive assessment of their participation in regional networks. For example, one respondent noted that “[r]egional co-operation is definitely very important and useful. In the same region the competition problems might be similar, sometimes the same companies are involved.” Some, in fact, said that they could only identify advantages in regional co-operation.

In identifying the specific advantages of regional co-operation, twenty-two (22) respondents emphasized the strong legal basis for co-operation including, for example, the provision of investigatory assistance and exchange of confidential information; sixteen (16) respondents highlighted convergence in national law and agency procedures, while coherent application and development of overarching regional law was mentioned by eleven (11) respondents; optimal resource allocation was mentioned by nine (9) respondents, including through allocation of cases. All these factors are seen as contributing to increased effectiveness of competition enforcement.

Table 25: Potential advantages of regional co-operation, by number of respondents¹⁰⁰

Main Potential Advantages	
Strong legal basis, including for exchange of information	22
Convergence of national laws/procedures	16
Economic similarities or shared history of development	12
Coherent application and development of regional law	11
High relevance of co-operation (similar companies and cases)	10
Strong network of contacts	10

¹⁰⁰ The results presented in the Table are the most commonly mentioned advantages, drawn from Question 38, which is an open-ended question asking respondents for a qualitative assessment of the advantages and disadvantages of regional co-operation. In order to draw conclusions from the results, commonly mentioned advantages and disadvantages were identified in the responses themselves; the number of respondents which address each advantage or disadvantage has been used as a basis for comparison of their importance and prevalence.

These advantages were strongly identified in the responses of participants in networks such as the ECN and the Nordic Alliance, where competition-specific legal instruments are available and have been used extensively in enforcement. Many ECN respondents stressed that the ECN provides a unique setting for co-operation, in that its members apply the same substantive rules and belong to a highly economically and politically integrated area. As one respondent put it, “[t]he ECN is a unique network because it operates with regard to a single body of law, as opposed to multiple laws and legal systems.” ECN respondents also stressed that the ECN framework provides very powerful rules and instruments for investigatory assistance, as well as for the exchange of information on cases: “[t]he most important facilitator of co-operation in the ECN is the ability to exchange information. This lack of confidentiality constraints allows authorities to discuss current cases openly with one another. It ensures that cases can be transferred effectively between authorities as necessary and that theories of harm can be compared.”

An agency participating in the ECN explained that “[w]hat distinguishes the international co-operation that we are able to achieve within a regional network from co-operating internationally with agencies outside the network, is the legal framework of the [former]. Lessons from this regional co-operation that we think would be worth expanding to international co-operation with agencies outside the network are that this kind of legal co-operation framework (law or soft law or bilateral/multilateral agreements) increases co-operation.”

Other respondents were less sure about whether this kind of co-operation might be repeated in other contexts. For example, one said that “[t]he compulsory nature of EU regulations is the main feature that distinguishes this regional network from general international co-operation. However, the idea of an obligatory system of co-operation will probably not be possible to introduce at a global level.”

Twelve (12) respondents outlined the advantages for co-operation due to shared economic similarities across a region, including shared experiences of economic growth, while a further ten (10) respondents emphasized the high relevance of co-operation within a regional network due to the existence of similar industries and similar competition issues.

Another perceived benefit stemming from regional co-operation, mentioned in ten (10) responses, is the establishment, through continuous interaction, of a strong network of personal contacts, facilitating access to other agencies. As one agency stated, “there are good personal contacts between the officials of the competition authorities in the neighbouring countries, which

makes co-operation even easier.” Cultural and language similarities shared at the regional level were also indicated by seven (7) respondents.

An agency participating in the Nordic Alliance said that “[m]any of the contact persons within the NCN network have worked together for many years. During their co-operation they have developed mutual trust between the authorities.”

Ten (10) respondents indicated that similarities extended to cases and the companies involved, often resulting in a large number of parallel investigations; and four (4) respondents reported that similarities can be found in procedural/methodological approach (which developed due to proximity and similarities in economic history, as opposed to purposeful convergence through concrete co-operation). For example, one respondent said that “[t]he most useful co-operation is on the regional level due to similar (same) cases and investigations we deal with and the similar economy and business conditions.” Another emphasized that co-operation “[...] with neighbouring countries which to a large extent share traditions and history, and have market economies with several common characteristics, has been very beneficial.”

Promotion of regional relations was indicated as an advantage by nine (9) respondents, including economic relations. Three (3) respondents further opined that regional co-operation is a necessity for the functioning of regionally integrated markets.

5.4.2 Disadvantages of regional co-operation

Few unique disadvantages of regional co-operation (excluding general disadvantages of co-operation) were identified.

Table 26: Potential disadvantages of regional co-operation, by number of respondents¹⁰¹

Main Potential Disadvantages	
Similar resource constraints (increased by obligation to make resources available in the region to regional partners)	7
Mutual lack of experience	2
Constraints on course of action	2
Enforcement actions of one agency may affect the others	1
Potential delays	1
Lack of competition law or strong competition institutions in the region	1

Seven (7) respondents observed that agencies within the same region may face the same challenges, such as those related to limited resources which may be exacerbated by the obligation to make these scarce resources available for co-operation. They also observed that due to limited experience in handling investigations, participants may not offer each other a varied opportunity for learning new techniques and strategies. Two (2) respondents also indicated that lack of experience across the region may negate potential capacity-building benefits of co-operation. One agency, for example, observed that “[m]any agencies within a region may face the same challenges, such as those related to limited resources [or] limited experience in handling investigations, and as such they may not offer each other a varied opportunity for learning new techniques and strategies.”

5.5 Final considerations

The Survey shows that two-thirds of respondents identified themselves as belonging to a regional network. Respondents referred to broadly two different types of regional networks: i) platforms that provide competition-specific rules

¹⁰¹ The results presented in the Table are the most commonly mentioned disadvantages, drawn from Question 38, which is an open-ended question asking respondents for a qualitative assessment of the advantages and disadvantages of regional co-operation. In order to draw conclusions from the results, commonly mentioned advantages and disadvantages were identified in the responses themselves; the number of respondents which address each advantage or disadvantage has been used as a basis for comparison of their importance and prevalence.

for co-operation in enforcement, and ii) *fora* for general policy discussions on common regional issues, and exchanges of experiences.

The Survey highlights the importance of the European Competition Network in serving as the main platform for co-operation in Europe in terms of the number of participating agencies (all EU member countries' agencies), the availability of formal instruments for co-operation, and facilitating the exchange of confidential information and investigatory assistance.

The Survey suggests that many ECN respondents think that the ECN provides a unique setting for co-operation, in that its members apply the same substantive rules and the framework provides very powerful instruments for co-operation.

Also in Europe, on a sub-regional scale, the Nordic Alliance has emerged as an enhanced network of co-operation and a platform where participating countries co-operate closely in enforcement.

The Survey shows that in other geographical areas (Latin America, Africa and Asia) there are several regional networks that have adopted or are about to adopt regional competition law provisions, including establishment of regional agencies, though the experience in case co-operation is still very limited. Other networks mentioned in the responses to the Survey provide a *forum* in which competition policy issues can be discussed at the regional level.

Participants in regional networks, especially in Europe, identified specific advantages of regional co-operation, such as the strong legal basis for co-operation and convergence in national laws and agency procedures, which are seen as contributing to increased effectiveness of competition enforcement.

The Survey also suggests that respondents perceive economic similarities across a region, including shared experiences of economic growth, to represent factors that facilitate co-operation within a regional network. Another perceived benefit stemming from regional co-operation was the establishment, through continuous interaction, of a strong network of personal contacts, facilitating access to other agencies. Cultural and language similarities shared at the regional level were also mentioned as an advantage in regional co-operation.

A small number of survey respondents indicated possible disadvantages that may be shared by participants in a regional co-operation network, including limited resources, which may make regional co-operation ineffective and particularly burdensome.

6. LIMITATIONS AND CONSTRAINTS ON INTERNATIONAL CO-OPERATION

An important part of the Survey is dedicated to the analysis of existing limitations and constraints on international co-operation. Respondents were asked to identify the key practical and legal limits on effective co-operation, to assess their importance and frequency in cross-border enforcement cases, to provide illustrative examples of cases where limitations have adversely affected an investigation or prevented effective co-operation, and finally, to suggest how to improve co-operation in the context of the identified limitations.¹⁰²

This Chapter covers the following issues:

- Limitations and constraints on international co-operation encountered by agencies;
- Benefits and costs that would result from the addressing these limitations and constraints.

This Chapter will not cover in great detail the main limiting factor to international co-operation which has been identified by respondents, namely legal protection on the disclosure of confidential information. Such protections often are constituent parts of the authority of agencies to compel information in competition investigations. As such, they are fundamental components of an agency's ability to obtain information and ultimately are key underpinnings that facilitate international co-operation. Without confidentiality protections, there would be no information to share.¹⁰³

¹⁰² Reference is to Questions 29 (and associated Table 7) through 35 of the Survey.

¹⁰³ Exchanges of information between enforcers will be covered separately in Chapter 7. Suggestions for improving co-operation in relation to the limitations identified in this Chapter will be discussed in Chapter 9.

6.1 Limitations and constraints – Importance and frequency

The Survey indicated that there are a number of factors which sometimes restrict international enforcement co-operation between agencies. Sixteen (16) agencies indicated that they had insufficient experience to comment on limitations on co-operation, while three (3) respondents felt that limitations did not affect them, as they handled only domestic cases, or had found co-operation within a regional legal framework to be sufficient. Of these nineteen (19) respondents, nine (9) respondents were OECD agencies and ten (10) respondents were non-OECD agencies. This left a total of thirty-six (36) respondents (twenty-three (23) OECD and thirteen (13) non-OECD agencies) who identified limitations and constraints.¹⁰⁴

Many of those who responded to the question on limitations and constraints on international co-operation identified differences between jurisdictions which contribute to limitations, and which may be grouped into two broad categories: (i) legal differences (17 respondents), *i.e.* limitations due to divergence in the national and/or international legal framework in which agencies operate; and (ii) practical limitations (16 respondents), *i.e.* practical factors that affect the ability of agencies to engage in effective enforcement co-operation relationships with foreign peers.

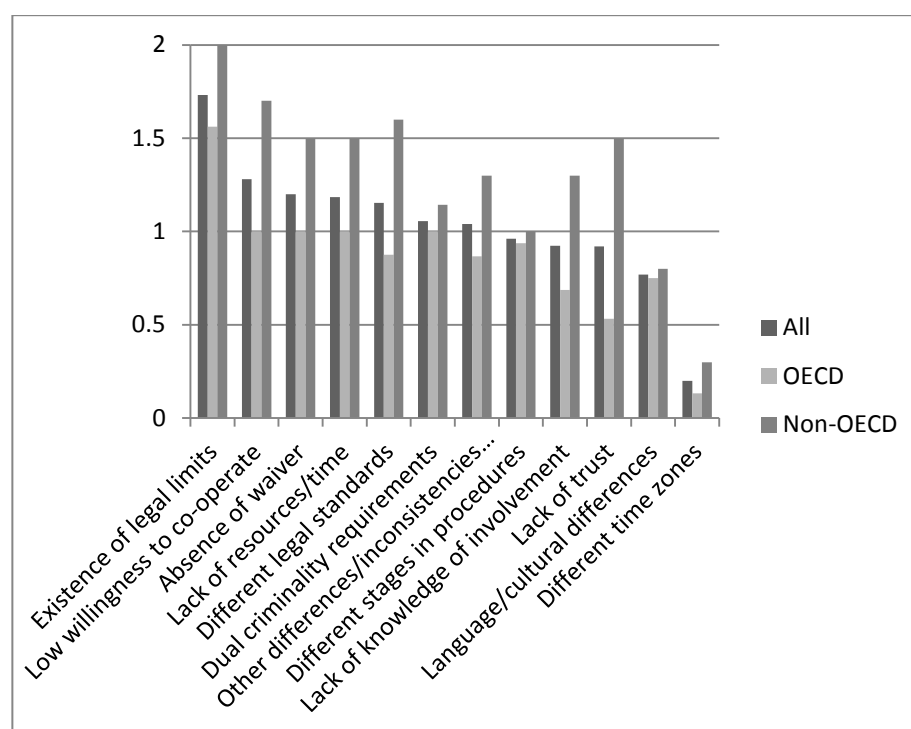
¹⁰⁴

In Table 7, respondents were asked to identify the frequency with which they had experienced various categories of limitations to co-operation (in cases in which international co-operation would have been relevant), and to rank the importance of each type of limitation. The available responses to the question on frequency were: 'Frequently (> 60% of relevant cases)', 'Occasionally (20% - 60%)', 'Seldom (< 20%)', and 'Never'. The available responses for importance were: 'High', 'Medium', and 'Low'. In order to aggregate the results of these Tables, an ordinal score was assigned to the relative responses ([Frequently = 3], [Occasionally = 2], [Seldom = 1], [Never = 0]; [High = 2], [Medium = 1], [Low = 0]), and these ordinal scores were summed across the sample of respondents. The average scores for 'frequency' and 'importance' among those who had provided a response were then taken for each category of limitation, as a basis for comparison. However, several respondents only partially completed the Table, and the averages are therefore calculated over different divisors. This method for calculating the averages was chosen because it best captures the opinions of those agencies who felt that they had sufficient experience of each category of limitation to respond. However, it does imply that categories to which there were few responses may still appear to be ranked as more important or frequent than categories with many responses.

It must be noted at the outset of this discussion that a large majority of respondents reported that the absence of co-operation has not hindered a case or an investigation, or that, although they could foresee difficulties, they have not encountered those difficulties in practice.¹⁰⁵ Even among those respondents who reported instances where lack of co-operation hindered an investigation, one (among others) noted that “[a]lthough there have been cases in which a lack of international co-operation between agencies has hindered an investigation or prosecution, in our experience, this has rarely occurred over the past five years.”

Tables 27 and 28 below list the limitations ranked by respondents in order of importance.¹⁰⁶

Table 27: Limitations - average score of responses for “importance” (0=low, 1=medium, 2=high)



¹⁰⁵ Reference is to responses to Question 32 of the Survey.

¹⁰⁶ These Tables are based on Table 7 in the Survey.

Table 28: Ranking of limitations and constraints by “importance”¹⁰⁷

	All respondents	OECD	non-OECD
1	Existence of legal limits	Existence of legal limits	Existence of legal limits
2	Low willingness to co-operate	Low willingness to co-operate	Low willingness to co-operate
3	Absence of waivers)	Absence of waiver	Different legal standards
4	Lack of resources/time	Lack of resources/time	Absence of waiver
5	Different legal standards	Dual criminality requirements	Lack of resources/time
6	Dual criminality requirements	Different stages in procedures	Lack of trust
7	Other differences/inconsistencies between legal systems	Different legal standards	Other differences/inconsistencies between legal systems
8	Different stages in procedures	Other differences/inconsistencies between legal systems	Lack of knowledge of involvement
9	Lack of knowledge of involvement	Language/cultural differences	Dual criminality requirements
10	Lack of trust	Lack of knowledge of involvement	Different stages in procedures
11	Language/cultural differences	Lack of trust	Language/cultural differences
12	Different time zones	Different time zones	Different time zones

The existence of legal limitations¹⁰⁸ and a perceived low willingness to co-operate were identified in the Survey as the two most important limitations (in relative terms)¹⁰⁹ on international co-operation. Lack of access to waivers and

¹⁰⁷ This ranking is based on the average scores for ‘importance’ of those respondents who provided a score. As several respondents only partially completed the Table, the divisor used to calculate the average varies.

¹⁰⁸ The Survey did not specify what was meant by “legal limitation” and many respondents included restrictions on the exchange of confidential information in this category.

¹⁰⁹ Table 7 included a set of 12 possible limitations, including the possibility to add limitations under “Other”. No respondent added a limitation to the suggested list.

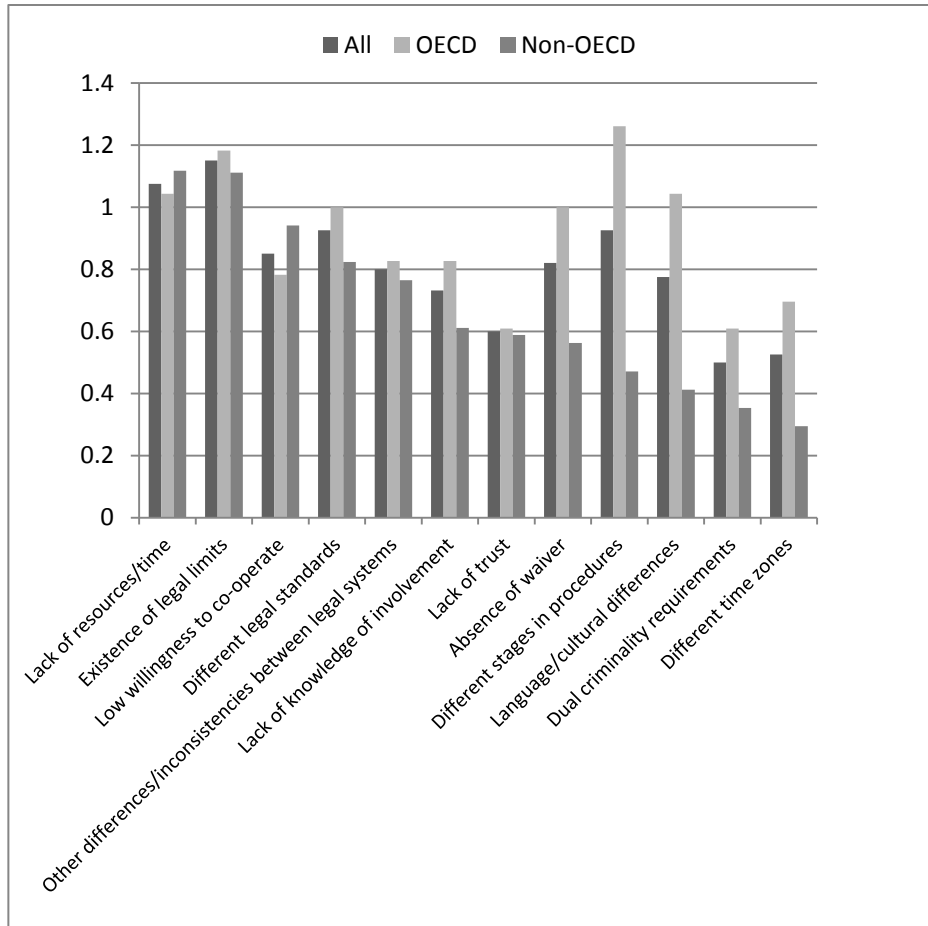
practical limitations (such as lack of resources and time to devote to co-operation) follow closely. Differences in the legal standard applied by the agencies involved and differences in enforcement systems (criminal vs. civil/administrative) were also considered to be among the most important limitations identified by respondents. On the other hand, some of the more practical limitations (language differences and different time zones) were considered to be less important obstacles to co-operation.

It is notable that all limitations and constraints included in Table 7 appear to be relatively more important for non-OECD agencies than for OECD agencies. This may reflect the fact that OECD agencies face – or perceive that they face – fewer limitations and constraints. Only dual criminality requirements, difficulties arising from the fact that the investigations of the two agencies are in different stages of the procedure, and language/cultural differences between agencies seem to have the same weight and importance¹¹⁰ for both OECD and non-OECD agencies.

Significantly, the fact that a certain limitation or constraint on international co-operation is considered relatively more important does not necessarily mean that it occurs more frequently in the enforcement practice of the agencies. Table 29 and 30 below list the same set of limitations identified by the respondents but in order of frequency of occurrence.

¹¹⁰ Based on the average score for ‘importance’ among agencies who provided a reply in each category.

**Table 29: Limitations - average score of responses for “frequency”¹¹¹
(0=never, 1=seldom, 2=occasionally, 3=frequently¹¹²)**



¹¹¹ Table 7 requested respondents to score various categories of limitations in terms of the frequency with which they are encountered in cases in which international co-operation would have been relevant. Available responses were “Frequently (> 60% of relevant cases)”, “Occasionally (20% - 60%)”, “Seldom (< 20%)”, and “Never”.

¹¹² The results of Table 7 seem to indicate that none of the limitations mentioned in the Table have been frequently encountered by respondents. As Table 29 demonstrates, the highest average score has been assigned to the existence of legal limitations, but this category has only been ‘seldom’ encountered. While a few respondents did reply that they had ‘Frequently’ encountered a specific limitation, aggregating the scores results in low averages.

Table 30: Ranking of limitations and constraints by “frequency”¹¹³

	All respondents	OECD	non-OECD
1	Existence of legal limits	Different stages in procedures	Lack of resources/time
2	Lack of resources/ time	Existence of legal limits	Existence of legal limits
3	Different legal standards	Lack of resources/time	Low willingness to co-operate
4	Different stages in procedures	Language/ cultural differences	Different legal standards
5	Low willingness to co-operate	Different legal standards	Other differences/ inconsistencies between legal systems
6	Absence of waivers	Absence of waiver	Lack of knowledge of involvement
7	Other differences/inconsistencies between legal systems	Other differences/ inconsistencies between legal systems	Lack of trust
8	Language/ cultural differences	Lack of knowledge of involvement)	Absence of waiver
9	Lack of knowledge of involvement	Low willingness to co-operate	Different stages in procedures
10	Lack of trust	Different time zones	Language/ cultural differences
11	Different time zones	Lack of trust	Dual criminality requirements
12	Dual criminality requirements	Dual criminality requirements	Different time zones

A comparison of the two Tables (relative ‘importance’ and ‘frequency’) reveals several points:

- the existence of legal limits on international co-operation is at the same time the most important limitation identified by all respondents (regardless of whether they are OECD or non-OECD respondents) and the most frequently encountered by all respondents, but only the 2nd

¹¹³ This ranking is based on the average scores for “frequency” with which a limitation has been encountered (in relevant cases), of those respondents who provided a score. As several respondents only partially completed the Table, the divisor of the average varies.

most frequent limitation for both OECD and non-OECD respondent subgroups; differences in stages in procedures ranks as the most frequent limitation for OECD respondents, and lack of resources/time as the most frequent limitation for non-OECD respondents.

- practical limitations appear to be relatively less important with, for example language/cultural differences and difference in time zones ranking 11th and 12th in terms of ‘importance’ for all respondents; but they appear to be more frequent in the enforcement practice of respondents (the same two factors ranking 8th and 11th in terms of ‘frequency’);
- in cartel investigations/cases, the fact that two jurisdictions seeking to co-operate are applying different enforcement laws (criminal vs. civil/administrative) is a limitation which is perceived as relatively important (6th), but does not arise frequently in practice (12th);
- conversely, the fact that the investigations of two agencies are at different stages ranks only 8th in terms of importance, but appear to be a rather frequent occurrence (4th most frequent limitation);
- lack of resources/time was identified as the 2nd most frequently encountered limitation on co-operation, and the 4th most important. Its lower ranking in terms of importance could suggest that this is a limitation which can be overcome in practice,¹¹⁴ apparently confirmed by the fact that other practical limitations (*e.g.* language differences and different time-zones) score very low in terms of both importance and frequency.¹¹⁵

¹¹⁴ One respondent suggested that clarifying the importance of prioritising investigations involving international anti-competitive practices and the potential benefits of international co-operation could promote the allocation of resources so as to address this limitation.

¹¹⁵ The structure of the Survey does not allow for weighting the impact of “lack of time” across enforcement areas. In this respect, one can note that lack of time is a constant constraint in merger investigations as opposed to behavioural cases. This might affect the frequency rating for overall co-operation. Because of the pervasiveness of this limitation, it becomes accepted and practices are developed to deal with it, which may explain the lower ‘importance’ rating. In other words, this apparent divergence may reflect the paramount and ever-present timing constraints in merger investigations.

Table 29 on ‘frequency’ also indicates that most of the identified limitations and constraints on international co-operation (10 out of the 12) arise more frequently in the experience of OECD respondents than in that of non-OECD respondents. The fact that OECD agencies are much more frequently involved in international co-operation might explain in part this result. Differences in stages of the investigations of the two co-operating agencies limit co-operation much more frequently in OECD jurisdictions than in non-OECD jurisdictions. A similar divergence appears with respect to absence of waivers, language/cultural differences, different time zones and dual criminality requirements: all these factors arise more frequently in co-operation involving an OECD agency. On the other hand, lack of resources and a low willingness to co-operate are limitations to co-operation which are experienced more frequently by non-OECD respondents.

Box 7: Exchange of information and waivers

One of the most important limitations to international co-operation mentioned in the Survey relates to the legal protections of *confidential information* which restrict the ability of competition agencies to exchange such information. Seventeen (17) respondents identified restrictions on the exchange of confidential information as a limitation on co-operation in the qualitative sections of the Survey. Respondents identified the following specific factors which contribute to this limitation:

- different treatment and definitions of protected information,
- asymmetries in information made publicly available by agencies regarding the status of investigations, and
- requirements that disclosure of information not interfere with domestic enforcement and be in alignment with domestic priorities (*e.g.* avoidance of any risk that the other agency’s uncoordinated enforcement or investigative actions might ‘tip off’ the target company).

A related limitation – which ranked 3rd in terms of importance and 6th in terms of frequency among all respondents – is the absence of *confidentiality waivers*. Waivers allow parties to voluntarily permit the exchange of their own confidential information, but may not always be available. Respondents indicated that waivers may not be forthcoming from parties in cartel or abuse of dominance investigations, and that difficulties and delays in obtaining waivers can be costly.

Limitations related to the ability of agencies to exchange information in general (and confidential information in particular), and limitations related to difficulties with confidentiality waivers will be assessed in more detail in Chapter 7 of this report.

