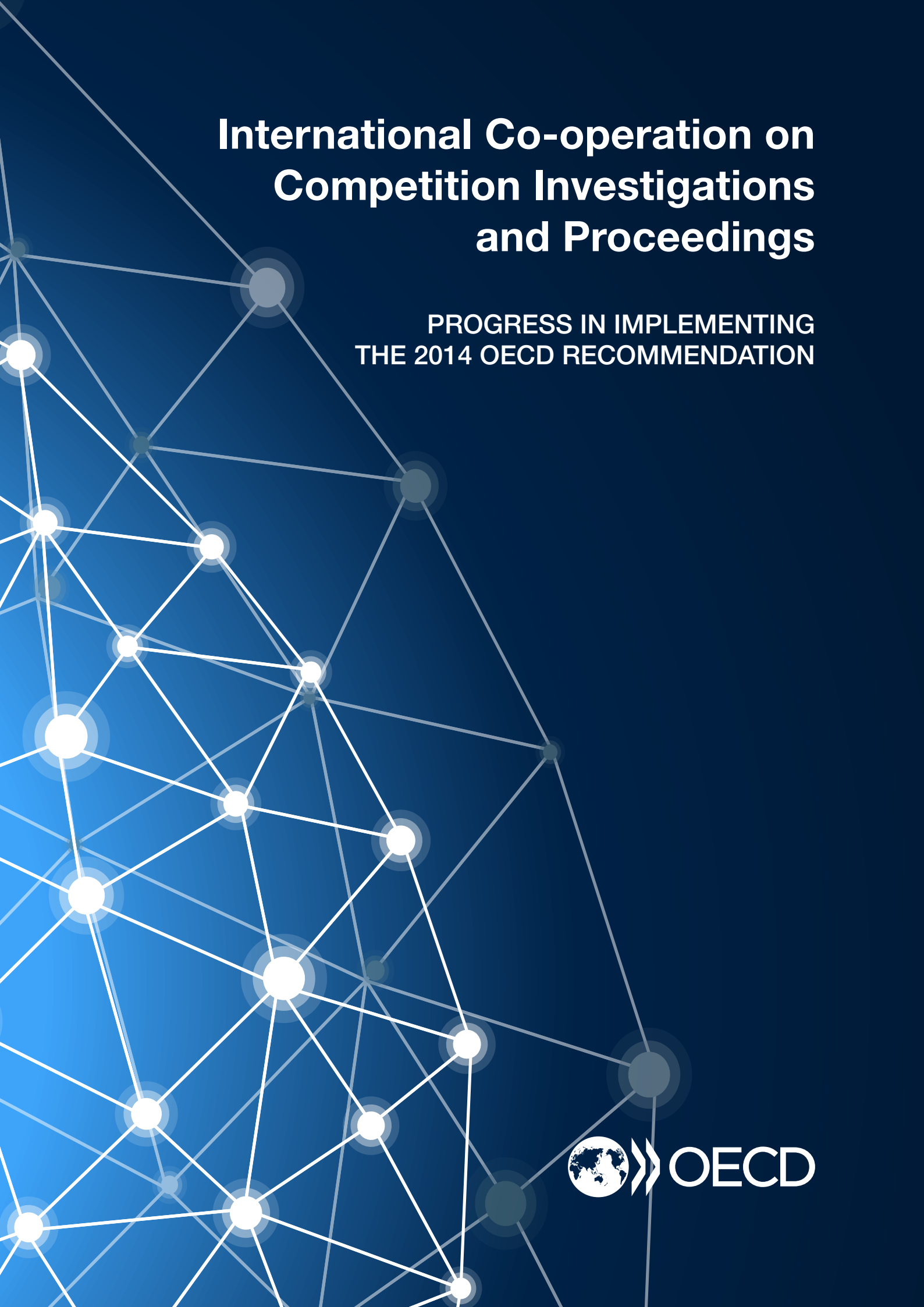
International Co-operation on Competition Investigations and Proceedings

PROGRESS IN IMPLEMENTING THE 2014 OECD RECOMMENDATION



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Foreword

The 2014 Recommendation of the Council concerning International Co-operation on Competition Investigations and Proceedings recommends to governments to commit to international co-operation and to promote effective enforcement co-operation between competition authorities in their investigations and proceedings. Enforcement co-operation between competition authorities is essential for meeting the challenges of enforcing competition law in an increasingly inter-connected and digitalised world. Effective enforcement of competition laws on a global scale is a prerequisite for open economies, fair trading conditions and level playing fields and, ultimately, for improved well-being and better lives. The OECD, through its Competition Committee, has, for over 50 years, supported and promoted international enforcement co-operation, engaging in policy and practice-related activities and developing a substantial body of resources and policy guidance designed to improve enforcement co-operation. Since 1967, successive updates of this Recommendation aimed at establishing best practices and encouraging more and better co-operation between competition enforcers.

This Report underscores that, while the Recommendation continues to address the current challenges to international enforcement co-operation, more can be done to implement the existing provisions. Significant progress has been made since the adoption of the 2014 Recommendation, and co-operation is now part of the daily enforcement reality of many competition authorities. However, the findings in this Report demonstrate that persistent legal limitations, differences in legal standards and a lack of precedents and models for enhanced co-operation, prevent more and intensified international enforcement co-operation, in particular outside of regional networks. Severe limitations stand in the way of the exchange of confidential information, investigative assistance, and joint or co-ordinated enforcement action. The Report concludes that the 2014 Recommendation is relevant and continues to provide a solid basis for the Competition Committee to explore suitable ways forward to improve international competition enforcement co-operation.

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Abbreviations and acronyms

CEC	Competition Enforcement Co-operation Template
DGIC	UNCTAD Discussion group on international co-operation
ECN	European Competition Network
CAP	ICN Framework for Competition Agency Procedures
GFC	Global Forum on Competition
ICN	International Competition Network
LACCF	Latin American and Caribbean Competition Forum
MMAC	Multi-lateral Mutual Assistance and Cooperation Framework for Competition Authorities between Australia, Canada, New Zealand, United Kingdom and the United States
MoU	Memorandum of Understanding
NGA	Non-governmental Advisor
OECD RCCs	OECD Regional Centres for Competition
RIA+Supra	Regional Integration Arrangements with Supra-National Competition Authorities
RTA	Regional Trade Agreement
UNCTAD	United Nations Conference on Trade and Development
US DoJ	United States Department of Justice
US FTC	United States Federal Trade Commission
WP3	Working Party No. 3 of the OECD Competition Committee

1. Background

This Background section sets out:

- The history of the development of the OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings [OECD/LEGAL/0408] (hereafter, the "2014 Recommendation")
- The purpose and scope of the 2014 Recommendation
- The purpose of this Report
- An overview of developments relevant to international enforcement co-operation; and
- Information on additional international actors working on enforcement co-operation.

1.1. The history of the development of the 2014 Recommendation

Enforcement co-operation between competition authorities is essential for meeting the challenges of enforcing competition law in an increasingly inter-connected world. Effective enforcement of competition laws on a global scale is a prerequisite for open economies, fair trading conditions and level playing fields, and ultimately, for improved well-being and better lives. For over 50 years, the OECD has supported and promoted enforcement co-operation, engaging in policy and practice-related activities and developing a substantial body of resources and policy guidance designed to improve enforcement co-operation.[1] This work has delivered substantive work including through reports,[2] hearings,[3] roundtable discussions,[4] practical tools and training for improving enforcement co-operation in different enforcement areas,[5] as well as the development of standards, in the form of OECD Recommendations.

This standard-setting activity has been a central pillar of the OECD work to promote and support enforcement co-operation between authorities. Since 1967, the OECD Council has adopted a series of Recommendations dealing with international enforcement co-operation between competition authorities (see Table 1.1). The subsequent Recommendations have replaced, enriched and updated the previous instrument.

The earliest Recommendation adopted in 1967 provided only very basic recommendations on notification, a general endeavour to co-ordinate, and information exchange. The 1973 Recommendation provided an extra set of principles on consultation and conciliation in the case of conflicts between jurisdictions, which was supposed to involve the OECD Committee. The Recommendation adopted in 1979 widened the scope in recommending comity principles, and integrating the 1973 Recommendation with its provisions on consultation and conciliation. In 1986, the body of the Recommendation remained largely unchanged, however, an Annex with guiding principles was added, providing more detailed guidance on procedures and circumstances relevant to notifications, the collection of information abroad, consultation, conciliation and confidentiality. The 1995 Recommendation extended the guiding principles in the Annex by adding provisions on the co-ordination of investigations and assistance.

Table 1.1. OECD Recommendations dealing with international enforcement co-operation between competition authorities

Year of adoption; year of abrogation	Recommendations
1967; 1979	Recommendation of the Council concerning Co-operation between Member Countries on restrictive Business Practices Affecting International Trade [OECD/LEGAL/0082]
1973; 1979	Recommendation of the Council concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade [OECD/LEGAL/0109]
1979; 1986	Recommendation of the Council concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [OECD/LEGAL/0180]
1986; 1995	Revised Recommendation of the Council concerning co-operation between Member Countries on Restrictive Business Practices affecting International Trade [OECD/LEGAL/0223]
1995; 2014	Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade [OECD/LEGAL/0280]
2014; in force today	Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings [OECD/LEGAL/0408]

The OECD Council adopted the current OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings [OECD/LEGAL/0408] (hereinafter "2014 Recommendation") on 16 September 2014 on the proposal of the Competition Committee. The 2014 Recommendation abrogates and replaces the 1995 OECD Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade [OECD/LEGAL/0280] and is a step forward in the fight against anti-competitive practices. It follows from the 2013 Survey carried out by the OECD and the International Competition Network (ICN) which showed that very few jurisdictions co-operated with other jurisdictions in competition law enforcement (especially due to legal and/or practical limitations to co-operation). It integrates provisions that were previously annexed as guiding principles, provides definitions, widens the commitment to international co-operation by extending it to laws and regulations in general and asking for transparency, calling for convergence of leniency or amnesty programmes, and foreseeing more detailed and specific provisions and instruments for co-ordination, assistance and information exchange. Provisions on conciliation were abolished. The 2014 Recommendation applies to all OECD Member countries, but is also open to Non-Members' adherence (referred together as the "Adherents"). To date, the 2014 Recommendation has 41 Adherents, of which three are not OECD Members.

Table 1.2. Member and Non-Member Adherents

Adherent	Status	Adherence date
Australia	Member	16/09/14
Austria	Member	16/09/14
Belgium	Member	16/09/14
Brazil	Non-Member, Associate in the Competition Committee	28/11/14
Canada	Member	16/09/14
Chile	Member	16/09/14
*Colombia**	Member	28/11/14
Costa Rica	Member	25/05/21
Czech Republic	Member	16/09/14
Denmark	Member	16/09/14
Estonia	Member	16/09/14
Finland	Member	16/09/14
France	Member	16/09/14
Germany	Member	16/09/14
Greece	Member	16/09/14
Hungary	Member	16/09/14
Iceland	Member	16/09/14
Ireland	Member	16/09/14
Israel	Member	16/09/14
Italy	Member	16/09/14
Japan	Member	16/09/14

Adherent	Status	Adherence date
Korea	Member	16/09/14
*Latvia**	Member	28/11/14
*Lithuania**	Member	16/09/14
Luxembourg	Member	16/09/14
Mexico	Member	16/09/14
Netherlands	Member	16/09/14
New Zealand	Member	16/09/14
Norway	Member	16/09/14
Poland	Member	16/09/14
Portugal	Member	16/09/14
Romania	Non-Member, Associate in the Competition Committee	11/12/14
Russian Federation	Non-Member, Participant in the Competition Committee	28/11/14
Slovak Republic	Member	16/09/14
Slovenia	Member	16/09/14
Spain	Member	16/09/14
Sweden	Member	16/09/14
Switzerland	Member	16/09/14
Turkey	Member	16/09/14
United Kingdom	Member	16/09/14
United States	Member	16/09/14

Note: * Adhered when was a non-Member.

In addition to the 2014 Recommendation, two enforcement-area specific Recommendations also deal with international co-operation (Box 1.1): the 2019 Recommendation Concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452][6] and the 2005 Recommendation on Merger Review [OECD/LEGAL/0333].

Box 1.1. Enforcement-area specific recommendations dealing with international co-operation

2019 Recommendation Concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452]

Hard core cartels are anti-competitive agreements or practices between competitors that aim to fix and raise prices, restrict supply and divide or share markets, thereby causing substantial economic harm. Hard core cartels are the most egregious violations of competition law and their prosecution is a priority policy objective for the OECD, and an enforcement priority for Adherents' competition authorities.

The 2019 Recommendation replaced the 1998 Recommendation [OECD/LEGAL/0294] and reflects the most salient developments in cartel enforcement of the last 20 years, including amnesty/leniency programmes, proactive investigation tools and investigation powers, settlements, effective fines and private enforcement actions. With regard to international co-operation, it references the 2014 Recommendation "…HAVING REGARD to the Recommendation of the Council on Fighting Bid Rigging in Public Procurement [OECD/LEGAL/0396] and the Recommendation of the Council on International Co-operation in Competition Investigations and Proceedings [OECD/LEGAL/0408], which includes detailed guidance on all aspects of competition enforcement co-operation, including co-operation in hard core cartel cases;…".

2005 Recommendation on Merger Review [OECD/LEGAL/0333]

The 2005 Recommendation on Merger Review evolved from a desire to consolidate and reflect the wide-ranging work on merger control, and to take into account important work by other international bodies in this area. The goal was to create a set of internationally recognised best practices for the merger review process, including co-operation among competition authorities in merger review. The Recommendation deals specifically with co-ordination and co-operation in cross-border merger cases and invites Member countries to co-operate and to co-ordinate 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 co-ordination.

1.2. Purpose and scope of the 2014 Recommendation

The 2014 Recommendation provides a high-level framework of existing aspects of international co-operation. Its purpose is to promote effective enforcement co-operation. The development of these elements is supported and facilitated not only by the Recommendation, including the instructions it provides to the Competition Committee, but also by the activities of other international organisations and competition authorities' activities (see below).

The 2014 Recommendation calls for Adherents to promote their competition laws and practices to foster international co-operation among competition authorities and to reduce the harm arising from anticompetitive practices and from mergers with anticompetitive effects.

It is divided into seven substantive sections:

- **Section II**: **Commitment to Effective International Co-operation**: recommends steps to minimise direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities.
- **Sections III and IV**: **Consultation and Comity:** invites Adherents to exchange views, and request or accept consultations on cases and practices affecting their important interests.

- **Section V**: **Notifications of Competition Investigations or Proceedings**: recommends mechanisms for notifications in cases of investigations or proceedings affecting another Adherent's important interests.
- **Section VI**: **Co-ordination of Investigations or Proceedings**: recommends that in the same or related cases, Adherents endeavour to co-ordinate, for example by having co-operating competition authorities: inform on, and align timetables for investigative proceedings; request waivers of confidentiality; discuss case analyses; design and implement co-ordinated competition remedies; and explore new forms of co-operation.
- **Section VII: Exchange of Information in Investigations or Proceedings:** recommends that Adherents provide each other with relevant information to enable effective enforcement co-operation. It recommends the use of confidentiality waivers and the consideration of national provisions that allow competition authorities to exchange confidential information without the need to seek prior consent from the source of information (so-called "information gateways").
- **Section VIII**: **Investigative Assistance to Another Competition Authority:** recommends enhanced co-operation, including assisting in obtaining and compelling the production of information, ensuring the service of another Adherent's official documents and executing searches on behalf of another Adherent.

In addition, the 2014 Recommendation provides instructions to the Competition Committee. The Competition Committee is instructed to:

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

1.3. Purpose of this Report

The 2014 Recommendation instructs the Competition Committee to monitor its implementation, dissemination and continued relevance and report to the Council every five years. The purpose of this Report is to meet this instruction by outlining the progress in the implementation and dissemination of the 2014 Recommendation, along with identifying possible areas for further work.

This Report considers important progress and developments, along with the remaining most significant challenges to the implementation and notes various areas for future improvement and further work for the Competition Committee. In particular, it suggests that in the future, an update to the Recommendation may be useful or needed depending on the progress of proposed work for the Competition Committee to consider options to help resolve the long-standing obstacles to international co-operation between many

competition authorities, especially those co-operating outside of the European Union (EU) or other similar regional co-operation arrangements.

1.4. An overview of developments relevant to international enforcement co-operation

Three major developments and drivers for international enforcement co-operation can be identified. They have been relevant for two decades, but have arguably increased in intensity since 2014:

- An increase in the number of competition authorities and the maturing and expansion of the competencies of these authorities
- Continued growth in international economic interconnectedness and interdependence
- Developments in the international digital economy

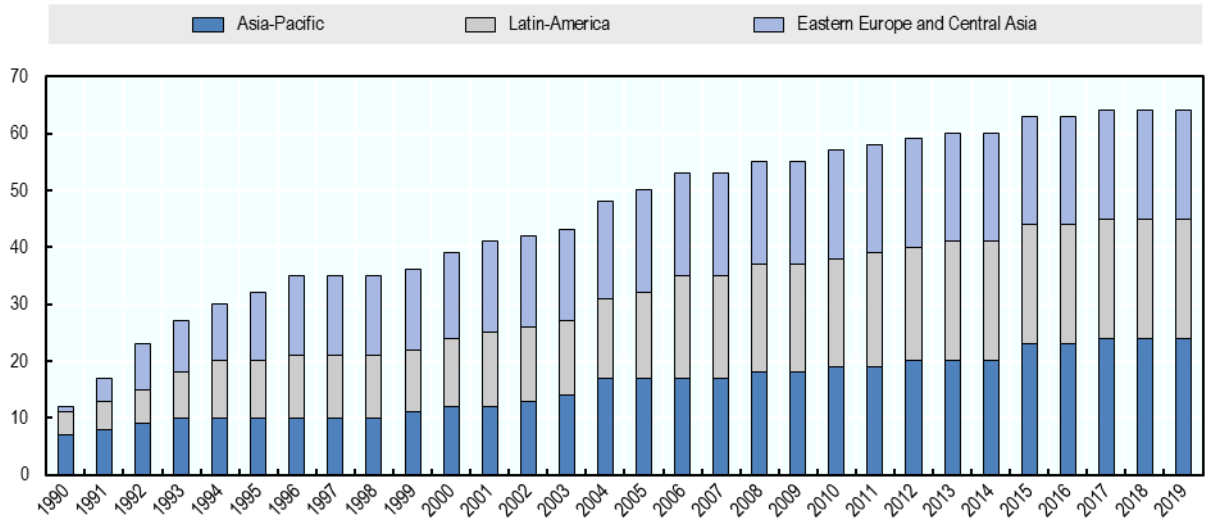
In this context, competition authorities will increasingly investigate the same or closely related anticompetitive practices or mergers within their jurisdictions; and consider how their current tools, resources and laws are equipped to deal with these global developments.

1.4.1. Growth in, and maturing of, competition authorities

In the last 30 years, the number of jurisdictions with a competition law increased by more than 600% - from fewer than 20 in 1990 to about 140 in 2016 (Kovacic and Mariniello, 2016[1]; UNCTAD, 2017[2]; OECD, 2018[3]). Figure 1.1 illustrates this continued growth for a subset of Non-Member jurisdictions, the 64 beneficiaries of the OECD Regional Competition Centres, which all have competition laws now.

Figure 1.1. Development of competition laws

Evolution in the adoption of a competition law in the 64 jurisdictions participating in the OECD Regional Competition Centres.



Source: OECD (2020[4]), *OECD Competition Trends 2020.*

New competition regimes have been established, including in Hong Kong, China (2015), the Philippines (2015), Thailand (2017) (OECD, 2018[5]), Curaçao (2017) and Myanmar (2018) (Ministry of Commerce, 2020[6]; Fair

Trade Authoriry of Curaçao, 2020[7]). Younger authorities have developed their competition laws, for example, through the introduction of merger control powers (e.g. in Argentina, Peru and Chile) (Clifford Chance, 2020[8]), strengthening of the general competition regime (e.g. Viet Nam expanded laws relating to extra-territorial reach and the scope of domestic application of their regime) (Holian and Reeves, 2017[9]) and mechanisms to investigate cartels (e.g. dawn raid powers in the Philippines) (Philippines Competition Commission, 2020[10]).

Further, through various international and regional capacity building efforts,[7] younger and developing authorities have been building the expertise and processes to improve enforcement. Relatedly, the OECD's 2021 Competition Trends (OECD, 2021[11]) show that many authorities have had growing budgets and staff numbers. There has been growth in average budgets of both competition authorities in Member countries (5.5% increase) and non-Member jurisdictions (3.1% increase), which was mirrored in the increase between 2015 and 2019 in number of staff: an almost 2.4% increase in OECD Members and almost 1.8% increase in non-OECD Members (OECD, 2020[4]).

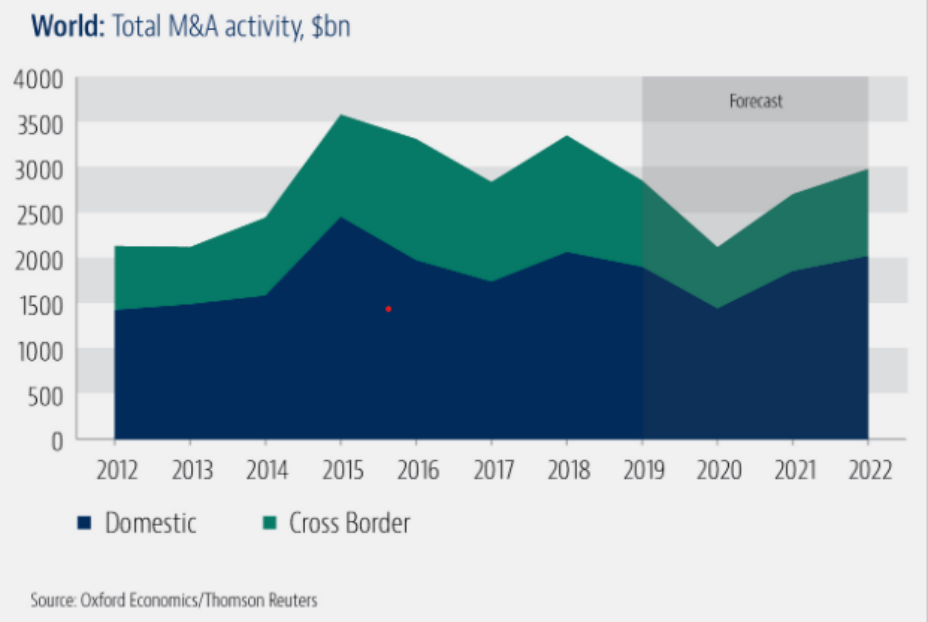
While younger authorities can face certain practical enforcement challenges (ICN, 2019[12]), they are flexing their muscles, and the higher the number of enforcing jurisdictions, the higher the likelihood that competition authorities may be considering the same or related cases, and consequently, the greater the benefits of co-operation (see also (OECD, 2014[13])).