Other limitations and constraints on international co-operation discussed by respondents in the qualitative portion of the Survey include the following:

- Among legal restrictions, ***restrictions on the use of investigatory powers*** (for example, a ***lack of authority by the requested agency to compel evidence***) were cited by five (5) respondents as a limiting factor to effective co-operation. One respondent reported that “[our] ability to co-operate was limited by our powers to compel the production of information”, and it referred to a specific case where “[t]he [foreign] Competition Authority approached us about collecting information in relation to an investigation of a number of financial services companies based in [our jurisdiction]. When they realised that our powers to compel were limited to by summons procedure, there was no further attempt on their behalf to co-operate with us.” This restriction, coupled with ***requirements that co-operation be aligned with priorities for domestic enforcement***, could also present a challenge when investigations are at different stages, or one agency has already completed its review.
- ***Lack of knowledge of the investigations of other agencies***, while ranked relatively low in terms of both ‘frequency’ and ‘importance’ (9th place out of 12) in the quantitative part of the responses, featured in several of the qualitative responses to the Survey. For example one respondent said that “[a]symmetries in publicly available information about investigations and actions in other jurisdictions diminish the level of transparency. Such lack of transparency may lay at the basis of misunderstandings and uninformed (potentially conflicting) decision making”.
- Some respondents also indicated that they were unable to co-operate with other agencies unless they were ***involved in a parallel investigation***, or there was some other ***benefit to their ongoing investigations***. In these circumstances, requests for co-operation in relation to closed cases had to be declined. Although ranked relatively low in terms of ‘importance’ (8th), this limitation is identified as the 4th most ‘frequently’ encountered. For the same reason, sequential, rather than parallel, investigations by enforcement agencies in different jurisdictions were highlighted as a possible constraint on co-operation by one (1) respondent.

- The *existence of a relationship of trust* between agencies is cited by Survey respondents as a key factor for successful and effective co-operation between enforcement agencies. However while nine (9) respondents identified *lack of trust* as a ‘highly important’ limitation, two (2) respondents said that it ‘frequently’ presented a limitation; overall, lack of trust was ranked 10th in terms of both ‘importance’ and ‘frequency’. This could be interpreted as indicating that while mutual trust might be an important pre-condition for co-operation, in practice, situations where cross-border enforcement is affected by a lack of trust between the relevant agencies are rare. As one respondent noted, “[t]he differences in experiences between individual agencies and lack of mutual trust may occasionally complicate effective co-operation” (emphasis added). In other parts of the Survey, respondents indicated that, due to market conditions, their co-operative activities often involve the same agencies across multiple instances, leading to a situation in which they have developed strong relationships with the agencies which are most likely to be relevant to their enforcement priorities.

Other limitations not listed in the Table above, but mentioned by respondents in the qualitative responses included:

- gaps in knowledge about and procedures for co-operation (2 respondents),
- lack of understanding of the procedures of other agencies (2 respondents),
- the requirement of authorisation from another national agency (1 respondent), and
- the lack of relevant points of contact (1 respondent).

Divergent prioritization of cases, either due to different enforcement priorities or different magnitudes of harm in the relevant jurisdictions, was mentioned by three (3) respondents as a limitation to international co-operation.

6.2 Limitations of a legal nature – respondents’ experiences

Many agencies consider the primary limitation on international co-operation to be legal protections which prevent competition agencies from *exchanging confidential information* and/or evidence obtained during an investigation. This will be discussed in greater detail in Chapter 7. Here, it is noted that most national

laws do not permit the sharing of confidential information, absent the express permission of the entity which provided the information.

Beyond legal limitations on the exchange of confidential information, some respondents referred to *specific legal issues that might more generally affect the exchange of information* (and not only confidential information). One respondent, for example, noted that “[d]ifferences in legal systems, including in the legal definitions and scope of confidentiality, privacy, and legal privilege, can affect an agency’s ability to share certain information, and may also limit its willingness to co-operate. [...] Blocking statutes can also create legal limitations to international co-operation. As international co-operation becomes more common, agencies around the world will also need to consider what other information can be shared and how it can be shared consistent with domestic privacy laws.” Another respondent said that “[d]ifferences in national data protection systems [...] may complicate the exchange of information with third countries.” This may be the case, for instance, if the transfer of personal data to other agencies is only lawful where there is an “adequate” level of personal data protection in the other country.

In addition to limitations on the exchange of confidential information, a variety of *other legal constraints* were identified by respondents. These included: “different enforcement legal standards”, “dual criminality requirements”, “different investigatory procedures”, “different procedures for requesting co-operation” and “different sector regulation frameworks”. Achieving an understanding of the *varying and complex legal requirements for making a successful formal request* from jurisdiction to jurisdiction was identified as an additional, resource-heavy complexity (and shortcoming) for agencies willing to engage in international co-operation. These legal uncertainties increase the time required and the administrative burden placed upon agencies when making a request. For example, according to one respondent, “[t]here are a number of additional challenges that may present themselves in circumstances where the [agency] does not have a history of co-operation. These include: ignorance about whether, and on what terms, the counterpart agency can share information; ignorance of the counterpart’s domestic approval requirements; ignorance of who to liaise with to facilitate co-operation; and lack of mutual trust may discourage ceding to requests.” Another respondent said that in a co-operation case “[t]he complexities of reciprocal disclosure requirements relative to the potential benefits meant that this avenue was not pursued.”

In addition, there may be *specific national legal provisions* which affect co-operation. This is the case for statutes which:

- prohibit agencies from co-operating with other agencies in the absence of an underlying bilateral agreement or memorandum of understanding (MoU);
- require competition agencies to seek permission from other government bodies in order to engage in co-operation activities;
- prevent companies from co-operating in investigations of competition agencies in other jurisdictions (blocking statutes); or
- require that other agencies channel their requests for information and notification of their decisions via the diplomatic services (or other public instances) of the country in which the company addressee has its primary seat.

Concerning legal limitations resulting from **procedural differences** and **differences in enforcement powers** of the various agencies involved, one respondent said that “the limitations may also be procedural as regards particularly the operations of search and seizure. For instance, the following questions are susceptible to arise in such situations: Does the national legislation authorise [the agency] to take copies of or extracts from books or records related to the business in question? Does the national legislation authorise [the agency] to seal business premises and books or records for the period [of], and to the extent necessary for the inspection? Is the presence of a judiciary police official compulsory during the inspection? etc.”.

Box 8: Example of unsuccessful co-operation in light of legal limitations

One respondent reported a case of an ongoing investigation of alleged abuse of dominance which was hindered by the inability of the investigating agency to access information in possession of other enforcers. In this case, the agency’s staff needed information which was in the possession of other agencies in order to prove dominance. In order to obtain the information, it contacted three other agencies requesting the data. The information requested included both confidential and public (but not easily accessible) information. The requested agencies never responded to the co-operation request. As a result, the requesting agency decided to approach the target companies directly. It concluded, however, that “*[a]s a result of [the] absence [of] co-operation, [the agency’s] investigation was hindered.*”

6.3 Limitations of a practical nature – respondents’ experiences

One of practical limitations to effective international co-operation, identified by eight (8) respondents in the qualitative questions, derives from a

lack of prior interaction between agencies, coupled with a *lack of awareness of each other's procedures and legal regimes*. Agencies that have not previously co-operated, or have done so infrequently, may need time and experience to build the necessary trust and understanding required to engage in intensified international co-operation. One respondent, for example, said that “[t]he main challenge to co-operating with an agency with which we have no history of co-operation is that there will not yet be a relationship of trust. We would want to put appropriate safeguards in place. For example, agreements over that agency’s use of the information provided.”

Lack of knowledge of parallel investigations undertaken by other agencies has also been identified as a relevant practical limitation. Although ranked relatively low (9th) in terms of both ‘importance’ and ‘frequency’, it is identified as a barrier to co-operation in several other (qualitative) responses. One respondent noted that “[t]ransparency of agencies’ work has greatly increased in the last 10-15 years (thanks to the internet, greater use of media by agencies, development of commercial providers [...], [and] more published reasoned decisions). [...] [I]t can often be a matter of luck that we find out about similar or parallel investigations. Quite often the first an agency might hear about another relevant piece of work being done by [another] agency may be from the parties (who can be surprised that we do not already know) or when it is published. Often this can be too late to make a difference to a case in terms of time saved or efficiencies.”

Such lack of transparency can hinder investigations in situations where, as one respondent noted, “the absence of international co-operation might ‘tip-off’ the parties to a cartel that they were about to be investigated and so may encourage them to alter, destroy or remove incriminating material.” This has occurred in practice, as another respondent reported: “in [a] few cases which have concerned parallel investigations, the [agency] would have started inspections earlier if it had been aware that another NCA had already carried out inspections. As the inspections concern the same firms - even if they are located in different national markets - there is a risk that the latter NCA carrying out inspections will lose evidence.” Another agency reported: “There are past cartel investigations, where the [agency] was unaware that another jurisdiction had evidence that was relevant to the [agency’s] investigations. It is only when the other jurisdiction’s investigation became public, that the [agency] became aware of missed co-operation opportunities. Access to such evidence would have allowed the [agency] to engage in more detailed discussions with its counterpart, or expand existing cartel inquiries to new targets or conduct that the [agency] would not otherwise know about. Access to such evidence could

have allowed the [agency] to establish the existence of agreements where the evidence was not available in [the jurisdiction].”

Other practical limitations have been identified by respondents, in particular limitations due to (i) **lack of resources** (eight [8] respondents); (ii) **time constraints** (ten [10] respondents); and (iii) **language/cultural barriers** (nine [9] respondents). More specifically, respondents referred to the associated administrative burden, time added to procedures and decision-making in cases which involved strict time limitations, and costs involved in training personnel. These limitations can affect co-ordination of investigations and may lead to sub-optimal results. **High costs involved in translating documents** were specifically mentioned by a few respondents.¹¹⁶

Other respondents noted that these practical limitations undermine effective international co-operation and, especially in cartel cases, hinder the preservation of the element of surprise in all affected jurisdictions. This can lead to delays in obtaining evidence (or evidence being destroyed), and important evidence can be missed if it is located in a non-co-operating jurisdiction. It seems, however, that such practical limitations can be overcome by agencies relatively easily. One respondent, for example, noted that “[w]e have experienced limited co-operation with some agencies due to language barriers and time zone differences, although this has not had a significant impact on any investigation”.

One respondent offered the following view concerning the impact that limitations on international co-operation may have on the **reputation of international competition enforcement as a whole**. This respondent noted that the “[a]bsence of international co-operation also has broader implications for the legitimacy of competition enforcement. Parties and the public may question the soundness of the competition enforcement system if different agencies investigating the same merger or conduct reach conflicting results or impose different remedies without explaining the reasons justifying the different outcomes.”

6.4 Potential benefits and costs flowing from actions to address existing limitations and constraints

Question 31 of the Survey requests the opinion of respondents regarding the benefits which could be realized by addressing the limitations identified above, and the costs associated with their removal.

¹¹⁶ Five (5) mention additional costs due to language differences, three (3) specifically mention the costs of translation. One (1) respondent pointed out that language barriers made it difficult to communicate precisely.

Nine (9) respondents acknowledged that it might be “*difficult to remove limitations from different legal systems*”. However, respondents also recognised that the effort could produce important potential benefits. One respondent said that “[s]urely [...] *competition enforcement would switch into [a] more international regime, enabling competition authorities to conduct their investigations across [...] national markets.*” Another suggested that “*the exchange of information amongst competition agencies may also enable them to streamline procedures (with a view [to] increasing convergence) and focus better [on] pending investigations.*” Another noted that “*the benefits of an [improved] network of international co-operation of law enforcement would translate into a stronger competition law enforcement mechanism against transnational practices.*” The overall result could be, as one respondent put it, “*international cartels and corporate mergers will be more swiftly addressed. Deterrence against international cartel attempts will increase.*”

Twenty-nine (29) respondents recognize a need to establish a more comprehensive legal basis for co-operation. Of these, twelve (12) believe that improved provisions for the exchange of confidential information would be beneficial. One respondent identified the benefits of reforming the current system to allow “*an easier flow and exchange of information*” among enforcers. For nine (9) respondents, benefits would mainly consist of gains in time and efficiency of investigations; one respondent stated that “[i]f such limitations were removed, *valuable resources could be saved.*” Another respondent identified clear benefits from finding workable approaches to sharing confidential information, stating that it “*would increase agencies’ abilities to co-operate on specific matters and could also promote substantive and procedural convergence, including analytical methods and review timelines.*”

In contrast, other respondents emphasised the importance of confidentiality protections as necessary to enable agencies to obtain information necessary for their investigations in the first place. One respondent, for example, noted that if “[*they*] *will be obliged to disclose sensitive/confidential information; this may put [their] credibility in peril if it is unduly used by the recipient.*” Another respondent said that “*protection of confidential information – by law and by agency policies, practices, and reputation for such protection – is a critical component of effective enforcement and international cooperation. Such protections enable access to the information needed for investigation while providing safeguards for the parties that provide such information. In the international co-operation context, the exchange of confidential information between agencies must be subject to the confidentiality protections of the co-operating agencies and, where appropriate, the parameters of waivers. Parties and third parties are more likely to grant waivers when they know that confidentiality will be maintained by the agencies and that information will not be shared with domestic competitors.*”

One (1) respondent addressed benefits according to particular enforcement areas. For cartel investigations, it suggested that “the benefits from removing limitations to international co-operation would be to have access to better and more comprehensive information about cases that are being investigated by other jurisdictions. Also, jurisdictions could coordinate better the timing of their procedures. These would lead to more effective enforcement and prosecution of cartel conduct.” For merger investigations, it submitted that “the competition law should be modified to ease co-operation and align investigation timing with other jurisdictions. The amendments would be beneficial since notification procedures among agencies could be standardized. This would reduce uncertainty for firms that have to report to multiple jurisdictions, and facilitate case analysis and the implementation of remedies.”

As for the costs that agencies might incur if these limitations were to be addressed, four (4) respondents suggested that addressing restrictions on international co-operation would not entail significant costs. The nineteen (19) respondents who identified costs associated with addressing existing limitations on international co-operation identified several types of costs:

- (i) ***Costs related to the increased administrative burden responding to co-operation requests in an environment of scarce resources.*** Seven (7) respondents noted that costs may increase in parallel with more effective cross-border actions. One agency pointed out that there are “*certain costs linked to the removal of limitations to co-operation. It requires the allocation of scarce resources.*” Along the same line, another respondent concluded that “[t]he main cost would be the administrative burden.” Another respondent noted that “[i]f expanded international co-operation includes sharing confidential business information, agencies may require additional resources to manage international co-operation with other agencies. In addition, as more agencies co-operate, agencies will need to manage staff time more effectively when investigations involve numerous bilateral discussions.”
- (ii) ***Costs related to the adoption and implementation of any necessary legislative reforms*** (six [6] respondents). One respondent noted that “*costs would entail changing legislation,*” which is a lengthy and difficult process, especially when, as identified by another respondent, some of the necessary reforms would have to be introduced at constitutional level.
- (iii) ***Costs related to the impact of these reforms on other enforcement policies.*** A specific comment from one respondent referred to the effect that legislative reforms to favour more exchanges of information between agencies could have on other enforcement tools. This respondent said that “[i]t should be noted though that removing all of these limits may have a

negative impact on Leniency Programmes. Leniency applicants need to be able to trust an agency that the information they provide is not passed on to third country jurisdictions in which they have not applied for leniency, in particular, if this may lead to criminal prosecutions of individuals in certain jurisdictions.”

In considering the balance of benefits and costs associated with addressing the main limitations on effective international enforcement co-operation, we refer to the only response that opined on the balance of benefits and costs. This agency said that “[w]ith respect to costs, developing solutions and relationships requires time and resources, but in the [agency’s] experience, the benefits of international co-operation often outweigh these costs.”

6.5 Final considerations

A variety of factors were identified by respondents to the Survey as having an impact on the ability of agencies to effectively co-ordinate their enforcement actions across borders. Legal limitations due to differences in legal systems and to restrictions in domestic legislation appear to be important and the one that agencies encounter more frequently. Practical limitations due, for example, to scarce resources or timing and language differences, appear to be less important and less frequent in practice.

Some limitations are general, *i.e.* they apply to all enforcement areas, such as lack of previous relationships between the enforcers. Lack of trust affects the willingness of enforcers to co-operate with each other and limits effective co-operative relationships to a small group of agencies which regularly engages in co-operation. Others limitations are specific to one enforcement area, such as the dual criminality requirement which affects co-operation in cartel cases between agencies operating under different legal regimes for cartel prosecution/investigation. While it is important to identify the types of limitations considered to impact international co-operation, it should also be noted that the average frequency experienced for any limitation identified was considered ‘seldom’.

The Survey also indicates a willingness of respondents to address at least some limitations to and maximise benefits from international co-operation. Addressing these limitations may, however, entail costs: costs related to increased administrative burden from increased co-operation; costs related to implementing the reforms required to address some of the restrictions, especially the limitations related to existing legal constraints; and costs related to the impact of these reforms on other enforcement policies.

7. EXCHANGE OF INFORMATION AND CONFIDENTIALITY WAIVERS

Competition agencies highlighted that the ability to exchange information, and particularly confidential information, can substantially contribute to more effective co-operation and enforcement in competition cases. The previous Chapter emphasized that many respondents identified difficulties in exchanging confidential information with other enforcers as one of the main limitations to effective co-operation in cross border investigations. As will be discussed below, the Survey responses indicated that a significant number of respondents (10 respondents) cannot share confidential information under *any* circumstance.

Recognizing that the exchange of information, including confidential information, continues to be an important issue for international enforcement co-operation, Section 5 of the Survey focused on four aspects of information exchange:

- The types of information that agencies are allowed to exchange with other international enforcers, and the benefits derived from exchanging this information (Questions 21 and 23);
- The normative and legal framework allowing agencies to exchange information (Question 20);
- The conditions under which the exchange of information is allowed, and limitations on the use of the information exchanged (Questions 22 and 26);
- The use of confidentiality waivers to overcome existing legal constraints on the exchange of information, and the difficulties in obtaining such waivers (Questions 24 and 25).

7.1 Types of information that can be shared

The Survey identified five broad categories of information that agencies share with other competition enforcers, under a variety of circumstances and conditions:

- **Publicly available information:** Twenty-seven (27) respondents (49%) declared that they are allowed to share public information with other enforcement agencies without any restriction. There seem to be differences in the responses between OECD (53%) and non-OECD respondents (43%).
- **Non-public agency information:** Sixteen (16) respondents (29%) identified agency-generated information that is not in the public domain, as a type of information that they can share with other enforcers.¹¹⁷ Examples of this kind of information include: the fact that the agency has opened an investigation; the fact that the agency has requested information from an individual or a firm located outside its jurisdiction; how the staff analyzes the case, including product and geographic market definition and assessment of competitive effects; and potential remedies.
- **Confidential information:**¹¹⁸ Ten (10) respondents (18%) identified this category as the one category of information that can never be disclosed to other enforcers, unless they are part of a formal regional network which allows it. Many respondents (31, 56%) indicated that they can exchange confidential information only if the parties consent to it by way of a confidentiality waiver.¹¹⁹ It appears from a few responses that two types of confidential information enjoy a particularly high level of protection: legally privileged information and information obtained by the agency through an amnesty/leniency application. On this last point, while respondents generally did not

¹¹⁷ The transmission of this type of information to another enforcement agency is generally not subject to restrictions, provided that it does not involve the disclosure of confidential party information. The responses show a difference between OECD and non-OECD countries: *i.e.* a higher number of OECD agencies consider that this information can be shared (34% of the OECD respondents as opposed to 22% of the non-OECD respondents).

¹¹⁸ The Survey defined “confidential information” as “[...] *information the disclosure of which is either prohibited or subject to restrictions. For example, information could be defined as confidential if it constitutes business secrets of a company or if its disclosure in normal circumstances could prejudice the commercial interests of a company.*”

¹¹⁹ The analysis of the responses shows somewhat different views between OECD and non-OECD respondents: 44% of the OECD respondents specified in their response that it is possible for them to share confidential information under a confidentiality waiver, as opposed to only 30% of non-OECD respondents.

qualify their responses with respect to different enforcement areas (mergers, cartels, or unilateral conduct/abuse of dominance), one response emphasised that leniency applicant information cannot generally be shared, and certainly not without a waiver.

- ***Non-confidential, case-related information:*** It is interesting to note that twelve (12) respondents (22%) consider it possible to share case information with other agencies, provided that it does not include legally protected confidential information; one respondent clarified that it would share case information but would use pseudonyms to protect the confidentiality of the parties.
- ***Decisions after publication:*** This refers to the publication of decisions in enforcement cases. Four (4) respondents specifically indicated that they make available non-confidential information (or non-confidential versions of confidential information) in the reasoning provided in support of the enforcement decision which is a publicly available document to which requesting agencies can refer.

Box 9: The definition of “confidential information”

Responses to the Survey indicate that there is no commonly agreed definition at the international level concerning what information is “confidential” in competition matters. Some responses also indicate that there may be different definitions within the same jurisdiction, depending on the statutory provisions that the agency is applying (*e.g.* merger control law or provisions on behavioural conduct). These definitions of “confidential information” are not necessarily included in legal statutes, but may instead be developed by practices of the enforcement agencies and of the courts.

Jurisdictions define information as “confidential” according to one or more of these criteria:

- By the ***nature and type of the information***, such that information is confidential if its disclosure would harm the commercial interests of the source that provided it (*e.g.* information related to price, sales, costs, customers and suppliers). Most respondents (31, 56%) consider companies’ business secrets to be confidential; some respondents (11, 20%) consider confidential any information which is prejudicial to the commercial position of the subject; some respondents (11, 20%) consider confidential any internal document and inter-agency correspondence; other respondents (15, 27%) consider confidential any personal data or information; others (8, 15%) consider confidential the source of the information. Others look at whether the information, if released, would affect future supply of information, if it would jeopardize an investigation, or, finally, if the disclosure would be contrary to the public interest.

- By *the way in which the information is collected*. Many respondents (19) consider confidential any information obtained by the agency in the course of the performance of its official duties and functions. Others refer to confidential information as information obtained by power of compulsion, or obtained during non-public procedures, or obtained by other agencies.
- By *the purpose for which the information was collected or submitted*, so that any information collected or submitted for a particular purpose (*e.g.* any information submitted for purpose of a pre-merger notification) will be protected as confidential.
- By *the way the parties define it*, so that any information that the source has defined as such is considered confidential (8 respondents).

Agencies have pointed out that differences in the definition of confidential information (*i.e.* where to draw the line between “confidential information” that cannot be shared with other agencies in absence of waivers, and information that can be shared with others, even in the absence of a waiver) can sometimes impact discussions between agencies. Lack of clarity may exist within the definition of “confidential information”, especially when other jurisdictions make further distinctions between *e.g.* ‘business secrets’ and other types of confidential information, of which many do. These distinctions are important because of the different levels of protection granted to different types of confidential information.

The preceding discussion suggests that an agreement on the exchange of confidential information can be impacted by the degree of convergence in the way in which confidential information is defined (and protected). Agreeing on whether a specific piece of information is confidential or not can sometimes be a time consuming process, and mistakes can expose the requested agency to legal liabilities. If in doubt, the risk of litigation may discourage agencies from disclosing such information to foreign agencies when requested.

7.2 The normative framework for the exchange of information

According to the Survey responses, the ability of competition agencies to exchange information with other enforcement agencies is often provided for by national legislation. This was the case for forty (40) respondents to the Survey (73%), and there are no major differences between OECD and non-OECD respondents in this respect. In many cases (50% of respondents), provisions granting powers to competition agencies to exchange information are included

in competition-specific statutes, as opposed to general legal provisions.¹²⁰ In rare cases there are no specific legal provisions regulating information exchanges (this was the case for two non-OECD respondents) or the ability to exchange information is regulated by the agency's own policy and practice (this was the case for one non-OECD respondent). In a limited number of cases (7 respondents), provisions on the exchange of information are included in international co-operation agreements. These co-operation agreements, however, rarely allow for the sharing of confidential information; exceptions include the 1999 US-Australia Mutual Assistance Agreement¹²¹ and the recent co-operation agreement between the EU and Switzerland.¹²²

¹²⁰ A number of responses made reference to other relevant statutes that may affect the disclosure and transmission of information contained in an agency's file. Statutes that may restrict disclosure of information include privacy and data protection laws, which generally prevent government agencies from disclosing to third parties any personal or confidential information collected in the course of their activities. This includes disclosure to other (domestic and foreign) government agencies. There are generally exemptions to these rules (*e.g.* freedom of information laws, disclosure in the interest of public safety, criminal justice and taxation), but outside these exemptions the information cannot be disclosed without the consent of the individuals and firms involved. Other statutes which may extend the rights of access to information include public access to information laws which are aimed at increasing transparency and accountability of the actions of a public administration.

¹²¹ The agreement facilitates assistance and information exchange in civil or criminal investigations that ordinarily would be prohibited. The agreement requires reciprocal commitments, including equivalent legislation guaranteeing sufficient protection for any confidential information that is shared. For this reason, requests for assistance under the agreement must be accompanied by written assurances by the relevant antitrust authority that there have been no significant modifications to the confidentiality laws and procedures described in the agreement.

¹²² The agreement includes the possibility to exchange confidential information without the need to seek a waiver, subject to conditions. It provides for discussion and transmission of information covered by waivers, and information not covered by waivers subject to three conditions: (i) both competition authorities are investigating the same or related conduct or transaction, (ii) the request is made in writing, identifies the undertakings concerned, and includes a general description of the subject matter, nature of investigation and specific legal provisions, and (iii) the authorities will consult to determine what information is relevant and may be transmitted.