1.4.2. International economic interconnectedness and interdependence

Measuring international economic interconnectedness and interdependence is challenging and tends to be done by considering a range of elements, such as: trade flows, trade agreements, foreign direct investment levels and global value chains. No one indicator provides a clear picture of global economic interdependence, but continued growth of various indicators and in particular digital trade seem to be characteristic (World Trade Organisation, 2019[14]), (DHL, 2020[15]).

Cross-border merger and cartel trends are also an indicator of global economic interconnectedness. Cross-border mergers accounted for almost half (47%) of all global mergers in terms of value and 36% in terms of volume in 2017 (OECD, 2019[16]). These numbers increased in the first half of 2018, when cross-border mergers hit their highest level of the last decade (Baker Mckenzie, 2017[17]; Grocer, 2018[18]). Figure 1.2 sets out mergers and acquisitions trends predicting a further increase, after a dip in 2020.

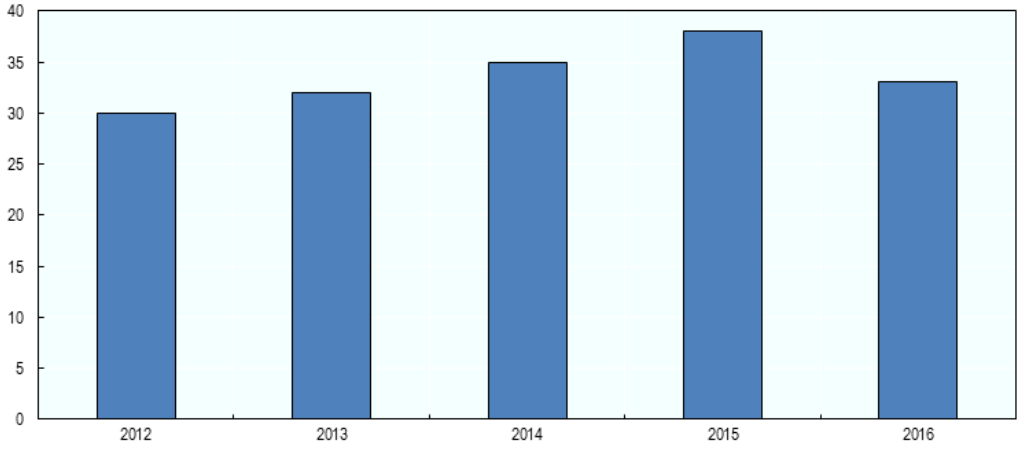
Figure 1.2. Global merger trends, 2012 – 2022



Source: (Baker McKenzie, 2020[19]).

As reported in the 2020 OECD Competition Trends and outlined in Figure 1.3, the number of international cartels discovered and sanctioned has remained relatively stable in recent years (2012-2016). The 2020 OECD Competition Trends noted a general global decrease in international cartels after 2000 (although, it does not include ones that are currently in an appeal or review process) and noted various potential factors for this (OECD, 2020[4]). However, discovered and sanctioned cartels seemed to be up again to more than 30 between 2012 and 2016. Even in the context of possibly flat-lining international cartel numbers, the responses to the survey of OECD and ICN members conducted in 2019 (2019 Survey) showed that enforcement co-operation between jurisdictions on cartel matters has increased since 2012 (OECD/Eurostat, 2005, p. 94[20]). Statistics of the European Competition Network (ECN) show that the number of cartels in Europe with a cross-border dimension is on a steady high level.[8]

Figure 1.3 Number of international cartels discovered and sanctioned, 2012-2016



Note and source: Cartels discovered after 2016 are not included as cartels are included in the ICStats database only after an investigation has been officially concluded and the competition authority has published a final decision. Since the average length of a cartel investigation is approximately three years, decisions of cartels discovered after 2016 will result in decisions after 2019/20.

1.4.3. Digital economy developments

Competition issues related to the digital economy have been the focus of consideration within the global competition community for some years, as has been reflected in the work programmes of both the ICN and OECD.[9] The scale, scope and nature of the global digital economy enable businesses to more easily operate across borders. Consequently, competition issues identified in one national market in relation to one of these businesses may arise in another in a similar or identical manner. At the time of the drafting of this Report, similar investigations in various jurisdictions into behaviours of the same large global companies in the digital sphere are taking place – at least 12 involving Apple, 14 involving Amazon, 19 involving Google, and 14 involving Facebook.[10]

Competition enforcement in relation to firms selling either digital goods or services or through digital platforms may involve novel and/or complex issues (such as algorithmic collusion, network effects, two-sided markets, artificial intelligence, data privacy). Given the speed with which these markets, their products and services and the related technologies develop, the rate of change itself is part of the challenge facing authorities. In this context, there is greater potential for competition authorities to take divergent approaches towards the same issue and the same company or for there to be conflict in the methodologies used in the same or related cases, potentially resulting in inconsistent enforcement outcomes.[11] Conversely, sharing of experiences and approaches on enforcement matters can help authorities address the related analytical, technical and enforcement challenges more effectively, especially when considering their resources as compared to the major global digital platforms and businesses.[12]

The growth of the digital economy has also seen the rise of truly global businesses that play significant roles in multiple markets within multiple jurisdictions, such as Google, Amazon, Apple and Facebook. Many jurisdictions have undertaken reviews relating to the challenges facing competition authorities in this context and how best to develop effective competition policy in the digital era. For example, there have been reports from authorities in the United States, United Kingdom,[13] European Union, Australia, France, Germany, Japan,[14] and the Netherlands, which have been the subject of extensive discussion and review in the competition community.[15] The challenges outlined in some of these reviews are not limited to high-level issues of competition policy, but extend to practical enforcement issues as well that can benefit from co-operation between authorities.

1.5. Additional international actors working on enforcement co-operation

Next to the OECD, other actors actively develop and support international enforcement co-operation, most notably the International Competition Network (ICN) and the United Nations Conference on Trade and Development (UNCTAD). OECD, ICN and UNCTAD co-operate closely (Box 1.2), and developments in enforcement co-operation must be understood in this wider context. The implementation of the 2014 Recommendation is equally driven by actions and instruments of these other actors, and co-ordination seeks to ensure complementarity and unnecessary duplication of work.

1.5.1. ICN

The ICN is a membership network constituted of representatives from national and multinational competition authorities that are devoted to competition law enforcement. It is currently composed of 140 authorities from 129 jurisdictions.[16] Since its founding in 2001, the ICN has promoted and facilitated competition enforcement co-operation through is activities.

Box 1.2. OECD Co-ordination with ICN and UNCTAD

The Competition Committee co-ordinates with ICN and UNCTAD on a regular basis. For both, dedicated OECD liaison officers were appointed by Members and report regularly to the Competition Committee on work carried out or planned by the ICN and UNCTAD. The liaison officers co-ordinate the interaction between the three actors and are the first point of call for seeking information or requesting co-ordination. The Secretariat participates in UNCTAD and ICN meetings and conferences, and vice versa.

A recent example for the close co-operation between OECD and ICN is the 2019 Survey and the 2021 OECD/ICN Report (on both, see section 2.2).

The ICN has no formal rule-making functions. Where the ICN authorities identify recommendations, or "best practices" arising from the projects, individual competition authorities decide whether and how to implement the recommendations or join so-called "frameworks".[17]

The ICN provides its member competition authorities with a specialised and informal venue for maintaining regular contacts and addressing in particular practical aspects of competition policy and law enforcement. The ICN's working groups such as on Cartels, Mergers, and Unilateral Conduct provide fora for member authorities and non-governmental advisors (NGAs) to share effective co-operation strategies and practices. An annual conference and workshops provide opportunities to discuss working group projects and their implications for enforcement.

1.5.2. UNCTAD

UNCTAD undertakes initiatives to support international co-operation between competition authorities. The UNCTAD Secretariat has established a discussion group on international co-operation (DGIC) to exchange views and discuss the modalities for facilitating international co-operation under Section F of the United Nations Set Of Principles And Rules On Competition (UNCTAD, 2000[21]). In 2018-2019, the DGIC took stock of the work done by UNCTAD as well as other international actors such as the ICN and the OECD in promoting international co-operation and co-ordinated the drafting of a set of guidelines. In 2018, Guiding Policies and Procedures under Section F of the UN Set on Competition (UNCTAD, 2018[22]) were adopted. These guidelines target in particular developing countries and countries with economies in transition, with little or no experience in international co-operation, in order to provide them with practical tools and methods of co-operation. They take into account pre-existing tools and manuals developed by the ICN and the OECD, which are listed in an Annex, to avoid duplication, enhance complementarity between the different organisations and, at the same time, ensure consistency with the existing ICN and OECD work.

2. Methodology

2.1. Methods for collecting information on the implementation of the Recommendation

The Secretariat collected and reviewed extensive material since the adoption of the 2014 Recommendation by the Council. This Report is based on information relating to international co-operation in competition enforcement as available in:

- The 2019 Survey to competition authorities (see section 2.2), and the related OECD/ICN Joint Report (OECD, 2021[23]).
- OECD roundtables and papers since 2014,[18] as outlined in the Dissemination section below and in further detail in OECD/ICN Report (OECD, 2021[23])
- OECD country reviews since 2014[19]
- ICN and UNCTAD papers and documents;[20]
- Review of international case experience with enforcement co-operation (see also (OECD, 2019[24]))
- Review of updated lists of competition co-operation agreements between competition authorities and between governments[21]
- Academic literature.[22]

2.2. The 2019 Survey

The 2019 Survey was a key source of information regarding the implementation of the 2014 Recommendation. It was based on a 2012 Survey carried out jointly by the OECD and the ICN (2012 Survey), which informed an OECD report (OECD, 2013[25]) and the development of the 2014 Recommendation. Resending a similar set of questions allowed the drafters to update results with developments since the 2014 Recommendation was adopted. The full results of the 2019 Survey, including answers by non-Adherents were published in the joint OECD/ICN Report (OECD, 2021[23]), which also serves as a background to this Report (Box 2.1).

Box 2.1. The OECD/ICN Report

In 2021, the first joint report on International Co-operation in Competition Enforcement (OECD/ICN Report) (OECD/Eurostat, 2005[20]) by the OECD and the International Competition Network (ICN) was published.

The OECD/ICN Report followed the first joint survey on international enforcement co-operation by the OECD and ICN in 2012, which resulted in two separate reports, one from each organisation (OECD, 2013[25]); (ICN, 2018[26]). In 2019, OECD and ICN members were surveyed again and the OECD/ICN Report is an analysis of the 2019 Survey results, along with comparisons with 2012 Survey results.

The OECD/ICN Report found that since 2012:

- there has been an overall increase in instances of international enforcement co-operation across all enforcement areas
- authorities use various legal bases for enforcement co-operation, although there are some long-standing legal barriers to effective international enforcement co-operation
- authorities derive significant benefits from international enforcement co-operation, regardless of their respective size and level of maturity
- key challenges and limitations to effective enforcement co-operation remain, and while some are an inherent and ongoing part of engaging in international enforcement co-operation, others could potentially be resolved
- regional enforcement co-operation is one of the most significant and successful types of co-operation for authorities, including for those outside highly developed and mature regional enforcement co-operation arrangements.

The five key categories of challenges that limit international enforcement co-operation are:

- resourcing
- co-ordination/timing
- legal limitations, especially relating to:
  - confidential information sharing
  - investigative assistance
  - enhanced co-operation
- trust and reciprocity
- practical issues (e.g. language, time differences etc.).

Source: (OECD, 2021[1]).

This Report is based on the answers by Adherents only, which were filtered from the total set of answers.[23] In some instances, results for non-Adherents have been included, and this is expressly stated on each occasion. In these cases, the comparison adds to the analysis, or the overall use of certain instruments is informative as international enforcement co-operation is not limited to Adherents.

2.2.1. Respondents to 2019 Survey: Adherents and non-Adherents[24]

As outlined in Table 2.1 below, sixty-two competition authorities responded to the 2019 Survey. Of these 62, 41 are Adherents to the 2014 Recommendations. Adherents include all the 38 OECD Members plus 3

non-Members: Romania (Associate in the Competition Committee), Russian Federation (Participant in the Competition Committee), and Brazil (Associate in the Competition Committee).

Table 2.1. OECD Competition Committee status of survey respondents

OECD status	No. of total respondents to 2019 Survey by Committee Status	No. of total Adherents to 2019 Survey by Committee Status
Member	38	38
Associate in the Competition Committee	2	2
Participant in the Competition Committee	13	1
Other non-Member	9	
Total	**62**	**41**

2.2.2. Presentation and treatment of data

The 2019 Survey requested both qualitative and quantitative information in 48 questions and provided instructions to allow for a uniform understanding of the questions.[25] A specific set of questions related exclusively to the 2014 Recommendation and the OECD's current and future work on international enforcement co-operation.[26]

The 2019 Survey provided useful data and insights into enforcement co-operation, particularly for a) confirming the continuing importance of enforcement co-operation to competition authorities and b) developing proposals for future areas of focus to improve enforcement co-operation. However, there were some limitations in the depth and quality of data collected. Importantly, many respondents noted that they did not systemically record enforcement co-operation activities and that their responses were estimates only.

The 2019 Survey data has been presented in figures and tables throughout the Report. Descriptions and qualifications of the data have been noted under each figure or table presenting Survey data. A general reader can rely on the following summary:

- Quantitative data: where the 2019 Survey's questions requested quantitative responses (such as data on the number of cartel cases within a particular year) or provided a set of defined options to select (for example, ranking the limitation to effective international co-operation by importance and frequency), these have been marked as "Data source type: defined data set."
- Qualitative/free-text data: where the 2019 Survey questions requested qualitative responses and these have been categorised into a data set that could either be quantified (e.g. number of people who answered yes/no answer) or grouped (e.g. experience with comity) these have been marked as "Data source type: quantitative representation categorised free text."

For detailed information on quality of data, their treatment and necessary qualifications, the OECD/ICN Report provides in-depth explanations.[27]

3. Process

The Council instructed the Competition Committee to monitor the implementation of the 2014 Recommendation and to report to the Council every five years.

At the 129th meeting of the Working Party No. 3 (WP3) on Co-operation and Enforcement on 4 June 2019, WP3 started monitoring the implementation of the 2014 Recommendation [DAF/COMP/WP3(2021)3]. To this purpose, the Secretariat prepared and presented a note setting out some developments in Adherents as well as OECD's work on international co-operation since 2014 (OECD, 2019[24]). Delegates agreed that, to enable the monitoring of the implementation of the 2014 Recommendation, they would respond to a monitoring survey conducted jointly with the ICN.

In August 2019, the OECD and the ICN launched a survey on international competition law enforcement co-operation. The 2019 Survey was almost identical to a survey the OECD and the ICN had conducted in 2012, to allow drawing comparative results, and contained a section on monitoring the 2014 Recommendation.

At the 130th meeting of WP3 on 2-3 December 2019, the Secretariat presented preliminary results of the 2019 Survey and invited the delegations that had not sent a reply to it to reply by the end of 2019 [DAF/COMP/WP3(2021)3].

Owing to the COVID-19 pandemic, the preliminary results of the 2019 Survey were presented in two virtual sessions to the OECD and ICN membership on 9 July 2020, outside the regular WP3 meeting in June 2020.

At the 132nd meeting of WP3 on 4 December 2020, the final version of the OECD/ICN Report (OECD, 2021[23]) was presented and discussed [DAF/COMP/WP3(2021)3], including with respect to its serving as a basis for the monitoring of the implementation of the 2014 Recommendation. Adherents expressed a high interest to continue with an aspirational agenda that should also draw on co-operation instruments developed by the OECD in other areas. The OECD/ICN Report was published in January 2021.[28]

On 11 May 2021 and on 28 July 2021, the OECD Secretariat circulated drafts of the Competition Enforcement Co-operation Template (CEC) for comments to WP3 [DAF/COMP/WP3/WD(2021)2 and DAF/COMP/WP3/WD(2021)31]. The CEC is an early work product addressing needs expressed by Adherents and ICN membership in the 2019 Survey.

On 28 October 2021, WP3 held a virtual workshop on legal models for competition enforcement co-operation. The workshop introduced existing models for enforcement co-operation and exchanges of confidential information, which can inform next steps of the Competition Committee to address results of the OECD/ICN Report and insights from the monitoring process of the 2014 Recommendation. International experts discussed their visions for the future of competition enforcement co-operation.

The draft Report [DAF/COMP/WP3(2021)3] was submitted for discussion and review at the 134th meeting of the WP3 on 30 November 2021 [DAF/COMP/WP3/A(2021)2/FINAL], where delegates confirmed that it presented an accurate and comprehensive picture of the status of international competition enforcement co-operation and agreed to the transmission of the draft Report with a few changes to the Competition Committee for approval [DAF/COMP/WP3(2021)3 and DAF/COMP/WP3/A(2021)2/FINAL]. During this meeting, WP3 delegates also discussed topics and priorities for future work on international enforcement

co-operation to address the findings of the draft Report on the basis of a note prepared by the Secretariat to inform the discussion [DAF/COMP/WP3(2021)4].

Comments and changes suggested by the WP3 were reflected in the final version of the Report which was approved by written procedure by the Competition Committee on14 January 2022 [DAF/COMP(2021)22]. Following approval, minor adjustments were made in the Report, at the request of one Adherent. The Committee was been informed of these adjustments ahead of the transmission to Council.

The Report was noted and declassified by the OECD Council at its 23 February 2022 meeting [C(2022)23]. A link to the Report will be included in the public webpage of the 2014 Recommendation on the online Compendium of OECD legal instruments as well as on the Secretariat's international co-operation homepage.

4. Dissemination

Following the adoption of the 2014 Recommendation, the Competition Committee, Adherents individually and the OECD Secretariat have undertaken various activities to support its dissemination.

4.1. Roundtable discussions, hearings and development of other OECD Recommendations

The Competition Committee served as a forum for exchanges of views on matters related to the 2014 Recommendation. It hosted several roundtables and hearings on or relating to international co-operation in competition enforcement over the years, including the following:

- **"Hearing on enhanced enforcement co-operation" (2014)**

  The hearing discussed possible new and different forms of co-operation among agencies. Future challenges agencies may encounter when enforcing domestic laws against cross-border practices were addressed, together with issues such as the recognition of foreign cartel decisions and advantages and disadvantages of voluntary "lead agency" and "one-stop-shop" models (see also Box 5.17).[29]

- **"The extraterritorial reach of competition remedies" (2017)** (OECD, 2017[27]).

  The roundtable debated the challenges related to the imposition of extraterritorial remedies and discussed how authorities approach enforcement in cross-border cases, including co-operation.

- **"Treatment of legally privileged information in competition proceedings" (2018)** (OECD, 2018[28])

  The roundtable discussed the different approaches to legal professional privilege among jurisdictions, including authorities' co-operation and sharing of information in cross-border cases involving jurisdictions offering dissimilar levels of protection.[30]

- **"Benefits and challenges of regional competition agreements" (2018)** (OECD, 2018[29]).

  The Global Forum on Competition held a roundtable discussion to explore the potential benefits, obstacles and challenges of Regional Competition Agreements. The discussion examined the approaches of different geographic regions that have adopted a regional competition framework in order to strengthen their competition law and policy in pursuit of increased regional integration.

- **"Challenges and Co-Ordination of Leniency Programmes" (2018)** (OECD, 2018[30]).

  The roundtable to discussed challenges to which amnesty/leniency programmes are exposed and proposals for improvements (see also Box 5.10). Optimising the design and organisation of leniency programmes is important for their success over time, especially in cases of parallel leniency applications to several jurisdictions where enforcement co-ordination can be crucial.

- **"Access to the case file and protection of confidential information" (2019)** (OECD, 2019[31]).

  The roundtable explored the different approaches to protecting confidential information across jurisdictions, including the relevance with regard to international co-operation, which depends to a large extent on the exchange of confidential case information.

- **"Competition provisions in trade agreements" (2019)** (OECD, 2019[32]).

  The Global Forum on Competition looked at the purpose and impact of competition provisions in trade agreements, to discuss their usefulness in broadening and strengthening the application of competition law worldwide. In addition, the session looked at the role of competition authorities in the drafting and negotiation of competition provisions in trade agreements and their impact on international co-operation.

- **"Criminalisation of cartels and bid rigging conspiracies" (2020)** (OECD, 2020[33]).

  The roundtable considered among other issues the implications of different types of enforcement regimes for international co-operation as an essential element to ensure effective cartel enforcement and found that legal and practical obstacles exist for co-operation between criminal and administrative regimes.

Box 4.1. GFC and LACCF

Both GFC and LACCF are organised annually, and they target a wider audience, beyond Adherents. They are intended to engage in particular non-Members in OECD work, to disseminate OECD work products, and to improve mutual knowledge and trust between OECD Members and non-Members. In doing so, these fora recognise that international enforcement co-operation necessarily goes beyond OECD membership, and that substantive and procedural convergence will benefit global enforcement co-operation.

The GFC brings together every year competition officials from over 110 authorities and organisations worldwide, and celebrates its 10th anniversary in 2021.[1] The LACCF is a joint effort by the Inter-American Development Bank and the OECD to foster effective competition law and policy in Latin America and the Caribbean, with attendance by 20+ jurisdictions from the LACCF region and OECD Members.[2] In 2021, the 19th meeting took place.

Topics directly related to enforcement co-operation include:

- Trade, development and competition (2021)
- Competition provisions in trade agreements (2019)
- Benefits and challenges of regional competition agreements (2018)
- Peer reviews of competition law and policy.

Notes: [1] https://www.oecd.org/competition/globalforum/;
[2] https://www.oecd.org/competition/latinamerica/.

The Committee's roundtable discussions, even if not specifically focused on international co-operation, always serve as a comparison of different practices with the aim to promote mutual learning and alignment towards similar substantial and procedural rules and practices, an enabling condition to international co-operation. Adherents regularly submit papers on their experience relevant to a specific topic, and the Secretariat provides summaries of the discussion and the submissions. Dissemination also takes place in the Global Forum on Competition (GFC) and the Latin American and Caribbean Competition Forum (LACCF).

The Competition Committee has also worked to ensure the 2014 Recommendation is referenced in other competition Recommendations related to the competition matters, including the updated Recommendation of the Council concerning Effective Action against Hard Core Cartels [OECD/LEGAL/0452] (OECD, 2019[34]) and the Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465] (which aims to improve transparency of legal rules, as per Section II of the

2014 OECD Recommendation). This underlines the importance of the 2014 Recommendation in its role as a Recommendation fundamental to most of the Competition Committee's work.

4.2. Peer reviews

The assessment of a jurisdiction's competition law and policy against the 2014 Recommendation and its implementation is a regular feature of the Competition Committee's country reviews of competition policy frameworks.[31] Examples are the accession reviews of Colombia (OECD, 2016, pp. 83-86[35]) and Costa Rica (OECD, 2020, pp. 80-82[36]), the review for Associate status in the Competition Committee of Brazil (OECD, 2019, pp. 151-158[37]), and the peer review of Mexico (OECD, 2020, pp. 179-192[38]). The peer review of Mexico recommended to introduce information gateway provisions and to allow Mexican enforcers to enter directly into second generation agreements with other competition authorities. Costa Rica was encouraged to enter into co-operation agreements after legal reforms following earlier OECD reviews allowed it, and to start international enforcement co-operation. Brazil was encouraged to adopt information gateway provisions.

4.3. Publications and speeches

The OECD Secretariat disseminated the 2014 Recommendation and the related work products by publishing articles and presenting on international co-operation on numerous occasions. The examples below show a selection:

- Implication of Globalisation for Competition Policy: The Need for International Co-Operation in Merger and Cartel Enforcement (Capobianco, Davies and Ennis, 2014[39])
- Developments in International Enforcement Co-operation in the Competition Field (Capobianco and Nagy, 2016[40])
- In 2018, Secretariat staff moderated an ICN webinar on information sharing gateways and international assistance in information sharing[32]
- In 2017, Secretariat staff spoke at a workshop in Paris on regional co-operation among regulators[33]
- In 2017, Secretariat staff presented at the Sofia Competition Forum on due process and its international dimension[34]
- In 2017, Secretariat staff gave a presentation on international co-operation at the conference "13 Years Competition Policy in Albania"
- In 2016, Secretariat staff spoke at the Bundeskongress on compliance management on international co-operation of competition authorities[35]
- In 2015, Secretariat staff presented on international co-operation of competition authorities at the Deutscher Kartellrechtstag.[36]

4.4. The OECD Regional Centres for Competition

In co-operation with Korea, Hungary and Peru, the OECD maintains three regional centres for competition (RCC).[37] The RCCs provide capacity building assistance and policy advice through workshops, seminars and training programmes on competition law and policy for officials in competition enforcement agencies and other parts of government, sector regulators, judges and others. The RCCs are led by senior staff of the OECD Secretariat in Paris, and they regularly disseminate OECD work products, including guidance on international co-operation (see Box 4.2).[38] The beneficiaries of the RCCs are enforcers from more than 60 jurisdictions,

which are not Members of the OECD, and the work undertaken is a way to achieve harmonisation in implementation of the law and to foster working level contacts, and informal as well as formal co-operation.

Box 4.2. Dissemination Activities of the Regional Competition Centre in Budapest

In 2017, the RCC created a practical co-operation tool for its beneficiary authorities, 18 jurisdictions from East and South East Europe. The "Request for Information" instrument is hosted on the RCC website and provides a template for requests on enforcement related questions. These requests allow authorities to share information on markets, cases, enforcement approaches and theories of harm, within the legal limits to this kind of information exchange. Non-public or confidential information may be exchanged, when the exchanging jurisdictions have the necessary legal bases and protections in place.

In a recent seminar in 2020, the RCC dealt with enforcement co-operation in cross-border cases. The seminar discussed international co-operation in practice, looking at the operating principles in Europe and in CIS countries, and at the challenges to formal and informal co-operation, and highlighted the role of international organisations in setting the ground for enforcement co-operation. Invited experts presented best practices to show how co-operation cost can be reduced, inconsistencies avoided and procedural fairness guaranteed in parallel proceedings.

Source: https://www.oecd.org/daf/competition/oecd-gvh-newsletter9-july2017-en.pdf; www.oecdgvh.org/contents/events/archived-2020/10, www.oecd.org/daf/competition/RCC-FAS-enforcement-cooperation-in-cross-border-cases-agenda-october-2020.pdf.

4.5. Dissemination by Adherents

Adherents work in many different ways to promote the spirit of the 2014 Recommendation, however, no systematic tracking of such activities is taking place. Apart from entering into bilateral or multilateral competition agreements, as referenced below in this Report, they engage in

- International conferences – for example the German Bundeskartellamt's biannual international conference,[39] the annual European Competition Day,[40] the Seoul International Competition Forum,[41] the BRICS International Competition Conferences,[42] or the ICN Annual Competition Conferences.[43] Such conferences promote coherence and exchange and create networks of like-minded enforcers. They are one of the foundations for the most important enabling factor in international co-operation – trust.
- International capacity building activities, such as the OECD RCCs (see above), OECD competition workshops hosted by Adherents,[44] EU competition twinning projects,[45] the ACCC's Competition Law Implementation Program,[46] the FTC's technical assistance programme,[47] or ICN workshops.[48] These activities aim in particular at strengthening of enforcement capacities on case handler level, and help substantive and procedural alignment as well as the creation of trust and relationships between enforcers. They create an understanding of the international enforcement environment and thus prepare the ground for fruitful future enforcement co-operation.
- Engagement in international co-operation efforts by other international players such as the ICN and UNCTAD.[49] Within the ICN, significant work is undertaken to promote and improve international co-operation.[50] The work centres on information exchanges and the practical implementation of enforcement co-operation and is thus fully in line with essential elements of the 2014 Recommendation. Seventeen out of 20 members of the ICN Steering group are Adherents,[51] and at least one Adherent is co-chair in every ICN Working Group.[52]

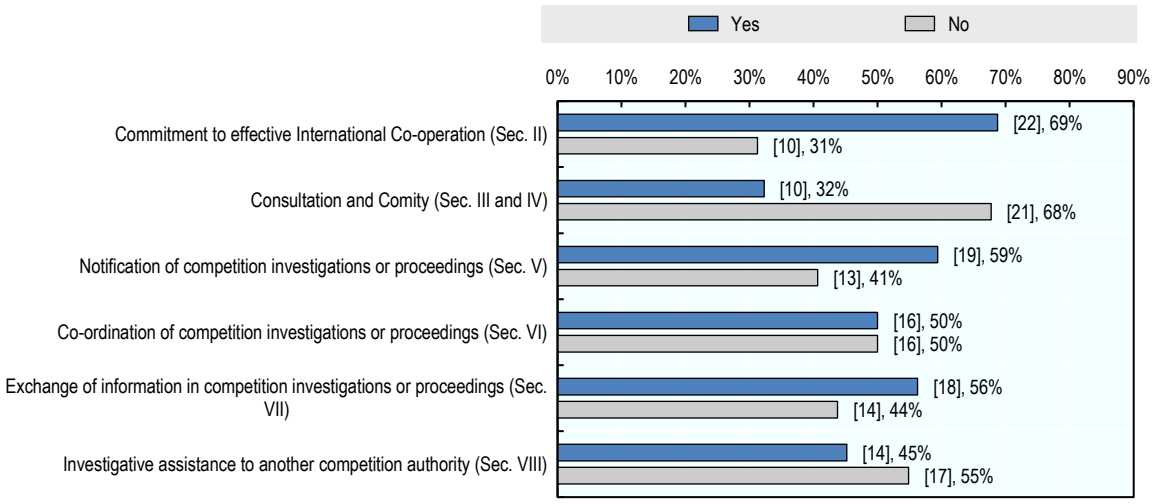
5. Implementation

5.1. Summary of the implementation of the 2014 Recommendation as a whole

The 2014 Recommendation is a reference point to many Adherents in their international enforcement co-operation, and most provisions are relevant. Nevertheless, important limitations to international enforcement co-operation persist and will require additional efforts, in particular the removal of legal barriers, but also the development of more ambitious co-operation tools and instruments.

The majority of Adherents who responded to the 2019 Survey had "used" at least one section of the 2014 Recommendation.[53] Figure 5.1 shows the Adherents reported "use" of each provision of the Recommendation. Importantly, additional data suggest an even wider effective implementation by Adherents. For most parts of the 2014 Recommendation, the actual implementation by Adherents has increased, compared to the time before the adoption.

Figure 5.1. Use of the Recommendation sections, by percentage of Adherents responding to the question



Note: The figure represents only responses from the Adherents. Response rate: 82% [32]. Only jurisdictions that did not respond to the use of all the sections of the Recommendation were considered as non-respondents for the calculation of this response rate. Data source type: defined data set.
Source: OECD/ICN Joint Survey 2019, Question 39 – Table 9.

The Survey identified areas for improvement in the implementation of the Recommendation, in particular:

- the need to remove long-standing legal barriers to co-operation to ensure effective international co-operation (Section II), comity (Section IV), exchange of information (Section VII) and investigative assistance (including enhanced co-operation) (Section VIII)

- the need to improve trust and transparency between authorities in order to facilitate consultation (Section III) and co-ordination (Section VI).

Adherents provided their opinions on important future work to be carried out by the Competition Committee in order to address perceived shortcomings in effective international enforcement co-operation, and they are in line with the findings of this Report:

- ensuring a vision for, and the value of, enforcement co-operation as set out in the 2014 Recommendation and its benefits are promoted to the international competition community and governments
- developing best practice guidance on various types of enforcement co-operation; model instruments to support enforcement co-operation; and identifying case studies to assist with its implementation
- considering effective enforcement co-operation in the context of issues arising from the digital economy
- considering the most efficient and effective options for addressing the legal barriers to enforcement co-operation, including possibly using models for co-operation used in other areas of law enforcement
- co-ordinating support for co-operation with other leading international organisations and networks (particularly the ICN) and consider how the work of each complements the other.

The following sections provide a detailed analysis of the implementation of the 2014 Recommendation, structured along the different sections of the Recommendation, and based on the 2019 Survey and other sources, as mentioned above.

5.2. Building Block 1: Commitment to Effective International Co-operation (Section II)

The first item in the 2014 Recommendation is of a general nature and asks Adherents' commitment to effective enforcement co-operation:

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

Such commitment may take different forms, and all measures that implement the subsequent parts of the 2014 Recommendation serve to demonstrate the commitment. Other measures addressed by this specific recommendation are transparency of rules and procedures, and convergence of rules on leniency and immunity in cartel cases. The analysis in this section focuses on more general observations on high-level engagement and commitment, as addressed by Section II, including developments in the area of competition co-operation agreements.

Starting from the 2019 Survey results, there is evidence that competition agencies have worked to minimise direct and indirect obstacles to effective enforcement co-operation. More than 2/3 of Adherents have used Section II of the 2014 Recommendation, and in practical terms, this shows in the considerable growth of co-operation agreements between competition agencies, and the significant growth in second-generation agreements. Trade agreements including competition provisions or chapters have proliferated, and there is continued commitment to "soft" co-operation – demonstrated for example by ongoing engagement in international competition fora. Competition authorities see considerable benefits in international enforcement co-operation (Box 5.1). However, what remains largely unchanged since the entry into force of the 2014 Recommendation is that in particular legal obstacles to enforcement co-operation remain.

Box 5.1. Benefits of international enforcement co-operation

Respondent authorities (Adherents and Non-Adherents) to the 2019 Survey, identified a number of benefits of international enforcement co-operation:

Opportunities for more efficient and effective consideration of competition matters

- more efficient and better use of an authority's resources (i.e. time, human and financial) based on the sharing of expertise, strategies, (and to the extent possible) case information
- achieving better quality and more effective resolutions through improved awareness of the (practical and analytical) approaches and remedies considered by other authorities
- reducing the administrative burdens on business (i.e. when they are engaging with multiple authorities on the same matter(s))
- obtaining information and evidence that would otherwise be slow, difficult or impossible to obtain, including via investigative assistance
- incentivising parties to be transparent with all authorities, recognising that many authorities can co-operate, most commonly by comparing non-confidential information and analytical approaches
- assisting with case prioritisation, including whether a matter should be investigated.

Further enhancing the co-ordination and co-operation among authorities

- promoting effective, efficient and coherent global competition enforcement, including improving and harmonising competition practices and tools (e.g. development of consistent marker wording and waiver templates)
- avoiding unnecessarily inconsistent and conflicting approaches and remedies to the same matters
- pro-actively communicating about the same or related matters (including notification and consultation)
- co-ordinating to prevent the destruction of evidence
- supporting broader authority interaction and learning, which in turn can strengthen authority analysis and tools domestically and internationally.

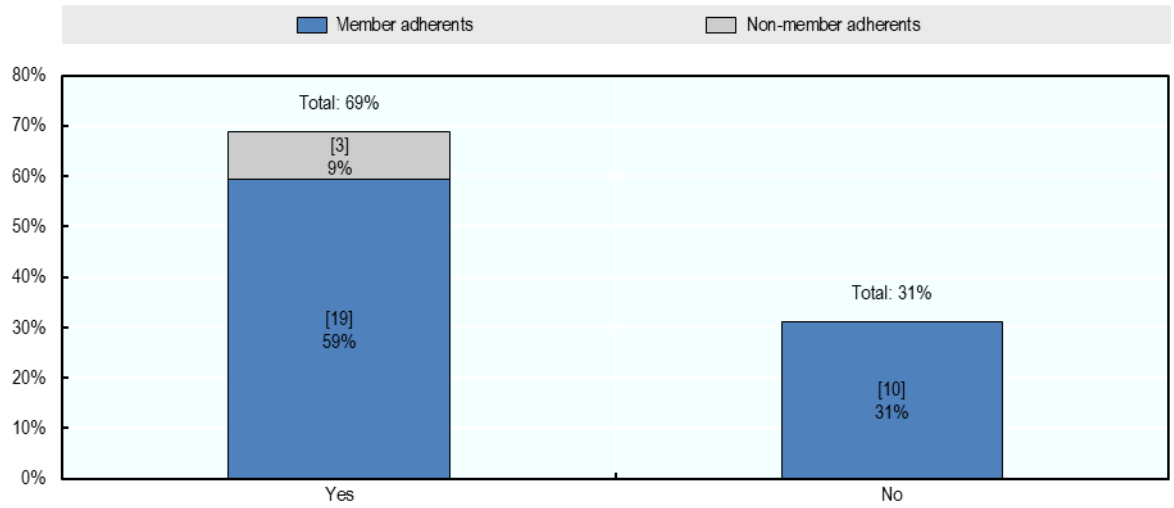
Improving relationships, trust and transparency

- creating personal and organisational relationships of trust, which can serve as a basis for effective and deeper enforcement co-operation
- improving transparency and understanding of counterpart authority practices and procedures

Source: (OECD/Eurostat, 2005, p. 119[20])..

Twenty-two of the 41 Adherents declared to have used Section II of the 2014 Recommendation (Figure 5.2).

Figure 5.2. Use of Section II: Commitment to Effective International Co-operation, by percentage of Adherents responding to the question



Note: This figure only presents responses from the Adherents. Response rate: 82% [32]. Data source type: quantitative representation categorised free text
Source: OECD/ICN Joint Survey 2019, Question 39 – Table 9.

The answers vary, and while for some the use of the "commitment" provision cannot be detailed and serves more as a summary provision, others mention it as a specific reference point and that they have used it, for example, in pointing out a jurisdiction's commitment when dealing with other state bodies or when arguing the need for legal changes. The 2014 Recommendation and its precursors are used as reference points when concluding international agreements (Box 5.2), and have been used as the driving force behind countries' efforts to adjust procedural or leniency frameworks and to increase transparency about legal bases and procedures.

Box 5.2. Competition co-operation agreements

Inspired by the 2014 Recommendation, the 2017 Nordic Agreement was signed by Denmark, Finland, Sweden, Norway and Iceland, allowing for extended co-operation compared to the 2001 precursor, and expanding the geographic scope – Finland was included.

> *Having regard to the Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings of 16 September 2014,*
>
> *Whereas:*
>
> *In order to strengthen and formalize the cooperation between their national competition authorities and to ensure an effective enforcement of their national competition acts the Parties are adhering to the following:*
>
> *To commit to effective cooperation and take appropriate steps to minimize direct or indirect obstacles to effective enforcement cooperation between the Parties' competition authorities.*
>
> *Normally a Party should notify another Party when its investigation or proceeding can be expected to affect the other Party's important interests.*
>
> *Where two or more Parties investigate or proceed against the same or related anticompetitive practice or merger, they should endeavour to co-ordinate their investigations or proceedings where their competition authorities agree that it would be in their interest to do so.*
>
> *In cooperation with other Parties, where appropriate and practicable, the Parties should provide each other with relevant information that enables their competition authorities to investigate and take appropriate and effective actions with respect to anticompetitive practices and mergers.*
>
> *Regardless of whether two or more Parties proceed against the same or related anticompetitive practice or merger, if competition authorities of the Parties deem it appropriate they should support each other in their enforcement activities by providing each other with investigative assistance as appropriate and practicable, taking into account available resources and priorities.*

This agreement between the five Nordic countries, of which only three (Denmark, Finland and Sweden) are EU member countries, addresses perceived shortcomings of the previous agreement and extends co-operation beyond information exchanges to investigative assistance. Both information exchange and investigative assistance apply to antitrust and merger cases, and to purely national cases, setting the 2017 Agreement apart from the more restrictive rules governing the European Competition Network (ECN). Information exchange includes the exchange of confidential information, and investigative assistance allows for carrying out inspections on behalf of and with staff support by the requesting jurisdiction.

Another recent example for an agreement inspired by the 2014 Recommendation is the Multi-lateral Mutual Assistance and Cooperation Framework for Competition Authorities between Australia, Canada, New Zealand, UK and US (MMAC) that was concluded in 2020. The first recital reads:

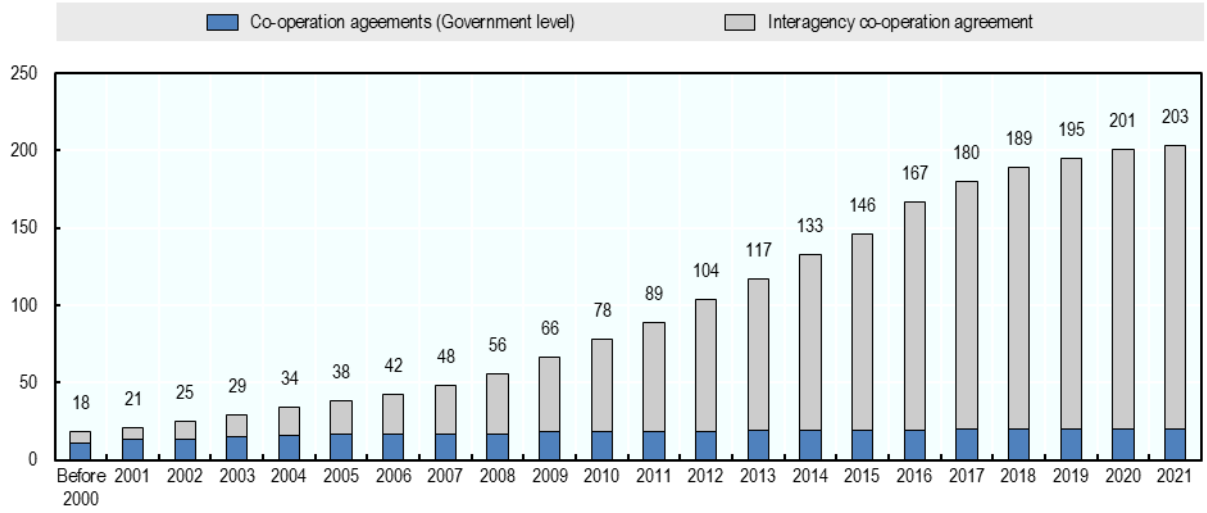
> *Recognising the 2014 Recommendation of the Organisation for Economic Co-operation and Development (OECD) Council concerning International Co-operation on Competition Investigations and Proceedings, the 2005 OECD Council Recommendation on Merger Review, and the 2019 revised OECD Council Recommendation concerning Effective Action against Hard Core Cartels, which promote deeper international cooperation among competition authorities;*

Sources : (Taurula, 2020[41]); https://www.kkv.fi/en/facts-and-advice/competition-affairs/international-cooperation-related-to-competition-affairs/nordic/agreement-on-cooperation-in-competition-cases/; https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04550.html.

The commitment to international enforcement co-operation is also demonstrated by the increase over time of the number of competition co-operation agreements signed since 1976 (Figure 5.3). Since 2014 alone, 85 new interagency co-operation agreements were signed, together with one new co-operation agreement at government level, amounting to 42% of all existing agreements.

Common clauses in such agreements deal with the following substantive topics: transparency, notifications, enforcement co-operation and investigative assistance, exchange of information, co-ordination of investigations and proceedings, comity, consultation, regular meetings, confidentiality, legal bases and communication.[54]

Figure 5.3. Growth of co-operation agreements, 1976-2021



Sources: https://www.oecd.org/competition/inventory-competition-agency-mous.htm and https://www.oecd.org/competition/inventory-competition-agreements.htm.