In addition to providing a snapshot of the legal basis on which agencies rely to exchange information with other enforcers, the Survey responses also indicate that in some jurisdictions the rules on exchange of information are accompanied by strict sanctions for their violation. In many of these cases (10 out of 13 responses which indicated the applicability of strict sanctions) the sanctions are of a criminal nature; this is the case for all the OECD respondents who mentioned that strict sanctions may apply, and for three (3) of the six (6) non-OECD respondents.

Fifty-two (52) respondents have rules regarding the protection of confidential information (all thirty-two [32] OECD respondents and twenty [20] non-OECD respondents) that protect confidential information in possession of the agency, and generally prevent the agency from disclosing this information freely. In general, these provisions apply to all competition cases without distinction between merger, cartel or unilateral conduct cases. In many jurisdictions, competition officials are bound by a duty of “professional secrecy” or something similar,¹²³ which prevents them from disclosing information received in their official capacity, unless otherwise provided by law. These safeguards for the protection of confidential information apply not only to requests for access by other parties to an investigation, or by third parties,¹²⁴ but also to requests for access by other enforcement agencies. Only

The agreement also specifies various limits on the discussion, transmission and use of the information. There can be no exchange of leniency or settlement information without waivers, and there can be no exchange of information protected under legal privilege. The information exchanged can only be used for the application of competition law by the respective competition authorities to the same, or related, conduct. Information exchanged cannot be used to impose sanctions on individuals.

¹²³ Seven (7) respondents (all OECD members) refer specifically to professional secrecy obligations, and a further 18 (13 of which are OECD members) describe restrictions which sound very similar (i.e. restrictions on the disclosure of any non-public information obtained during official duties/enforcement of law).

¹²⁴ In many jurisdictions, however, the parties’ right to confidentiality vis-à-vis other parties and third parties is not absolute. In particular, this right is limited by other parties’ rights of defence (mentioned specifically by 11 respondents, 8 of which are OECD members). There is a general procedural fairness requirement under which a case may not be decided unless the party subject to the enforcement proceeding has been informed about factual information submitted to the authority by persons other than the party itself, and has been given the opportunity to express its views on such information.

one (1) non -OECD respondent replied that it has no restriction whatsoever on its ability to exchange information with other agencies.

Some exceptions exist to this general principle of non-disclosure of confidential information. The first is when the agencies wishing to exchange information have obtained confidentiality waivers from the interested party(ies), allowing for the exchange to take place.¹²⁵ The second is when national legislation empowers the agency to exchange confidential information with other agencies (a so-called “information gateway”). Six (6) respondents (five [5] OECD respondents and one [1] non-OECD respondent) have such enabling statutes. The Survey responses, however, do not provide useful information regarding the extent to which these statutes have been used in practice to cooperate with other agencies and to exchange confidential information. One respondent noted that *“the gateway for disclosure to an overseas agency [...] is quite heavily circumscribed by a number of considerations that the [agency] must make in relation to each disclosure. This means that disclosure can be burdensome, in particular in balancing whether the disclosure of confidential information is necessary in the context of another agency’s case. We have so far only used the provision once to disclose information to the [foreign agency] in a cartel investigation and the experience confirmed that the process was burdensome. In another case, we could not use the provision as it would have taken too long. This burden may ease over time, as an assessment on one case could be used to inform another, but it does require a heavy upfront cost.”*

Box 10: The UK overseas information “gateway”

In the United Kingdom (UK), the Enterprise Act provides for statutory information ‘gateways’, including an overseas information gateway allowing the Office of Fair Trading (OFT) and the Competition Commission (CC) to voluntarily disclose information obtained under their statutory powers of investigation, in order to facilitate the exercise by an overseas agency of any function relating to the purposes of civil or criminal antitrust cases in those jurisdictions.

The key provisions are contained in Part 9 of the UK Enterprise Act 2002 (the EA02). The framework allows the OFT/CC to disclose specified information where a ‘gateway’ exists in the EA02 or where disclosure is permitted under other legislation.

This is the case even if the information that the agency wishes to use as evidence is confidential. Every jurisdiction has its own set of rules regulating conditions for access to the case file.

¹²⁵

Confidentiality waivers will be discussed further below.

The key provisions are: (i) the general power to disclose for the purpose of facilitating the agency's functions under the Act and other legislation (section 241); (ii) specific gateways allowing disclosure of certain information to an overseas public agency if certain criteria are met (see section 243 of the EA02) or where consent to disclosure is given by the information providers and owners (section 239 EA02); (iii) other legislation, including the EU Modernisation Regulation (Reg. 1/2003) and any relevant Mutual Legal Assistance Treaties (MLATs).

Disclosure under section 243 is limited by the need for the OFT/CC to have regard to a number of considerations, such as:

- Whether the matter is sufficiently serious,
- Whether there are adequate safeguards in the recipient country against the disclosure of personal information,
- Whether there are reciprocal arrangements for the exchange of information, and
- The need to exclude information that might significantly harm the commercial interests of an undertaking – balanced against the extent to which that information is necessary for the purposes for which disclosure is permitted.

Where disclosure is permitted, the OFT/CC must nonetheless have regard to three further considerations when making disclosure (section 244 of the EA02). Broadly speaking, these are:

- (i) the need to exclude from disclosure (so far as practicable) any information the disclosure of which the OFT/CC considers contrary to the public interest;
- (ii) the need to exclude from disclosure (so far as practicable) any commercial information the disclosure of which might cause significant harm to an undertaking's legitimate business interests, and information relating to the private affairs of an individual that might cause significant harm to the individual's interests (so far as practicable); and
- (iii) the extent to which the disclosure of information mentioned in (ii) is necessary for the purpose for which the disclosure is being made.

The UK's overseas information gateway was used in the Marine Hose cartel investigation,¹²⁶ and was described by the Australian Competition and Consumer Commission as 'decisive' for its investigation.¹²⁷ However, the process can be both resource-intensive and lengthy for the agencies involved.

¹²⁶ ACCC v Bridgestone Corporation & Ors [2010] FCA 584.

¹²⁷ See Australia's contribution to the 2012 Global Forum on Competition [DAF/COMP/GF/WD(2012)36].

Even where an information gateway exists, the transmission of confidential information is not unconditional. The agency is generally required to assess the request for transmission under a number of criteria. These criteria differ according to each jurisdiction but may include (i) the seriousness of the offence (1 respondent); (ii) the existence of adequate downstream protections (3 respondents); (iii) the availability of reciprocal treatment (1 respondent); (iii) the importance and need for the disclosure in the receiving jurisdiction (3 respondents); (iv) the existence of rule of law in the receiving jurisdiction (1 respondent); and (v) the existence of limitations on the use of the received information (1 respondent).

Many responses discussed special rules applying to co-operation and the exchange of information within regional networks, which enable the agencies associated with the regional network to exchange information among themselves.¹²⁸ One interesting factor, highlighted by sixteen (16) respondents (twelve [12] OECD and four [4] non-OECD), is that the exchange of all types of information may be facilitated if the agencies concerned belong to a regional network.¹²⁹ This applies also to the exchange of confidential information (12 respondents), although a number of limitations were identified: for example, (i) whether the recipient is bound by a duty of confidentiality; (ii) the information exchanged can only be used in evidence for the application of regional law or in parallel cases (*i.e.* not to open a separate independent proceeding); (iii) the information can be used as evidence against natural persons only if that would have been possible also under the legal framework of the transmitting agency; or (iv) whether procedural fairness rules are similar in the two jurisdictions.

¹²⁸ On regional co-operation networks, see also the discussion in Chapter 5.

¹²⁹ The fact that the interested agencies are part of a co-operation agreement also appears to be an important facilitating factor for the exchange. Although the responses addressing this point were few, it appears that in some cases the presence of a co-operation agreement not only facilitates the exchange of public information and non-public agency information, but also of confidential information. One OECD respondent and one non-OECD respondent made this point in their responses.

Box 11: The exchange of confidential information within the ECN

The European Competition Network (ECN) provides a unique framework for co-operation among the competition agencies of the member states of the European Union. The ECN offers mechanisms based on common substantive laws¹³⁰ and common procedural rules,¹³¹ providing similar procedural guarantees. Article 12 of Regulation 1/2003 specifies that the Commission and the competition agencies of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information. It should be noted that this power concerns proceedings against anti-competitive agreements under Article 101 and proceedings against abuses of dominance under Article 102 of the Treaty on the Functioning of the European Union.¹³²

The following safeguards apply to the exchange and use of confidential information:

- *“The Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities [...] shall not disclose information acquired or exchanged by them pursuant to the Council Regulation which is of the kind covered by the obligation of professional secrecy. However, the legitimate interest of undertakings in the protection of their business secrets may not prejudice the disclosure of information necessary to prove an infringement of Articles [101] and [102] of the Treaty”;*¹³³
- *“Information exchanged [within the network] shall only be used in evidence for the purpose of applying of Article [101] and [102] of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law”;*¹³⁴
- *“Information exchanged [...] can only be used in evidence to impose sanctions on natural persons where: (i) the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article [101] or Article [102] of the Treaty or, in the absence thereof, (ii) the information has been collected in a way which respects the same level of protection of the rights of defense of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions”.*¹³⁵

¹³⁰ Articles 101 and 102 of the Treaty on the Functioning of the European Union.

¹³¹ In particular, see Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Official Journal L 1, 04.01.2003, p.1-25) and Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Official Journal L 24/1, 29.01.2004, p. 1-22).

¹³² Different, stricter rules apply in merger proceedings.

¹³³ See Article 28 of Regulation 1/2003.

¹³⁴ See Article 12(-2) of Regulation 1/2003.

¹³⁵ See Article 12(-3) of Regulation 1/2003.

Box 12: The exchange of confidential information within the Nordic Alliance

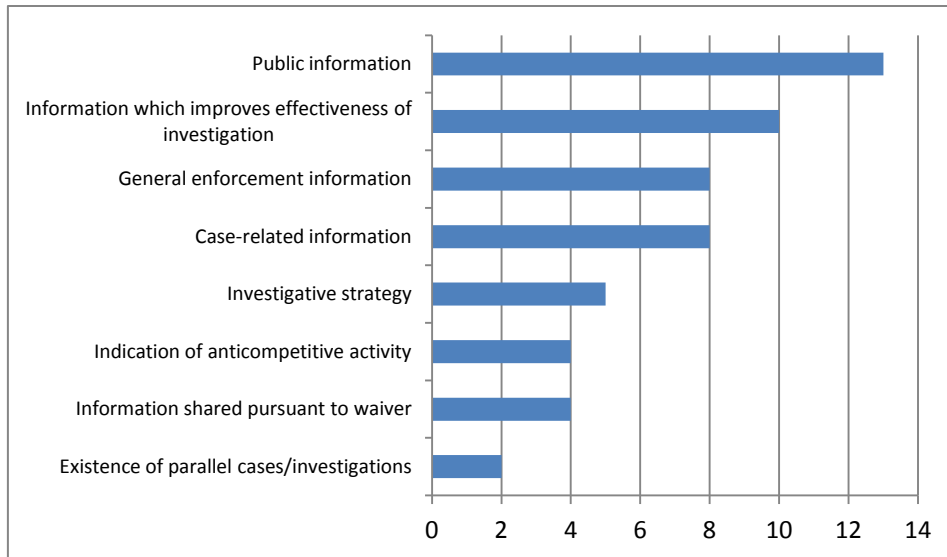
According to the international agreement entered into by Denmark, Iceland, Norway and Sweden on co-operation in competition cases, the respective competition agencies can exchange any confidential competition-related information with the other agencies concerned, if such information

- a. is subject to a duty of confidentiality in the agency that receives the information that is at least equal to that of the agency that provides the confidential information,
- b. may exclusively be used for the purposes stipulated in the international co-operation agreement, and
- c. may only be transmitted by the competition agency that receives the information if it has obtained in advance the express consent of the competition agency that supplied the information, and used only for the purpose covered by such consent.

7.3 Benefits from sharing different types of information

While respondents to the Survey emphasized the importance of being able to exchange confidential information between enforcers, many respondents underscored that there are great benefits accruing from exchanging other types of information, regardless of whether this information is in the public domain or not. Thirty-six percent (36%) of all respondents (eight [8] OECD, and twelve [12] non-OECD respondents) did not respond to the question which asked them to identify the information from which they derive the most benefit from sharing with other agencies (Survey Question 23), possibly indicating that they have insufficient experience with exchanging information to answer this question. The thirty-five (35) respondents to this question identified several types of information that they find beneficial to share; these are indicated in the Table below.

Table 31: Information the exchange of which is most beneficial, by number of respondents



Because the question was open-ended, it is not possible precisely to rank the information from the most to the least useful, as some respondents may have found each category useful. However, we can draw a number of conclusions from the responses:

- Case-related information*** is considered valuable when shared, as identified in the responses to this question by eight (8) respondents. This ranges from case-specific information generated by the agency on market analysis, theory of harm, or remedies, to the exchange of specific pieces of evidence. Some respondents (4) highlighted the benefits of sharing information under a waiver, indicating that the most useful information for an investigation is often information that may not be exchanged due to existing legal constraints and that is accessible only if the parties waive their confidentiality rights. Two (2) respondents also indicated that exchanging information on the existence of parallel cases/investigations is very useful; the ability to share and discuss strategies for gathering evidence (*e.g.* timing of dawn-raids and location of evidence) was also described as very important by five (5) respondents.

- *Other enforcement-related information*, but not necessarily case-related information, is also valued by agencies (eight [8] respondents), but slightly less so than case-specific information. This includes information that helps agencies to prioritise their enforcement actions, information on similar cases, or information on the existence of other investigations in the same industry.
- Four (4) agencies also specify that they value *information that can help them open an investigation*,¹³⁶ while ten (10) agencies specify information which can *maximise the effectiveness of the investigation itself* as valuable.¹³⁷ While this was not explicitly mentioned in the responses, it seems that agencies find beneficial exchanges of information that allow them to minimize the impact of some of the limitations on the exchange of confidential information.
- Thirteen (13) respondents specifically mention benefits of sharing *public information*. They stressed that access to public information could be very useful to an investigation because, as one respondent put it, the agency “*might have no knowledge of that particular public foreign information*”.

7.4 Conditions attached to the transmission of confidential information and to the use of confidential information received

7.4.1 Conditions for transmission

Jurisdictions that allow their enforcement agency(ies) to exchange confidential information do so subject to conditions.

The single most common condition, identified by more than 70% of the respondents who are allowed to exchange confidential information with another agency, is the condition that the parties involved in the investigation have agreed to the exchange through a *confidentiality waiver*.

¹³⁶ One agency, for example, responded that it “benefit(s) most from ‘leads’ on possible cases” and another referred to “information that informs prioritisation decisions as to whether to take forward investigations”.

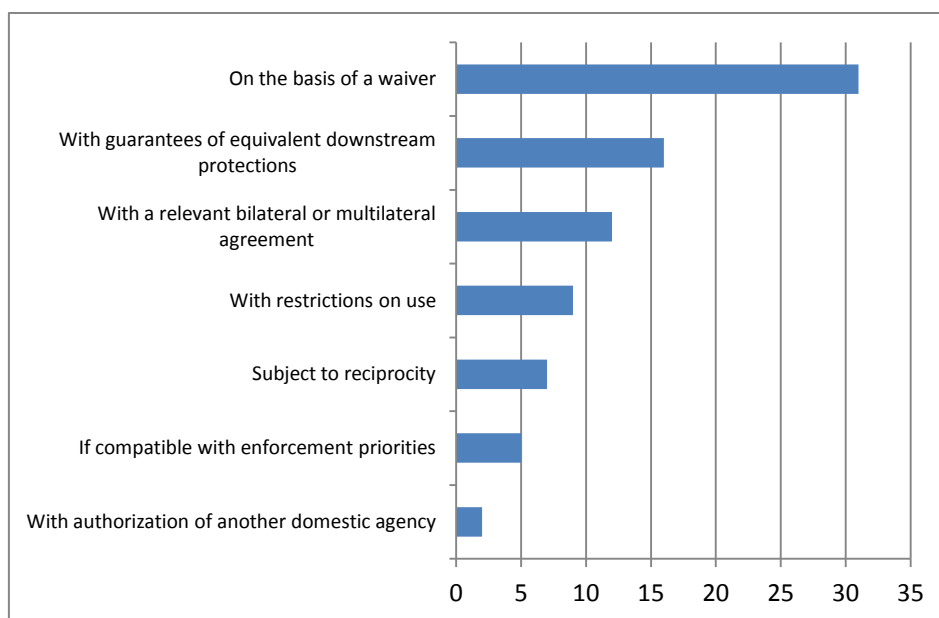
¹³⁷ One respondent, for example, referred to “*potential sources of evidence that would either (i) not otherwise have been obtained or (ii) which would have been more difficult to obtain*”.

Other commonly identified conditions for the transmission of confidential information, where permitted, are listed in the Table below and include:

- Guarantees of *equivalent protection*. The guarantee can be either included in statutory provisions of the receiving agency, or offered by the receiving agency in a written undertaking to adopt the confidentiality obligations of the providing agency. The availability of a strict regime of sanctions for violation of the confidentiality duty in the receiving jurisdiction is also viewed as an important condition to the transmission.
- The *existence of a bilateral or multilateral co-operation agreement* between the two agencies. This condition relates to the existence of an explicit legal basis allowing the agencies concerned to exchange the information.
- Conditions related to *the use of the information transmitted made by the receiving agency*.¹³⁸ These conditions usually restrict the use of the information exchanged to the matter for which it was requested, for the purpose for which the information was collected by the transmitting agency, or for use in a non-criminal proceeding.
- The fact that the possibility of exchanging confidential information is subject to *reciprocity*.
- That the exchange of confidential information is *compatible with the agency's enforcement priorities*. Respondents mentioned this in the context of either (i) concerns that uncoordinated action by the other agency on the basis of shared information could undermine the agency's own investigation, or (ii) a general unwillingness to commit resources to co-operation requests unless the requested activity is compatible with the agency's own priorities.
- Lastly, some agencies condition the transmission of confidential information on *authorization by another domestic agency*. This refers to the use of formal instruments which must be approved through judicial process (*e.g.* a court) or by another agency (*e.g.* the diplomatic services).

¹³⁸

See next section.

Table 32: Conditions for transmission of confidential information, by number of respondents

7.4.2 *Conditions on the use of confidential information once transmitted*

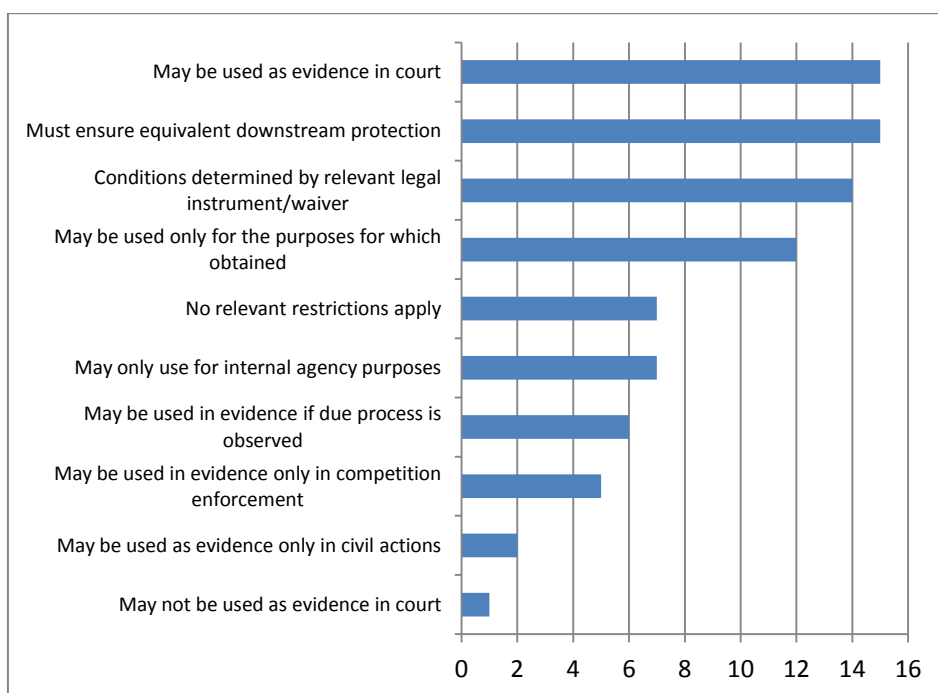
When agencies are allowed to transmit confidential information, either because there are relevant provisions in law or because the parties involved have agreed to the transmission, there can still be limitations on the receiving agency regarding the use of the information received. The more commonly identified limitations on the use of confidential information once exchanged are:

- Fifteen (15) respondents (27%) stated that when they received confidential information from another agency, they were required to ensure the same level of confidentiality protection as in the originating jurisdiction, and onward transfer without permission from the providing agency was prohibited;
- Fifteen (15) respondents (27%) stated that they were able to use confidential information obtained as evidence in court, with only one respondent saying that this was not possible in its jurisdiction and two respondents saying that the information could be used as evidence but only in civil actions. On the other hand, 7 respondents (13%) clarified

that they are entitled to use the confidential information received only for internal agency purposes.

- Fourteen (14) respondents (25%) said that conditions of use were determined on a case-by-case basis by the relevant legal instrument used for the exchange of information, or by the scope of the waiver;
- Twelve (12) respondents (22%) clarified that they can use the information received only for the specific purposes for which it was obtained (either the purposes specified in the request for information, or the purposes for which it was originally obtained by the transmitting agency);
- Six (6) respondents (11%) identified that the information could be used in court only if due process rules are observed;
- Five (5) respondents (9%) were restricted to using the information in competition enforcement cases.

Table 33: Commonly identified conditions on the use of confidential information



It is important to note that eleven (11) respondents (20%) did not respond to this particular question, while seven (7) respondents (13%) stated expressly that no such restriction applied in their jurisdiction. It is also relevant to note that notwithstanding any existing limitation on the use of the confidential information received, in some cases, national criminal courts/investigators can compel the agency to disclose the information received from a foreign enforcer - two (2) respondents referred to this particular possibility in their response. Another limiting factor, identified in other parts of the Survey, is the possibility that confidential information could be discoverable in other jurisdictions, a factor which may reduce the agencies' willingness to provide confidential information when requested. This refers to the possibility that the legislation of the receiving jurisdiction allows access to the files of the agency by third parties or the discoverability of the information in a court proceeding.¹³⁹

7.5 The use of confidentiality waivers

The Survey defined a “waiver” or “confidentiality waiver” as any permission granted by a party under investigation or a third party in a case/investigation that enables investigating agencies in different jurisdictions to discuss and/or exchange information, which is protected by confidentiality rules of the jurisdiction(s) involved, and which has been obtained from the party in question. The overall tenor of the Survey responses shows that agencies rely significantly on waivers to overcome the statutory limitations preventing them from exchanging confidential information: thirty-nine (39) agencies (71% of all respondents) responded that they are allowed to use waivers in their enforcement activity, and only four (4) agencies (all non-OECD) responded that they are not allowed to use waivers. Although not all respondents addressed this point, it appears that waivers may be less important in regional co-operation, where the legal framework allows for the exchange of confidential information, than in international co-operation.

Respondents were similarly divided on whether they actively seek waivers in order to co-operate with other agencies: twenty-two (22) respondents (20 of which were OECD agencies) said that they actively seek waivers when they believe that an exchange of information with a foreign agency may be beneficial to their enforcement action; eight (8) respondents took the opposite view and do not actively seek waivers, but rely on the parties to voluntarily grant them. One respondent was very clear about the voluntary nature of waivers when it noted

¹³⁹ Such as the Freedom of Information Act (FOIA) in the United States or the Public Access to Information and Secrecy Act in Sweden.

that “*the decision whether to grant a waiver is [at] the sole discretion of the parties and competition agencies should not pressure parties to provide a waiver.*”

Thirteen (13) respondents reported having a standard form for waivers, but many of them allow for negotiation and modifications to the standard form to meet specific needs of the parties. Seventeen respondents (17), however, do not use a standard waiver form and negotiate the terms and condition for the parties’ consent to the transmission of information and/or documents to another enforcement agency on a case-by-case basis. Three (3) respondents referred to the ICN standard waiver form for merger cases,¹⁴⁰ either as a model for developing their own domestic standard waiver form or, where such standard form does not exist, as an example that parties are encouraged to refer to when providing a waiver¹⁴¹

The Survey responses also indicate that agencies’ experience with waivers demonstrates that parties to an investigation are more inclined to grant waivers in merger cases than in cartel investigations (outside the context of leniency) or unilateral conduct cases. As one respondent put it: “*[i]ncentives may differ between mergers (where it is generally in the party’s interests to be co-operative to try to get the deal through) and competition cases, which may lead to infringement findings and the imposition of sanctions in the receiving and transmitting jurisdictions, and where parties may be less likely to give waivers. The position is different of course for immunity applicants in cartel cases.*” For this reason, five (5) respondents have included the grant of a waiver as a condition for immunity/leniency in cartel investigations; in one of these cases, waivers are sought as a requirement for obtaining a marker.

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Available at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf>.

141

The ICN Model Waiver received the second highest cumulative score for ‘Usefulness’ among ICN work products in Table 10 of the Survey (based on the sum of an ordinal score for usefulness), and tied with ICN Recommended Practices for Merger Review for the highest total number of respondents who ranked it as ‘Highly useful’ (21 respondents).

Box 13: Full vs. procedural waivers in Canada

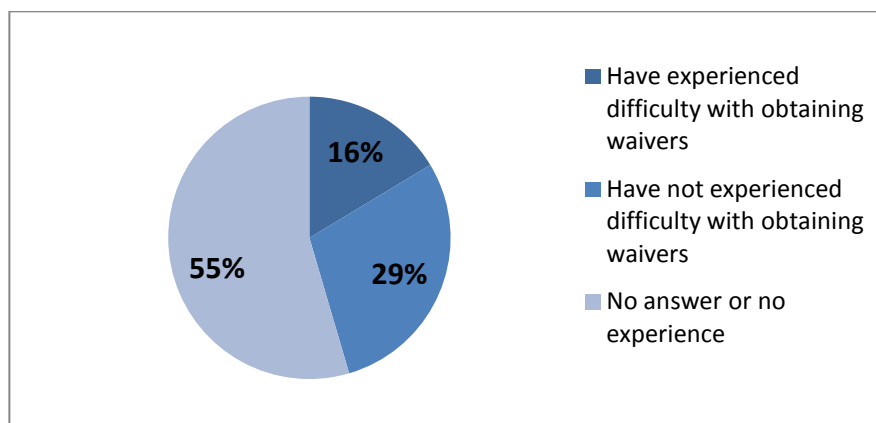
With respect to immunity or leniency applicants, in Canada there are two different types of waivers: procedural and full. Procedural waivers relate to the timing of key investigative events and the nature of co-operation, while full waivers allow for the discussion of the content of information, evidence, records, or statements provided by co-operating parties.

Absent compelling reasons, the Bureau will expect a waiver authorizing the communication of information with those jurisdictions to which an applicant has made similar requests for immunity or leniency. An applicant's willingness to provide a waiver will be evaluated favourably by the Bureau when considering the value of co-operation provided by an applicant.

In the vast majority of cases, such waivers are provided. However, in a recent international cartel investigation, as a result of a late marker request, waivers provided by immunity and leniency applicants were delayed, which prevented the Bureau from executing search warrants and document production orders in coordination with other competition agencies.

Any delay in the provision of waivers is not an acceptable practice, and the Bureau will require immunity and leniency applicants to provide a waiver to the Bureau as soon as they start providing evidence (such as proffers, witnesses or documents) to another jurisdiction.

The Table below summarises the experience of most respondents with obtaining waivers from parties, which is generally positive. With regard to the question concerning the difficulties experienced while obtaining waivers, over half of Survey respondents (30) either declined to answer the question or had insufficient experience with waivers to be in a position to answer the question. Of the twenty-five (25) respondents to this question, nine (9) had experienced some difficulties (in two cases, though, this did not happen "often") and sixteen (16) had not experienced any particular difficulty.

Table 34: Experiences with obtaining waivers

Among the difficulties that agencies have experienced in obtaining waivers, we note the following:

- Two (2) respondents referred to problems of coordination when the parties do not provide waivers to all the agencies involved in the investigation of the case. One respondent noted that *“[o]ften the problem is that firms do not necessarily provide waivers to every jurisdiction involved, so even when the [agency] obtains a waiver it is not possible to exchange information with another authority that did not obtain a waiver.”*
- A related issue identified by three (3) OECD respondents concerns the different terms and conditions attached to waivers which in practice may restrict the exchange of information between the agencies. Difficulties can arise when what can be exchanged varies under different waivers. The risk of this happening is higher where jurisdictions do not use a standard waiver form, but instead negotiate the content of waivers on a case-by-case basis.
- Four (4) respondents experienced difficulties with delays in getting the necessary waivers in place, especially when the other competition agency had completed its assessment of the case. This may not necessarily be the result of strategic behaviour on the part of the firms, but may be the result of lengthy negotiations on the terms and conditions of the waiver itself. According to one respondent, *“[s]ome parties provide the [agency] with waivers that are based on another*

jurisdiction's standard confidentiality waiver. This kind of waiver often does not accord with the terms required by the [agency]. Seeking to arrange acceptable waivers can result in substantial delays and tie up a disproportionate amount of resources.”

- According to some respondents (6), difficulties in obtaining waivers may stem from the parties' reluctance to grant a waiver.¹⁴² A number of reasons for this reluctance were mentioned:
 - (i) parties may be concerned with the scope of the waiver, which may be viewed as allowing an unnecessary or disproportionate transmission of documents or information;
 - (ii) parties may be concerned about sharing certain confidential information with newer agencies because of parties' unfamiliarity and inexperience with these agencies' confidentiality protections;
 - (iii) in some cases, parties are concerned that the sharing of information between agencies may lead to more severe sanctions in one or both jurisdictions; and
 - (iv) in other cases, parties have expressed concerns that the information provided to one of the agencies during an investigation could be used in private litigation brought by a third party.

7.6 Final considerations

The ability of agencies to coordinate their enforcement actions depends upon their ability to exchange information (confidential and non-confidential) about the cases they are investigating. The Survey indicated that the exchange of information remains a core issue in international co-operation.

National and international legal frameworks do not allow agencies to exchange confidential information. This may impact on the effectiveness of international co-operation. Regional co-operation platforms, such as the ECN and the Nordic Alliance, which provide for effective mechanisms for exchanging confidential information, are the one significant exception. National

¹⁴² According to one respondent: “Parties may [...] provide waivers to ensure a more timely review process or to reduce the duplication of effort and resources in providing the same or similar information to multiple agencies.”

legislation or international agreements (outside regional co-operation platforms) allow for the exchange of confidential information only in rare cases, and even when this is possible, it is rare that these provisions are actually used by agencies. The procedures and criteria allowing for the exchange can be burdensome and time-consuming, and often do not respond to the need of agencies for timely access to the information.

The exchange of non-confidential information is generally allowed and occurs more frequently. Agencies engage in discussions on how to analyse a particular case (*e.g.* product and geographic market definition) or assess the competitive effects of the case, and potential remedies which could be accepted. While the exchange of confidential information relies on formal mechanisms for co-operation, the exchange of non-confidential information and internal agency information often occurs on an informal basis. However, practical limitations (such as different timing of the investigations, language differences or lack of resources) can limit the effectiveness of these types of exchanges.

As will be discussed in Chapter 9, respondents identified information exchange as an important area where improvements should be sought. Many suggested that agencies should agree on a clear and common legal framework for the exchange of confidential information, *i.e.* the type of case-specific information that agencies find most useful. This framework could identify the type of information that can be exchanged, the conditions for its transmission to another enforcement agency, and the use to which the receiving agency may put the information received. Because the limitations to the exchange of confidential information are often structural, solutions suggested are also structural and include the adoption of national legislation or of international instruments that would allow exchange of confidential information under clear conditions and with adequate safeguards.

Confidentiality waivers are often relied upon by the large majority of agencies to address, when possible, limitations to the exchange of confidential information. The use of waivers, however, has its limits: agencies cannot mandate waivers, which remain at the discretion of the parties; and parties' incentives to grant waivers differ significantly between merger and cartel cases; in cartel cases their availability largely depends on whether the party has applied for amnesty/leniency. Respondents identified areas of possible improvement to the waiver system, referring to the need to further standardise their scope, and the terms and conditions under which the information may be exchanged.

8. THE ROLE OF THE OECD IN FOSTERING INTERNATIONAL CO-OPERATION

Section 9 of the Survey covered the role of the OECD in promoting international co-operation.

All of the key recommendations issued by the OECD Council in the area of antitrust enforcement also address international co-operation. Of these recommendations, however, only the 1995 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade (the “1995 Recommendation on International Co-operation”) deals exclusively with international co-operation, while the other instruments handle international co-operation only indirectly. In addition, in 2005 the OECD Competition Committee issued a series of Best Practices for the formal exchange of information between competition agencies in hard core cartel investigations (the “2005 Best Practices”).

This Chapter focuses on the 1995 Recommendation on International Co-operation and on the 2005 Best Practices and introduces the main facets of the 1998 Recommendation on Hard Core Cartels and the 2005 Recommendation on Merger Review related to international co-operation. In contrast to other recommendations,¹⁴³ the Committee has never reported to the Council on the application of the 1995 Recommendation on International Co-operation and its previous iterations, and it has never reviewed the experiences of member countries with the 2005 Best Practices.

¹⁴³ See for example the implementation reports on the 1998 Recommendation on Hard Core Cartels (three, from 2000, 2003, and 2005) or on the 2001 Recommendation on Structural Separation, or the recent reports on the implementation of the 2005 Recommendation on Merger Review and the 2009 Recommendation on Competition Assessment.

Box 14: The 1998 Recommendation on Hard Core Cartels

The **1998 Recommendation on Hard Core Cartels**¹⁴⁴ marked the first time the OECD defined and condemned a particular kind of anti-competitive conduct. The Recommendation was expected to contribute to the efficient operation of international markets by promoting, *inter alia*, co-operation among member and non-member countries. The first part of the 1998 Cartel Recommendation provides that member countries should ensure that their competition laws effectively halt and deter hard core cartels. The second part of the Recommendation stresses member countries' common interest in preventing hard core cartels, and sets forth principles concerning the "when" and the "how" of co-operating with respect to hard core cartel investigations.

The Recommendation invites member countries to improve co-operation through positive comity principles, under which a country could request that another country take remedial action addressing anti-competitive conduct that adversely affects both countries. It recognizes that member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with other competition agencies. It also recognizes the benefit of investigatory assistance from one agency in the gathering of documents and information on behalf of another agency. The Recommendation further encourages the review of obstacles to effective co-operation with respect to hard core cartels and consideration of actions, including national legislation and/or bilateral or multilateral agreements or other instruments, to eliminate or reduce them.

¹⁴⁴ See Recommendation concerning Effective Action against Hard Core Cartels [C(98)35/FINAL].

Box 15: The 2005 Merger Review Recommendation

The **2005 Recommendation on Merger Review**¹⁴⁵ emerged from a desire to consolidate and reflect the OECD's wide-ranging work in the area of merger review, and also to take into account important work by other international bodies in this area, in particular the International Competition Network (ICN).¹⁴⁶ The goal was to create a single document that would set forth internationally recognised best practices for the merger review process, including co-operation among competition agencies in merger review. Part B of the Recommendation deals specifically with coordination and co-operation on cross-border merger cases. In particular, it invites member countries to co-operate and to coordinate their reviews of transnational mergers in order to avoid inconsistencies. Member countries are encouraged to consider actions, including national legislation as well as bilateral and multilateral agreements or other instruments, by which they can eliminate or reduce impediments to co-operation and coordination.

In order to better understand how the OECD has contributed to the development of international enforcement co-operation and what role the OECD can adopt in supporting competition agencies in their present efforts to improve the quality and intensity of international co-operation, this Chapter focuses on three aspects:

- The extent to which the 1995 Recommendation on International Co-operation has been useful to agencies in their co-operation efforts (Question 39);
- The ways in which the 1995 Recommendation on International Co-operation could be improved in light of these experiences (Question 40); and

¹⁴⁵ See Recommendation on Merger Review, C(2005)3.

¹⁴⁶ The Recommendation addressed all steps of the merger review process, including the definition of thresholds to establish jurisdiction over international mergers, notification requirements, transparency of the merger review process, procedural fairness, the protection of confidential business information, and coordination and co-operation among competition agencies. It also encouraged Member countries to ensure that competition agencies have sufficient powers to conduct efficient and effective merger review and to effectively co-operate and co-ordinate with other competition agencies in the review of transnational mergers. Recommendations were made on (a) notification and review procedures, (b) co-ordination and co-operation, (c) resources and powers of competition agencies, and (d) regular periodic review of laws and practices.

- The actual use and implementation by agencies of the 2005 OECD Best Practices for the formal exchange of information between competition agencies in hard core cartel investigations (Question 41).

8.1 Experiences with the OECD 1995 Recommendation on International Co-operation

Over the last 45 years, the OECD has adopted a series of Council Recommendations, subsequently elaborated and progressively refined by the Competition Committee, that deal directly with international co-operation between competition agencies in enforcement cases. The current version of the Recommendation on international co-operation was adopted in 1995¹⁴⁷ and builds on four previous Recommendations.

Box 16: The history of the OECD Recommendations on International Co-operation

The first Recommendation on International Co-operation in enforcement cases dates back to 1967.¹⁴⁸ This first instrument, recognising that the powers of competition agencies to co-operate are limited, encouraged member countries to (a) notify other countries of an investigation involving their important interests, (b) co-ordinate their respective actions when more than one jurisdiction is looking at the same case, and (c) supply each other with any information on anti-competitive practices. The Recommendation acknowledged that competition agencies should operate within the limits of existing national laws and that the Recommendation should not be construed as affecting national sovereignty and extra-territorial application of national competition laws.

In 1973, the Council adopted a new Recommendation,¹⁴⁹ which, in keeping with the earlier version, recognised that closer co-operation between member countries was needed. In order to facilitate the resolution of cross-border cases, it recommended that member countries implement on a voluntary basis a consultation procedure in cases in which anti-competitive business actions in foreign jurisdictions affected the interests of a member country. Should the consultation fail to provide a satisfactory solution, the issue could be submitted to the Committee for conciliation.

¹⁴⁷ See Annex IV to this report.

¹⁴⁸ See Council Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(67)53(Final)].

¹⁴⁹ See Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade [C(73)99(Final)].

In 1979 a new version of the Recommendation was adopted,¹⁵⁰ which superseded the 1967 and 1973 recommendations. The 1979 recommendation combined the previous two, and was divided into two sections. The first dealt with notification, exchange of information and coordination of actions when a member country decided to take enforcement measures likely to affect the interests of another member country(ies). The second part of the Recommendation dealt with consultation and conciliation procedures when a member country considered that anti-competitive actions by firms located in another member country(ies) were likely to affect its important interests.

The 1979 recommendation was replaced in 1986 by a revised version,¹⁵¹ which in addition to the provisions of the 1979 text, included in an Annex a set of ‘Guiding Principles’ intended to clarify the procedures laid down in the Recommendation on notification, exchange of information, consultation and coordination. The Guiding Principles were then refined by the Committee in 1995,¹⁵² when the Council adopted the latest recommendation on international co-operation. The revision included substantive amendments to the Appendix, but not to the recommendation itself.¹⁵³ The 1995 Recommendation on International Co-operation remains in force today.

¹⁵⁰ See Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(79)154(Final)].

¹⁵¹ See Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [C(86)44(Final)].

¹⁵² See Recommendation Concerning Co-operation between Member Countries on Anti-competitive Practices Affecting International Trade [C(95)130(Final)].

¹⁵³ For example, the text lists additional circumstances in which notification would be appropriate, including the possibility of remedies that would require or prohibit conduct in the territory of another member country. It also includes a new section on *coordination of concurrent investigations and proceedings*, which specifies that such coordination should be undertaken on a case-by-case basis and should include notification of applicable time periods and schedules, sharing of information consistent with national laws on confidentiality, and coordination in the negotiation and implementation of remedies. It also introduces a new description of various *means by which information may be provided by one competition agency to another, including obtaining information by compulsory means*. As in the case of concurrent investigations, it was specified that such co-operation should be undertaken on a case-by-case basis, with assistance subject to the applicable national laws of the assisting agency.

The 1995 Recommendation on International Co-operation includes five main parts:

- A section on **notification** of investigations or proceedings that may affect important interests of another member country (Recommendation I.A.1); the notification procedure should enable the acting jurisdiction, while retaining full freedom of ultimate decision, to take account of the views of the other member country and of any remedial action that the other member country may find feasible to take under its own laws.
- A section on **coordination of actions** calling on member countries to coordinate their actions, insofar as appropriate and practicable, where two or more member countries proceed against an anticompetitive practice in international trade (Recommendation I.A.2).
- A section on **assistance and exchange of information** between investigating agencies¹⁵⁴ (Recommendation I.A.3). Member countries should assist each other and co-operate in developing or applying mutually satisfactory and beneficial enforcement measures, and to do so, they should supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose. The exchange of information under the Recommendation is subject to the laws of participating member countries governing the confidentiality of information.
- A section on a **consultation** procedure. The Recommendation distinguishes between consultation in situations where a member country wishes another country to engage in an enforcement action to protect important interests in the requesting jurisdiction (a *positive comity request*) (Recommendation I.B.4); and consultation in situations where a member country wishes to request another member country to assist in its own enforcement action (a *request for*

¹⁵⁴

Assistance might include any of the following steps, consistent with the national laws of the countries involved: a) assisting in obtaining information on a voluntary basis from within the assisting member's country; b) providing factual and analytical material from its files, subject to national laws governing confidentiality of information; c) employing on behalf of the requesting member country its authority to compel the production of information in the form of testimony or documents, where the national law of the requested member country provides for such authority; and d) providing information in the public domain relating to the relevant conduct or practice.

investigatory assistance) (Recommendation I.B.5). Both requests for assistance are governed by the same standard: the requested country is to give “*full and sympathetic consideration*” to the request.

- A section on a *conciliation procedure*, in case the consultation procedure has no satisfactory conclusion (Recommendation I.B.8). In that case, the member countries concerned can consider recourse to the good offices of the Competition Committee with a view to conciliation.

An Appendix to the Recommendation includes a set of Guiding Principles for the implementation of these co-operation mechanisms. The purpose of these principles is to clarify the procedures laid down in the Recommendation and thereby to strengthen co-operation and to minimise conflicts in the enforcement of competition laws.

Forty-four (44) agencies replied to the questions on the use of and experiences with the 1995 Recommendation on International Co-operation,¹⁵⁵ of these, sixteen (16) respondents were agencies from non-OECD member countries. A total of seventeen (17) respondents (of which three [3] are from non-OECD countries) reported having had experiences with the Recommendation. The Table below shows how many respondents have used or have experience with each of the different co-operation mechanisms provided for by the Recommendation.

Table 35: Experience with the 1995 Recommendation on International Co-operation

Instruments under the Recommendation	All respondents with experience	OECD respondents with experience	Non-OECD respondents with experience
Notification of existing investigations (Rec. I.A.1)	14	11	3
Co-ordination of actions (Rec. I.A.2)	9	7	2
Exchange of information (Rec. I.A.3)	11	9	2
Consultation procedure (Rec. I.B.4 and 5)	4	4	--
Conciliation procedure (Rec. I.B.8)	1	1	--

¹⁵⁵ Reference is to Section 9, Questions 39 and 40.

The results indicate that two mechanisms, *i.e.* notifications, the exchange of information, and co-ordination of actions have been used relatively frequently, while the consultation and conciliation procedures were rarely used in practice. The responses also indicate that a number of mechanisms in the Recommendation have been used more frequently because they have been integrated in national or international legislation. This is particularly the case for notifications and information exchanges, which are key features in a number of regional co-operation platforms (the ECN and the Nordic Alliance were expressly referenced by a number of respondents). Hence, it appears that reliance on the tools outlined in the Recommendation by incorporation in national laws and regional platforms enhances their use both with respect to the jurisdictions concerned and as concerns their co-operation with other countries.¹⁵⁶

According to some of the respondents, the mechanisms in the Recommendation are useful as they “*helped orient [agencies’] requests for co-operation*”; in other words, they provided a last resort framework for co-operation when no other co-operation instrument was available. As one (1) respondent put it, “*[w]hen we co-operate with foreign competition agencies in OECD member jurisdictions with which we have not concluded the anticompetitive co-operation agreements or EPAs/FTAs, we usually rely on [the] OECD 1995 Recommendation*”. According to other respondents, the Recommendation “*often serves as reference when we draft co-operation provisions in international agreements. In that sense, it represents a ‘common basis’ on which we can build*”; or “*served as a model for [agency’s] co-operation agreements and arrangements.*”

A number of respondents (14) identified particular areas in which the 1995 Recommendation on International Co-operation could be improved, including revisions to reflect the current status of international co-operation, taking into account existing networks and bilateral agreements (also in other areas of law enforcement), the use of waivers and the current practices and approaches used, for example, for the exchange of information, notification and consultations.

¹⁵⁶

For example, one (1) European respondent said “*[f]rom May 2004 our international co-operation has been focused [in] the regional Network ECN due to the compulsory enforcement of EU Regulations n°1/2003 and n°139/2004. However, we also had a useful experience on informal co-operation on a merger case going in parallel with a [competition agency] outside the ECN. The co-operation started under a 1995 OECD Recommendation notification of the case that we received from the [competition agency] outside the EU.*”

There were three (3) specific suggestions for amendments to the Recommendation:

- **Revision of the notification procedure** in light of the changes that have taken place since 1995, e.g. in terms of information technology, in order to reflect current practices. One (1) respondent for example said that “*the strong emphasis on (formal) notifications seem a bit outdated and could be replaced by less formal methods of information sharing. It would be useful if the Recommendation would underline in more clear terms the need for transparency as to the agencies own enforcement activities, for instance by means of the creation and maintenance of up to date web-sites (in English).*” Three (3) respondents noted that the emphasis on formal notifications could be replaced with more informal contact; one (1) noted that notifications “*should be possible informally via e-mail*”.¹⁵⁷
- **Revision and strengthening of the provisions in the Recommendation on the exchange of information and inclusion of minimum protections for confidential information.** While many respondents found the recommendations on information sharing useful, they also pointed out that they “*might be improved [by] taking into account existing networks and focusing on instruments for sharing information.*” One (1) other respondent pointed out that “[t]he Recommendation could be amended to recommend that competition authorities adopt a provision that would allow the sharing of confidential information in certain circumstances with appropriate safeguards. Since information communicated in confidence between enforcement authorities must be protected to the fullest extent possible, there may be merit in expanding the confidentiality provision [...] to more specifically outline recommended minimum standards that should be considered by Members.”
- **Elimination of the conciliation procedure**, which has had little or no use over time. One (1) respondent noted that “[p]ractice has shown that there are other ways to settle potential disputes between agencies.”

¹⁵⁷

One (1) respondent also suggested expanding the scope of the notification procedure to a “*competition authority’s intervention or participation in regulatory or judicial proceedings that are not initiated by the competition authority and that address issues that may affect the important interests of another jurisdiction.*” (emphasis added)

Other suggested ways to improve the effectiveness of the Recommendation were presented in the responses. Three (3) respondents believed that the OECD should encourage greater compliance with the Recommendation. While these responses did not have specific suggestions on how to improve the Recommendation itself, they indicated that members should be encouraged to make more use of it in a variety of ways. One (1) respondent, for example, suggested that *“more practical rules that could formalize [...] co-operation without hindering it need to be taken into consideration. The step forward would also be to establish speedy mechanisms of consultations in which [it] would be easier to find focal points and connect [...]”*

Other respondents noted that the effectiveness of the Recommendation could be improved by more regular monitoring of experiences with the Recommendation. One (1) agency said *“[f]requent reports on its implementation and application would improve international co-operation by following best practices actually implemented by agencies.”* Another agency suggested that the OECD should do *“a thorough evaluation, consolidated into a report, on the implementation of the Recommendation. That way any issues which might have arisen with this document and [...] needed improvements would be clearly visible.”* Another agency noted that *“it would be useful to update the 1995 Recommendation to provide examples or practices on particular approaches used by the agencies to exchange information, notify and consult their counterparts.”*

Finally, one (1) respondent noted that the Recommendation contemplates coordination among members on both a bilateral and multi-lateral basis and suggested that *“[d]ue to the multilateral nature of the 1995 Recommendation, the related provisions could be enhanced to further strengthen the promotion of multilateral co-operation and coordination on a case-by-case basis and where appropriate.”*

8.2 Experiences with the 2005 OECD Best Practices on the exchange of information in cartel cases

In 2004, the Competition Committee began developing a set of Best Practices for the formal exchange of information in cartel investigations. The final version of these Best Practices was adopted by the Committee in October 2005.¹⁵⁸ The 2005 Best Practices identify safeguards that member countries should consider applying when they authorise competition agencies to exchange confidential information in cartel investigations. By identifying appropriate safeguards for information exchanges, the 2005 Best Practices assist member

¹⁵⁸

See Annex III to this report.

countries in removing obstacles to effective co-operation by facilitating the exchange of confidential information in cartel investigations.

The 2005 Best Practices are based on the following principles:

- International treaties or domestic laws authorising a competition agency to exchange confidential information in certain circumstances should provide for safeguards to protect the confidentiality of exchanged information. On the other hand, such safeguards should not apply where competition agencies exchange information that is not subject to confidentiality restrictions under domestic law.
- Member countries should generally support information exchanges in cartel investigations. This practice should, however, always be at the discretion of the requested jurisdiction to provide information in a specific case, or to provide it only subject to conditions, and there should be no obligation to act upon such a request. A country may decline a request for information, for example, because honouring the request would violate domestic law or would be contrary to public policy in the requested jurisdiction.
- When initiating an exchange of information, jurisdictions should act with the necessary flexibility in light of the circumstances of each case. They should consider engaging in initial consultations, for example, to assess the requirements of the jurisdiction receiving the request for the maintenance of the confidentiality of information in the request, as well as the ability of the requesting jurisdiction to maintain the confidentiality of any exchanged information.
- Appropriate safeguards should apply in the requesting jurisdiction when it is using the exchanged information. In this context, the Best Practices address in particular the use of exchanged information for other public law enforcement purposes, disclosure to third parties, and efforts to avoid unauthorised disclosure.
- Information exchanges should provide safeguards for the rights of parties under the laws of member countries. The Best Practices specifically mention the legal professional privilege and the privilege against self-incrimination. In this context, member countries may have to take into account differences in the nature of sanctions for violations of competition laws concerning hard core cartels in different jurisdictions.

In response to Question 41 of the Survey, which asked respondents to discuss experiences with the implementation of the 2005 Best Practices, the majority of respondents (28) reported that they had no experience with the Best Practices or did not answer this particular question (15 respondents). Twelve (12) respondents, however, did report experiences with the Best Practices. Responses indicated that most experience with the 2005 Best Practices related to informal exchanges of information, and that the Best Practices were used as guidance on the terms for the exchange. The Best Practices have also been used as guidance to inform more formal exchanges of information when the exchange occurred in a more structured context, such as within a regional co-operation platform. The Best Practices have also been used as a reference for the development of national legislation, or provisions in regional or bilateral agreements, on the exchange of information between agencies.