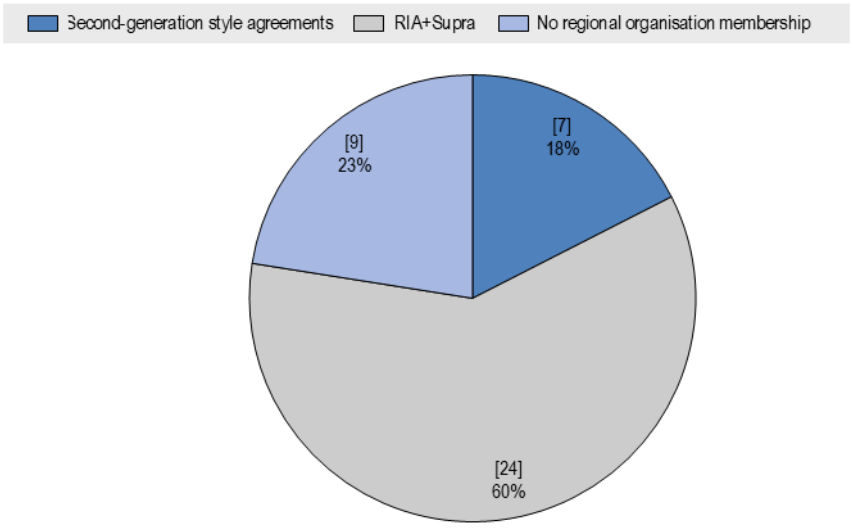
Adherents to the 2014 Recommendation are also parties to second-generation agreements (Table 5.1),[55] which enable competition authorities to engage in deeper co-operation activities in clearly prescribed circumstances, such as sharing confidential information, providing investigative assistance, and engaging in enhanced co-operation. Following the adoption of the 2014 Recommendation, five second-generation type agreements were concluded, while before only three second-generation agreements relating only to competition co-operation existed.[56]

Table 5.1. Second generation agreements

Parties	Year	Agreement	Bilateral/Multilateral
Australia-New Zealand-Canada-US-UK	2020	Multi-lateral Mutual Assistance and Cooperation Framework for Competition Authorities between Australia, Canada, New Zealand, UK and US (MMAC)	Multilateral
Canada-Japan	2017	Co-operation Arrangement between the Commissioner of Competition, Competition Bureau of the Government of Canada and the Fair Trade Commission of Japan in relation to the Communication of Information in Enforcement Activities (2017)	Bilateral
Denmark-Finland-Iceland-Norway-Sweden	2017	Agreement on Cooperation in Competition Cases	Multilateral
Canada-New Zealand	2016	Co-operation arrangement between the Commissioner of Competition (Canada) and the New Zealand Commerce Commission in relation to the sharing of information and provision of investigative assistance (2016)	Bilateral
Australia-Japan	2015	Co-operation Arrangement between the Australian Competition and Consumer Commission and the Fair Trade Commission of Japan (2015)	Bilateral
New Zealand-Australia	2013	Co-operation Arrangement between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission in relation to the provision of compulsorily-acquired information and investigative assistance (2013)	Bilateral
EU-Switzerland	2013	Agreement between the European Union and the Swiss Confederation concerning co-operation on the application of their competition laws (2013)	Bilateral
US-Australia	1999	United States-Australia (1999), The Australia - United States Mutual Antitrust Enforcement Assistance Agreement	Bilateral

Regional agreements also provide for co-operation on competition matters. There are currently 334 Regional Trade Agreements (RTAs) in force listed on the World Trade Organisation website, of which 238 contain competition provisions,[57] 78 of which entered into force since 2014, accounting for 1/3 of all agreements since 1958.[58] The most frequent competition provisions concern commitments to prohibit abuses of market power and anti-competitive agreements, commitments to ensure that SOEs and subsidies do not distort the level-playing field, and provisions on international co-operation. Provisions on co-operation and co-ordination in competition policy refer for example to positive or negative comity, taking into account the interests of the other party either to refrain or to investigate certain practices, notification requirements or exchange of information requirements.[59] RTAs are no longer strictly based on geographic location, and they can be agreed bilaterally between individual countries (Free Trade Agreements), between one country and a group of countries (plurilateral agreements), or between regions or blocs of countries (multilateral agreements). 78% of Adherents are participants of a regional arrangement that supports and/or has functions that support international co-operation in competition enforcement. These regional arrangements include Regional Integration Arrangements with Supra-National Competition Authorities (RIA+Supra) and regional second-generation-style agreements (Figure 5.4).

Figure 5.4. Adherents' involvement in regional arrangements supporting enforcement co-operation, by type of arrangement[60]



Note: Five countries among the Adherents are part of a second generation agreement and of a RIA+Supra. For the purpose of this figure they have been only counted among parties to RIA+Supra. The category 'No regional organisation membership' is used in this Report to describe jurisdictions that are not part of any regional organisations with specific competition enforcement co-operation functions.

The EU remains the most integrated and comprehensive example of regional enforcement co-operation. Fifty-five percent of Adherents are part of the EU and 81% of EU Member States are Adherents.[61] Other regional models also provide for deep and effective enforcement co-operation, such as the Nordic Alliance and the Australia and New Zealand arrangements.[62]

Even where regional arrangements may be facing challenges or are supported only by very high-level or limited enforcement co-operation instruments,[63] Adherents responding to the 2019 Survey noted that regional relationships and networks are the source of the most frequent enforcement co-operation for many authorities.

Next to these more formalised ways of co-operation, a commitment to international enforcement co-operation also shows in the continued relevance of experience exchanges and participation in international meetings. These softer tools lay the foundation for effective enforcement co-operation as they allow for mutual learning and creation of relationships of trust between competition authorities and enforcers (see also (Caro de Sousa, 2020[42])). The meetings of the Competition Committee and its Working Parties twice a year are usually attended by all Adherents, and often at Head of Agency level, and typically high numbers of written country contributions prove the interest and the willingness to contribute actively to the international exchange on enforcement practices. In 2020, a year when in-person meetings were suspended due to the Covid 19 pandemic and working conditions were difficult for many enforcers, the international competition community showed a remarkable ability to stay connected and to exchange on pandemic related consequences to competition enforcement (see Box 5.3). All Adherents are also members of the ICN, where they engage in frequent exchange.[64]

Box 5.3. 2020 OECD Webinars on Competition policy responses to COVID-19

As a part of the Competition Division's effort to provide support to competition agencies in the ongoing crisis, four webinars were held on 26 and 28 May 2020 on the topics of Merger control and Antitrust in times of crisis. The webinars were organised as morning and afternoon sessions to reach as many participants as possible. They benefited from COVID-related notes which served as background for the discussions. The webinars were attended by more than 550 participants from around the world.

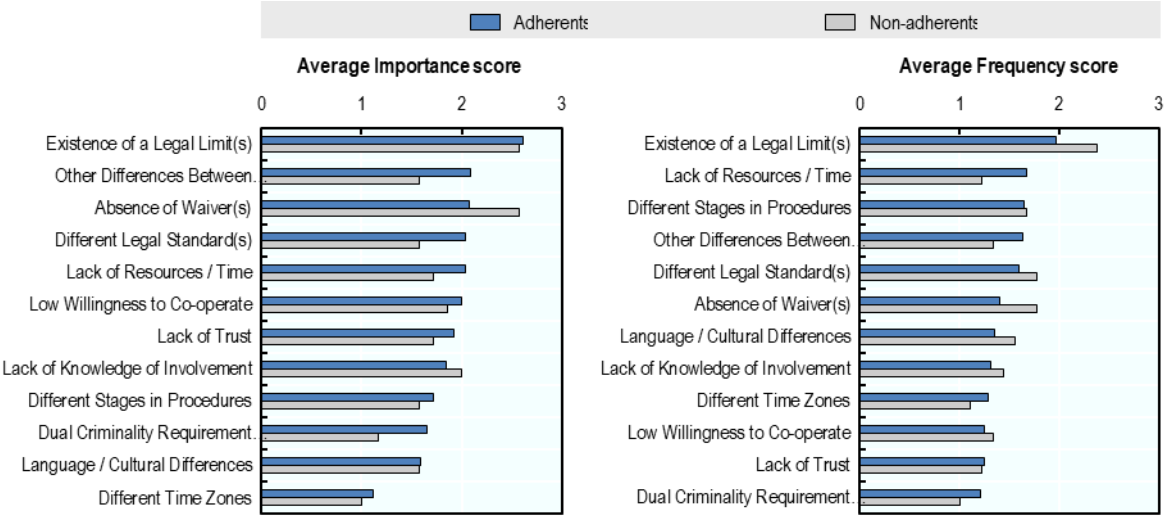
Note: See Competition policy responses to COVID-19 - OECD.

Next to a general commitment to international enforcement co-operation, the 2014 Recommendation advises to create legal and procedural transparency, and to minimise inconsistencies between leniency and amnesty programmes that could adversely affect co-operation. In both areas, relevant work was carried out, and it demonstrates that Adherents are well aware of the issues:

- Leniency or amnesty programmes are a primary detection tool for illegal cartels, and when cross-border cartels operate, co-ordinated enforcement is required. The OECD has held a Roundtable on challenges and co-ordination of leniency programmes in 2018, which concluded that convergence was essential for effective enforcement.[65] The ICN has published a series of work products since 2014,[66] all intended to enhance leniency co-operation and to align rules and procedures. Within the ECN, Chapter VI of the ECN+ Directive[67] provides detailed rules for leniency programmes of Member States, and the implementation of the Directive will ensure consistent rules across all Adherents belonging to the ECN.
- Regarding transparency on procedures and substantive rules, two recent work products by the ICN and the OECD are worth mentioning and will promote the implementation of the 2014 Recommendation. In 2019, the ICN launched the Framework for Competition Agency Procedures (CAP),[68] and participants commit to submit a template with information regarding their competition law investigation and enforcement procedures. 36 Adherents are participants, and 33 have published template information on their applicable laws and procedures.[69] The Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465] recommends under II.1 that Adherents ensure that competition law enforcement is transparent and predictable, including the implementation of international competition law enforcement transparency and procedural fairness best practices. This Recommendation underlines the commitment of Adherents to the equivalent principles in the 2014 Recommendation and will promote their implementation.

Despite Adherents' demonstrated commitment to international enforcement co-operation, many limitations still exist. Respondents were asked to provide qualitative responses on the limitations of enforcement co-operation and to complete a table, ranking limitations to effective international enforcement co-operation by importance and frequency.[70] Figure 5.5 provides a comparative analysis between the frequency and importance dimension of the responses for Adherents and Non-Adherents. It shows that 'The existence of legal limits' is both the most frequent and most important limitation of enforcement co-operation. Differences in enforcement regimes and legal standards, as well as the absence of waivers and a lack of resources also feature high as impediments to enforcement co-operation.

Figure 5.5. Limitations to international enforcement co-operation outside of regional arrangements, by average scores of frequency and importance, Adherents vs. non-Adherents, 2019



Note: Overall response rate: 57% [32], Adherents response rate: 64% [25], Non-Adherents response rate: 41% [7]. Data source type: defined data set.
Source: OECD/ICN Joint Survey 2019, Question 29 – Table 7.

The observed limitations are persistent. A comparison of the importance and frequency of limitations to enforcement co-operation between 2012 and 2019 Survey results shows that both the importance and frequency of all limitations have increased,[71] and legal limitations, differences in enforcement regimes and legal standards and the absence of waivers were among the most important already before the adoption of the 2014 Recommendation.

In summary, the developments over the last five years demonstrate that Adherents are committed to improving and enhancing international enforcement co-operation, and the 2014 Recommendation played a role in raising awareness of the topic and being a useful reference when implementing or advocating for change. However, the persistence of mostly legal limitations and differences in legal standards and regimes demonstrate that more far-reaching measures are required to advance international enforcement co-operation further, in particular with regard to co-operation outside of regional networks and multi-lateral co-operation.

5.3. Building Block 2 and 3: Consultation and Comity (Sections III and IV)

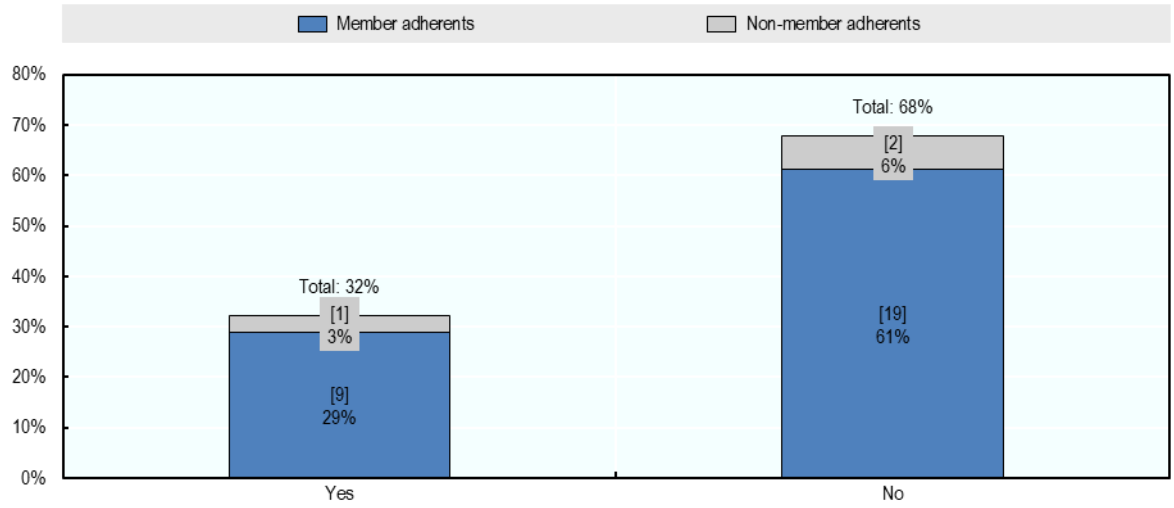
Under the headline of "Consultation and Comity" it is recommended that Adherents consult when they consider that another's enforcement action impacts them, or when anticompetitive conduct in another jurisdiction has an impact on them:

> *"RECOMMENDS that an Adherent that considers that an investigation or proceeding being conducted by another Adherent under its competition laws may affect its important interests should transmit its views on the matter to, or request consultation with, the other Adherent."*
>
> *"… RECOMMENDS that an Adherent that considers that one or more enterprises or individuals situated in one or more other Adherents are or have been engaged in anticompetitive practices or mergers with anticompetitive effects that substantially and adversely affect its important interests, may request consultations with such other Adherent or Adherents."*

The sympathetic consideration of another jurisdiction's interests when enforcing domestic competition law, and actions against anticompetitive acts that have an effect in another jurisdiction are generally known as "comity".[72] Comity will be facilitated if jurisdictions communicate their interests and consult with each other about possible solutions that meet the respective jurisdictions' interests. In practice, despite the relatively widespread availability of legal bases, comity seems to be an instrument with low relevance.

The majority of responding Adherents (68% - [21]) stated that they did not use Sections III and IV (Figure 5.6).

Figure 5.6. Use of Sections III and IV: Consultation and Comity, by percentage of Adherents responding to the question

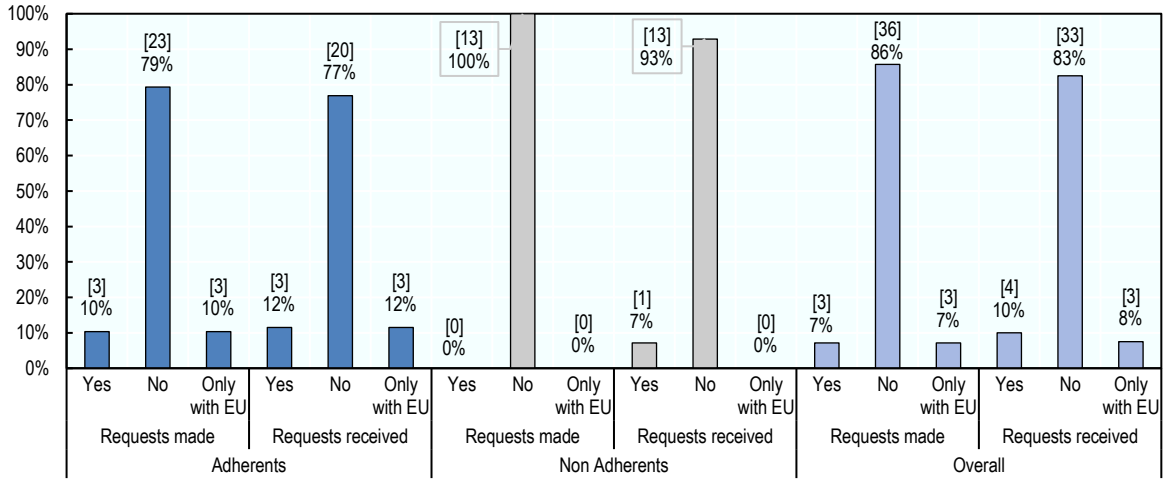


Note: This figure only presents responses from the Adherents. Response rate: 79% [31].
Data source type: quantitative representation categorised free text
Source: OECD/ICN Joint Survey 2019, Question 39 Table 9.

At the same time, 65% [24] of the responding Adherents have the legal ability to take into account the interests of another jurisdiction when conducting their law enforcement activities. The legal basis for comity is provided mostly by bilateral agreements (57% - [16]) and multi-lateral agreements (32% - [9]), and in only 11% [3] by national law.[73] This is consistent with previous analyses of Memorandums of Understanding (MoU).[74] There is no major change compared to the situation in 2012, when 23 Adherents reported having comity provisions available to them.[75]

Experience with positive comity during the 2012 – 2018 period outside of regional networks is very limited. More than 75% of responding Adherents have neither received requests for positive comity nor have they requested it, and half of the requests made or received were within the European Union. Non-Adherents have even less experience, limited to one received request.

Figure 5.7. Experience in making and requesting positive comity outside of regional arrangements, by percentage of respondents to the question, 2012 - 2018



Note: Response rates: Requests made: Overall 75% [42], Adherents 74.5% [29], Non-Adherents 76.5% [13]. Requests received: Overall 71% [40], Adherents 67% [26], Non-Adherents 82% [14].
Data source type: quantitative representation categorized free text.
Source: OECD/ICN Joint Survey 2019, Question 13.

As can be expected, given the low numbers of actual use and experience with comity, it is difficult to find examples for its application. However, there are public examples of authorities responding to the decisions and approaches of other authorities in determining whether they will proceed with their own case, investigation, remedy or sanction, or whether they will instead rely on the effect of the decision made in another jurisdiction to effectively resolve the issue in their own jurisdiction (Box 5.4).

Box 5.4. Examples for use of comity

GSK-Novartis merger case (2015):

The Australian Competition and Consumer Commission concluded that some merger remedies to address the anti-competitive effects of the merger agreed by the parties with the European Commission solved its competitive concerns. Therefore, next to two Australia-specific divestment remedies, it required the parties' commitment to the agreed remedies in Europe.[1]

Auto-parts cartel case (Nishikawa) (2016):

In this bid-rigging conspiracy involving body-sealing parts for automotive use, the Canadian Competition Bureau collaborated with the US Department of Justice (DoJ) and agreed that the matter would be addressed solely by the DoJ as the conduct primarily targeted US consumers. The DoJ included the USD 236 million in sales that were made to car producers in Canada in its assessment of the proposed fine. The Bureau was satisfied that the USD 130 million fine imposed by the US sufficiently addressed the adverse effects of the conduct in both Canada and the United States.[2]

Towage cartel case (2017):

In cartel investigations relating to towage services in German and Dutch ports, the Netherland's Authority for Consumers and Markets (ACM) deferred to the German Bundeskartellamt's enforcement. Both authorities collaborated closely in the investigation, and the ACM considered the Bundeskartellamt to be in a better position to take enforcement action. The case was concluded with settlement decisions in Germany.[3]

Notes:
[1] ACCC will not oppose three part GSK – Novartis deal | ACCC;
[2] https://www.canada.ca/en/competition-bureau/news/2016/07/unprecedented-cooperation-with-us-antitrust-enforcement-authority-leads-to-major-cartel-crackdown.html;
[3] http://competitionlawblog.kluwercompetitionlaw.com/2018/02/06/towage-services-cartel-new-chapter-collaboration-competition-authorities/
Source: (OECD, 2019[24])

To conclude, it is not entirely clear if the overall lack of utilisation of the comity principle in international enforcement co-operation is due a lack of legal bases in national laws, overly demanding provisions complicating its use, or if for the time being competition authorities consider that they have sufficient and less burdensome informal co-operation instruments at hand that allow for meaningful co-ordination. At least in Adherent jurisdictions, there seems to be relatively widespread availability of legal bases but they may be limited to a few countries in each case, with which an authority has concluded an agreement. Voices in the literature call for wider use of comity principles to address perceived risks of contradictory enforcement, diverging decisions or waste of agency resources through duplicative enforcement action.[76] The establishment of explicit provisions allowing for positive and negative comity in national laws could mark an important step to facilitating comity and increasing its use.

5.4. Building Block 4: Notification of Competition Investigations or Proceedings (Section V)

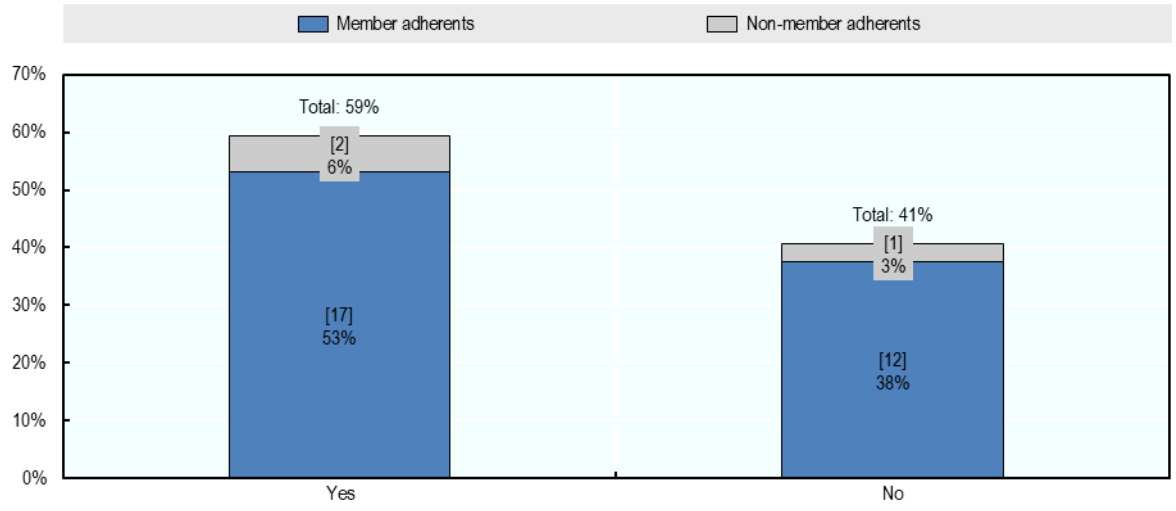
Section V of the 2014 Recommendation is a cornerstone for international co-operation, as it recommends that investigations with a potential impact on another jurisdiction's interests be notified:

> *"Notifications of Competition Investigations or Proceedings… RECOMMENDS that an Adherent should ordinarily notify another Adherent when its investigation or proceeding can be expected to affect the other Adherent's important interests."*

Notifications allow jurisdictions to be aware of other jurisdictions' investigations that might affect their territory. This includes the gathering of non-public information in another jurisdiction, the investigation of enterprises located abroad or of practices occurring in the territory of another Adherent, or the consideration of remedies requiring or prohibiting conduct in the other territory. A notification is a necessary first step for any further co-operation or co-ordination and will allow the notified party to become aware of potential anticompetitive conduct from within its territory. If the conduct also has effects within the notified jurisdiction, this will allow to start an investigation, possibly in close co-ordination with the notifying jurisdiction, or to otherwise support the notifying jurisdiction in their investigation. The use of this section is widespread, and experience with making or receiving notifications has increased.

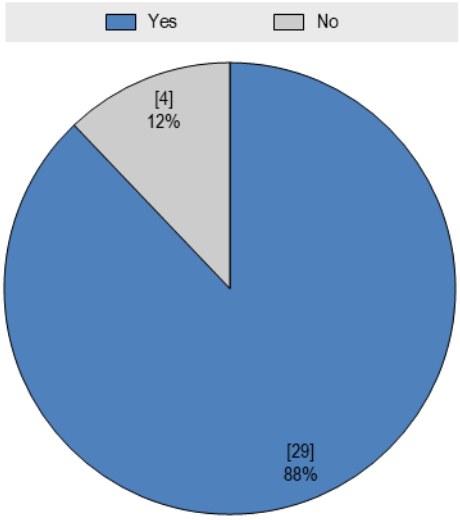
The majority of the Adherents (59% - [19]) reported having used Section V of the Recommendation – notifications were made with an explicit reference to the provision (Figure 5.8). At the same time, 10 of the responding Adherents that said they did not use it, have responded in other parts of the 2019 Survey that they have experience with making notifications. Taken together, 88% of Adherents are making active use of notifications of their competition proceedings to other jurisdictions, and they find them useful (Figure 5.9).