In particular, seven (7) respondents reported that the Best Practices had informed the development of their domestic legislation and/or bilateral/multilateral co-operation agreements. Three (3) respondents reported referencing the Best Practices in exchanging information in enforcement activities. One (1) respondent used the Best Practices as general guidance in exchanging information, although it relied on other formal arrangements. Three (3) respondents referred to the Best Practices in the context of informal co-operation and one (1) respondent had no experience using the Best Practices in case work, but asserted that they are influential as general guidance for co-operation. One (1) respondent pointed out that the process of development of the final document of the Best Practices contributed to a better understanding of the potential and limitations of information exchange, and thought that it had led to more open and positive communication in enforcement work.

8.3 Final considerations

The responses to the Survey confirm the important role played over the years by the OECD in shaping the current framework for international co-operation. It also confirmed that the role of OECD recommendations on international co-operation has been significantly more effective than that of the 2005 Best Practices.

Many respondents reported experiences with the 1995 Recommendation on International Co-operation, in particular with three of the co-operation mechanisms provided for by the recommendation: notifications, exchange of information, and co-ordination of actions. By contrast, fewer respondents reported actual experiences with the 2005 Best Practices. Many, however, recognised the important role of the 2005 Best Practices as guidance for

legislative reforms at the national and international levels, and as a reference document for informal exchanges of information.

The Survey also confirmed that the OECD instruments could be amended or revised to reflect the current status and needs of international co-operation. In particular, it was suggested that the notification procedure in the 1995 Recommendation on International Co-operation should be modernised in light of technology advances and that it should be revised to strengthen its provisions on the protection and exchange of confidential information and eliminate the conciliation procedure, which did not have much use over the years.

9. AREAS OF POTENTIAL IMPROVEMENT FOR INTERNATIONAL CO-OPERATION AND FUTURE WORK FOR THE OECD

This Chapter draws together responses from different parts of the Survey in which agencies were asked to take a forward-looking approach, and suggest possible ways in which incentives to co-operate could be improved. Respondents were also asked to provide suggestions for mechanisms which could be put into place to enhance international enforcement co-operation – and in particular the exchange of confidential information – based on their experiences, and to give their opinions as to what role the OECD could play in rethinking the current framework for international co-operation, with a view to addressing the limitations which currently constrain effective co-operation between enforcers.

In particular this Chapter reports on responses to the following Survey questions:

- whether the current framework for international co-operation provides sufficient incentives for co-operation and how such incentives can be created or strengthened (Question 34);
- how agencies see the future of international co-operation and in particular how would they like international co-operation to look in 5, or 10, or 15 years time (Question 6)
- how the current framework for international enforcement co-operation between competition agencies can be improved (Question 35); and
- how to improve the ways in which agencies can exchange confidential information with other enforcers (Question 36); and
- what work should be carried out by the OECD in the next 12 – 24 months to facilitate co-operation between enforcement agencies (Question 42 and Table 10).

9.1 Incentives to engage in international co-operation

Respondents were asked whether the current framework for international co-operation, with its existing limitations and constraints,¹ provides sufficient incentives to agencies to co-operate effectively with enforcers from other jurisdictions.² Respondents were almost evenly divided:

- Twenty (20) respondents (eleven [11] OECD respondents and nine [9] non-OECD respondents) thought that incentives for co-operation are currently insufficient;
- Eighteen (18) respondents (twelve [12] OECD respondents and six [6] non-OECD respondents) thought that in the current system the incentives for co-operation are sufficient; and
- Seventeen (17) respondents (nine [9] OECD respondents and eight [8] non-OECD respondents) did not respond at all to this question, or responded that they did not have enough experience to take a position;

The twenty (20) respondents who felt that the incentives for co-operation in the current framework are insufficient identified two general ways to address perceived insufficiencies:

- ***Improvement of the legal and institutional setting for co-operation*** (16 respondents, 8 of OECD countries). Many respondents emphasised that incentives and willingness to co-operate are strictly related to the existing legal and institutional structures for co-operation. Seven (7) respondents (3 of OECD countries) pointed out that incentives can be increased if a clear legal structure and procedures could be implemented to foster co-operation. An OECD agency suggested that “[o]ne of the main challenges for international co-operation is different legal frameworks and national procedural rules [...]. To achieve more convergence in this regard is important for effective co-operation.” Another OECD respondent suggested that “[i]n cartel investigations [...] incentives could be strengthened by having more transparent grounds for co-operation. For example, issuing guidelines stating which information can be shared by competition authorities when a waiver is absent and what information

¹ See discussion in Chapter 6.

² See Question 34 of the Survey.

can be shared when waivers are available. With the elaboration of [these] simple guidelines, both enforcers and businesses will have a clearer picture regarding information exchanges.” One non-OECD agency noted that “the applicable framework for international co-operation lacks [...] procedural ways to take effect”. Another non-OECD agency noted that “establishing clear and straight procedures and possibilities of co-operation [...] is a first step.”

- **Improvement in the level of awareness of the benefits derived from effective international co-operation** (5 respondents, 3 of OECD countries). A number of respondents suggested that agencies would be more receptive to international co-operation if the benefits of co-operation were better understood. As one respondent put it: “[i]ncreased transparency of agency practices and greater awareness by agencies, parties, and third parties of the benefits of enforcement co-operation can strengthen everyone’s willingness to engage in and facilitate effective international co-operation.” Another OECD respondent agreed, noting that “incentives could be strengthened [...] if the benefits of co-operation would be clearer to all stakeholders.” Another respondent pointed to specific benefits of co-operation which should be emphasised; it noted that “[o]ne should advocate, particularly, [...] that [e]nhancing international co-operation will increase both deterrence and detection.” Similarly, other respondents underlined the benefits in terms of lower enforcement costs which might be achieved through a better co-operation system for both agencies and parties. In particular, one respondent said that emphasis should be put on the fact that improved co-operation “[c]an produce important transactional efficiencies and reduce enforcement cost [...]”.

Concerning incentives to co-operate, one agency indicated that it would be interested “to see whether this Survey identifies differing incentives between competition agencies to co-operate. For example, are competition agencies of mid-sized or smaller economies who are impacted by international anti-competitive conduct but are less likely to have relevant evidence within their jurisdiction more likely to see a need for enhanced co-operation than larger economies or regulators who are members of strong regional networks?” The Survey does not address this question specifically, but there are broad indications that smaller agencies (and in particular European agencies) favour co-operation within regional networks, which offer more clear and formal

structures and procedures for co-operation.³ On incentives for co-operation between more established agencies and newer agencies, only one non-OECD agency noted that it does “*not think the current framework of international co-operation provides sufficient incentives to competition agencies because in most cases, the developed agencies are not usually [keen?] to provide assistance to the developing agencies. Therefore, in principle international co-operation is more practical among the agencies that are already developed.*”

9.2 Views on the future of international co-operation

In Section 1 of the Survey, agencies were asked their vision for the future of international co-operation, and how they would like international co-operation to look in 5, or 10, or 15 years time.⁴ Three key themes can be synthesised from the responses:

- (i) Forty-six (46) respondents ***expect to see more international enforcement co-operation*** in the future, particularly at regional level.

One respondent emphasized that co-operation is necessary to involve an increasing number of agencies around the world: “*[o]ur vision for the future is to achieve even closer co-operation among competition agencies throughout the world. This includes a continued process towards consensus building and convergence toward legal frameworks, sound competition policy and practices, and a better understanding of each other’s laws and policies. The main goal is to improve competition law enforcement and competition advocacy across the global antitrust community, for the benefit of business and consumers.*” Along the same lines, another OECD respondent said that “*[i]t is our expectation that the need for international co-operation is likely to intensify over the years. More agencies will come up and existing agencies will mature. There will be an increased pressure from businesses on competition agencies to converge on many policy fields, to avoid duplications in proceedings and contradictory outcomes.*”

One respondent, conversely, emphasised the regional dimension of co-operation and noted that “*[i]n the future we would like to see international co-operation progressing as it is now, but perhaps with a greater emphasis on*

³ See Chapter 5 on Regional and multilateral co-operation. As for views on the need for enhanced co-operation mechanisms, see Chapter 4 on Experience in international co-operation: frequency, types and assessment.

⁴ See Question 6 of the Survey.

regional co-operation.” Similar considerations were made by another agency: *“in the future an increasing need to develop instruments for international co-operation as cross border cases increase. We think that the number of agencies involved in enforcement, the adoption of merger reviews regimes and leniency programs in many countries are elements that call for more co-operation. In this respect we think that the experience gained so far, either in regional agreements or in bilateral agreements, might be used to focus on the aspects that require changes in existing laws and regulations in order to achieve results (for example with respect to information sharing).”*

- (ii) Seventeen (17) respondents hoped to see ***better provisions for international co-operation and in particular for information sharing.***

For example, according to one respondent, *“[a] future vision of international co-operation might include: i) improved transparency between agencies about the work they are undertaking, or are due to undertake; ii) effective and efficient coordination of work that reduces delay, overlap and duplication; iii) early contacts between agencies (without compromising individual decision-making) that could lead to informal task forces to discuss how best to approach issues where common interests are identified [...]; iv) reduced risk of conflicting decisions, especially in addressing novel issues for competition law and/or innovation in rapidly changing markets (note the recent contrasting rulings in disputes between Apple and Samsung in the IP sphere); and v) the legal ability and resource system to address positive comity requests.”* The same respondent added that *“[i]nternational co-operation could also be improved by increased harmonisation of the ability of enforcers to share information (in particular confidential information). This might be through, for example, greater use of co-operation agreements (bilateral or multilateral). Harmonisation of leniency regimes would also be beneficial. Increased harmonisation (of processes/timetables etc) can also reduce the costs for business while ensuring respect for competition law. Greater informal staff-level contact is essential.”*

According to an OECD respondent, *“[i]n 10-15 years international co-operation should be common place in all parallel cases. By that time ideally a framework would have emerged which would facilitate the design on a case by case basis of ad-hoc solutions to channel the co-operation in an effective efficient and transparent manner, in spite of differences in investigation timetables and procedures. It is difficult to predict how such framework would look but the need for it seems clear.”* According to another OECD respondent, *“[t]he conclusion of second-generation co-operation agreements allowing the*

exchange of confidential information with [one's] principal trading partners is another preferred route."

On the specific issue of information sharing, one OECD agency said that they *"would also welcome further international co-operation in cartel investigations. In the case of parallel proceedings, a mutual exchange of information might be appropriate at several stages throughout the proceedings up to the conclusion of the case. In particular, there might be situations in which it would be desirable to intensify co-operation during the decision-making stage."*

Finally, one OECD respondent referred to the need to think of new mechanisms for co-operation: *"[i]n the future, the [agency] anticipates increased enhanced co-operation and new avenues of multilateral and bilateral co-operation in enforcement and policy areas. With increased enhanced co-operation, work sharing should allow agencies to focus their resources more effectively and efficiently."* In this context, the role of the OECD and ICN was emphasised: *"these networks could foster the development of an international co-operation protocol, covering all technical aspects of international co-operation (e.g. contact information, disclosure, secrecy, international etc.) for authorities to follow. Such a protocol could perhaps substitute existing bilateral agreements and save the resources of drafting new ones."*

(iii) Fourteen (14) respondents emphasised ***globalization as a motivation for more co-operation.***

According to an OECD respondent, *"[t]he growing process of globalization stimulates business activity to expand and further operate at an international level. Therefore, in the future, competition authorities will have to further align their enforcement activities, so as to fight anticompetitive practices with an international dimension. This will entail a closer form of interaction, more enhanced co-operation and significant modification of the existing systems. The international organizations such as the OECD or the ICN should take the lead in the creation of these new frameworks and try to bring the Competition Authorities together in the achievement of these goals."*

One non-OECD respondent noted that *"[c]ooperation between competition agencies across jurisdictions is a necessity in this age of globalization, where markets are increasingly integrating. Cartels or engagement in abusive conduct and cross-border transactions challenge national competition laws and this requires that competition authorities co-operate with each other to establish effective mechanisms of competition*

enforcement.” Another respondent said that “*with the further integration of the global economy, cross-border cases are likely to become more relevant, making it a priority to strengthen international co-operation.*”

9.3 How to improve the current framework for international co-operation

Another question in the Survey relevant to this discussion asked how international co-operation between competition enforcers can be improved.⁵ The question was open-ended and respondents made a variety of suggestions, ranging from the building/expansion of a comprehensive and consistent legal framework, clarification of the benefits of co-operation, empirical study emphasising the importance of prioritising cases with an international element, and the establishment of practical procedural frameworks within which co-operation may take effect. Suggestions can be grouped under three broad categories:

- (i) Suggestions on how to *better utilise the existing system* of international enforcement co-operation.

These suggestions reflect the statements by respondents that the current system for international enforcement co-operation is to some extent under-utilised. All these suggestions call for a maximisation of the use of existing co-operation tools and for improvement of the effectiveness of co-operation within the existing legal framework and its implied limitations. Suggestions in this area include:

- *Greater familiarity with the workload of other agencies and pipeline of cases.* Respondents suggested various methods for improving communication and publicity of ongoing work (where permitted by confidentiality rules): fourteen (14) respondents indicated that improved transparency was an objective of their efforts in international co-operation, and many reported that they endeavoured to monitor publicly available information about the ongoing work of other agencies in order to identify parallel investigations. Six (6) respondents suggested that improved transparency of caseload would be beneficial for the encouragement of international co-operation; two (2) respondents suggested this might be possible through the creation of a registry including very basic identifying information about ongoing cases, and one (1) respondent thought that asking parties about

⁵ See Question 35 of the Survey.

the involvement of other agencies at the outset of the investigation would help to improve transparency. One (1) respondent indicated that finding out about parallel cases is often a matter of luck; it usually is informed by the parties, who may be surprised that the agency is unaware of the other investigations, or once the other agency publishes its findings, at which point it may be too late.

- *Further co-operation (either formal or informal) on cross-border cases.* Ten (10) respondents thought that actual co-operation in enforcement cases would help agencies to garner experience, leading to development of practical procedures and best practices, and providing for the building of relationships.
- *Establishment of clear, transparent and practical procedures for requesting and executing co-operative activities.* Nine (9) respondents pointed out that a lack of understanding of the procedures for requesting co-operation in other jurisdictions constituted a barrier to co-operation. Similarly, developing greater clarity regarding the procedure for exchange of information, and clarification of the definition of types of information, was suggested by six (6) respondents.
- *Encouragement of the sharing of non-confidential information.* Six (6) respondents suggested that encouraging co-operation within the current limitations may lead to the resolution of those limitations.
- *Expansion and promotion of convergence in the use of waivers.* Three (3) respondents suggested convergence on waiver policies as a means of addressing the barrier to exchange of confidential information. Two (2) respondents suggested that requesting waivers should be standard procedure in merger notifications and/or leniency applications. One (1) respondent also suggested that best practice should preclude the acceptance of any terms in the confidentiality waiver which might limit the discussion of topics which could have been discussed absent a waiver.
- Other suggestions referred to *improving mutual understanding of the existing legal frameworks for co-operation*, including: reaching a common approach to sharing confidential information in leniency applications (4 respondents); improving mutual understanding of the legal frameworks for co-operation (4 respondents); improving efficiency of co-operation procedures (4 respondents); coordination of activities (2 respondents) and providing managerial support for co-operation (1 respondent).

- (ii) Suggestions on how to *improve the existing legal system* for international enforcement co-operation.

These suggestions reflect the acknowledgement that, while there is room for improving co-operation within the existing legal framework, there are some limitations to effective co-operation which require reforms of the current system. A majority of respondents are in favour of exploring possibilities for new legal structures and tools, which would allow agencies to better co-operate. Suggestions in this area include:

- *Building/expanding a comprehensive and consistent legal framework.* Twenty nine (29) respondents felt that improvement of the legal provisions for co-operation was a necessary step for addressing limitations to co-operation. Examples of suggested areas for improvement were: building legal provisions for the exchange of confidential information (12 respondents); building a network of bilateral and multilateral co-operation agreements, free trade agreements and/or MoUs (4 respondents);⁶ building regional networks (2 respondents); extending/improving functional co-operation mechanisms or developing new ones (1 respondent); and establishing a legal basis for the mutual admissibility of evidence (1 respondent).
- *Advocating reforms and convergence of national legislation and procedures.* Ten (10) respondents asserted that limitations on international co-operation could be addressed by greater advocacy for reforms at national and international levels.

- (iii) Suggestions to *increase the degree of interaction between enforcers.*

The following suggestions, collected from the qualitative responses, reflect the fact that effective co-operation depends on agencies' positive relationships with other enforcers. Promoting contacts and relationships between institutions and between individuals in these institutions is perceived as a key element to establishing relationships of trust which are so very important for effective co-operation. Suggestions in this area include:

⁶ According to one respondent, for example, “[t]he lack of bilateral agreements with other agencies analyzing the same economic concentration did not allow the jurisdictions involved to co-operate and coordinate their actions. Without a doubt, the impacts or effects in the economy couldn’t be analyzed in a broader sense, as it could have been if [they] co-operated with other jurisdictions.”

- *Interaction and building relationships between agencies.* Twenty-three (23) respondents viewed this as a key factor to fostering greater enforcement co-operation between agencies. Ideas on how to achieve better relations include: organising teleconferences, seminars, workshops etc. (11 respondents); identifying designated contacts for international agencies (4 respondents);⁷ finding a common cultural element/shared priorities (2 respondents); and expanding personnel exchange programmes (1 respondent).
- *Sharing experience and insight.* Eight (8) respondents suggested that more extensive sharing of experiences, as well as increased capacity-building activities between agencies (6 respondents), would contribute to better co-operation activities.⁸ Clarifying the benefits of international co-operation (2 respondents) through empirical studies supporting prioritisation of international cases was also cited as a possible method for improving the willingness of agencies to co-operate.

9.4 **Ways to improve the exchange of confidential information between enforcers**

Confidentiality rules are an essential component of the ability of enforcers to compel information of a confidential nature. In almost every jurisdiction, the power to compel production of confidential information and the statutory limits on the use of the information received often go together. While the Survey did not intend to question the importance of confidentiality rules, responses to the questionnaire indicate that such legal frameworks may have an effect on the ability of competition agencies to co-ordinate enforcement actions on parallel cases/investigations.

⁷ One respondent, for example, said that “[o]ne possible solution may be to set up a co-operation contact point within each competition agency, and to consolidate a database of these contact points for ease of reference. This naturally will entail time and monetary costs in the setting up of the database. Given that there can be attrition of officers in some competition agencies, it may be important to constantly update the database with the latest information. This will also involve time and monetary costs.”

⁸ For example, according to one respondent, “[r]emoving language barriers and cultural barriers are a simple means to improve international co-operation and to produce benefits. This can be achieved if the competition law officials working in a particular area meet or co-operate with each other with some degree of regularity.”

The analysis in this Chapter and in Chapter 6 above shows that many agencies consider a key impediment to international co-operation to be legal limitations preventing competition agencies from exchanging confidential information and evidence obtained from investigative targets.⁹ Most national laws do not permit the sharing of confidential information, absent permission from the entity that provided the information. This may well not be forthcoming where the firm is accused of engaging in cartel conduct or is the target of an abuse of dominance investigation. Generally, with few exceptions,¹⁰ international agreements and instruments do not allow, or allow only to a limited extent, the exchange of confidential information and data.

The Survey also asked for respondents' views on how to improve the tools by which agencies can obtain confidential information from other agencies.¹¹ Respondents referred to the need to find *structural* solutions to what is in essence often a *structural* problem. In general, the report does not suggest that the way forward to address this issue is non-application of confidentiality rules, or their weakening. In a number of these answers reference is made to “*protocols*”, “*instruments*”, “*model agreement*”, “*international agreement*”, “*better system of information sharing*”, “*clear legal instruments*” and more generally to the need to “*develop and introduce a reliable mechanism for the exchange of confidential/sensitive information*”. More specifically, twenty (20) respondents (36%) (eleven [11] OECD, nine [9] non-OECD) suggested structural solutions for limitations to the exchange of confidential information in the form of:

- legal guarantees of confidentiality in national (three [3] respondent) or bilateral law (one [1] respondent);
- a more practical protocol for exchange of information, for example regarding timing of procedures (eight [8] respondents);

⁹ The variety of results presented in Sections 7.4.1 and 7.4.2 on the transmission and use of confidential information suggest that perceived impediments from legal protections relating to the disclose of confidential information arise from inconsistent and insufficient protections on the exchange of information rather than the mere existence of legal protections on exchanges.

¹⁰ Exceptions include the 1999 US-Australia Mutual Assistance Agreement and the recently signed co-operation agreement between the EU and Switzerland.

¹¹ See Question 36 of the Survey.

- a legal framework for the use of information exchanged (two [2] respondents);
- standardization of confidentiality waivers (seven [7] respondents).

Establishing best practice of requiring waivers in leniency applications, easing domestic legal restrictions on the exchange of information, convergence in procedures, legal provisions for the exchange of information without a waiver, and the development of the OECD Recommendation into a model agreement were also indicated as possible ways to address the effects on international co-operation of confidentiality rules by at least one (1) respondent each.

Twenty (20) respondents (36%) stated that in order to address restrictions to the exchange of confidential information, countries should put legislation in place expressly allowing for it and providing the necessary safeguards. Indeed, there was a general consensus that any improvement in the way confidential information can be exchanged between enforcers should always be accompanied by appropriate safeguards to protect legitimate interests and the rights to confidentiality.

- Thirty-five (35) respondents (64%) suggested that the receiving agency should grant the *same or an equivalent level of confidentiality protection* provided by the jurisdiction of the transmitting agency. Among the mechanisms suggested to ensure a sufficient degree of confidentiality protection in the receiving jurisdiction, some respondents mentioned the use of electronic and password-protected means of access to the confidential information; that access to the information should be granted to individuals on a strict need-to-know basis; the imposition of strict sanctions on those who infringe the confidentiality duty; the guarantee that the information received will be destroyed or returned by the agency at the end of the case; and a written undertaking by the receiving agency that it will abide by confidentiality rules of the transmitting agency.
- Twenty-one (21) respondents (38%) suggested that the transmission of confidential information from one agency to another should also be conditioned *upon limitations on the use* of the information by the receiving agency. These use restrictions should relate to the purpose for which the information is requested by the receiving agency (10 respondents) or the purpose for which the information was originally collected by the transmitting agency (2 respondents); others mentioned

the fact that the information should not be used to impose sanctions on individuals (5 respondents).

Other elements identified as relevant to the decision of whether an agency should transmit confidential information to another agency include the following:

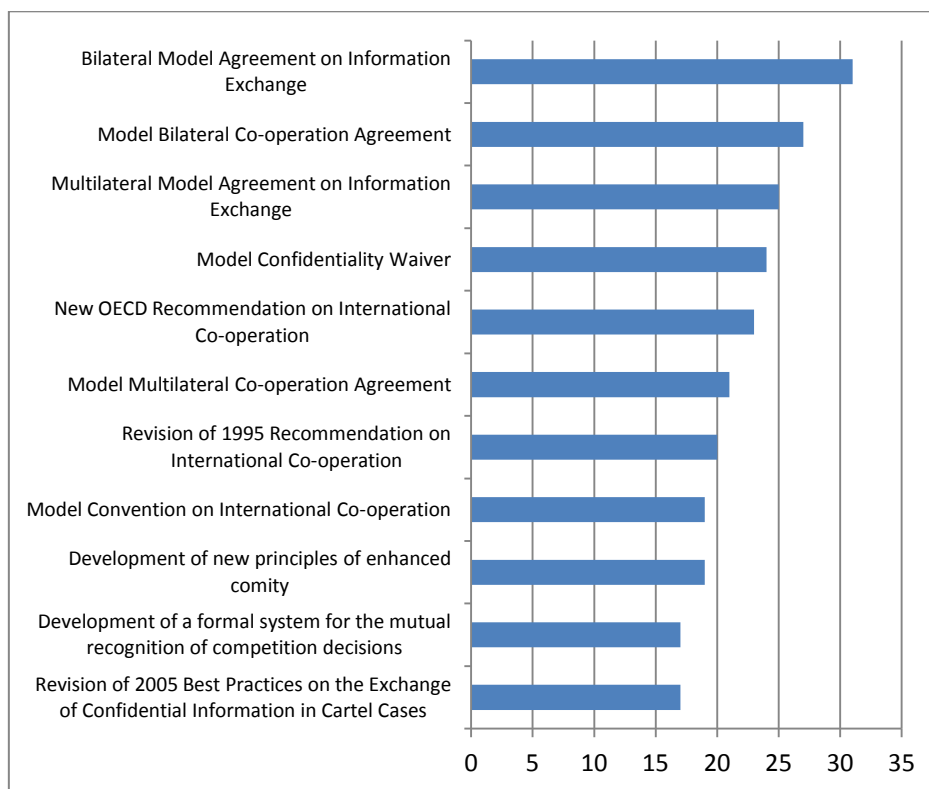
- The information requested is required for an investigation, and only information relevant to the investigation would be transmitted;
- The principle of reciprocity would apply;
- The transmission would not interfere with enforcement by the sending agency;
- Both agencies involved are investigating the same or related conduct, or transaction;
- The information to be exchanged is already present in the file of one agency;
- Leniency/settlement information should never be exchanged without a waiver;
- No information protected under the rights and privileges guaranteed under the respective parties' laws (*e.g.* legal privilege) should be transmitted;
- Information should only be transmitted in response to a duly reasoned request; and
- The competition agency receiving the request to share information in its possession should retain its discretionary power to decide whether to transmit the information.