Figure 5.8. Use of Section V: Notification of Competition Investigations or Proceedings, by percentage of responding Adherents



Note: This figure only presents responses from the Adherents. Response rate: 82% [32]. Data source type: quantitative representation categorised free text.
Source: OECD/ICN Joint Survey 2019, Question 39 – Table 9.

Figure 5.9. Usefulness of notifications, by percentage of responding Adherents with experience in notifications, 2019

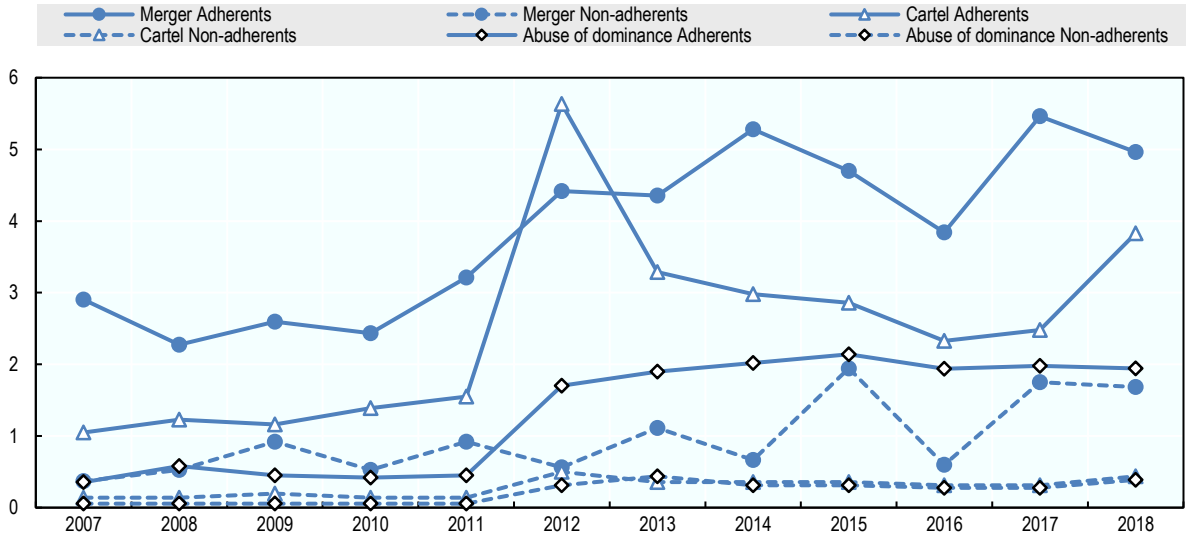


Note: Response rate: 87% [34]. Data source type: quantitative representation categorised free text.
Source: OECD/ICN Joint Survey 2019 – Question 11.

To illustrate the actual frequency of notifications, Figure 5.10 shows the average number of notifications received per year, differentiated by Adherents and Non-Adherents and by enforcement area. As is to be expected, most notifications are made in merger cases. Cartel notifications see an upward trend. The comparison between Adherents and Non-Adherents demonstrates that Adherents make more frequent and increasing use of the instrument.

Figure 5.10. Average number of notifications received by authorities by enforcement area, 2007 – 2018

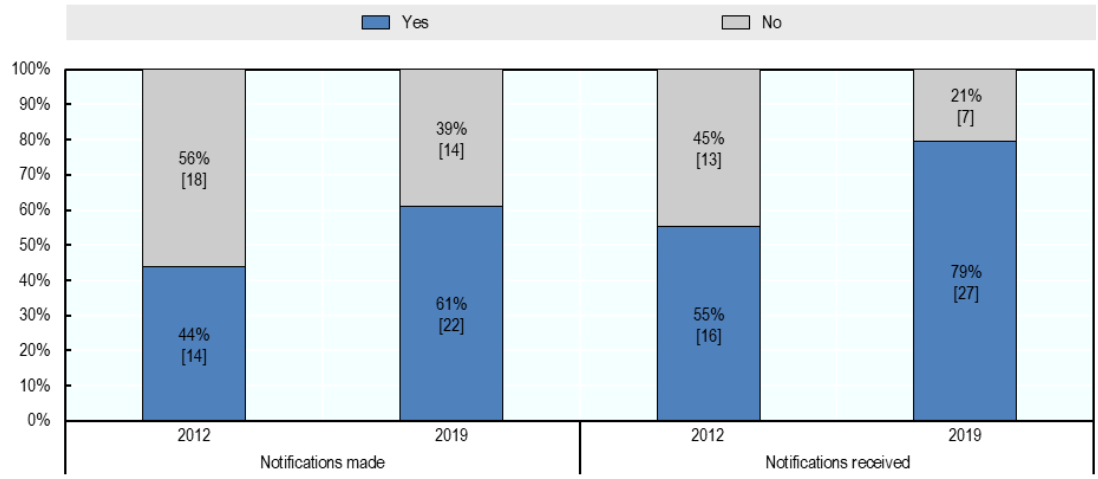
All respondents



Source: OECD/ICN Joint Survey 2019, Question 10 – Table 3.2

Figure 5.11 compares the 2012 and 2019 Survey results in relation to notifications made and received by Adherents to the 2014 Recommendation. It demonstrates that in 2012 there were substantially fewer Adherents with experience in making or receiving notifications compared to 2019. In 2012, only 44% and 55% of the Adherents respectively made or received notifications, while 55% and 79% of the Adherents did so in 2019. The increase in experience indicates that there is increased use of and exposure to notifications.

Figure 5.11. Experience making and receiving notifications, by percentage of responding Adherents to the question, 2012 vs. 2019



Note: Response rates: Notifications made 2012: 94% [32]. Notifications received 2012: 85% [29]. Notifications made 2019: 92% [36]. Notifications received 2019: 87% [34].
Data source type: defined data set.
Source: OECD/ICN Joint Survey 2019, Question 10 – Table 3.1 and 3.2.

The data on the experience with notifications underline their importance as an essential prerequisite to international enforcement co-operation, and they can support enforcement activity in all enforcement areas (Box 5.5).

Box 5.5. Relevance and uses of notifications

Notifications that inform competition authorities about proceedings in other jurisdictions with a nexus to their own jurisdiction not only support comity or investigative assistance, but they can also inform an authorities' own enforcement work and may ultimately trigger co-ordinated case investigations.

- In merger cases, a merger notified in one jurisdiction could also raise competition concerns in another where it was not notified, enabling an investigation and/or discussions on remedy co-ordination. Alternatively, there may be information from previous cases in the receiving jurisdiction that could inform the investigation of the notifying jurisdiction which can be made available once the receiving jurisdictions learns about the case.
- This can also be relevant in cartel or abusive conduct investigations, which can benefit from information about similar conduct and investigations in other countries. In addition, early notification of the opening of proceedings could in addition allow the receiving jurisdiction to consider starting its own parallel or co-ordinated investigation. Jurisdictions which are geographic neighbours and share other similarities often have the same enterprises active in their national markets and face similar (anti)competitive behaviours. To them early notification is of particular interest as it can allow to address anticompetitive conducts affecting a wider region more effectively.

A potential development to be kept in mind is that the more international co-operation exists, the less formal it may become, in particular when hardly any legal obstacles exist with regard to the co-operation instrument as is the case for notifications. When competition authorities have established relationships of mutual trust and understanding, they may at times inform each other about instances as foreseen in Section V of the Recommendation just with a quick phone call or a very informal e-mail contact. There will be no need for a more formalised notification with explicit reference to the Recommendation. An additional factor, which may contribute to a decreased need of a formalised notifications instrument is the widespread availability of competition related information services, which offer easy access to case information and investigations in a multitude of jurisdictions, and allow for monitoring by countries, industries, types of violations, or enterprises (see also Box 5.6).

Box 5.6. Intelligence gathering by competition authorities

The 2019 Survey revealed a number of methods competition authorities use, next to formal or informal notifications, to become aware of possible parallel investigations:

- Established inter-authority communication networks
- Review of competition related information services (such as MLEX, PaRR, GCR, international business news)
- Pro-actively following the activities of specific authorities (such as media releases and announcements, lists of notifications and cases)
- Communicating with parties to the investigation (mandatory or voluntary disclosure of parallel investigations in other jurisdictions in merger cases or by leniency applicants in cartel cases).

Source: (OECD/Eurostat, 2005, p. 147[20]).

Notifications are an instrument well used by Adherents, and their use is still growing. While it may seem counterintuitive at first, their actual relevance may however decrease with increasing international enforcement co-operation. Formalised notifications with a specific reference point such as the 2014 Recommendation may be replaced by more informal notification processes and other sources of enforcement-relevant intelligence. Section V of the 2014 Recommendation already encourages Adherents to use "any effective and appropriate means of communication", preferably in written form. While informality has the potential to greatly facilitate notification exchanges, competition authorities should always ensure that competition authority staff is aware of all the instances in which a notification is required, to ensure that all Adherents can expect notifications in appropriate cases. Only then can notifications maintain and develop their full impact and potential for international enforcement co-operation.

5.5. Building Block 5: Co-ordination of competition investigations or proceedings (Section VI)

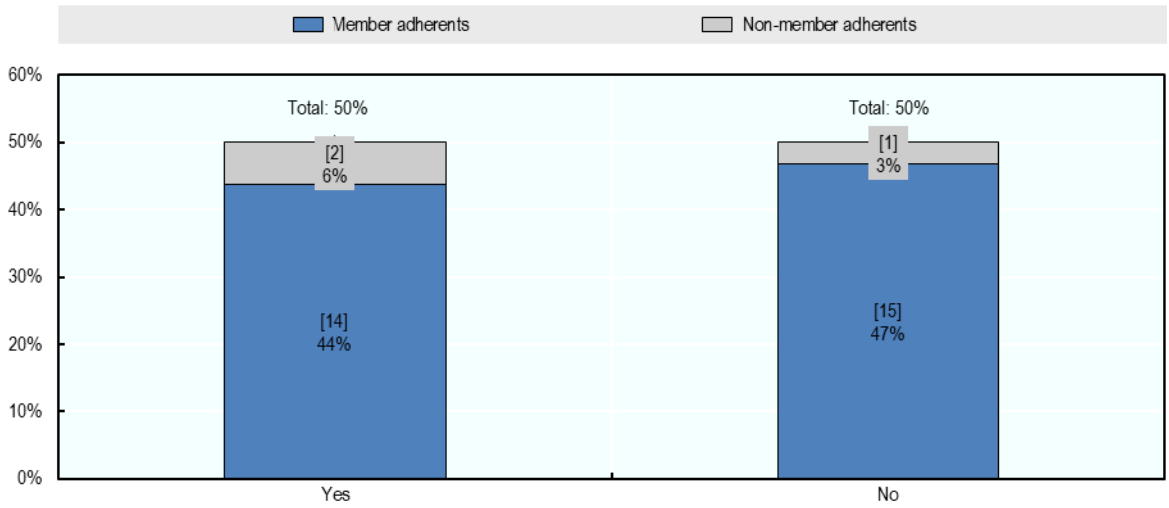
Section VI is, next to section VIII (Investigative Assistance), a cornerstone of the 2014 Recommendation, as it recommends co-ordination of parallel or closely related proceedings in order to avoid conflicting approaches or outcomes and to reduce enforcement cost:

> *"Co-ordination of Competition Investigations or Proceedings… RECOMMENDS that where two or more Adherents investigate or proceed against the same or related anticompetitive practice or merger with anticompetitive effects, they should endeavour to co-ordinate their investigations or proceedings where their competition authorities agree that it would be in their interest to do so."*

It suggests co-ordination of timetables, co-ordination and discussion of substantive analyses, requests of waivers to enable joint approaches, co-ordination of remedies, mandatory notifications of parallel merger notifications, and encourages new forms of co-operation. Adherents have a steady and slightly increasing record of co-ordination in anticompetitive conduct and merger cases, and case examples show how co-ordination works in practice. There may, however, be potential for more and better co-ordination, in particular in the areas of anticompetitive conduct and in light of the main drivers of international co-operation, and this may require the adaptation of legal frameworks.

When asked whether they used Section VI of the Recommendation, half of the responding Adherents answered positively (Figure 5.12):

Figure 5.12. Use of Section VI: Co-ordination of competition investigations and proceedings, by percentage of responding Adherents

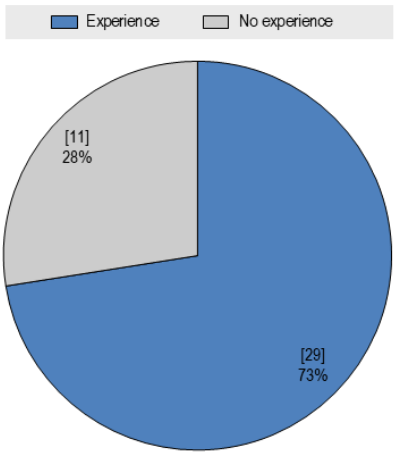


Note: This figure only presents responses from the Adherents. Response rate: 82% [32]. Data source type: quantitative representation categorised free text.
Source: OECD/ICN Joint Survey 2019, Question 39 – Table 9.

Similar to the answers in the Notification section above, many Adherents that declared not to have used Section VI of the Recommendation, responded positively when asked if they engaged either frequently or occasionally in at least one type of co-ordination in at least one of the enforcement areas. In light of this, Figure 5.13 may give a better picture of the implementation of Section VI. It shows that 73% [29] of responding Adherents had engaged in some form of co-ordination covered by Section VI.

Figure 5.13. Adherents' experience in any type of co-ordination activity

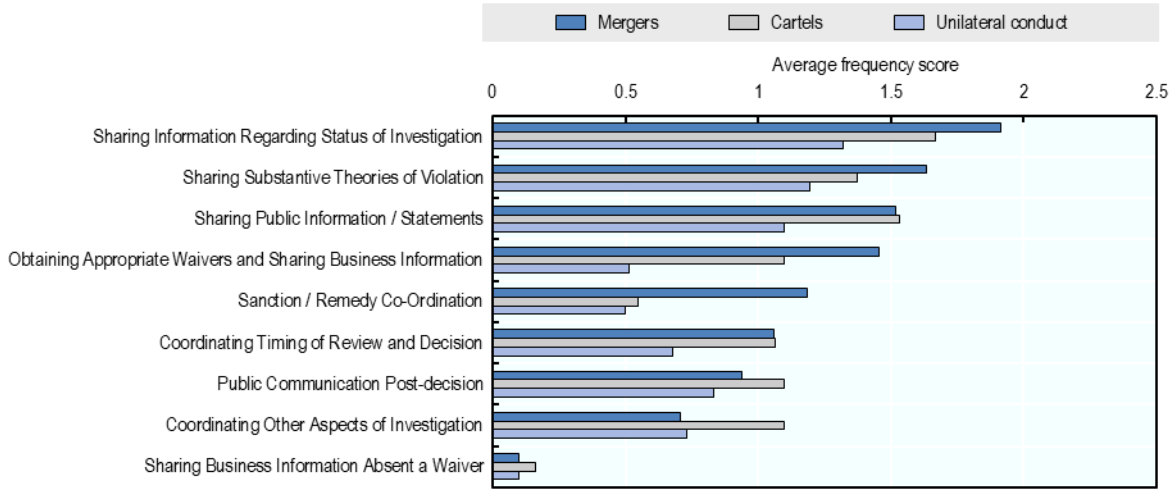
Number of respondents engaging either frequently or occasionally in some sort of co-ordination



Note: Response rates: Table 6.1: 87% [34], Table 6.2: 85% [33], Table 6.3: 79% [31]. Data source type: quantitative representation categorised free text.
Source: OECD/ICN Joint Survey 2019, Question 19 – Tables 6.1, 6.2, and 6.3.

Figure 5.14 shows the average frequency score[77] associated with each type of co-operation across the enforcement areas. For all three enforcement areas, the most frequent type of co-operation is "sharing information regarding status of investigation". The sharing of theories of harm and public information seems to be more relevant as well, while most other types of co-ordination seem to be rarer across all enforcement areas. Merger control stands out again as the enforcement area with the most frequent co-operation across most types of co-operation. Compared to 2012, the frequency of the different types of co-operation reported by respondents has approximately doubled, across all types and enforcement areas (OECD/Eurostat, 2005, pp. 96-99[20]).

Figure 5.14. Adherents' ranking of types of co-operation outside of regional arrangements in all enforcement areas, by average frequency score, by enforcement area



Note: Response rates: Table 6.1: 87% [34], Table 6.2: 85% [33], Table 6.3: 79% [31]. Data source type: quantitative representation categorised free text. Figure depicts average frequency scores, where options were: [Frequently = 3], [Occasionally = 2], [Seldom = 1], [Never = 0].
Source: OECD/ICN Joint Survey 2019, Question 19 – Tables 6.1, 6.2, and 6.3.

Enforcement co-operation is facilitated and encouraged by provisions in co-operation agreements. The OECD review of MoUs of bi-lateral enforcement co-operation[78] agreements showed that about half of the MoUs included provisions on co-ordination, mostly as general statements such as:

> *(w)here the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, each intends to consider co-ordination of their enforcement activities as appropriate.*[79]

A few MoUs have detailed co-ordination clauses, such as e.g. Australia-Japan (2015), Korea-Mexico (2004), Australia-Korea (2002), Australia-Papua New Guinea (1999), and Australia-Chinese Taipei (1996).[80] Box 5.7 shows an example from the Australia-Japan (2015) MoU.

Box 5.7. ooperation Arrangement between the Australian Competition & Consumer Commission and the Fair Trade Commission of Japan (2015)

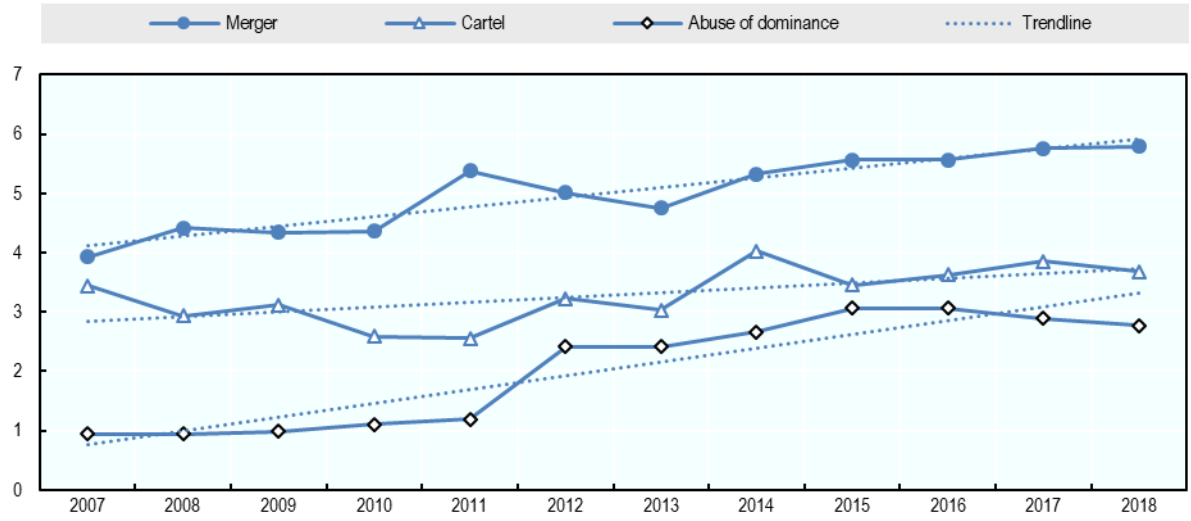
Paragraph [*05] Coordination of Enforcement Activities

> *5.1. Where the competition authorities are pursuing enforcement activities with regard to matters that are related to each other:*
>
> *(a) the competition authorities will consider coordination of their enforcement activities; and*
>
> *(b) each competition authority will consider, upon request by the other competition authority and where consistent with the respective important interests of the competition authorities, inquiring whether persons who have provided confidential information in connection with the enforcement activities will consent to the sharing of such information with the other competition authority.*
>
> *5.2. In considering whether particular enforcement activities should be coordinated, the competition authorities will take into account the following factors, among others:*
>
> *(a) the effect of such coordination on their ability to achieve the objectives of their enforcement activities;*
>
> *(b) the relative abilities of the competition authorities to obtain information necessary to conduct the enforcement activities;*
>
> *(c) the extent to which either competition authority can secure effective relief against the anticompetitive activities involved ;*
>
> *(d) the possible reduction of cost to the competition authorities and to the persons subject to the enforcement activities; and*
>
> *(e) the potential advantages of coordinated relief to the competition authorities and to the persons subject to the enforcement activities.*
>
> *5.3. Each competition authority may at any time, after notifying the other competition authority of its decision, limit or terminate the coordination of enforcement activities and pursue its enforcement activities independently.*

Source: "Paragraph 5(2)" (ACCC/JFTC, 2015[43]) and (OECD, 2017[44]); (OECD/Eurostat, 2005, p. 152[20])

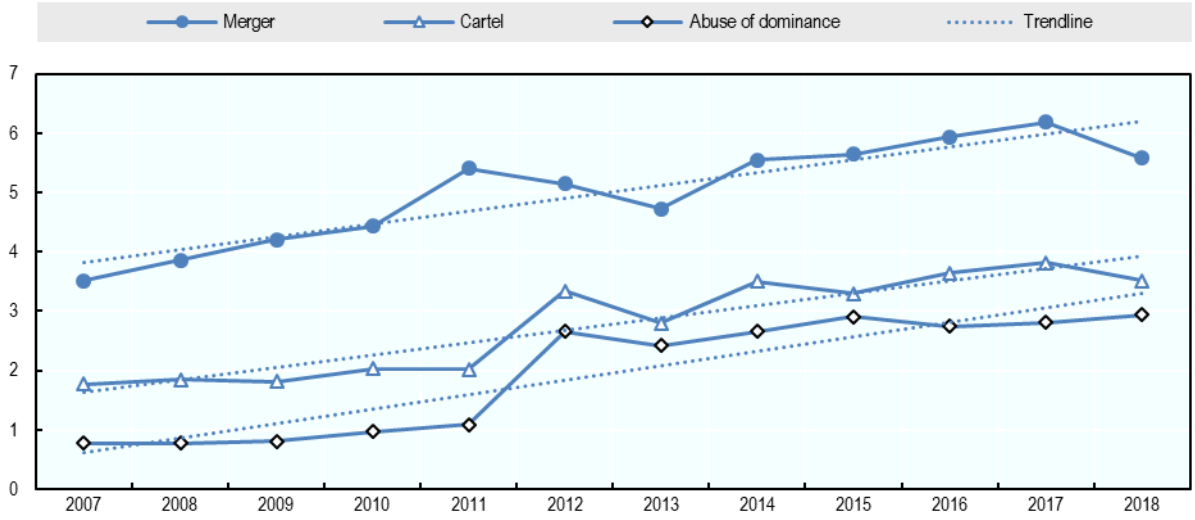
Figure 5.15 and Figure 5.16 show increasing trends in co-operation between authorities when looking at co-operation incidents, either by number of authorities or by number of cases. The former presents the average number of authorities with which Adherents have co-operated over the years 2007 to 2018. The latter presents the average number of cases involving international enforcement co-operation, by enforcement area.[81] Taken together, they may allow for an interesting observation: while the number of authorities with which Adherents co-operate has not increased significantly, the number of cases in which co-operation takes place experienced a steady increase. This could indicate that relationships between competition authorities are intensifying and prior experience and trust in the exchanges foster co-operation in more cases by the same pairs of authorities.[82]

Figure 5.15. Average number of authorities with which Adherents have co-operated, by enforcement area, 2007 – 2018



Note: 2012 response rate: 85% [29]. 2019 response rate: 82% [32]. Data source type: defined data set.
Source: OECD/ICN Joint Survey 2019, Question 18 – Table 5.1.