9.5 Suggestions for future OECD work on international co-operation

Question 42 and Table 10 of the Survey sought respondents' views on future work and projects that the OECD should undertake to help agencies improve the current status of co-operation. The Tables below offers a snapshot of the responses (both OECD and non-OECD respondents) to Table 10 of the Survey, listing possible work streams for the OECD. Table 37 lists projects for the OECD by 'priority' order, according to responses of OECD agencies only.

Table 36: Future work for the OECD, by number of respondents

Suggested projects for the OECD	Priority		
	Low	Medium	High
Revision of 1995 Recommendation on International Co-operation	18	13	9
New OECD Recommendation on International Co-operation	12	14	13
Revision of 2005 Best Practices on the Exchange of Confidential Information in Cartel Cases	11	16	8
Model Bilateral Co-operation Agreement	8	19	14
Model Multilateral Co-operation Agreement	11	18	12
Model Confidentiality Waiver	16	14	11
Bilateral Model Agreement on Information Exchange	10	11	21
Multilateral Model Agreement on Information Exchange	12	13	17
Model Convention on International Co-operation	16	15	9
Development of new principles of enhanced co-operation	18	12	11
Development of a formal system for the mutual recognition of competition decisions	19	12	9

Table 37: Future work for the OECD by „Priority’,¹² based on OECD responses

A review of the responses of only the OECD members on projects which should have a ‘high priority’ (see Table 38 below) indicates a strong view that the OECD should focus its resources on developing model instruments and/or agreements.¹³ Many respondents pointed out that the OECD should focus on its specific strengths (*e.g.* “whole of government” approach) and that it may be well placed to deal with obstacles to effective co-operation, in particular those

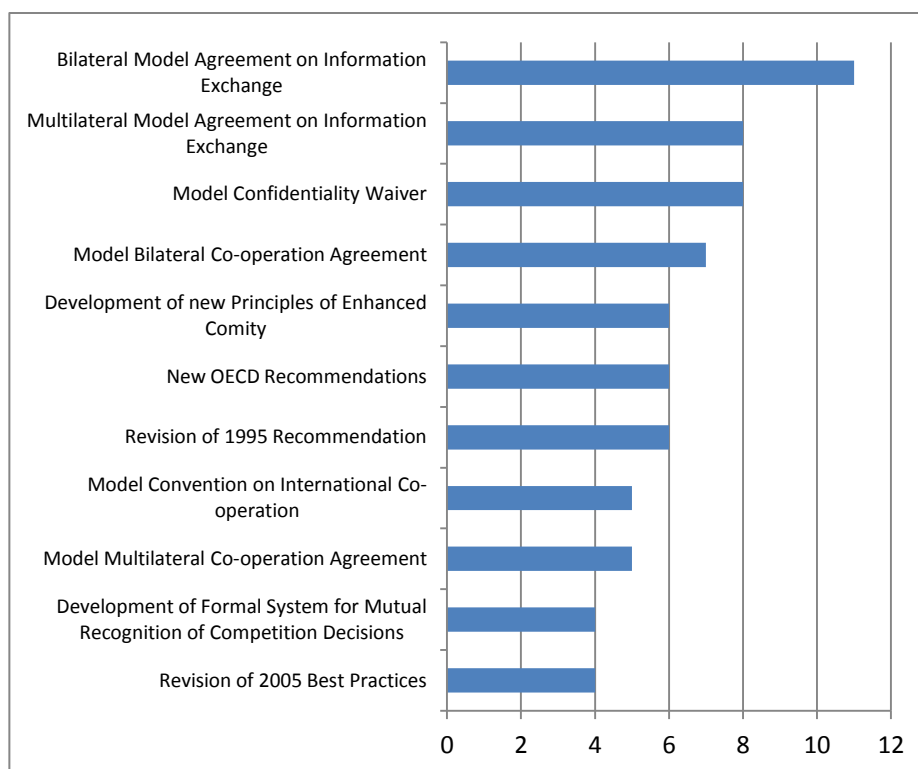
¹² Ranking based on the sum of ordinal scores assigned to priority, and has been calculated from only the responses of agencies of OECD members.

¹³ These results do not vary significantly if preferences across the whole set of responses (*i.e.* OECD and non- OECD respondents) are considered.

of a national legal nature.¹⁴ As discussed in previous sections of this report, respondents identified statutory restrictions on information disclosure as the main obstacle to international co-operation on casework. The OECD is viewed as the best placed venue in which to work on addressing these limitations in domestic legislation. Hence, as the chart below shows, the top-ranking work streams for the OECD, as expressed by the responses of member agencies, include developing a model for bilateral (eleven [11] respondents, or 34% of OECD respondents ranked as ‘high priority’) and multilateral (eight [8] respondents, or 25% of OECD respondents ranked as ‘high priority’) agreements on the exchange of information between competition enforcers.

More generally, members recognised the key role of the OECD as promoter of effective co-operation through the definition of best practices; hence, many respondents suggested that the OECD should work on a model bilateral (seven [7] respondents, or 22% of OECD respondents ranked as ‘high priority’) or multilateral (five [5] respondents or 16% of OECD respondents ranked as ‘high priority’) co-operation agreement. For the same reason, interest was also expressed in a new OECD recommendation on international co-operation (six [6] respondents, 19%) or a revision of the 1995 Recommendation on International Co-operation (six [6] respondents, 19%). The development of a model confidentiality waiver also received a fair amount of support among OECD respondents (eight [8] respondents, 25%).

¹⁴ For example, in the context of the discussion of the revision of the 1995 OECD Recommendation, one (1) respondent suggested that the revision could be used to encourage national legislators more explicitly to remove legal obstacles to co-operation to the extent that they: prohibit agencies from co-operating with other agencies in the absence of an underlying bilateral agreement or MoU; and require competition agencies to seek permission from other government bodies in order to engage in co-operation activities.

Table 38: Future work for the OECD by „High Priority’,¹⁵ based on OECD responses only

A review of the narrative responses to Question 42 of the Survey also shows that respondents expect to see the OECD continue to play a key role in the policy discussion on international co-operation. This could lead to rationalizing and decreasing the number of overlapping guidelines, best practices and recommendations, and facilitating the creation of a uniform system for co-operation. Some respondents highlighted that the OECD should continue to discuss the benefits of international co-operation and identify positive lessons learned from effective co-operation experiences. This course of work would allow the OECD to continue promoting common principles and best practices for international co-operation.

¹⁵ Ranking based on the number of respondents who ranked each potential work stream as ‘high priority’, and has been calculated from only the responses of agencies of OECD members.

9.6 Final considerations

Responses to the Survey suggest that incentives to engage in international enforcement co-operation can be improved. Incentives depend on the effectiveness of the international enforcement system. Reforms of the legal and institutional setting for international co-operation can increase incentives for agencies to engage more effectively in case co-operation. Similarly, ensuring a high level of awareness of the benefits of international co-operation and the downside of lack of co-operation was suggested as one priority for the enforcement community.

Several suggestions on how to improve the degree and quality of international co-operation were put forward by respondents to the Survey. These suggestions fell into three main categories: suggestions on how to maximise the benefits of co-operation within the existing legal and practical constraints; suggestions on how to improve the existing system of co-operation by addressing the effect of existing legal and practical constraints on co-operation; and finally, a number of suggestions focussed on ways to improve interaction between enforcers, establish contacts, and develop procedures and best practices for more effective relationships.

Respondents also identified information exchange as a key area for improvements. Many suggested that agencies should agree on a clearer and common legal framework for the exchange of confidential information, *i.e.* the type of case-specific information that agencies find most useful. This framework should identify the type of information that can be exchanged, the conditions for its transmission to another enforcement agency, and the permitted use of the information received by the receiving agency. Because limitations on the exchange of confidential information are often structural, solutions suggested are structural and include the adoption of national legislation or of international instruments which would allow exchanges of confidential information under clear conditions and with adequate safeguards.

The Survey also confirmed that OECD instruments could be amended or updated to reflect the current status and needs of international co-operation. In general, respondents thought that the OECD could take a leading role in helping member countries to shape a new legal framework for international co-operation. For example, many respondents believe that the OECD should encourage national legislators more explicitly to remove legal obstacles to co-operation from their legislation, *e.g.* by facilitating information exchanges and investigatory assistance between enforcers.

ANNEX I

QUESTIONNAIRE ON INTERNATIONAL ENFORCEMENT CO-OPERATION: STATUS QUO AND AREAS FOR IMPROVEMENT

Introduction and background

This questionnaire was prepared to support the OECD Competition Committee's long-term project on International Co-operation and the ICN Steering Group International Enforcement Co-operation project.¹ The purpose of the questionnaire is to Survey current practices on international co-operation between agencies in enforcement cases/investigations, and to identify examples of effective international co-operation and areas for improvement. The results of the Survey will inform decisions on future work that the OECD and the ICN will undertake to foster more and better international co-operation between enforcement agencies.

The questionnaire was prepared jointly by the OECD Secretariat and by the ICN, and the two organisations will continue to work together during the Survey process and the preparation of the Survey results. The results of the Survey will be made available to both the OECD and ICN memberships. Preliminary results of the Survey will be presented to the OECD Competition Committee for discussion at its meetings in October 2012. A complete report of the key findings from the Survey will be discussed at the Global Forum on Competition which will take place at the OECD in February 2013. The ICN Steering Group and the relevant ICN Working Groups will also review preliminary results and ICN members will receive copies of the final report for consideration.

¹ For more information on the scope of the OECD project, OECD member and observer countries are referred to the OECD document DAF/COMP(2012)1. For more information on the scope of the ICN project, ICN members are referred to the ICN document <http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf>.

The questionnaire is structured in three parts: Part I includes a set of instructions for completing the questionnaire; Part II includes definitions of terms for purposes of this questionnaire; and Part III includes the questions for respondents organised in 10 separate sections.

Responses to this questionnaire should be sent to Antonio Capobianco (Antonio.Capobianco@oecd.org) and Erica Agostinho (Erica.Agostinho@oecd.org) for the OECD Secretariat; and to the US Department of Justice (atr.oecd-icnresponses@usdoj.gov) and to the Turkish Competition Authority (lkayihan@rekabet.gov.tr) for the ICN by Friday, 14 September 2012. In light of the tight deadlines for processing the Survey replies and the presentation of the preliminary results, replies received after the deadline may not be fully considered in the compilation of the preliminary results presented to the OECD Competition Committee in October 2012.

The contact persons indicated above are available for any clarification of the questionnaire.

I. Instructions on completing the questionnaire

Before completing the questionnaire, please read carefully the instructions below.

- **Questions and sub-questions.** The questionnaire contains 48 questions. Many of these questions include a number of sub-questions. Respondents are requested to answer as many questions and sub-questions as possible, in order to provide a richer set of responses.
- **Qualitative information.** The questionnaire includes questions requiring both qualitative information (covering background, experience and ideas) and quantitative data. We would like to stress the importance of gathering qualitative information on how international co-operation works in practice and where its strengths and weaknesses are. Where a qualitative answer is requested, respondents may supplement their responses by annexing additional material (e.g., articles or papers) that may be useful in understanding their position. Whenever possible, and even if not expressly indicated, when answering qualitative questions, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreements) cases/investigations.

- **Quantitative data.** We understand that a number of agencies may not have access to the extensive data required to fully answer the quantitative parts of the questionnaire, and may therefore have difficulty providing some of the figures requested. Please complete all questions to the extent possible, using the information and data available to your agency. However, when hard data is not readily available, respondents are requested to provide estimates, if possible, clarifying the conditions under which the estimate was made, or to use the following ranges if necessary: [0-5], [5-10], [10-20] and [more than 20].
- **Time periods.** A number of tables within the questionnaire request data for the last five years (2007 – 2011). Additional questions seek to cover developments over a longer period of 10-15 years. We understand that for many agencies it may not be possible to provide data for this entire time period. Respondents are invited to reply starting with information concerning the most recent year for which information is available, and working backwards providing as much information as possible. Tables also request data for 2012. This information should be provided only if readily available and only for the first half of the calendar year.
- **Confidential/business** information and sensitive information. When responding to the questionnaire, care should be taken to comply with confidentiality rules applicable in your jurisdiction. For example, information regarding specific individuals or companies, the disclosure of which is prohibited, should not be included in the answers to the questionnaire.

As for non-confidential information the disclosure (to the public or to other agencies) of which may nevertheless be sensitive, we urge respondents to include this information in their replies but clearly mark it as sensitive. This is to ensure as complete, open and fair a Survey as possible of the issues covered by the questionnaire. The results of the Survey will be prepared in an aggregated and anonymous way. Any disclosure of individual replies (or parts thereof) will only be made with the prior consent of the agency(ies) concerned.

- **Questions on “frequency”.** Across the questionnaire, a number of questions aim at estimating the frequency of certain international co-operation activities. Frequency is measured as Never, Seldom (less than 20% of cases/investigations), Occasionally (between 20% and 60% of cases/investigations), and Frequently (more than 60% of cases/investigations). In order to estimate these percentages, respondents should only consider the subset of cases/investigations where international

co-operation is potentially available (e.g., because there is more than one jurisdiction directly or indirectly involved with the case/investigation) or necessary (e.g., because the case/investigation potentially raises cross-border competition issues), and not the total universe of cases subject to the agency's jurisdiction.

- **Formal and informal co-operation.** The questionnaire seeks information relating to both formal and informal international co-operation. Agencies are likely to have different views of what constitutes “formal” vs. “informal” international co-operation, and where the characterization makes a difference in their international co-operation work they should explain it in the narrative sections of their responses. Note that section 3 of the questionnaire focuses on what is traditionally known as formal co-operation (i.e., directly pursuant to bilateral or multilateral arrangements of some kind).
- **Co-operation within regional networks.** When answering the questionnaire you are requested to distinguish between co-operation occurring within an existing co-operation platform (such as the ECN, Caricom, WAEMU, Nordic Alliance) and that which occurs outside such specialized frameworks, whether bilateral or multilateral. Because co-operation within regional networks relies on special rules and international agreements, the questionnaire separates the two forms of co-operation. Sections 1 and 2 refer to co-operation both within and outside regional networks. Respondents are requested to answer Sections 3 to 7 of this questionnaire with exclusive reference to co-operation outside regional networks. Section 8 of the questionnaire is intended to cover only experiences within regional and multi-lateral co-operation networks.
- **OECD and ICN specific questions.** The last two sections of the questionnaire refer specifically to OECD and ICN work products and work plans. Non-OECD members and observers are welcome to answer the OECD-specific questions (section 9) if they have views or suggestions on where the OECD should focus its efforts.

II. Definition of terms

For the purpose of this questionnaire, the following definitions apply:

- **Comity** (or traditional comity) involves a country's consideration of how it may prevent its law enforcement actions from harming another country's important interests. It generally implies notifying another country when enforcement proceedings carried out by a competition

agency may affect other jurisdictions' important interests or requesting another country to modify or cease its enforcement action to protect the requesting jurisdiction's own important interests.

- **Confidential information** refers to information the disclosure of which is either prohibited or subject to restrictions. For example, information could be defined as confidential if it constitutes business secrets of a company or if its disclosure in normal circumstances could prejudice the commercial interests of a company.
- **Enhanced co-operation** can entail identifying a lead enforcement agency, setting up joint investigative teams, or entering into work sharing arrangements. Enhanced co-operation does not involve a withdrawal of jurisdiction over a case; parallel enforcement action can be taken by more than one agency if one agency is not in a position to safeguard the interests of the other jurisdiction(s) affected.
- **Information exchange** refers to both the sharing of general information and knowledge about a case/investigation, including public information, and more specific sharing of information which may be sensitive or confidential.
- **International co-operation** is limited to co-operation between international enforcement agencies in specific enforcement cases, i.e. merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreement) cases. This questionnaire does not concern general co-operation on matters of policy, capacity-building, etc.; only international co-operation in the detection, investigation, prosecution and sanctioning of a specific anti-competitive behaviour or the investigation or review of mergers is covered.
- **Investigatory assistance** involves co-operation with another jurisdiction's investigation. It entails a variety of co-operative activities such as assisting with the gathering of evidence or taking witness statements to providing information relevant to the investigation. In contrast to positive comity, investigatory assistance does not involve a request to another agency for a particular remedial action.
- **Mutual recognition of decisions** involves the recognition of decisions by enforcers or courts of another jurisdiction. The outside decision is recognised or even, in some cases, enforced by other countries as if it was a decision taken by the agency of these latter countries.

- **Notification** refers to any means of officially informing another jurisdiction of a planned or current investigation, proceeding or enforcement action that may affect the interests of that country. Notifications are usually considered in the context of traditional comity, and usually involve written communications.
- **Positive comity** involves a jurisdiction's consideration of another jurisdiction's request that it open or expand a law enforcement proceeding in order to remedy conduct that is substantially and adversely affecting the other jurisdiction's interests.
- **Waiver** or **confidentiality waiver** means permission granted by a party under investigation or a third party in a case/investigation that enables investigating agencies in different jurisdictions to discuss and/or exchange information, protected by confidentiality rules of the jurisdiction(s) involved, that has been obtained from the party in question.

III. Questionnaire

1. Qualitative assessment of international co-operation

1. What are the **objectives** that your agency pursues by co-operating internationally? (For example, avoiding conflicting outcomes, keeping other competition agencies informed of your activities, building trust, co-ordinating timing etc.)

2. How important to your agency is co-operating with competition agencies in other jurisdictions? Is improving international co-operation a **policy priority** for your agency?

3. What types of international co-operation activities has your agency found **most beneficial** and why? What types have been the **least beneficial** and why? What have been your best and worst experiences of international co-operation? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

4. On the basis of your experiences so far, how **useful** has international co-operation been to your enforcement strategy? How has international co-operation, or lack of it, affected enforcement by your agency? What impact or difference has your agency's experience with international co-operation made on your ability to investigate and prosecute cases generally? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

5. What do you consider to be the costs and benefits of international co-operation generally? How do you decide whether the benefits (for example, reduced costs, greater transparency, avoiding duplication, etc.) outweigh the costs (for example, lack of resources, timing, and administrative burden)?

6. What is your **vision for the future** of international co-operation? How would you like international co-operation to look in 5, or 10, or 15 years time?

7. At what **stage** of a case/investigation does your agency typically co-operate with competition agencies in other jurisdictions? How is international co-operation initiated? If contact is made before opening an investigation does international co-operation continue throughout the investigation? Or does it depend on the specifics of the case/investigation and the relevant enforcement area? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

In addition to providing a narrative answer, please also fill out the table below:

Table 1 – Stage of case/investigation at which international co-operation takes place (please tick the relevant box)				
	Never	Seldom ($< 20\%$ of cases or investigations)	Occasionally ($20\% - 60\%$ of cases or investigations)	Frequently ($> 60\%$ of cases or investigations)
Pre notification/ before opening investigation				
During investigation				
Post investigation				
Other (please specify)				

2. Legal basis of international co-operation

8. What are the **legal bases** which your agency uses to engage in international co-operation with competition agencies from other jurisdictions enforcing competition laws? Do you have any national law provisions which allow for international co-operation? Are these legal provisions specific to competition law, or are they more general legal provisions? Is reciprocity a condition for international co-operation or aspects of it? Is the ability to co-operate inherent in your agency's law enforcement mission?

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In addition to describing the terms of your agency's legal authority to co-operate with international agencies, please fill in the table below.

Table 2 – Legal basis for international co-operation				
	Availability (Yes/No)	Number of agreements concluded	Relevance for your international co-operation activities (1 not relevant /5 very relevant)	Frequency of use (1 never / 5 frequently)
Bilateral competition agreement(s)				
Bilateral non- competition agreement(s)				
Multilateral competition agreement(s)				
Multilateral non- competition agreement(s)				
Free Trade Agreement(s)				
Mutual Legal Assistance Treaty(s)				
National law provisions		N/ A		
Letters rogatory		N/ A		
Confidentiality waiver		N/ A		
Other (please specify)				

3. Different types of formal international co-operation

3.1 *Notifications and comity provisions*

9. Please describe any provisions in your law, or in a bilateral or multilateral agreement applicable to cross-border competition enforcement, which give you the ability to take into account the interests of other countries (so-called '**comity**').

10. Over the last 5 years, have you made **formal notifications** of enforcement actions to other jurisdictions? Have you received formal notifications from other jurisdictions related to their enforcement actions? What type of cases/investigations did they relate to (merger, cartel, unilateral conduct/abuse of dominance, other (e.g., non-cartel agreements)? If possible, please provide a broad estimate of how many formal notifications your agency makes per year and how many it receives. Is there a specific **legal basis** for your notifications?

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In addition to providing a narrative answer, please also fill in the tables below.

Table 3.1 – Number of formal notifications made, by enforcement area				
(if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])				
Year	Cartel cases / investigations	Merger cases / investigations	Unilateral conduct/abuse of dominance cases / investigations	Other (e.g., non-cartel agreements)
2012				
2011				
2010				
2009				
2008				
2007				

Table 3.2 – Number of formal notifications received, by enforcement area				
(if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])				
Year	Cartel cases / investigations	Merger cases / investigations	Unilateral conduct/abuse of dominance cases / investigations	Other (e.g., non-cartel agreements)
2012				
2011				
2010				
2009				
2008				
2007				

Please discuss if your answer would be significantly different if the time frame considered was 10-15 years or longer. Are there any reasons for any increase or decrease in international co-operation during this timeframe? Are these increases or decreases anticipated to continue? For what reasons?

11. In your experience, are formal notifications of enforcement actions to or from other jurisdictions **useful**? Please explain the reasons for your answer.

12. Other than through formal notifications, what steps, if any, does your agency take to become aware of any **parallel investigations** of the same conduct or transaction going on in another jurisdiction? Have there been incidences where you have found out about parallel investigations too late? Are there additional informal tools or approaches that you consider helpful to avoid this happening? If so please explain. Do you make efforts to inform other jurisdictions whom you know to be working on the same case/investigation? If so, please clarify who is informed (e.g., Foreign Ministry, competition agency), how (e.g., letter or email) and at what stage of the case/investigation. If not, why?

13. Have you issued or responded to a formal request asking you to take enforcement action on behalf of another jurisdiction (so-called '**positive comity**')? Approximately how many times over the last 5 years? Have you responded negatively to a formal request to take an enforcement action on behalf of another jurisdiction? If so, for what reasons? How often? Have your formal requests for enforcement action been rejected by an agency in another jurisdiction and for what reasons? How often?

3.2 Formal requests for investigatory assistance

14. Have you issued or responded to a formal request for **investigatory assistance**? Approximately how many times per year, over the last 5 years? What have been the types of assistance requested, *e.g.* gathering information, interviewing witnesses? How many times have you responded negatively to a formal request for investigatory assistance? How many times have your formal requests for investigatory assistance been rejected? What reasons were given for refusing a formal request? How long does a typical formal request for investigatory assistance take to process and result in assistance? What have you found to be the shortcomings of these types of formal requests? Please identify any specific **legal bases** for formal investigatory assistance requests.

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In addition to providing a narrative answer, please also fill in the tables below.

Table 4.1 – Number of formal requests for investigatory assistance made per year over the last 5 years, by type of assistance requested

(if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])

Type(s) of assistance requested (please specify)	Number of requests made per year in last 5 years	Number of requests with a positive outcome

Table 4.2 – Number of formal requests for investigatory assistance received per year over the last 5 years, by type of assistance

(if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])

Type(s) of assistance requested (please specify)	Number of requests received per year in last 5 years	Number of requests with a positive outcome

Table 4.3 – Number of formal requests for investigatory assistance made over the last 5 years, by enforcement area

(if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])

Cartel cases/ investigations	Merger cases/ investigations	Unilateral conduct / abuse of dominance cases/investigations	Other (e.g., non-cartel agreements)

Table 4.4 – Number of formal requests for investigatory assistance received over the last 5 years, by enforcement area

(if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])

Cartel cases/ investigations	Merger cases/ investigations	Unilateral conduct / abuse of dominance cases/investigations	Other (e.g., non-cartel agreements)

Please discuss if your answer would be significantly different if the time frame considered was 10-15 years or longer. Are there any reasons for any increase or decrease in formal requests for investigatory assistance during this timeframe? Are these increases or decreases anticipated to continue? For what reasons?

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3.3 *Enhanced international co-operation provisions*

15. Do you have any experience with joint investigations, work sharing arrangements, or any other form of **enhanced co-operation**? If yes, please describe your experience, the challenges/successes and the limitations that you have encountered.

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16. To what extent do you take other agencies' **remedies** into account when deciding on your own remedies? What are the conditions under which you are able, or willing, to do this? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreements) cases/investigations.

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4. **Frequency of international co-operation between competition agencies**

17. In the set of your cases/investigations in which international co-operation would be feasible or likely, how **frequently** has this co-operation taken place?

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18. Please provide figures for the **number of international agencies** with which your agency has co-operated on cases/investigations, and the **number of cases/investigations**, over the last 5 years.

Table 5.1 – Number of international agencies with which your agency has co-operated by enforcement area (if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])					
Year	Cartel cases / investigations	Merger cases / investigations	Unilateral conduct/abuse of dominance cases / investigations	Other (e.g., non-cartel agreements)	Legal basis used
2012					
2011					
2010					
2009					
2008					
2007					

Table 5.2 – Number of cases/investigations in which your agency has co-operated by enforcement area

(if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])

Year	Cartel cases / investigations	Merger cases / investigations	Unilateral conduct/abuse of dominance cases / investigations	Other (e.g., non-cartel agreements)	Legal basis used
2012					
2011					
2010					
2009					
2008					
2007					

Please discuss if your answer would be significantly different if the time frame considered was 10-15 years or longer. Are there any reasons for any increase or decrease in international co-operation during this timeframe? Are these increases or decreases anticipated to continue? For what reasons?