Figure 5.16. Average number of cases involving international enforcement co-operation by Adherents, by enforcement area, 2007 – 2018



Note: 2012 response rate: 85% [29]. 2019 response rate: 82% [32]. Data source type: defined data set.
Source: OECD/ICN Joint Survey 2019, Question 18 – Table 5.2.

Box 5.8. Role of co-operation in merger control

Trends in this Report show that merger co-operation features more prominently in actual cases of international enforcement co-operation and in the relevance of these exchanges. Cross-border mergers are the most likely candidate to trigger parallel investigations in several jurisdictions, and they have experienced a steady increase.* In most jurisdictions, prior merger notification is mandatory, often linked to the requirement to inform about parallel notifications. Moreover, co-operation will be facilitated by the incentives of the merging parties to increase efficiency and speed of the investigations and to avoid inconsistent outcomes. Waivers for the exchange of confidential information are commonly granted by merging parties. Even without waivers, competition authorities can exchange non-public information, discuss theories of harm, timelines and, to a certain extent, information about remedies.

Case examples

Halliburton/Baker Hughes (2016): the merger between Halliburton and Baker Hughes was abandoned in May 2016, after the transaction raised competition concerns in numerous product markets related to oilfield services. Several competition authorities across the world co-operated closely in the investigations, including the United States DoJ, the European Commission, the Brazilian competition authority CADE and the Australian Competition and Consumer Commission.[1]

Dow/DuPont (2017): this merger affected markets for pesticides and was cleared subject to remedies in the EU, the US, Australia, Brazil, Canada, Chile, China, and South Africa.[2] The competition authorities co-operated in reviewing the transaction and co-ordinated to align remedies. The Mexican competition authority COFECE refrained from taking action as it considered that the remedies agreed with the US and the EU addressed all of its competitive concerns adequately.[3]

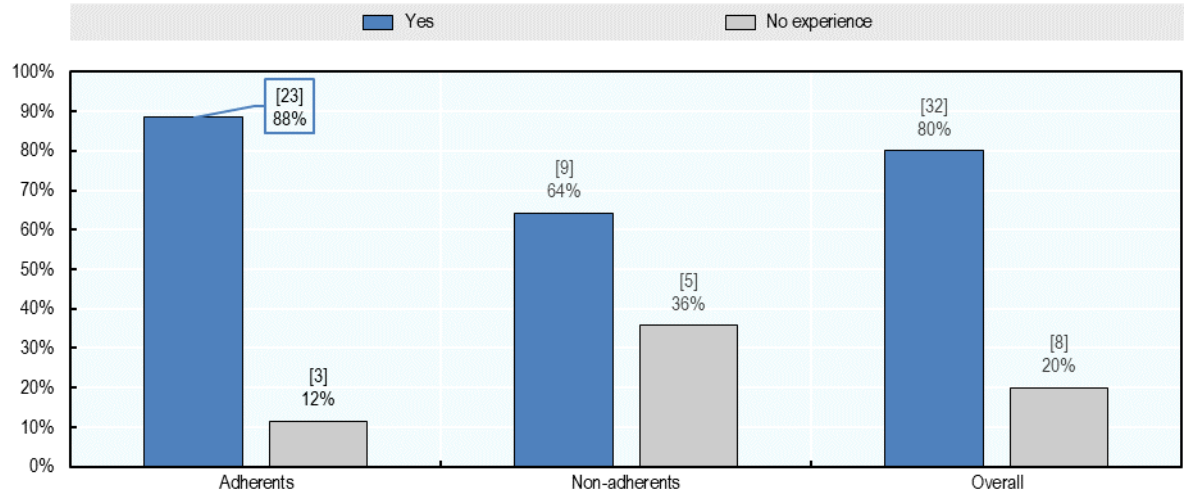
Bayer/Monsanto (2018): the acquisition of Monsanto by Bayer affected seeds and crop protection markets and was reviewed by several authorities. It was cleared, although markets with overlaps were subject to divestiture remedies. In this case, the European Commission, the United States DoJ and the Australian, Brazilian, Canadian, Chinese, Indian and South African competition authorities worked closely together.[4]

Knauf/USG case (2019): the acquisition of USG by Knauf, which affected building products markets, was cleared subject to remedies by the Australian and New Zealand authorities. During the investigation, the two authorities co-operated closely, and the buyer of the divestiture asset had to be approved by both authorities.[5]

Notes: Only three Adherents have no prior notification system: Australia, the United Kingdom and New Zealand, ((OECD, 2018, p. 5[45])).
* See https://www.statista.com/statistics/955594/worldwide-number-of-cross-border-merger-and-acquisition-deals/; https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-cross-border-m-a-defied-the-pandemic-in-a-record-q1; accessed on 5 August 2021.
Sources: [1] www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal; http://europa.eu/rapid/press-release_STATEMENT-16-1642_en.htm,; www.accc.gov.au/media-release/halliburton-and-baker-hughes-proposed-merger-terminated; http://en.cade.gov.br/press-releases/general-superintendence-issues-opinion-on-halliburton2019s-takeover-of-baker-hughes. [2] http://europa.eu/rapid/press-release_IP-17-772_en.htm; www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics; http://en.cade.gov.br/press-releases/merger-between-dow-and-dupont-is-approved-with-restrictions. [3] DAF/COMP/WP3/M(2017)2/ANN2/FINAL. [4] http://europa.eu/rapid/press-release_IP-18-2282_en.htm; www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened; http://en.cade.gov.br/press-releases/cade-approves-with-restrictions-bayer2019s-acquisition-of-monsanto; www.compcom.co.za/wp-content/uploads/2017/01/Commission-Conditionally-Approves-Bayer-Transaction-Final.pdf. [5] www.accc.gov.au/media-release/knauf%E2%80%99s-acquisitions-of-usg-and-awi-conditionally-approved; https://comcom.govt.nz/news-and-media/media-releases/2019/commerce-commission-grants-clearance-for-knauf-and-usg-to-merge-subject-to-a-divestment.

The Survey also asked whether authorities consider other authorities' remedies (see also Box 5.9) when assessing their own cases (both within and outside regional networks). The results show that the vast majority of respondents did so, and for Adherents the consideration of other authorities' remedies is almost standard practice - 88% [28] have done or would do so. The total number of Adherents with a positive response has increased by six since 2012, when only 22 would consider other authorities' remedies.83 There is an interesting difference between Adherents' and non-Adherents' answers, where the percentage is lower (Figure 5.17).This may indicate that Adherents place more weight on remedy co-ordination with other jurisdictions and aim to avoid conflicting outcomes of merger investigations, in line with the 2014 Recommendation.

Figure 5.17. Consideration of other authorities' remedies in own work, within and outside of regional arrangements, by percentage of respondents to the question, 2019



Note: Response rate: Adherents 92% [36], Non-Adherents 82% [14], Overall 89% [50]. Data source type: quantitative representation categorized free text.
Source: OECD/ICN Joint Survey 2019, Question 16.

Box 5.9. Extraterritorial remedies

The 2017 Roundtable discussion on extraterritorial remedies (OECD, 2017[27]) concluded that the prevalence of the effects doctrine as the jurisdictional test over foreign conduct enables competition authorities to review and take measures against acts that cause domestic harm, regardless of the nationality of the perpetrator or the place where the infringement took place. Comity considerations may limit the scope of remedies; however, there is no hard rule consistently applied across jurisdictions. In the absence of hard limits derived from public international law regarding the right geographical scope of remedies, interagency co-operation in imposing measures against conduct affecting more than one territory is crucial.

The OECD issues note, the discussion and the executive summary address the importance of international co-operation: good enforcement practice requires early engagement of authorities in all affected territories to address common issues, as well as reduce the risk of conflicting decisions, if there are parallel enforcement procedures. Co-operation can include discussing or jointly designing remedies, to arrive at a remedy package that solves competition concerns in each affected jurisdiction. In other cases, authorities can refrain from taking action altogether, when a remedy issued in another jurisdiction is sufficient to resolve the competition concerns at home, and is effective, viable, and will be enforced.

In cases where competition authorities decide to impose remedies with extraterritorial reach, it is important to give reasons for this decision, for clarity and transparency purposes. Parties should have the opportunity to understand the remedy and provide inputs so that the remedy is effective. Convergence of substantive standards also helps limit the potential for conflict

Source: Roundtable Executive Summary and Key Findings, https://www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm.

International enforcement co-ordination may be less frequent in cartel cases, but it is no less relevant. When international cartels have a global coverage, they are in 68% of all cases sanctioned by more than one jurisdiction (OECD, 2020, p. 33[4]). In the process of the revision of the 1998 Recommendation on Hard Core Cartels (OECD, 1998[46]), it was found that the growing number of international cartels had led to increased attention to co-operation and co-ordination among competition authorities, and that a lack of co-ordination of enforcement actions against the same cartel by different authorities risked jeopardising enforcement outcomes; for example early dawn raids in one country alert the cartel to the possibility of dawn raids in other countries and may lead to the destruction of evidence. Lack of co-operation in cross-border cartel cases can also duplicate the investigative efforts of the authorities, and creates a risk of divergent decisions (OECD, 2019, pp. 81-82[47]). The 2019 Recommendation (OECD, 2019[34]) recognises that action against hard core cartels is important from an international perspective and particularly dependent upon international co-operation among competition authorities and refers to the 2014 Recommendation.

Box 5.10. Challenges and co-ordination of leniency programmes

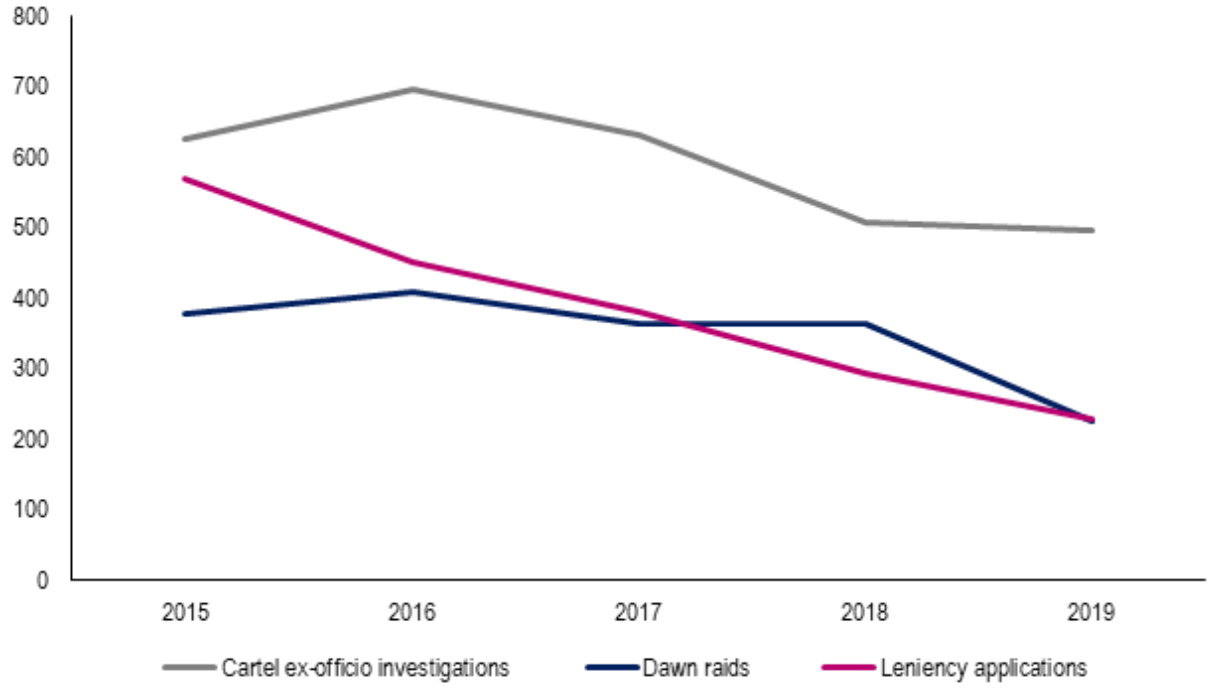
A 2018 Roundtable found that optimising the design and organisation of leniency programmes is important for their success over time, especially in cases of parallel leniency applications to several jurisdictions where enforcement co-ordination can be crucial. Currently, many jurisdictions are in the process of assessing the effectiveness of their leniency system and considering means to improve it, increase its attractiveness for potential applicants and strengthen co-operation with other agencies in cross-border cartel cases.

The proliferation of competition regimes and leniency programmes around the world creates both opportunities and challenges for the success of leniency programmes. Lack of co-ordination and conflicting requirements across jurisdictions may increase uncertainties regarding the benefits of multiple leniency applications and therefore affect the incentives of potential applicants in cross-border cartel cases. Convergence of leniency programmes and enforcement co-operation among competition authorities can reduce the costs and burden of leniency applications and help maintain incentives to apply.

Source: Executive Summary with Key Findings, DAF/COMP/WP3/M(2018)1/ANN2; (OECD, 2018[30]).

Leniency co-ordination may be a particularly promising starting point for intensified co-ordination of proceedings (Box 5.10). It is still a major detection instrument, but its use has been declining Figure 5.18, and this may be partly due to lack of co-ordination and conflicting requirements across jurisdictions (OECD, 2018[30]). Closer co-ordination in the leniency sphere could entail mandatory notifications of parallel leniency applications to other authorities by applicants and waivers for the exchange of case related confidential information, as well as recognition of markers or summary applications. Investigative measures such as inspections and interviews could be co-ordinated, as well as sanctions to ensure proportionality.

Figure 5.18. Leniency applications, dawn raids and ex-officio investigations in cartel cases, 2015-2019



Note: Data based on the 50 jurisdictions in the CompStats database that provided data for five years (including 40 Adherents). 4 jurisdictions have reported the total number of dawn raids for both cartels and abuse of dominance cases.
Source: OECD CompStats Database.

The unilateral conduct sphere is the one with the lowest number of reported authority contacts and cases of enforcement co-operation. This is, similar as for cartels, to a large extent due to the absolute lower numbers of enforcement cases in these two areas (OECD, 2021[11]). However, evidence for actual co-operation in such cases is scarce. At the same time, there is an increasing number of similar investigations in various jurisdictions into behaviours of the same large global companies in the digital sphere – at least 12 involving Apple, 14 involving Amazon, 19 involving Google, and 14 involving Facebook.[84] While there are examples of competition authorities co-operating in the area of research and market studies, to generate a better understanding of the markets and competition issues at stake (Box 5.11), little is known about any actual enforcement co-operation. Individual, parallel investigations into similar or identical behaviours can raise concerns about agency resources and coherent outcomes.[85]

Box 5.11. Co-operation between German Bundeskartellamt and French Autorité

In 2019, the French Autorité de la concurrence and the German Bundeskartellamt studied potential competition risks that might be associated with the use of algorithms. They studied the concept of algorithms and researched different types and fields of application. In their study, the two authorities focused in particular on pricing algorithms and collusion, but also considered potential interdependencies between algorithms and the market power of the companies using them as well as practical challenges when investigating algorithms. The joint study was undertaken also with the aim of reaching a common view between the two authorities.

Already in 2016, the two authorities published another joint study, on competition law and data. The aim was to determine why, how and to what extent data may become an instrument of market power. The study was undertaken against the background of a planned sector inquiry by the Autorité, and the then newly opened abuse proceeding by the Bundeskartellamt against Facebook. Bundeskartellamt President Mundt explained that "*Determining why, how and to what extent data may become an instrument of market power is important for competition authorities worldwide*."

Sources: Bundeskartellamt press releases - https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/10_05_2016_Big%20Data%20Papier.html; https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/06_11_2019_Algorithms_and_Competition.html.

Co-ordination of competition enforcement actions between competition authorities is part of Adherents' daily enforcement reality, in line with the 2014 Recommendation. Most engage in some forms of co-operation with multiple other authorities, and the number of cases where co-ordination takes place increases. Authorities often share information on the status of their investigations, and other, more frequent types of co-ordination are the sharing of theories of harm and public information. In merger cases, obtaining waivers to exchange confidential information and the co-ordination with regard to remedies are also more common. Such types of co-ordination are mostly possible without an explicit legal provision or co-operation agreement enabling their use unless they entail the exchange of confidential or otherwise protected information, and this may explain the high levels of experience and use of the co-ordination instrument. Adherents are applying their own laws in enforcing parallel or similar cases. Less co-ordination takes place in anticompetitive conduct cases, despite there being substantial potential for co-ordination. Lack of co-ordination can put parallel cartel investigations in other jurisdictions at risk, and is one possible reason for the decline in leniency applications in the past years. In abuse of dominance cases, co-ordination seems the exception.

To address the lack of co-ordination in particular in conduct cases, improving notification systems and exploring new forms of co-ordination that enable or facilitate joint investigations and/or allow for work sharing between authorities could be explored. This would go beyond what can currently be observed in enforcement co-ordination and would require appropriate legal frameworks to allow for the exchange of confidential information, and for active support of another jurisdiction's investigation without there necessarily being a parallel, national investigation. Both topics are addressed in the next two sections.

5.6. Building Block 6: Exchange of information in competition investigations or proceedings (Section VII)

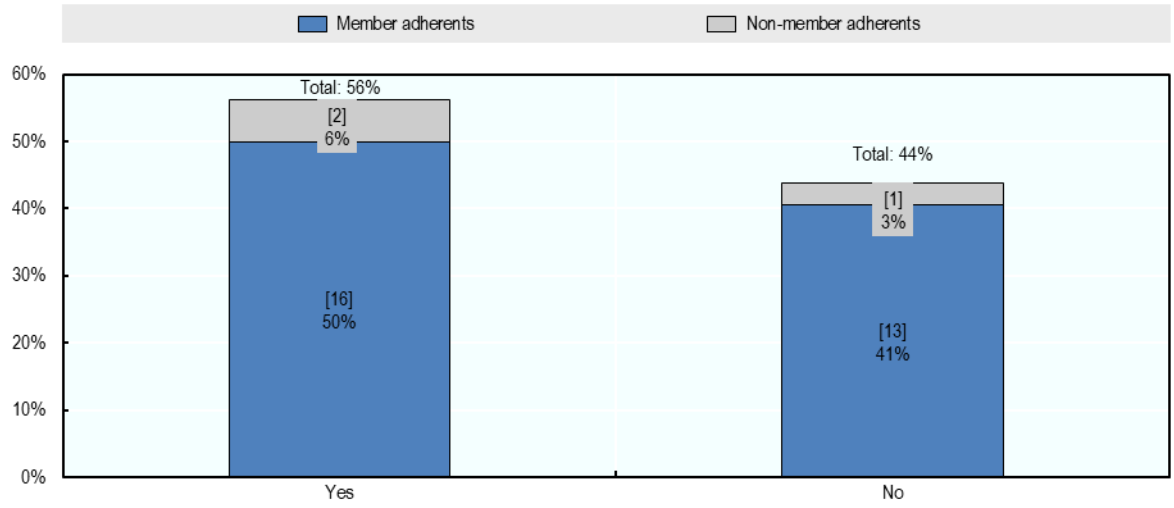
Section VII stipulates a necessary requirement for competition authorities to co-operate by consulting or notifying each other, co-ordinating enforcement action or providing investigative assistance – the exchange of information:

> *"Exchange of Information in Competition Investigations or Proceedings… RECOMMENDS that in co-operating with other Adherents, where appropriate and practicable, Adherents should provide each other with relevant information that enables their competition authorities to investigate and take appropriate and effective actions with respect to anticompetitive practices and mergers with anticompetitive effects.*

The 2014 Recommendation provides detailed guidance on the exchange of information, including non-confidential information, which can be public or agency internal information. When the exchange of this type of information is not sufficient, it recommends exchanging also confidential information on the basis of waivers or information gateways. Additional recommendations relate to safeguards and protections. While most Adherents engage in various forms of information exchanges, the exchange of confidential information is often difficult and encounters obstacles, legal or administrative.

The majority of the responding Adherents (56%, [18]) declared to have used Section VII of the Recommendation, but a significant number (44%, [14]) has not.

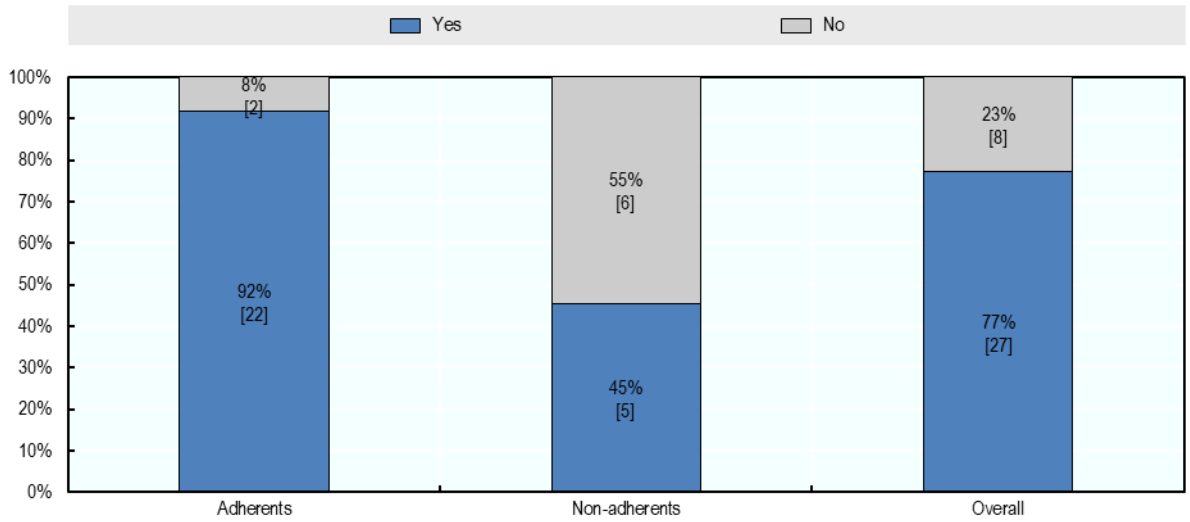
Figure 5.19. Use of Section VII: Exchange of information in competition investigations or proceedings, by percentage of responding Adherents



Note: This figure only presents responses from the Adherents. Response rate: 82% [32]. Data source type: quantitative representation categorised free text.
Source: OECD/ICN Joint Survey 2019, Question 39 – Table 9.

Figure 5.20 shows that 92% of the Adherents and 45% of the Non-Adherents have some form of legal provision that allows for the transfer of confidential information, including the possibility to use information exchange waivers.[86] The difference illustrates that co-operation between Adherents and Non-Adherents may be more difficult, and that one important expectation often cannot not be met in such a co-operation setting – reciprocity.

Figure 5.20. Existence of national provisions allowing transfer of confidential information, by percentage of respondents to the question, Adherents vs. non-Adherents, 2019

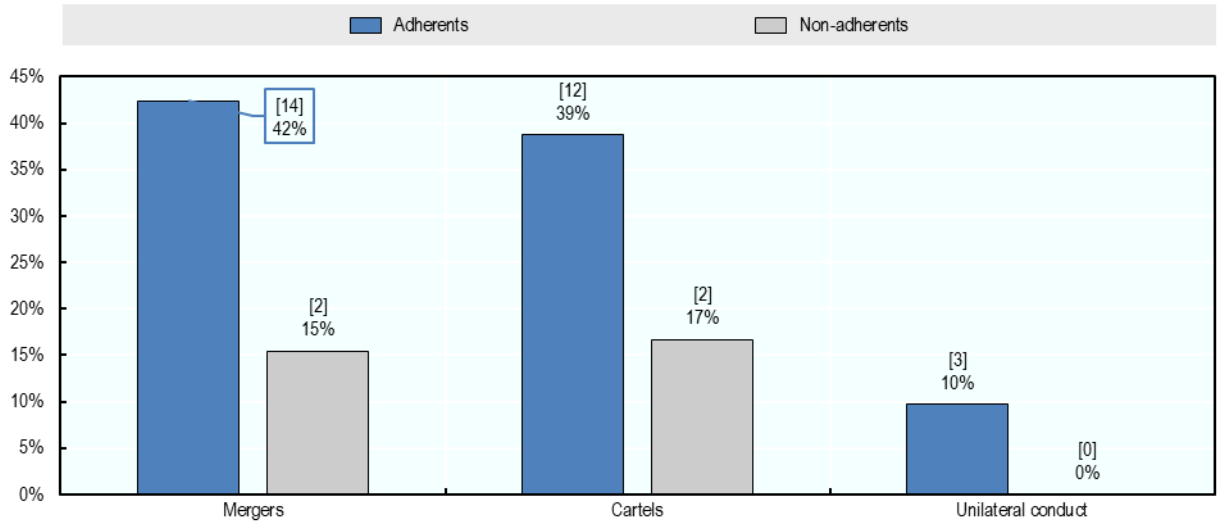


Note: Response rates: Adherents: 62% [24]; non-Adherents: 65% [11]; Overall: 63% [35]. Data source type: quantitative representation categorised free text.
Source: OECD/ICN Joint Survey 2019, Question 22.

Respondents also answered questions about the types and frequency of international co-operation by enforcement area. In relation to 'Obtaining appropriate waivers and sharing business information and documents with another authority', Figure 5.21 shows that 42% of Adherents [14] did so either 'Frequently' or 'Occasionally' for merger matters, 39% [12] for cartel matters, and 10% [3] for unilateral conduct matters. The same is true for respectively 15% [2], 17% [2] and 0% of Non-Adherents, which demonstrate to have less experience with this form of co-operation. These results are in line with the previous findings, demonstrating that jurisdictions, which lack a legal basis for information exchanges have significantly fewer occasions of actual exchanges taking place.

Figure 5.21. Co-operation in 'obtaining appropriate waivers and sharing business information and documents with another authority', by enforcement area, by percentage of respondents to the question, Adherents vs. non-Adherents, 2019

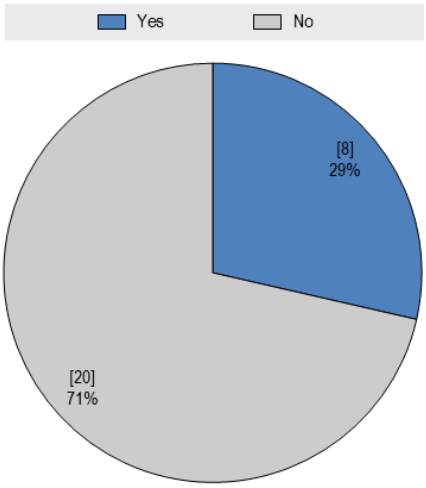
Percentage of respondents responding 'Frequently' or 'Occasionally'



Note: Response rates 80% or higher. Data source type: quantitative representation categorised free text.
Source: OECD/ICN Joint Survey 2019, Question 19 – Table 6.1, 6.2 and 6.3.

The 2019 Survey asked Adherents whether they had experienced difficulties when obtaining waivers. Responses were categorised as "yes" or "no" in order to createFigure 5.22, which shows that, although the majority of Adherents who use waivers do not experience any difficulty in obtaining them, some still do.

Figure 5.22. Adherents' difficulty obtaining waivers, by percentage of respondents to the question, 2019



Note: Figure depicts responses as proportions over total number of respondents with experience in obtaining waivers. Response rate: Adherents: 85% [33], Non-Adherents: 82% [14], Overall: 84% [47]. Data source type: quantitative representation categorized free text.
Source: OECD/ICN Joint Survey 2019, Question 25.

Box 5.12. Confidentiality waivers

Waivers are a common instrument for the disclosure of confidential information between competition agencies. Disclosure of confidential information to foreign competition agencies is possible in many jurisdictions, and facilitates international co-operation. The use of waivers is particularly common in merger control proceedings, but increasingly in the context of leniency applications as well. Parties to a merger will often have an incentive to provide competition authorities that work in parallel on the same merger case with a confidentiality waiver, as this facilitates co-ordination, may prevent the unnecessary duplication of information, and can help to align and speed up multiple investigations. In cartel cases, investigated parties which co-operate in the investigation for example as a leniency applicant will have an incentive to facilitate co-operation between authorities, and the granting of a waiver may also be part of the commitment to active co-operation.[1] Several authorities as well as the ICN have adopted template waivers to facilitate the process:

- European Commission: https://ec.europa.eu/competition/mergers/legislation/npwaivers.pdf. For waivers by leniency applicants in cartel cases, the European Commission has fully endorsed the ICN Model Waiver and requests its use.[2]
- International Competition Network: https://www.internationalcompetitionnetwork.org/portfolio/model-confidentiality-waiver-for-mergers; https://www.internationalcompetitionnetwork.org/portfolio/leniency-waiver-template/;
- United States FTC and DoJ: https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model_waiver_of_confidentiality.pdf;
- United Kingdom: https://www.gov.uk/government/publications/confidentiality-waiver-template, applicable to mergers.

Note:
[1] For example, European Commission Guidance on leniency applications, https://ec.europa.eu/competition-policy/cartels/leniency/leniency-applications_en;
[2] See also https://ec.europa.eu/competition-policy/cartels/leniency/leniency-applications_en.
Source: (OECD, n.d.[48]).

While waivers may be the most commonly used tool for the exchange of confidential information, they only allow for the information exchange with the explicit consent of the source of the information to be disclosed (Box 5.12), and are sometimes limited to a subset of co-operating authorities. Parties to an investigation can also seek to limit the disclosure to specific documents or parts of the file. In contentious proceedings with little or no co-operation by the parties, waivers often cannot be obtained. For this purpose, the 2014 Recommendation suggests the use of information gateways.[87]

Two types of national laws allow competition authorities to exchange confidential information absent a waiver: national laws that directly provide a 'gateway' to confidential information sharing absent a waiver and national laws that allow an authority to enter into second-generation international agreements.[88] In relation to the first type, the following Adherents are examples of those that can share confidential information absent a waiver in limited circumstances with another authority: Australia,[89] New Zealand,[90] Canada,[91] the United Kingdom,[92] and Germany.[93] These Adherents already had the respective legislation in place when the 2014 Recommendation was adopted, and no additional Adherents have adopted unilateral information gateway provisions since. In relation to the second type, some authorities have specific national laws that allow them to enter into second-generation agreements to facilitate intensive co-operation activities, such as sharing confidential information absent a waiver, providing investigative assistance or engaging in enhanced co-operation. These are for example the United States and Ireland. The number of second generation agreements that allow for the exchange of confidential information

concluded by Adherents have increased and include agreements by Canada and Japan (2017),[94] Canada and New Zealand (2016),[95] Australia and Japan(2015),[96] Australia and New Zealand (2013),[97] European Union and Switzerland (2013),[98] and United States and Australia (1999).[99] In addition, multilateral agreements can allow the exchange of confidential co-operation, and two agreements of this type have entered into force since 2014. The Nordic Alliance's Agreement on Cooperation in Competition Cases between the Nordic Countries (2017) makes explicit reference to the 2014 Recommendation (Box 5.2),[100] and in 2020 the Multi-lateral Mutual Assistance and Cooperation Framework for Competition Authorities between Australia, Canada, New Zealand, UK and US (MMAC) was concluded.[101]

Box 5.13. Provisions on (confidential) information exchange in bilateral and multilateral agreements

The ***Nordic Alliance's 2017 Agreement*** contains provisions on the exchange of and the request for information:

> *ARTICLE 3*
>
> *Exchange of information*
>
> *For the purpose of applying competition rules and merger control rules the competition authorities of the Parties shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.*
>
> *Information exchanged shall only be used in evidence and in respect of the subject matter for which it was collected by the transmitting authority.*
>
> *ARTICLE 4*
>
> *Requests for information*
>
> *The competition authority of a Party may in its own territory carry out any requests for information under its national law on behalf and for the account of the competition authority of another Party in order for the requesting authority to apply competition rules or merger control rules. Any exchange or use of the information collected shall be carried out in accordance with Article 3.*

The ***2015 Australia-Japan*** agreement allows for information exchange:

> *(3) Cooperation and Information Exchange in Enforcement Activities*
>
> *(a) Each competition authority will endeavour to render assistance to the other competition authority in the other's enforcement activities and provide the other competition authority with information within its possession that is relevant to the enforcement activities of the other competition authority.*
>
> *(b) Each competition authority will give due consideration to sharing information obtained during the course of an investigation.*
>
> *(c) Each competition authority recognises the benefits of seeking approval from one or more of the merging parties to disclose confidential information of such merging party or parties to the other competition authority.*
>
> *(d) Both competition authorities recognise that the Arrangement is not intended to affect any regulation, policy or practice adopted or maintained by each competition authority with respect to exchange of information including that received from a leniency applicant.*
>
> *Sharing information obtained during the course of an investigation as stated above (b) has not been provided in the previous Agreements concerning Cooperation on Anticompetitive Activities, Economic Partnership Agreements and so on, and is provided in the Arrangement for the first time.*

Sources: https://www.kkv.fi/en/facts-and-advice/competition-affairs/international-cooperation-related-to-competition-affairs/nordic/agreement-on-cooperation-in-competition-cases/; https://www.jftc.go.jp/en/pressreleases/yearly-2015/April/150430.html.

When information is shared, attention needs to be paid to the protection of the information against undue disclosure and the respect of the legal provisions protecting information according to the affected national laws of the exchanging Adherents. Divulging sensitive information may undermine the incentive of private parties to co-operate with an authority and affect the integrity and credibility of the investigations, as well as co-operation between competition authorities. Most agreements between competition authorities, well in line with the 2014 Recommendation, contain provisions on confidentiality of the information exchanged, and the sending party's discretion to set terms and conditions on the use and disclosure of the confidential information exchanged (see examples in Box 5.14).[102]

Box 5.14. Provisions on protection of confidential information

Korea-US (2015)

> *SECTION II Confidentiality*
>
> *1. Notwithstanding any other provision of this Memorandum, the U.S. antitrust agencies and the KFTC commit not to communicate information to the other if such communication is prohibited by the laws governing the agency possessing the information or would be incompatible with that agency's interest.*
>
> *2. Insofar as information is communicated between competition authorities pursuant to this Memorandum, the recipient should, to the extent consistent with any applicable domestic laws, maintain the confidentiality of any such information communicated to it in confidence. Each competition agency should oppose, to the fullest extent possible consistent with applicable domestic laws, any application by a third party for disclosure of such information*

Australia-Japan (2015)

> *Paragraph 10 Confidentiality of Information*
>
> *10.1. Each competition authority will, in line with the laws and regulations of its country, maintain the confidentiality of any information communicated by the other competition authority that is not publicly available, and will protect such information against disclosure in response to a request by a third party, unless the competition authority providing the confidential information otherwise consents in writing.*
>
> *10.2. Information, other than publicly available information, provided by a competition authority to the other competition authority under this Arrangement, will only be used by the receiving competition authority for the purpose of effective enforcement of its competition law, and will not be communicated by the receiving competition authority to other authorities or a third party except when the information is communicated in line with paragraph 4 of Article 15.8 of the Agreement.*
>
> *10.3. Notwithstanding subparagraph 10.2, information shared pursuant to subparagraph 4.3 will, unless otherwise decided in writing, only be used by the receiving competition authority for its current or future enforcement activities with regard to: (a) the conduct or transaction; and/or (b) the goods or services of one or more of the enterprises, which are, or were, the subject of the enforcement activities of the competition authority sharing the information, or other conduct or transaction and/or goods or services related thereto.*

Source: https://www.justice.gov/atr/file/768371/download; https://www.jftc.go.jp/en/pressreleases/yearly-2015/April/150430.html.

Recent efforts by competition authorities within the OECD and the ICN underline Adherents' efforts to apply all necessary safeguards to information sharing and protecting against undue disclosure. The Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465] includes in Article 6 provisions on the protection of confidential and privileged information. Section VI of the 2019 ICN Recommended Practices for Investigative Process contain detailed provisions on the protection of confidential information, its disclosure and legal privileges

(International Competition Network, 2019[49]),[103] as well as the 2019 ICN Framework on Competition Agency Procedures (International Competition Network, 2019[50]), which requires protection of confidential information, transparency about the applicable rules and fair procedures relating to disclosure in Section f). All Adherents are also members of the ICN and 36 participate in the CAP Framework. The 2021 Recommendation as well as the 2019 ICN Practices and Framework are equally applicable to domestic enforcement as well as to the disclosure of information in the context of international enforcement co-operation, and are a big step forward towards a globally aligned understanding of confidentiality protections and safeguards as stipulated in the 2014 Recommendation.

Hardly any meaningful enforcement co-operation can take place without the exchange of information between competition authorities. Considerable experience exists with the exchange of various forms of information – public, agency confidential or confidential – and national laws as well as competition co-operation agreements provide for legal bases for such exchanges. Waivers are a well-used tool but its use depends on the permission by the source of the information. At the same time, the legal bases to disclose information without party consent to other competition authorities remain limited. The number of national laws permitting the transmission of confidential information has remained unchanged, and while bilateral and multilateral agreements have increased, they remain limited to the signatories in their application. With regard to non-Adherents, the limitations weigh even stronger, as their lack of experience in information sharing and/or legal bases to do so is even more pronounced, and this limits international enforcement co-operation on a truly global scale.

5.7. Building Block 7: Investigative assistance to another competition authority (Section VIII)

Section VIII of the 2014 Recommendation asks Adherents to make efforts to support other authorities' investigations, regardless of having a parallel case or not:

> *"Investigative assistance to another competition authority …RECOMMENDS that regardless of whether two or more Adherents proceed against the same or related anticompetitive practice or merger with anticompetitive effects, competition authorities of the Adherents should support each other on a voluntary basis in their enforcement activity by providing each other with investigative assistance as appropriate and practicable, taking into account available resources and priorities.*

Such investigative assistance can comprise the provision of public or authority internal information, compelling testimony or documents, serving documents or executing searches, should respect all necessary safeguards and can include agreements on the appropriate sharing of costs. This type of co-operation is specific, as it asks Adherents to support enforcement action which may be taking place only in other Adherents' jurisdictions, without a local nexus or a parallel national case. As such, it is a more "altruistic" form of co-operation, and some experience exists, albeit limited.

Less than half of the responding Adherents say that they have used Section VIII (Figure 5.23), and this number includes Adherents who are part of regional networks, where this type of assistance is more common (see Box 5.15).

Box 5.15. Investigative assistance in regional networks

2020 Multi-lateral Mutual Assistance and Cooperation Framework for Competition Authorities between Australia, Canada, New Zealand, UK and US (MMAC)

The MMAC includes a Model Agreement, which creates a mechanism for formal requests for investigative assistance between the competition authorities. It sets out how requests for assistance should be made, how parties should respond to such requests, how information should be handled if the request is accepted, and how any costs associated with executing a request will be settled.

Types of investigative assistance include:

- providing or discussing investigative information in the possession of, or obtained by, a party, which includes information obtained through search warrants or compulsory notices
- obtaining information in order to provide it to the other party
- taking testimony or statements of persons
- obtaining documents, records, or other forms of investigative information
- locating or identifying persons or things
- executing searches and seizures

2017 Nordic Agreement

The competition authorities of the Nordic Alliance (Denmark, Finland, Iceland, Norway, Sweden) stipulate in their 2017 agreement to

- Notify each other of anticompetitive conduct or merger investigations which affect another jurisdiction's important interests
- Exchange information, including confidential information in all types of cases
- Carry out requests for information on behalf of another jurisdiction
- Carry out inspections on behalf of and with staff support of another jurisdiction.

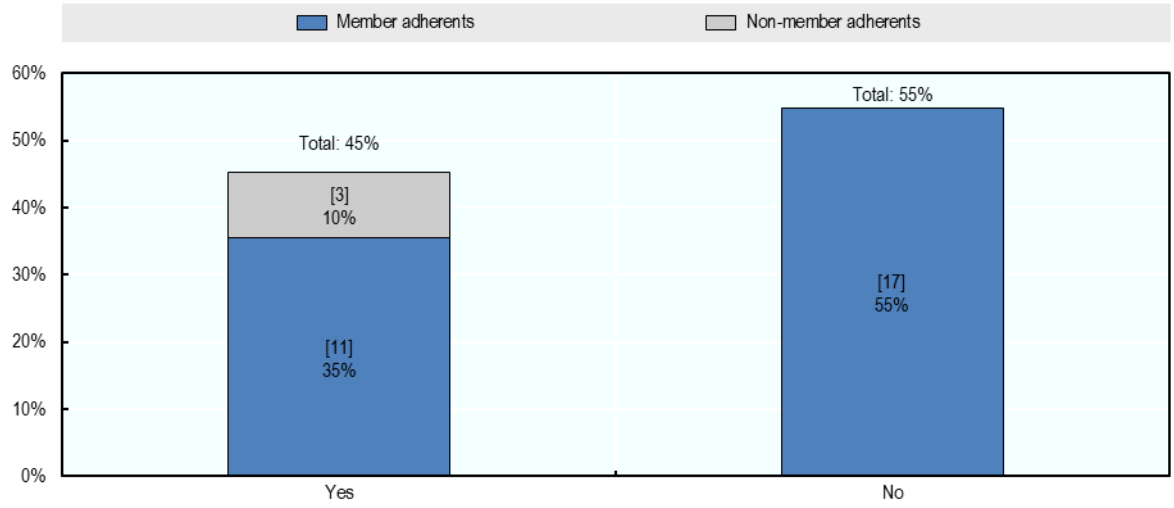
The Nordic co-operation started as early as 1959, with annual meetings ever since, and has progressed over time to an agreement allowing for close enforcement co-operation. In addition, the member countries engage in joint working groups, market studies and staff exchange. The 2017 agreement addressed severe shortcomings that hampered effective co-operation, such as requests for information and inspections, which now have a legal basis.[1] The investigative assistance is more far reaching than within the European Competition Network in that it includes merger investigations and purely national cases.

The European Competition Network (ECN)

Council Regulation No 1/2003 provides the legal basis for co-operation between the European Commission and the Member States. It applies to the enforcement of Articles 101 and 102 TFEU and requires the European Commission and the Member states to notify each other about investigative actions and the intended adoption of decisions (Art. 11); allows the exchange of confidential information (Art. 12); and empowers the Member States to carry out inspections for other Member States (Art. 22).

Note: See DAF/COMP/GF/WD(2018)14.
Sources: (OECD/Eurostat, 2005[20]) (OECD/Eurostat, 2005, pp. 241-243[20]); https://www.accc.gov.au/system/files/MMAC%20-%20FINAL%20English%20-%202%20September%202020%2811501052.1%29.pdf; https://www.kkv.fi/en/facts-and-advice/competition-affairs/international-cooperation-related-to-competition-affairs/nordic/agreement-on-cooperation-in-competition-cases/; https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001.

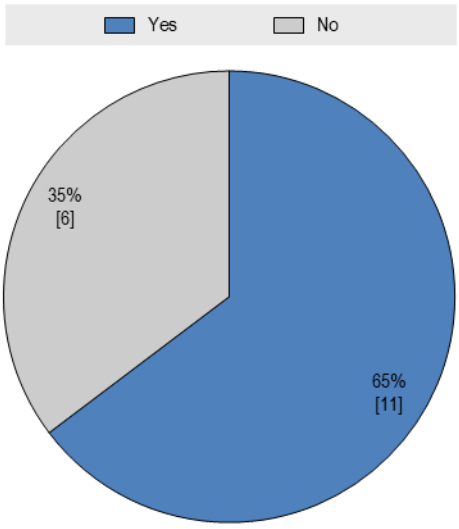
Figure 5.23. Use of Section VIII: Investigative assistance to another competition authority, by percentage of responding Adherents



Note: This figure only presents responses from the Adherents. Response rate: 79% [31]. Data source type: quantitative representation categorised free text.
Source: OECD/ICN Joint Survey 2019, Question 39 – Table 9.

Figure 5.24 shows that of the 17 Adherents who declared not to have used Section VIII of the recommendation, 65% [11] either has experience in making and/or receiving requests for investigative assistance or has the legal basis to engage in it. This indicates that more Adherents apply this part of the Recommendation than the previous answers on the use would imply.