19. In the set of your investigations where international enforcement co-operation would be feasible or likely (e.g., not the total universe of cases/investigations handled by your agency), please indicate the **types of international co-operation and their frequency** below.

Table 6.1 – Frequency in <i>merger</i> cases/investigations that involve international co-operation (please tick the relevant box)				
	Never	Seldom (< 20% of cases or investigations)	Occasionally (20% - 60% of cases or investigations)	Frequently (> 60% of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy co-ordination				
Public communication post-decision (e.g. press release, public statements)				
Other (please specify)				

Table 6.2 – Frequency in <i>cartel</i> cases/investigations that involve international co-operation				
(please tick the relevant box)				
	Never	Seldom ($< 20\%$ of cases or investigations)	Occasionally ($20\% - 60\%$ of cases or investigations)	Frequently ($> 60\%$ of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Sharing of leniency information, pursuant to waiver				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating with another agency on dawn raids/searches				
Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy co-ordination				
Public communication post-decision (e.g. press release, public statements)				
Other (please specify)				

Table 6.3 – Frequency in unilateral conduct / abuse of dominance cases/investigations that involve international co-operation (please tick the relevant box)				
	Never	Seldom ($< 20\%$ of cases or investigations)	Occasionally ($20\% - 60\%$ of cases or investigations)	Frequently ($> 60\%$ of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating with another agency on dawn raids/searches				
Co-ordinating other aspects of investigations (<i>e.g.</i> , timing of interviews and document demands)				
Sanction/remedy co-ordination				
Public communication post-decision (<i>e.g.</i> , press release, public statements)				
Other (please specify)				

Table 6.4 – Frequency in <i>other</i> (e.g. non-cartel agreements) cases/investigations that involve international co-operation (please tick the relevant box)				
	Never	Seldom ($< 20\%$ of cases or investigations)	Occasionally ($20\% - 60\%$ of cases or investigations)	Frequently ($> 60\%$ of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating with another agency on dawn raids/searches				
Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy co-ordination				
Public communication post-decision (e.g. press release, public statements)				
Other (please specify)				

5. **Exchange of confidential information and confidentiality waivers**

20. Please provide a summary of the **terms of the confidentiality** protections that apply to your agency.

21. What **types of information** is your agency authorized to share with other international competition agencies in the context of international co-operation? For example, can you share public information, non-public agency information, legally-protected confidential party or third party information? Does this differ as between cartels, mergers, and unilateral conduct/abuse of dominance cases/investigations? If so, please explain.

22. Under what conditions is the **transmission of confidential information** to an international competition agency possible in your jurisdiction? Is reciprocity a condition for sharing confidential information with other agencies? Does your competition agency allow the exchange of confidential information if equivalent protections are given from the requesting agency (i.e. downstream protection)? Does this differ as between cartels, mergers, and unilateral conduct/abuse of dominance cases/investigations? If so, please explain. Do you have any national law provisions which authorise the transmission of confidential information? Are the authorisations specific to competition law, or are they part of more general legal provisions? How often did you use these national provisions to exchange confidential information with other agencies?

23. What information (e.g., public information, non-public agency information, statutorily-protected confidential party or third party information) do you get most **benefit** from sharing with other agencies (either receiving or providing)? Please provide examples of cases/investigations in which an ability or inability to share (confidential) information benefited or impeded an investigation or affected the agencies' ability to co-ordinate sanctions or remedies.

- []
24. Is your competition agency permitted to rely on **confidentiality waivers** from parties and third parties to use their confidential information in discussions with agency staff from international competition agencies? Do you actively seek confidentiality waivers or do you rely on the parties to come forward with an offer to waive their right to confidentiality? Do you use a standard form for confidentiality waivers?

- []
25. Have you experienced **difficulties in obtaining confidentiality waivers** for international co-operation? If so what issues have you encountered? What are the different incentives driving targets of investigations to provide waivers? Do you have any ways in which you can share confidential information without a waiver and without the party's consent? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

- []
26. If your agency is in a position to obtain confidential information from another agency because this is permitted under the applicable rules or because the parties granted a confidentiality waiver, is there any **limitation on the uses** of that information (e.g., can it only be used for internal purposes by the agency, or can it also be used as evidence in court)?

[]

6. **Pros and Cons of international co-operation between agencies**

27. What **factors** does your agency consider in evaluating whether to request co-operation from another competition agency? What **factors** does your agency consider when it receives a request for co-operation from another competition agency?

28. Based on your experience, what have been the **advantages and disadvantages** of each type of formal co-operation referred to in Section 3 above (i.e., notifications; request for investigatory assistance; and enhanced co-operation mechanisms)? What are the advantages and disadvantages of different means of co-operation? Are some ways of co-operating more suitable or more effective for particular types of cases/investigations (merger, cartel or unilateral conduct/abuse of dominance), or particular jurisdictions, than others?

29. What are the **limitations** to international co-operation that you have encountered? (Please rank in terms of importance.) Are these limits *legal* or *practical* in nature? Are they specific to competition law or general under the constitution, legislation, case law or practice in your jurisdiction? Do they differ depending on whether your agency is requesting co-operation from another competition agency or if it is the recipient of a co-operation request? What difficulties do such limitations create? Where are the **gaps**, if any, in current international co-operation arrangements? What other arrangements might fill those gaps? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

In addition to providing a narrative answer, please also fill in the table below.

Table 7 – Limitations to effective international co-operation, importance and frequency (please tick the relevant box)					
	Ranking by importance (high / medium / low)	Never	Seldom (< 20% of cases or investigations)	Occasionally (20% - 60% of cases or investigations)	Frequently (< 60% of cases or investigations)
Lack of knowledge of another agency(ies) involvement					
Existence of a legal limit(s)					
Absence of waiver(s)					
Different legal standard(s) applied					
Other differences / inconsistencies between legal systems					
Dual criminality requirement (for cartels)					
Low willingness to co-operate					
Lack of trust in the other agency					
Different stages in the procedures					
Lack of resources/time					
Language/cultural differences					
Different time zones					
Other (please specify)					

30. Would the answers to the previous two questions be different for cases/investigations which involved international co-operation with an agency with which you have no history of international co-operation? What particular challenges do you face in such cases?

31. Are there **benefits** that would flow from removing these limitations? Are there **costs** that would flow from the removal of these limitations? If so, what are they? What in your jurisdiction is currently carried out less efficiently than might be possible if international co-operation were more effective? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

32. In what ways can **absence of international co-operation hinder an investigation**? Can you provide any examples of cases in which an absence of international co-operation has hindered an investigation? What were the circumstances? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel and unilateral conduct/abuse of dominance cases/investigations.

33. Can you provide any **examples** of cases in which international co-operation would have been useful but could not or would not have been possible so you did not make the request? What factors influenced your decision not to make a request? Describe the type of assistance that would have been useful and the impact of its unavailability on your enforcement efforts. If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

7. **How to improve the quality and intensity of international co-operation between agencies**

34. Do you think that the current framework for international co-operation provides sufficient **incentives** to competition agencies and to businesses to co-operate effectively with enforcers from other jurisdictions? How can such incentives be created or strengthened? Would your answer be different with regards to international co-operation with an agency with which you have no history of international co-operation? What particular challenges do you face in such cases?

35. In what ways can international co-operation between competition enforcers be **improved**?

36. Under what conditions do you think the **exchange of confidential information** between agencies should be allowed during co-operation? What **safeguards** would you require to disclose confidential information in your possession to another agency? What safeguards would you be prepared to provide to receive confidential information held by another agency? Do you have any views on how to improve ways in which you obtain (i) confidential information from other agencies and (ii) confidentiality waivers from the parties?

8. **Regional and multilateral co-operation**

37. Are you a member of a **regional organisation** which provides a platform for international co-operation in competition enforcement cases/investigations (e.g., ECN, Caricom, WAEMU, Nordic Alliance)? In what ways does membership in this organisation facilitate international co-operation? What types of international co-operation take place? What information are you able to share? Can the information you receive from other regional members be used in your own investigations?

In addition to providing a narrative answer, please also fill out the table below:

Table 8 – Overall frequency of international co-operation in regional organisations (types and ways) (please tick the relevant box)				
	Never	Seldom (<i>< 20% of cases or investigations</i>)	Occasionally (<i>20% - 60% of cases or investigations</i>)	Frequently (<i>> 60% of cases or investigations</i>)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Sharing of leniency information, pursuant to a waiver				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating with another agency on dawn raids/searches				
Co-ordinating other aspects of investigations (<i>e.g.</i> timing of interviews and document demands; joint interviews)				
Sanction/remedy co-ordination				
Public communication post-decision (<i>e.g.</i> press release, public statement)				
Other (please specify)				

38. What are the **advantages** and **disadvantages** of regional co-operation? What distinguishes the international co-operation you are able to achieve within a regional network from co-operating internationally with agencies outside the network? Are there useful lessons from this regional co-operation that you think would be worth expanding to international co-operation with agencies outside the network?

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9. OECD specific questions

39. Please describe your experience with the **implementation of the 1995 OECD Recommendation** concerning international co-operation between member countries on anticompetitive practices affecting international trade (the “1995 Recommendation”). Is any specific action taken to make the 1995 Recommendation known to staff within your agency? Do you refer to the 1995 Recommendation when you co-operate with other agencies? In particular, discuss if you have made any use of the following international co-operation mechanisms provided for under the Recommendation.

Table 9 – Implementation of OECD 1995 Recommendation		
International co-operation mechanisms in the 2005 Recommendation	Used (Yes / No)	If yes, when, in which circumstances and was the mechanism useful?
Notification of existing investigations (Rec. I.A.1)		
Co-ordination of actions (Rec. I.A.2)		
Exchange of information (Rec. I.A.3)		
Consultation procedure (Rec. I.B.4 and 5)		
Conciliation procedure (Rec. I.B.8)		

40. In light of any problems or gaps in international co-operation that you have identified in your experience, how could the 1995 Recommendation be **improved**?

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41. Please describe your experience with the **implementation of the 2005 OECD Best Practices** for the formal exchange of information between competition agencies in hard core cartel investigations.

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42. Based on your experience and answers, in what areas would you like to see **future discussion or work** being carried out by the OECD in the next 12 – 24 months? How would you like to see any output (including formal instruments) develop?

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In addition to providing a narrative answer, please also fill out the table below.

Table 10 – Future work for the OECD (please tick the relevant box)			
Outputs	Low priority	Medium priority	High priority
Revision of 1995 Recommendation on International Co-operation			
New OECD Recommendation on International Co-operation			
Revision of 2005 Best Practices on the Exchange of Confidential Information in Cartel Cases			
Model Bilateral Co-operation Agreement			
Model Multilateral Co-operation Agreement			
Model Confidentiality Waiver			
Bilateral Model Agreement on Information Exchange			
Multilateral Model Agreement on Information Exchange			
Model Convention on International Co-operation			
Development of new principles of enhanced comity (e.g., lead agency/ies in an investigation, work sharing arrangements, joint investigatory teams)			
Development of a formal system for the mutual recognition of competition decisions			
Other (please specify)			

10. ICN specific questions

43. How helpful has the following **ICN work** been to international co-operation?

Table 11 – Usefulness of ICN work to international co-operation (please tick the relevant box)			
Outputs	Low	Medium	High
ICN Recommended Practices for Merger Notification and Review Procedures, Recommended Practice X, Interagency Co-ordination (2004)			
ICN Guiding Principles for Merger Notification and Review, Guiding Principle 6, Co-ordination (2002)			
ICN Merger Working Group Model Confidentiality Waiver (2005)			
ICN Cartel Working Group paper, Co-operation Between Competition Agencies in Cartel Investigations (2007)			
ICN Cartel Working Group Charts Summarizing Information Sharing Mechanisms (ongoing)			
Framework for Merger Review Co-operation (ongoing)			

44. Based on your experience and answers, in what areas would you like to see **future discussion or work** being carried out by the ICN in the next 12 – 24 months? How would you like to see any output (including formal instruments) develop?

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In addition to providing a narrative answer, please also fill out the table below.

Table 12 – Future work for the ICN (please tick the relevant box)			
Outputs	Low priority	Medium	High priority
Revision of co-operation-related provisions of ICN Recommended Practices on Merger Notification and Procedure			
New ICN Guidance with respect to Co-operation on Cartel, Merger and/or Unilateral Conduct/Abuse of Dominance Enforcement Matters			
New ICN Recommended Practices with respect to Co-operation on Cartel, Merger and/or Unilateral Conduct Enforcement Matters			
New or Revised ICN Working Group Reports on Co-operation on Cartel, Merger and/or Unilateral Conduct Enforcement Matters, comparing co-operation practices, rules and experiences			
Broaden/replicate ICN Cartel Working Group Charts Summarizing Information Sharing Mechanisms for other enforcement areas			
Model Bilateral Co-operation Agreement			
New or Revised Model Confidentiality Waivers for Cartel, Merger and/or Unilateral Conduct Enforcement Matters			
Broaden/replicate Framework for Merger Review Co-operation for other enforcement areas			
Other (please specify)			

45. What aspects of ICN networking, work product (please identify), and events have been the most helpful in fostering international co-operation, whether case specific or in the broader sense – i.e., not limited to case co-operation?

46. In what enforcement areas (mergers, cartels, unilateral conduct, other) should the ICN focus its efforts to foster international co-operation?

47. Are there other aspects of co-operation in the broader sense – i.e., not limited to case co-operation – that have proven valuable in your enforcement work?

48. What can ICN do to help foster co-operation in the broader sense – i.e., not limited to case co-operation?

ANNEX II. METHODOLOGICAL NOTE

The Survey included forty-six qualitative questions, asking respondents to reflect on their experiences of and provide their opinions on the current framework for international co-operation in competition enforcement. In addition, respondents were asked to complete twelve quantitative tables, either with detailed data about the number of cases and the types of cases in which they had co-operated, or with quantified assessments of the frequency and importance of their experiences.

The following methodological note outlines the analytical methods employed to produce the results which are presented in this Report.

1. Qualitative responses

Respondents provided narrative replies to the forty-six qualitative questions in the Survey.¹ Many of these questions were fairly open-ended, and respondents were free to identify elements which they wished to highlight in their answers. Some of these questions were narrowly focused, and the aggregated responses clearly outline issues which many competition agencies consider to be important.² However, some of the questions asked respondents to reflect more generally on a topic of interest, and the responses to these questions often identified a wide variety of issues which reflect diverse experiences with international co-operation.³

1.1 *Qualitative responses – analytical methods*

In order to draw out themes from the narrative responses, key concepts were identified in the responses themselves. Each response was carefully read,

¹ In total, five hundred and twenty six (526) pages of narrative answers were submitted by respondents in reply to the qualitative questions.

² For example, Question 24 asks respondents whether confidentiality waivers are available as a legal basis for co-operation in their jurisdiction, whether they actively seek confidentiality waivers, and whether a standard form is used.

³ For example, Question 5 asks respondents to reflect generally on the costs and benefits of international co-operation

and the important concepts mentioned by the respondent were noted. The aggregate responses to each question were then considered, and the number of respondents who had mentioned each key concept was summed to provide a basis for comparison of the relative prevalence and importance of the themes expressed in the answers.

Documents were created by means of this method for twenty-two of the qualitative questions,⁴ which summarize the key concepts identified by respondents and the number of respondents who mentioned each theme. In many cases, the responses were disaggregated into OECD and non-OECD subgroups,⁵ in order to examine any contrast between the experiences of the two groups. In several cases, where there was a relatively high degree of overlap in the concepts identified, the percentages of respondents identifying each theme were also calculated.

The analytical method outlined above was particularly useful in examining responses to the broader qualitative questions, which asked for general reflections on topics of particular importance. These open-ended questions often received widely varied responses, and this is reflected in the documents which summarize the themes. For some of these questions, over twenty key concepts were identified in the narrative responses, many mentioned by only one or two agencies.

Additionally, a simpler method of analysis was employed to draw conclusions from the responses to the more narrowly focused qualitative questions. Some of these questions required ‘yes or no’ answers, with additional space for respondents to elaborate. Responses to these questions provided more overlap in the themes which were addressed. Each response was also carefully read, and key concepts identified, but instead of compiling comprehensive lists of the concepts mentioned in the responses, the general categories of answers were simply counted across the sample.⁶

Results of these qualitative questions are presented in the text and tables of the preceding Chapters of this report. Where it is stated in the text that

⁴ These are: Questions 1, 5, 15, 16, 20-29, 31, 34-38, 40, and 41.

⁵ See further discussion below on the distinction between OECD and non-OECD respondents.

⁶ This method was used (alone or in addition to more detailed analysis) to aggregate responses to Questions 2, 4-6, 9-11, 13-16, 22-25, 27, 29, 31, 34, 37, 39-41, and 46.

‘[number] of respondents mentioned [...]’, or reference is made to a qualitative question, this was usually the method employed to arrive at the given result.

The details and context of the full narrative responses were also taken into account in the drafting of the report; the individuals responsible for the drafting process familiarized themselves with and made frequent reference to the full text of the responses when clarification or illustrative examples were required.

1.2 Qualitative responses – methodological choices

It is worth noting that the methodologies outlined in this section have required some degree of subjective assessment on the part of the analysis team, regarding the categorization and aggregation of similar themes and concepts. Choices were made as to which subtleties could be included in the analysis while still providing clarity in the overall results, and it is possible that different choices might have yielded slightly different results. These choices were made with all due regard for the integrity of the general tone of the individual responses and the context in which they were made. We have a high degree of confidence that the results of the qualitative questions presented in the proceeding Chapters represent the views and experiences of respondents accurately and faithfully.

2. Quantitative responses

The Survey also included twelve Tables, which respondents were asked to complete with quantitative data. The data requested in the Tables relates to the following topics of interest.

- *The extent and frequency of experience with international co-operation.* In Table 1, respondents are asked to identify the frequency with which they co-operate at various stages of an investigation. Tables 3.1-3.2 request data on the number of formal notifications made and received by each agency. Tables 4.1-4.4 request data on the number of formal requests for investigatory assistance made and received by each agency. In Tables 5.1-5.2, data was requested regarding the number of cases in which co-operation had occurred, and the number of agencies with which the responding agency had co-operated. In Tables 6.1-6.4, respondents were asked to assess the frequency of different types of co-operation, disaggregated by enforcement area. In Table 8, respondents were asked to assess the frequency of different types of co-operation within regional co-operation networks.

- *The legal bases available for international co-operation.* Table 2 requests information about the availability, number, relevance and importance of different categories of formal legal bases for co-operation.
- *Limitations to effective co-operation.* In Table 7, respondents were asked to assess the frequency with which they experience and the importance of various limitations to effective co-operation.
- *Experience with the various co-operation enhancing work products of the OECD and the ICN.* In Table 9, information was requested in relation to experience with the OECD 1995 Recommendation. Table 10 asked respondents to assess the priority of future work for the OECD. Table 11 requested an assessment of the usefulness of various ICN work products, while Table 12 asked respondents to assess the priority of future work for the ICN.

In the analysis of all of the tables, a distinction was drawn between OECD respondents and non-OECD respondents,⁷ in order to identify any contrast in the experiences of the two subgroups.

2.1 *Quantitative responses – ‘frequency’ of experience*

Tables 1 and 6-8 request that respondents assess the ‘frequency’ with which they: co-operate at various stages of an investigation (Table 1); have experienced various types of co-operation (disaggregated by enforcement area, Tables 6.1-6.4); have experienced various limitations to effective co-operation (Table 7); and have experienced various types of co-operation within formal regional networks (Table 8).

Respondents were asked to assess frequency as a percentage of those cases with an international element, in which the investigation could potentially benefit from international co-operation (*i.e.* excluding strictly domestic cases). The available answers for ‘frequency’ in all of the tables mentioned above were:

- ‘Never’
- ‘Seldom’ (less than 20% of relevant cases)
- ‘Occasionally’ (between 20% and 60% of relevant cases), and
- ‘Frequently’ (more than 60% of relevant cases).

⁷ See further discussion below on the distinction between OECD and non-OECD respondents.

The responses were treated as ordinal; an ordinal score of [0] was assigned to responses of ‘Never’, a score of [1] to responses of ‘Seldom’, a score of [2] to responses of ‘Occasionally’, and a score of [3] to responses of ‘Frequently’.

Three types of metrics⁸ were used to assess the relative frequency of categories identified in the tables, as reported by respondents. The sums of the ordinal scores were used as a basis for comparison of the relative frequency of categories in several of the Tables.⁹ Alternatively, the average ordinal score was sometimes used as a basis for comparison.¹⁰ The final metric calculated in the analysis of the tables was the number and percent of respondents who had assigned each category of response (‘never’, ‘seldom’, ‘occasionally’ and ‘frequently’) to each category in the table.¹¹ The decision of which metrics to include in this Report for each of the tables was made based on the context of the Chapters, and the conclusions which could be drawn.

Because some respondents only partially completed Table 7, the second metric listed above (average of ordinal scores) was calculated over the number of actual responses received for each category, rather than the total number of respondents to the Survey. The choice to use this calculation was justified by the fact that non-answers would skew the averages downwards; however, non-answers are unlikely to be randomly assigned. It seems likely that the respondents who did complete the table would be those with a greater extent of experience in international co-operation, so that a different potential bias may have been introduced. It is difficult to see how both of these potential biases (underestimation through inclusion of non-answers, or overestimation through exclusion of non-answers) could have been simultaneously addressed.

A further consequence of this choice of calculation is that the average ordinal scores are calculated over different devisors; it is possible that a category could receive only two very high scores, and appear to be relatively more significant than another category which was scored by a larger number of respondents.

Table 2 also requested that respondents assess ‘frequency’, in this case of use of various legal bases for co-operation; however, in this table respondents are asked to score ‘frequency’ on a scale of [0-5]. Only those respondents who

⁸ In some cases, only one of these metrics was calculated. In other cases, multiple metrics were calculated, although only one may have been reported in the preceding chapters.

⁹ This was the case in the analysis of Tables 1, 6.1-6.4, 7 and 8.

¹⁰ This was the case in the analysis of Tables 7 and 8.

¹¹ This was the case in the analysis of Tables 1, 6.1-6.4, 7 and 8.

reported that a particular legal basis was available to them provided a score for the ‘frequency’ of its use. In the analysis of this table, the average score for ‘frequency’ was used as a basis for comparison, with similar caveats to those outlined in the paragraph above.

2.2 *Quantitative responses – ‘importance’ and ‘priority’*

Table 7 requests that respondents assess the ‘importance’ of various limitations to effective co-operation. Table 10 asks that respondents assign a ‘priority’ to future projects for the OECD, while Table 12 asks for the ‘priority’ of future projects for the ICN.

Available responses for both ‘importance’ and ‘priority’ were: ‘Low’, ‘Medium’, and ‘High’.

Once again, the responses were treated as ordinal; an ordinal score of [0] was assigned to responses of ‘Low’, a score of [1] to responses of ‘Medium’, and a score of [2] to responses of ‘High’.

The same three metrics were calculated to provide a basis for comparison across categories: the sum of ordinal scores¹², the average ordinal score¹³, and the number and percent of respondents who assigned each category of ‘importance’/‘priority’ (‘Low’, ‘Medium’, ‘High’) to each category in the tables¹⁴.

Because some respondents only partially completed Table 7, the second metric listed above (average of ordinal scores) was calculated over the number of actual responses received for each category, rather than the total number of respondents to the Survey¹⁵. A consequence of this choice of calculation is that the average ordinal scores are calculated over different devisors; it is possible that a category could receive only two very high scores, and appear to be relatively more significant than another category which was scored by a larger number of respondents.

3. **Estimated ranges**

In Tables 3-5 in the Survey, respondents were asked to provide quantitative data regarding: the availability and number of various categories of

¹² This metric was calculated for responses to Tables 7, 10 and 12.

¹³ This metric was calculated for responses to Table 7.

¹⁴ This metric was calculated for responses to Tables 7, 10 and 12.

¹⁵ See 2.1, above, for further discussion of issues which may arise from this methodological choice.

legal bases for international co-operation (Table 2); the number of formal notifications made and received (Tables 3.1-3.2); the number of formal requests for investigatory assistance made and received (Tables 4.1-4.4); and the number of cases and agencies with which co-operation had been experienced (Tables 5.1-5.2). In all of these tables, agencies were asked to provide disaggregated data by enforcement area.

Where exact numbers were not available or not known, respondents were allowed to provide estimated ranges ([1-5], [5-10], [10-20] or [20+]). A significant number of respondents completed the tables with estimated ranges.

Responses to these tables were used to calculate the total number of respondents with experience, the number of respondents with experience within a given range, the average number relevant to the data provided across the sample, and/or the total relevant number¹⁶. Where estimated ranges were given instead of exact numbers, the average of the range was substituted in the calculation; where the estimated range was [20+], a conservative estimate (20) was used.

4. OECD responses v non-OECD responses

In several Sections of this Report, reference is made to contrasts between the experiences of agencies from OECD member countries and that of agencies from non-OECD member countries. This distinction was used to try to construct two subgroups which would be likely to have had different experiences with degree and extent of co-operation.

For all mention of these subgroups throughout the report, unless otherwise specified, 'OECD members', 'OECD respondents' and 'OECD countries' all refer to the agencies of countries which are full members of the OECD, while 'non-OECD members', 'non-OECD respondents' and 'non-OECD countries' refers to all other agencies, including agencies of OECD observer countries.

5. International v regional co-operation

Section 1 of the Survey asked respondents to include data and reflections on their experiences of co-operation both internationally and within regional networks, and Section 8 of the Survey addressed specifically co-operation within regional networks. All other sections of the Survey requested information about only international (non-regional) co-operation.

¹⁶ Presentation of the results of these Tables in the preceding chapters details the particular metric used as a basis for comparison.

For the purposes of this Survey, ‘regional co-operation’ was defined as co-operation which takes place within an existent, formal, and legal framework for extensive co-operation within a regional organization.¹⁷ The existence of regional-level competition policy or legislation is an additional feature of the most significant regional networks identified by respondents, but this was not part of the core definition. Competition enforcement agreements which had been concluded bilaterally between neighbouring states did not qualify as regional frameworks.¹⁸

The reason for this distinction between international co-operation and regional co-operation is that experiences of co-operation within a regional network are distinct from experiences of international co-operation; co-operation within regional networks entails a very different set of costs and benefits, and different limitations from those encountered in international co-operation. If regional co-operation were to be included in Sections 2-7 of the Survey, results might be unrepresentative of experiences with international co-operation.

Several agencies failed to draw a distinction between region and international co-operation in their responses to the Survey. Where it was made clear in the responses that the agency had no experience of co-operation outside of a regional network, the data provided were amended accordingly. Where this was not clear in the response, every effort was made to contact the agency to request clarifications, and the data were amended according to these clarifications.

6. Seeking clarification from respondents

In the assessment of the responses to the Survey, several were identified in which the respondents may have misinterpreted the questions, the instructions, or the distinction drawn between region and international co-operation. Every effort was made to contact the responding agencies and request clarification before the data set was considered to be complete and the analytical results were produced.

¹⁷ For example, the European Competition Network (ECN).

¹⁸ For example, the multilateral co-operation agreement concluded between Australia, Singapore and New Zealand is not considered to be an example of regional co-operation for the purposes of this survey, and examples of co-operation under this agreement have been included in the data set.

**ANNEX III.
RECOMMENDATION OF THE COUNCIL CONCERNING
CO-OPERATION BETWEEN MEMBER COUNTRIES
ON ANTICOMPETITIVE PRACTICES AFFECTING
INTERNATIONAL TRADE**

25 July 1995 - C(95)130/FINAL

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 the control of anticompetitive practices affecting international trade has long existed, based on successive Recommendations of the Council of 5 October 1967 [C(67)53(Final)], 3 July 1973 [C(73)99(Final)], 25 September 1979 [C(79)154(Final)] and 21 May 1986 [C(86)44(Final)];

HAVING REGARD to the recommendations made in the study of transnational mergers and merger control procedures prepared for the Committee on Competition Law and Policy;

RECOGNISING that anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Member countries;

RECOGNISING that the continued growth in internationalisation of business activities correspondingly increases the likelihood that anticompetitive practices in one country or co-ordinated behaviour of firms located in different countries may adversely affect the interests of Member countries and also increases the number of transnational mergers that are subject to the merger control laws of more than one Member country;

RECOGNISING that the unilateral application of national legislation, in cases where business operations in other countries are involved, raises questions as to the respective spheres of sovereignty of the countries concerned;

RECOGNISING the need for Member countries to give effect to the principles of international law and comity and to use moderation and self-restraint in the interest of co-operation on the field of anticompetitive practices;

RECOGNISING that anticompetitive practices investigations and proceedings by one Member country may, in certain cases, affect important interests of other Member countries;

CONSIDERING therefore that Member countries should co-operate in the implementation of their respective national legislation in order to combat the harmful effects of anticompetitive practices;

CONSIDERING also that closer co-operation between Member countries is needed to deal effectively with anticompetitive practices operated by enterprises situated in Member countries when they affect the interests of one or more other Member countries and have a harmful effect on international trade;

CONSIDERING moreover that closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a fully voluntary basis, should be encouraged, it being understood that such co-operation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning anticompetitive practices, as may arise;

RECOGNISING the desirability of setting forth procedures by which the Competition Law and Policy Committee can act as a forum for exchanges of views, consultations and conciliation on matters related to anticompetitive practices affecting international trade;

CONSIDERING that if Member countries find it appropriate to enter into bilateral arrangements for co-operation in the enforcement of national competition laws, they should take into account the present Recommendation and Guiding Principles:

I. RECOMMENDS to Governments of Member countries that insofar as their laws permit:

A. Notification, Exchange of Information and Co-ordination of Action

1. When a Member country undertakes under its competition laws an investigation or proceeding which may affect important interests of another Member country or countries, it should notify such Member country or countries, if possible in advance, and, in any event, at a time that would facilitate comments or consultations; such advance notification would enable the proceeding Member country, while retaining full freedom of ultimate decision, to take account of such views as the other Member country may wish to express and of such remedial action as the other Member country may find it feasible to take under its own laws, to deal with the anticompetitive practices;

2. Where two or more Member countries proceed against an anticompetitive practice in international trade, they should endeavour to co-ordinate their action insofar as appropriate and practicable;

3. Through consultations or otherwise, the Member countries should cooperate in developing or applying mutually satisfactory and beneficial measures for dealing with anticompetitive practices in international trade. In this connection, they should supply each other with such relevant information on anticompetitive practices as their legitimate interests permit them to disclose; and should allow, subject to appropriate safeguards, including those relating to confidentiality, the disclosure of information to the competent authorities of Member countries by the other parties concerned, whether accomplished unilaterally or in the context of bilateral or multilateral understandings, unless such co-operation or disclosure would be contrary to significant national interests.

B. Consultation and Conciliation

4.a) A Member country which considers that an investigation or proceeding being conducted by another Member country under its competition laws may affect its important interests should transmit its views on the matter to or request consultation with the other Member country;

b) Without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision the Member country so addressed should give full and sympathetic consideration to the views expressed by the requesting country, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding;

5.a) A Member country which considers that one or more enterprises situated in one or more other Member countries are or have been engaged in anticompetitive practices of whatever origin that are substantially and adversely affecting its interests, may request consultation with such other Member country or countries recognising that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the Member countries concerned;

b) Any Member country so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting country and, in particular, to the nature of the anticompetitive practices in question, the enterprises involved and the alleged harmful effects on the interests of the requesting country;

c) The Member country addressed which agrees that enterprises situated in its territory are engaged in anticompetitive practices harmful to the interests of the requesting country should attempt to ensure that these enterprises take remedial action, or should itself take whatever remedial action it considers appropriate, including actions under its legislation on anticompetitive practices or administrative measures, on a voluntary basis and considering its legitimate interests;

6. Without prejudice to any of their rights, the Member countries involved in consultations under paragraphs 4 and 5 above should endeavour to find a mutually acceptable solution in the light of the respective interests involved;

7. In the event of a satisfactory conclusion to the consultations under paragraphs 4 and 5 above, the requesting country, in agreement with, and in the form accepted by the Member country or countries addressed, should inform the Competition Law and Policy Committee of the nature of the anticompetitive practices in question and of the settlement reached;

8. In the event that no satisfactory conclusion can be reached, the Member countries concerned, if they so agree, should consider having recourse to the good offices of the Competition Law and Policy Committee with a view to conciliation. If the Member countries concerned agree to the use of another means of settlement, they should, if they consider it appropriate, inform the Committee of such features of the settlement as they feel they can disclose.

II. RECOMMENDS that Member countries take into account the guiding principles set out in the Appendix to this Recommendation.

III. INSTRUCTS the Competition Law and Policy Committee:

1. To examine periodically the progress made in the implementation of the present Recommendation and to serve periodically or at the request of a Member country as a forum for exchanges of views on matters related to the Recommendation on the understanding that it will not reach conclusions on the conduct of individual enterprises or governments;
2. To consider the reports submitted by Member countries in accordance with paragraph 7 of Section I above;
3. To consider the requests for conciliation submitted by Member countries in accordance with paragraph 8 of Section I above and to assist, by offering advice or by any other means, in the settlement of the matter between the Member countries concerned;
4. To report to the Council as appropriate on the application of the present Recommendation.

IV. DECIDES that this Recommendation and its Appendix cancel and replace the Recommendation of the Council of 21 May 1986 [C(86)44(Final)].

APPENDIX.
**GUIDING PRINCIPLES FOR NOTIFICATIONS,
EXCHANGES OF INFORMATION, CO-OPERATION
IN INVESTIGATIONS AND PROCEEDINGS, CONSULTATIONS AND
CONCILIATION OF ANTICOMPETITIVE PRACTICES AFFECTING
INTERNATIONAL TRADE**

Purpose

1. The purpose of these principles is to clarify the procedures laid down in the Recommendation and thereby to strengthen co-operation and to minimise conflicts in the enforcement of competition laws. It is recognised that implementation of the Recommendation herein is fully subject to the national laws of Member countries, as well as in all cases to the judgement of national authorities that co-operation in a specific matter is consistent with the Member country's national interests. Member countries may wish to consider appropriate legal measures, consistent with their national policies, to give effect to this Recommendation in appropriate cases.

Definitions

2.a) "Investigation or proceeding" means any official factual inquiry or enforcement action authorised or undertaken by a competition authority of a Member country pursuant to the competition laws of that country. Excluded, however, are (i) the review of business conduct or routine filings, in advance of a formal or informal determination that the matter may be anticompetitive, or (ii) research, studies or surveys the objective of which is to examine the general economic situation or general conditions in specific industries.

b) "Merger" means merger, acquisition, joint venture and any other form of business amalgamation that falls within the scope and definitions of the competition laws of a Member country governing business concentrations or combinations.

Notification

3. The circumstances in which a notification of an investigation or proceeding should be made, as recommended in paragraph I.A.1. of the Recommendation, include:

a) When it is proposed that, through a written request, information will be sought from the territory of another Member country or countries;

b) When it concerns a practice (other than a merger) carried out wholly or in part in the territory of another Member country or countries, whether the practice is purely private or whether it is believed to be required, encouraged or approved by the government or governments of another country or countries;

c) When the investigation or proceeding previously notified, may reasonably be expected to lead to a prosecution or other enforcement action which may affect an important interest of another Member country or countries;

d) When it involves remedies that would require or prohibit behaviour or conduct in the territory of another Member country;

e) In the case of an investigation or proceeding involving a merger, and in addition to the circumstances described elsewhere in this paragraph, when a party directly involved in the merger, or an enterprise controlling such a party, is incorporated or organised under the laws of another Member country;

f) In any other situation where the investigation or proceeding may involve important interests of another Member country or countries.

Procedure for Notifying

4.a) Under the Recommendation notification ordinarily should be provided at the first stage in an investigation or proceeding when it becomes evident that notifiable circumstances described in paragraph 3 are present. However there may be cases where notification at that stage could prejudice the investigative action or proceeding. In such a case notification and, when requested, consultation should take place as soon as possible and in sufficient time to enable the views of the other Member country to be taken into account. Before any formal legal or administrative action is taken, the notifying country should ensure, to the fullest extent possible in the circumstances, that it would not prejudice this process.

b) Notification of an investigation or proceeding should be made in writing through the channels requested by each country as indicated in a list to be established and periodically updated by the Competition Law and Policy Committee.

c) The content of the notification should be sufficiently detailed to permit an initial evaluation by the notified country of the likelihood of any effects on its national interests. It should include, if possible, the names of the persons or enterprises concerned, the activities under investigation, the character of the investigation or procedure and the legal provisions concerned, and, if applicable, the need to seek information from the territory of another Member country. In the case of an investigation or proceeding involving a merger, notification should also include:

i) The fact of initiation of an investigation or proceeding;

ii) The fact of termination of the investigation or proceeding, with a description of any remedial action ordered or voluntary steps undertaken by the parties;

iii) A description of the issues of interest to the notifying Member country, such as the relevant markets affected, jurisdictional issues or remedial concerns;

iv) A statement of the time period within which the notifying Member country either must act or is planning to act.

Co-ordination of Investigations

5. The co-ordination of concurrent investigations, as recommended in paragraph I.A.2. of the Recommendation, should be undertaken on a case-by-case basis, where the relevant Member countries agree that it would be in their interests to do so. This co-ordination process shall not, however, affect each Member country's right to take a decision independently based on the investigation. Co-ordination might include any of the following steps, consistent with the national laws of the countries involved:

- a) Providing notice of applicable time periods and schedules for decision-making;
- b) Sharing factual and analytical information and material, subject to national laws governing the confidentiality of information and the principles relating to confidential information set forth in paragraph 10;
- c) Requesting, in appropriate circumstances, that the subjects of the investigation voluntarily permit the co-operating countries to share some or all of the information in their possession, to the extent permitted by national laws;
- d) Co-ordinating discussions or negotiations regarding remedial actions, particularly when such remedies could require conduct or behaviour in the territory of more than one Member country;
- e) In those Member countries in which advance notification of mergers is required or permitted, requesting that the notification include a statement identifying notifications also made or to be made to other countries.

Assistance in an Investigation or Proceeding of a Member Country

6. Co-operation among Member countries by means of supplying information on anticompetitive practices in response to a request from a Member country, as recommended in paragraph I.A.3. of the Recommendation, should be undertaken on a case-by-case basis, where it would be in the interests of the relevant Member countries to do so. Co-operation might include any of the following steps, consistent with the national laws of the countries involved:

- a) Assisting in obtaining information on a voluntary basis from within the assisting Member's country;

b) Providing factual and analytical material from its files, subject to national laws governing confidentiality of information and the principles relating to confidential information set forth in paragraph 10;

c) Employing on behalf of the requesting Member country its authority to compel the production of information in the form of testimony or documents, where the national law of the requested Member country provides for such authority;

d) Providing information in the public domain relating to the relevant conduct or practice. To facilitate the exchange of such information, Member countries should consider collecting and maintaining data about the nature and sources of such public information to which other Member countries could refer.

7. When a Member country learns of an anticompetitive practice occurring in the territory of another Member country that could violate the laws of the latter, the former should consider informing the latter and providing as much information as practicable, subject to national laws governing the confidentiality of information and the principles relating to confidential information set forth in paragraph 10, consistent with other applicable national laws and its national interests.

8.a) Member countries should use moderation and self-restraint and take into account the substantive laws and procedural rules in the foreign forum when exercising their investigatory powers with a view to obtaining information located abroad.

b) Before seeking information located abroad, Member countries should consider whether adequate information is conveniently available from sources within their national territory.

c) Any requests for information located abroad should be framed in terms that are as specific as possible.

9. The provision of assistance or co-operation between Member countries may be subject to consultations regarding the sharing of costs of these activities.

Confidentiality

10. The exchange of information under this Recommendation is subject to the laws of participating Member countries governing the confidentiality of information. A Member country may specify the protection that shall be accorded the information to be provided and any limitations that may apply to

the use of such information. The requested Member country would be justified in declining to supply information if the requesting Member country is unable to observe those requests. A receiving Member country should take all reasonable steps to ensure observance of the confidentiality and use limitations specified by the sending Member country, and if a breach of confidentiality or use limitation occurs, should notify the sending Member country of the breach and take appropriate steps to remedy the effects of the breach.

Consultations between Member Countries

11.a) The country notifying an investigation or proceeding should conduct its investigation or proceeding, to the extent possible under legal and practical time constraints, in a manner that would allow the notified country to request informal consultations or to submit its views on the investigation or proceeding.

b) Requests for consultation under paragraphs I.B.4. and I.B.5. of the Recommendation should be made as soon as possible after notification and explanation of the national interests affected should be provided in sufficient detail to enable full consideration to be given to them.

c) The notified Member country should, where appropriate, consider taking remedial action under its own legislation in response to a notification.

d) All countries involved in consultations should give full consideration to the interests raised and to the views expressed during the consultations so as to avoid or minimise possible conflict.

Conciliation

12.a) If they agree to the use of the Committee's good offices for the purpose of conciliation in accordance with paragraph I.B.8. of the Recommendation, Member countries should inform the Chairman of the Committee and the Secretariat with a view to invoking conciliation.

b) The Secretariat should continue to compile a list of persons willing to act as conciliators.

c) The procedure for conciliation should be determined by the Chairman of the Committee in agreement with the Member countries concerned.

d) Any conclusions drawn as a result of the conciliation are not binding on the Member countries concerned and the proceedings of the conciliation will be kept confidential unless the Member countries concerned agree otherwise.

**ANNEX IV.
BEST PRACTICES FOR THE FORMAL EXCHANGE
OF INFORMATION BETWEEN COMPETITION AUTHORITIES
IN HARD CORE CARTEL INVESTIGATIONS**

1. These Best Practices for the formal exchange of information¹ between competition authorities in hard core cartel investigations² (“Best Practices”) have been developed under the sole responsibility of the OECD’s Competition Committee.

2. The OECD gives high priority to effective competition law enforcement, particularly against hard core cartels.³ This has been recognised in recent acts by the OECD Council, which also encouraged member countries to co-operate in their law enforcement activities:

- The Council’s Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade [C(95)130/FINAL] recommended that, when permitted by their laws and consistent with their interests, Member countries should co-ordinate competition investigations of mutual concern and should comply with each other’s requests to share information.

¹ Throughout this document “exchanging information” and “providing information” are meant to refer to situations in which one competition authority shares information with, or otherwise makes information available to, another competition authority, including reciprocal exchanges of information between two competition authorities and the provision of information which one competition authority has obtained at the request of another competition authority.

² Throughout this document “investigation of a hard core cartel” is meant to include all steps related to the enforcement of competition laws against hard core cartels.

³ Throughout this document “hard core cartel” is meant to refer to hard core cartels as defined in the Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL.

- Furthermore the Council's Recommendation Concerning Effective Action Against Hard Core Cartels [C(98)35/FINAL] recognised that member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process, to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information.
- The latter Recommendation also encouraged member countries to review all obstacles to their effective co-operation in the enforcement of laws against hard core cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

3. The Best Practices are based on these two Council Recommendations and draw from the Committee's previous work on the fight against hard core cartels, and in particular the subject of information exchanges in hard core cartel investigations.⁴

4. Consistent with these Council Recommendations and in light of the Competition Committee's work on the topic of information exchanges in cartel investigations, the Committee believes that member countries should generally support information exchanges and should, in accordance with their laws, seek to simplify and expedite the process for exchanging information in order to avoid imposing unnecessary burdens on competition authorities and to allow an effective and timely information exchange.

⁴ The Committee's previous work on the subject of information exchanges in hard core cartel investigations has been documented in reports by the Committee to the Council on the implementation of the Council Recommendation Concerning Effective Action Against Hard Core Cartels. The Committee also held roundtable discussions on various issues related to co-operation and information exchanges in hard core cartel investigations. Representatives of the business community contributed to the Committee's discussions, and their views have been taken into account in developing these Best Practices.

5. The Competition Committee also recognises that:

- a member country may decline to comply with a request for information, or limit or condition its co-operation;
- the exchanging of confidential information presupposes effective safeguards (i) to protect against improper disclosure or use of exchanged information; and (ii) for privileged information, in particular information subject to the legal profession privilege, as well as for other rights under the laws of member countries involved in the exchange of information, which may have to take into account differences in the nature of sanctions for violations of competition laws concerning hard core cartels in different jurisdictions;
- information exchanges should not inadvertently undermine hard core cartel investigations, including the effectiveness of amnesty programs, and that, to that end, most member countries have adopted policies pursuant to which they do not exchange information obtained from an amnesty applicant without the applicant's prior permission;
- member country authorities should seek to ensure that information exchanges do not have negative consequences for informants, for example by deciding not to disclose their identities in certain cases;
- regional organisations and regional agreements may imply a very close co-operation which requires less safeguards than set out in these Best Practices.

6. Based on the above, the Competition Committee believes that member countries should take note of the following Best Practices when they enter into international agreements, or adopt domestic legislation, authorising the exchange of confidential information in investigations of hard core cartels under their competition laws, and in their policies and practices applicable to such exchanges:

I. Information Exchanges Covered by These Best Practices

A. These Best Practices apply to situations where (i) for the purposes of the investigation of hard core cartels under the competition laws of the requesting jurisdiction a competition authority in one jurisdiction provides information obtained from private sources to a competition authority in another jurisdiction;

(ii) the competition authority would normally, under domestic law, be prohibited from disclosing such information to other competition authorities; and (iii) the disclosure of such information can occur only because it is authorised in certain circumstances by an international agreement or domestic law. International agreements and domestic laws authorising such disclosure, as well as policies and practices of competition authorities applicable to such exchanges, should provide for the safeguards identified in these Best Practices.

B. The Best Practices should apply to exchanges of information that has been obtained on behalf of a foreign competition authority following a request for assistance as well as information already in the possession of the requested jurisdiction.

C. These Best Practices do not apply to:

- (i) Exchanges of information not subject to domestic law restrictions and which competition authorities therefore are free to exchange without authorisation by international agreement or domestic law;
- (ii) Information exchanges among members of a regional organisation or parties to a regional agreement that have adopted specific rules governing information exchanges among competition authorities, unless such exchanges involve information originating from a jurisdiction that is outside the regional organisation or not party to the regional agreement; and
- (iii) Information exchanges in the context of private litigation.

II. Safeguards for Formal Exchanges of Information

A. Authority to Exchange Information

1. Before making a formal request for information, a requesting jurisdiction should seek to consult with the requested jurisdiction to understand the circumstances under which the requested jurisdiction can act upon the request, in particular, whether it may have any disclosure requirements with respect to the information in the request and/or whether it would have to give notice to the source of the information. The requested jurisdiction should confirm that it will to the fullest extent possible consistent with its laws maintain the confidentiality of the information in the request.

2. The requesting jurisdiction should provide sufficient information as is necessary for the requested jurisdiction to act upon the request. The requesting jurisdiction should explain to the requested jurisdiction in detail how the request for information located in the territory of the requested jurisdiction concerns the requesting jurisdiction's investigation of a violation of the requesting jurisdiction's competition laws concerning hard core cartels.
3. The requested jurisdiction should have discretion to provide or not to provide the requested information. Reasons for declining to provide the requested information might include, but are not limited to: (i) the requesting jurisdiction's investigation relates to conduct that would not be deemed hard core cartel conduct by the requested jurisdiction; (ii) honouring the request would be unduly burdensome for the requested jurisdiction or might undermine an ongoing investigation; (iii) the requested jurisdiction believes that confidential information may not be sufficiently safeguarded in the requesting jurisdiction; (iv) the execution of the request would not be authorised by the domestic law of the requested jurisdiction; or (v) honouring the request would be contrary to the public interest of the requested jurisdiction.
4. The requested jurisdiction may offer to provide the requested information only subject to conditions and/or limitations on use or disclosure. It should at least consider doing so if otherwise it would have to decline the request for information.

B. Provisions Concerning Confidentiality, Use, and Disclosure in the Requesting Jurisdiction

1. The requesting jurisdiction should identify its domestic confidentiality laws and related practices so that the requested jurisdiction can consider the requesting jurisdiction's ability to maintain the confidentiality of the exchanged information.
2. The exchanged information should be used or disclosed by the requesting jurisdiction solely for purposes of the investigation of a hard core cartel under the requesting jurisdiction's competition laws in connection with the matter specified in the request and solely by the enforcement authorities in the

requesting jurisdiction, unless the laws of the requested jurisdiction provide the power to approve the use or disclosure of the exchanged information in other matters related to public law enforcement, and the requested jurisdiction has granted such approval in accordance with its domestic law requirements prior to the use of the information in such other matter in the requesting jurisdiction.

3. The requesting jurisdiction should confirm that it will to the fullest extent possible consistent with its laws: (i) maintain the confidentiality of the exchanged information; and (ii) oppose the disclosure of information to third parties for the use of such information in private civil litigation, unless it has informed the requested jurisdiction about such third party request for disclosure of the information, and the requested jurisdiction has confirmed that it does not object to the disclosure.
4. The requesting jurisdiction should ensure that its privilege against self incrimination is respected when using the exchanged information in criminal proceedings against individuals.
5. The requesting jurisdiction should take all necessary measures to ensure that an unauthorised disclosure of exchanged information does not occur. In addition, it should make information available about the consequences under its domestic law in the event of such unauthorised disclosure. If, under exceptional circumstances, an unauthorised disclosure of exchanged information occurs, the requesting jurisdiction should take steps to minimise any harm resulting from the unauthorised disclosure, including promptly notifying the requested jurisdiction, and to ensure that such unauthorised disclosure does not recur. The requested jurisdiction should consider whether it is appropriate to notify the source of the information about the unauthorised disclosure.

C. Protection of Legal Profession Privilege

1. The requested jurisdiction should apply its own rules governing information subject to and protected by the legal profession privilege when obtaining the requested information.

2. The requesting jurisdiction should, to the fullest extent possible, (i) formulate its request in terms that do not call for information that would be protected by the legal profession privilege under its law; and (ii) ensure that no use will be made of any information provided by the requested jurisdiction that is subject to legal profession privilege protections of the requesting jurisdiction.

D. Notice to Source of the Exchanged Information

1. If an information exchange is made consistent with these Best Practices, the requested jurisdiction should not give prior notice of the exchange to the source of the information, unless such notice is required under its domestic laws or an international agreement.
2. If the requested jurisdiction provides notice to the source of the information of the fact that information has been exchanged, it should do so only if such notice does not violate a court order, domestic law, or an obligation under a treaty or other international agreement, or jeopardise the integrity of an investigation in either the requesting or requested jurisdiction.
3. Prior to giving notice to the source of the information in accordance with Sections D.1 or D.2, the requested jurisdiction should, where practicable, consult with the requesting jurisdiction.

III. Transparency

To the extent possible without compromising legitimate enforcement objectives, jurisdictions should ensure that their relevant laws and regulations concerning information exchanges covered by these Best Practices are publicly available.