Figure 5.24. Experience in making or receiving requests for investigative assistance among adherent respondents who declared not to have used Section VIII of the Recommendation



Note: All the 17 jurisdictions who declared not to have used Section VIII of the 2014 Recommendation (Question 39 – Table 9) responded to Question 14. Data source type: quantitative representation categorized free text.
Source: OECD/ICN Joint Survey 2019, Question 14.

Box 5.16. Examples of investigative assistance

Premium Text Messaging case (2014): In this consumer protection matter, the Canadian Competition Bureau investigated Canada's three largest wireless companies and their industry association for charging customers for premium-rate digital content that they did not purchase or agree to pay. During the investigation, the Bureau sought the US Federal Trade Commission's (FTC) collaboration to obtain oral and documentary discovery from a US contractor hired by the Canadian industry association to collect and analyse data relevant for the investigation. The US District Court of Maryland ordered the US contractor to provide documents for the FTC to send to the Bureau. In this case, the co-operation between the Bureau and the FTC was enabled by the US Safe Web Act which allows the FTC to provide and request assistance to/from foreign agencies in consumer protection matters in case of online/digital investigations.[1]

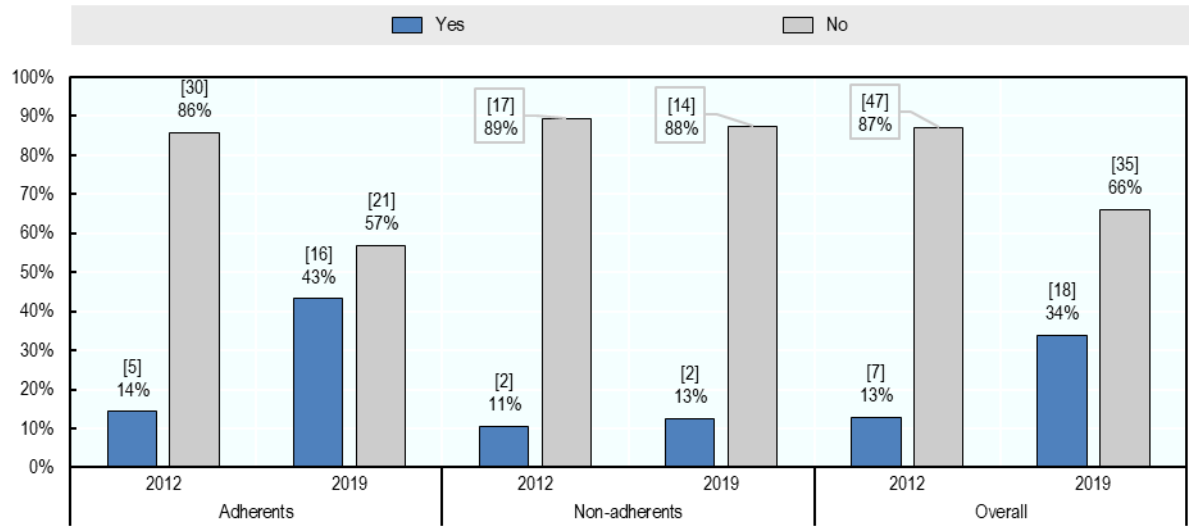
Investigation in the aviation insurance market (2017): in 2017, the Romanian Competition Council opened an investigation in the aviation insurance market, and benefitted from evidence-gathering provided by the UK Competition and Markets Authority, since relevant undertakings were headquartered in the United Kingdom.[2]

Investigation in the immunoglobulin market (2018): in 2018, the Romanian Competition Council opened an investigation into an alleged agreement between several producers of human immunoglobulins. Following a request of the Romanian Competition Council, the Italian and Belgian Competition agencies conducted inspections at the premises of some companies located in their territory. Romanian officials assisted the inspections.[3]

Notes:
[1] www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03498.html; Maryland District Court, 4 August 2014, Aegis Mobile, LLC, 2014 U.S. Dist. LEXIS 106214; 15 U.S.C. §41, et seq.; www.ftc.gov/sites/default/files/documents/reports/u.s.safe-web-act-first-three-years-federal-trade-commission-report-congress/p035303safewebact2009.pdf.; https://ecd.org/document/DAF/COMP/WP3/WD(2018);
[2] https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)38/en/pdf;
[3] www.consiliulconcurentei.ro/uploads/docs/items/bucket13/id13298/inspectii_imunoglobulina_english.pdf.
Source: (OECD, 2019[24]).

Next to parallel enforcement that would benefit from enforcement co-ordination, competition authorities could also pursue more ambitious forms of co-operation, and this is known as "enhanced co-operation" – for example, joint case teams, lead agency models or deference to other Adherents' decisions or remedies (Box 5.17).[104] Section VI suggests that authorities explore such new forms of co-operation. The Survey asked authorities about their experience in enhanced co-operation outside regional networks, and some had experience.[105] Figure 5.25 shows that the number of Adherents with enhanced co-operation experience has increased significantly from 14% [5] to 43% [16] from 2012 to 2019, while no increase in experience can be seen for Non-Adherents, where in absolute terms the number remains unchanged [2]. However, in answering the relevant questions, Adherents were not very specific and case examples for actual enhanced enforcement co-operation are missing.

Figure 5.25. Experience with enhanced co-operation, by percentage of respondents to the question, 2012 vs. 2019



Note: Response rates: Adherents: 2012: 100% [35], 2019: 95% [37]; Non-Adherents: 2012: 98% [19], 2019: 94% [17]; Overall: 2012: 98% [54], 2019: 96% [53]. Data source type: quantitative representation categorized free text.
Source: OECD/ICN Joint Survey 2019, Question 15.

Box 5.17. 2014 Hearing on enhanced enforcement co-operation

In 2014, the Competition Committee's Working Party No. 3 held a hearing on enhanced enforcement co-operation. The discussion recognised promoting international co-operation unanimously as a key objective of competition authorities across the globe. The lack of sufficient enforcement co-operation can reduce the effectiveness of the enforcement action and consequently create substantial harm to society. In an increasingly globalised economy, the need for more effective international co-operation between antitrust enforcers is perceived as more important than ever before.

It was found that international co-operation in competition law enforcement had made significant progress in the last two decades, mainly through the development of bilateral relationships between competition authorities. The Hearing discussion highlighted the need to review the scope and degree of the existing co-operation and to explore new and enhanced methods of co-operation between enforcers. Those new methods may also include the development of multilateral frameworks for co-operation.

In order to increase overall deterrence of international cartels, proposed mechanisms were discussed, which would allow competition authorities or courts in a jurisdiction to rely on the factual findings made in another jurisdiction (so-called recognition of foreign decisions). Such mechanisms could lower the enforcement costs for competition authorities and enable more competition authorities to review international cartels, especially in jurisdictions with few investigative resources, thus increasing the overall level of cartel deterrence.

New and more advanced ways in which authorities could co-operate more effectively include lead jurisdiction models where one authority is designated to investigate and make a decision on a cross-border case on behalf of all other affected jurisdictions. The business community also encouraged the

introduction of one-stop shop models as a way to improve co-operation between enforcers in cross border-cases and to reduce regulatory costs for businesses.

In addition to creating new institutional frameworks for enhanced co-operation among authorities, the discussion highlighted that it can also be effective to strengthen personal ties and build stronger relationships between enforcers. For this purpose, some competition authorities have engaged in joint investigative activities and have organised exchanges of staff with their counterparts.

The discussion showed that co-operation for purpose of competition law enforcement should not remain limited to competition authorities. Courts are competition decision makers in many jurisdictions, and review decisions of competition authorities in jurisdictions where competition authorities are the principal decision maker. It is equally important that courts in different jurisdictions be able to work together in their review of cross-border cases.

Source: Executive summary and key findings, DAF/COMP/WP3/M(2014)2/ANN3/FINAL

It was already pointed out under Building Block 1 that limitations to enforcement co-operation persist, and some of these are particularly relevant to Investigative Assistance. As shown in Figure 5.5 above, legal obstacles, lack of resources, and also lack of trust are seen as important limitations to international enforcement co-operation by Adherents. Legal limitations naturally play a major role in providing investigative assistance to another competition authority. Jurisdictions commonly provide enforcement and investigation powers to their own competition authorities for competition cases they pursue, which have an effect in their own jurisdiction. Such powers usually do not extend to cases pursued by foreign jurisdictions and/or without an effect in the home jurisdiction. Enforcement resources are accordingly commensurate to the domestic enforcement mandate a competition authority has, and will not include enforcement assistance to other jurisdictions. Trust plays a major role in investigative assistance even if the law allows for it and resources are available. A competition authority needs to have confidence that the investigative assistance it provides will be used in a way that would be in line with its own legal standards and requirements, and this extends inter alia to the merit of cases, the treatment and protection of confidential information and the procedural rights granted to parties to a proceeding. If scarce enforcement resources are spent on another jurisdiction’s investigation, an expectation of reciprocity will also play an important role, even if cost sharing agreements are in place, as can be found in some agreements (Box 5.18).

Box 5.18. Provisions on costs for investigative assistance

Section VIII of the 2014 Recommendation suggests Adherents to provide investigative assistance subject to an agreement on the sharing of costs, and regional agreements provide examples for such provisions.

2020 Multi-lateral Mutual Assistance and Cooperation Framework for Competition Authorities between Australia, Canada, New Zealand, UK and US (MMAC) – Model Agreement:

> *8. Costs*
>
> *8.1. The Parties shall mutually decide on a case-by-case basis who will pay the costs associated with executing a request, including costs associated with staff time and any disbursements.*
>
> *8.2. If during the execution of a request it becomes apparent that expenses of an amount substantially more than anticipated in Sub-section 8.1 above are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the request may be executed.*
>
> *8.3. The Parties shall decide on practical measures on a case-by-case basis for the management and payment of costs in conformity with this Section.*

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

> *Article 27 General principles of cooperation[2]*
>
> *(…)*
>
> *7. Member States shall ensure that, where requested by the requested authority, the applicant authority bears all reasonable additional costs in full, including translation, labour and administrative costs, in relation to actions taken as referred to in Article 24 or 25.*
>
> *8. The requested authority may recover the full costs incurred in relation to actions taken as referred to in Article 26 from the fines or periodic penalty payments it has collected on behalf of the applicant authority, including translation, labour and administrative costs. If the requested authority is unsuccessful in collecting the fines or periodic penalty payments, it may request the applicant authority to bear the costs incurred.*

Sources: https://www.accc.gov.au/system/files/MMAC%20-%20FINAL%20English%20-%202%20September%202020%2811501052.1%29.pdf; https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.011.01.0003.01.ENG&%20toc=OJ:L:2019:011:TOC.

Investigative assistance that goes beyond informal information sharing of public or authority-internal information, while well developed within regional networks, is still a scarce occurrence, and this seems even more true for enhanced co-operation. While Adherents reported a perceived increase in investigatory assistance and of the use of this part of the 2014 Recommendation, actual reported instances outside of regional networks are rare. This demonstrates the importance of trust, often based on legal, cultural and economic similarities between co-operating jurisdictions. Resource constraints may play an important role as well in limiting more and more effective investigatory assistance.

5.8. Instructions to the Competition Committee

As noted above in Section 1.2, in addition to making recommendations to Adherents, the 2014 Recommendation provides instructions to the Competition Committee. The Competition Committee was instructed to:

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

This section notes the activities undertaken by the Competition Committee and its Secretariat.

5.8.1. Serve periodically as a forum for exchanges of views on matters related to the Recommendation

The Competition Committee has served as a forum for exchanges of views on matters related to the Recommendation on multiple occasions since 2014, see the list of roundtables and hearings.

- 2014 Hearing on enhanced enforcement co-operation – the hearing discussed possible new and different forms of co-operation among agencies. Future challenges agencies may encounter when enforcing domestic laws against cross-border practices were also addressed together with issues such as the recognition of foreign cartel decisions and advantages and disadvantages of voluntary "lead agency" and one-stop-shop" models (see also Box 5.17 above).[106]
- 2017 Roundtable on extraterritorial reach of competition remedies – the roundtable debated the challenges related to the imposition of extraterritorial remedies in the light of recent cases, and discussed how agencies approach enforcement in cross-border cases. Recent developments included international co-operation agreements in competition enforcement (bilateral, multilateral or regional) to help overcome some of the difficulties that were identified (see also Box 5.9 above).[107]
- 2018 Roundtable on the treatment of legally privileged information in competition proceedings - the level and modalities of privilege differ from one jurisdiction to another, depending on the balance in each jurisdiction between the public interest in searching for evidence of competition law violations, and the parties' right to seek and obtain effective legal advice and representation. The roundtable discussed the different approaches to legal professional privilege among jurisdictions also in the light of the challenges they create regarding companies' international operations, and

authorities' co-operation and sharing of information in cross-border cases involving jurisdictions offering dissimilar levels of protection.[108]

- 2018 Roundtable discussion on benefits and challenges of regional competition agreements (RCA) – the roundtable examined the approaches of the different geographic regions that have adopted a regional competition framework (including regional competition provisions and a regional competition authority) in order to strengthen their competition law and policy in their pursuit of increased regional integration. The session specifically focused on RCAs between three or more jurisdictions that are located in the same geographic region and have established regional competition provisions, as they usually offer deeper levels of integration and a higher degree of co-operation on competition enforcement than bilateral agreements.[109]
- 2018 Roundtable on challenges and co-ordination of leniency programmes - optimising the design and organisation of leniency programmes is important for their success over time, especially in cases of parallel leniency applications to several jurisdictions where enforcement co-ordination can be crucial. When jurisdictions assess the effectiveness of their leniency system and consider means to improve it, and increase its attractiveness for potential applicants, they also do so with a view to strengthening co-operation with other agencies in cross-border cartel cases (see also Box 5.10 above).[110]
- 2019 Roundtable on access to the case file and protection of confidential information – the roundtable examined different types of rules and modes of access to the case file in competition proceedings. It also explored the different approaches to protecting confidential information, including such issues as the types of information considered confidential, the procedures used to determine whether confidential treatment must be granted, and the methods used to protect confidentiality. The relevance with regard to international co-operation, which depends to a large extent on the exchange of confidential case information was discussed.[111]
- 2019 Roundtable on competition provisions in trade agreements – the roundtable considered the purpose and impact of competition provisions in trade agreements in practice, and discussed their usefulness in broadening and strengthening the application of competition law worldwide. In addition, the session looked at the role of competition authorities in the drafting and negotiation of competition provisions in trade agreements and their impact on international co-operation.[112]
- 2020 Roundtable on criminalisation of cartels and bid rigging conspiracies – sanctions against cartels vary greatly across jurisdictions, from monetary fines against firms and other legal persons, to criminal sanctions (including custodial sentences) against individuals. In the last years, an increased adoption of criminal enforcement regimes has been observed across jurisdictions, in particular against hard core cartels, although custodial sentences remain quite limited in most jurisdictions. The roundtable also considered the implications for international co-operation as an essential element to ensure effective cartel enforcement and found that legal and practical obstacles exist for co-operation between criminal and administrative regimes.[113]
- In 2019, the Secretariat prepared and presented a note (OECD, 2019[24]) to the Competition Committee's Working Party No. 3 setting out some developments in Adherents as well as OECD's work on international co-operation since 2014.
- In 2020, a discussion of the joint OECD/ICN Report on International Enforcement Co-operation (OECD, 2021[23]) was held. The Report is an extensive stock-taking exercise, following a similar exercise in 2012/2013, which resulted in the 2014 Recommendation. It was produced to serve as a basis for this Implementation Report, as part of the monitoring. The presentation at the Competition Committee's Working Party No. 3 was preceded by two virtual meetings to present and discuss the preliminary results of the joint OECD/International Competition Network survey on international co-operation.

5.8.2. Contact list

As instructed, the OECD Secretariat has established and periodically updates the list of contact points. The last update was done in 2021, and next to personal authority contacts it also asked for a generic contact, to ensure that other authorities can be reached also in case of staff changes. It includes not only Adherents but also Associates and Participants to the Competition Committee, as these are relevant to international co-operation activities of Adherents.[114]

5.8.3. Developing waivers and model provisions on the exchange of confidential information

The Competition Committee has not developed waivers or model provisions on the exchange of confidential information. Provisions on the exchange of confidential information are part of the inventories of intergovernmental and interagency agreements on international co-operation (see below). In addition, the International Competition Network (ICN), of which all Adherents are members, has developed

- A framework for the sharing of non-confidential information[115]
- Charts summarising information sharing mechanisms in cartel cases[116]
- The ICN Framework for Competition Agency Procedures,[117]

all of which include important information on information sharing mechanisms, legal backgrounds and contacts.

Waiver templates have been developed by the ICN as well as the European Commission and by Adherents (United States, United Kingdom) (see Box 5.12 above). Against this background, the Competition Committee has not prioritised developing waivers or model provisions on the exchange of confidential information.

5.8.4. Developing model bi-lateral and/or multi-lateral agreements on international co-operation

The Competition Committee did not develop model agreements. However, the OECD Secretariat prepared, first, an inventory of intergovernmental co-operation agreements on competition in 2015,[118] and, second, an inventory of international co-operation Memoranda of Understanding between competition authorities in 2016.[119] As part of the 2014 Recommendation's monitoring process, the inventories have been updated in 2021. The inventories include comprehensive lists of intergovernmental and inter-agency competition agreements where at least one signatory is an OECD Member or Participant. In addition to the full list, they provide access to specific provisions of selected agreements by type of provision, for example on comity, co-ordination or notification, cross-referencing relevant parts of the 2014 Recommendation and instructive provisions from Adherents' agreements to serve as examples and inspiration for future agreements.

5.8.5. Developing enhanced co-operation tools and instruments

A first step towards the development and support of enhanced co-operation tools is currently being taken by the Competition Committee. Following the OECD/ICN Report (OECD, 2021[23]), it was decided to develop a form which would provide basic information relevant to enhanced co-operation – the Competition Enforcement Co-operation Template. It answers an identified need by competition authorities to have more transparency and easy access to information relevant to international co-operation (OECD, 2021, pp. 195-201[23]). The CEC Template is designed to collate consistent information regarding the ability of competition authorities to co-operate on enforcement matters, and to provide counterpart authorities with easy-to-access information about their co-operation practices, processes and preferences. It will be hosted on an

OECD website and maintained and updated by the OECD Secretariat. All information will be collected through an online survey, and will be easy to access through a flexible search function and fully public. The CEC template will reference the 2014 Recommendation and relevant ICN work products to cross-fertilise their uses, and will be open to all competition authorities. The current draft is under consultation, and it is expected that the Competition Committee can approve a final version in December 2021.

5.8.6. Monitor the implementation of this Recommendation and report to the Council every five years

The first monitoring cycle is ongoing and was started with an OECD Secretariat report on developments in international co-operation in competition cases since 2014 (OECD, 2019[24]).

This Report on the implementation of the 2014 Recommendation shows that its provisions and the challenges and best practices identified in the 2014 Recommendation remain relevant and up to date. Therefore, there is no need of revision of the 2014 Recommendation in the short term. However, a number of areas exist where further work could be done to ensure the continued relevance of the 2014 Recommendation. This Report as well as past and current work within the Competition Committee and other international fora prove that international enforcement co-operation is a focal point of many Adherents' efforts and will have to play an even more important role in the future, to address in particular digital global enforcement challenges. This may require more efforts to allow for deeper and enhanced forms of enforcement co-operation, along with the removal of still existing legal barriers.

6. Summary and conclusions

6.1. Dissemination – main findings and challenges

The 2014 Recommendation has been disseminated in a variety of ways. A number of roundtable discussions and hearings held by the Competition Committee and its working parties related to the 2014 Recommendation and looked at the relevance of international co-operation to specific enforcement topics. Other competition Recommendations adopted since 2014 reference the 2014 Recommendation and serve its implementation. Peer reviews of competition law and policy measure the reviewed countries laws and practices against the 2014 Recommendation and issue advice on how the implementation can be improved, both to Adherents and Non-Adherents. The Secretariat promotes the implementation and dissemination of articles, presentations at conferences and public speeches to a large variety of audiences. The Regional Competition Centres are the primary vehicle for fostering international enforcement co-operation by Non-Adherents and make use of opportunities to promote and disseminate the 2014 Recommendation in dedicated events and in relation to enforcement related topics.

Adherents engage in a large number of activities that promote the cause of the 2014 Recommendation, such as regular international conferences and participation of their staff in or support of capacity building events. Their engagement in the activities of other international actors such as the ICN or UNCTAD is often complementary and helps disseminate practices and instruments as foreseen in the 2014 Recommendation.

Further dissemination by the Secretariat and Adherents could include initiatives such as:

- Exploring synergies and complementarities with other international organisations' work products, and ensuring that complementary work and documents are referenced, to allow for easy access to the 2014 Recommendation and related work products
- Supporting Adherents' and non-Adherents' initiatives to foster international enforcement co-operation by providing staff and speaker support and ensuring that international enforcement co-operation is on the agenda
- Broadening the scope of outreach to other national actors in Adherents and non-Adherents to create a broader awareness of the need for international enforcement co-operation and the required legal instruments and resources
- Increasing the involvement and awareness of enforcement level staff. Adherents could seek to get more staff involved in international conferences and should actively seek to inform them about the substantive and procedural requirements in international enforcement co-operation cases. To ensure notifications in all relevant cases and active engagement in international enforcement co-operation, such activities could be included in the performance indicators for enforcement level staff. The Secretariat could support such initiatives by supporting or organising training events, or producing a model guidance on enforcement co-operation for enforcement level staff.
- Providing more domestic translations of the 2014 Recommendation. This would facilitate overall accessibility of the 2014 Recommendation in Adherents and non-Adherents.

6.2. Implementation – main findings and challenges

Adherents show a strong commitment to international enforcement co-operation (Section II), and the 2014 Recommendation played a role in raising awareness of the topic and being a useful reference when implementing or advocating for change. The increase in bilateral and multilateral competition agreements and trade agreements including competition provisions demonstrates that competition enforcement co-operation is high on the agenda. The OECD and other international actors have undertaken efforts to increase transparency on laws and procedures and to further align leniency and amnesty programmes. However, the persistence of mostly legal limitations and differences in legal standards and regimes demonstrate that more far reaching measures may be required to advance international enforcement co-operation, to go in particular beyond regional co-operation agreements. The identified limitations to enforcement co-operation have not changed since the adoption of the 2014 Recommendation, and the most important ones are legal limitations, differences in enforcement regimes and legal standards, and the absence of waivers. Their importance and frequency as perceived by Adherents has even increased compared to the situation before the adoption.

The consultation and comity principles (Sections III and IV), while potentially very powerful instruments that could help avoid contradictory enforcement, diverging decisions or waste of agency resources through duplicative enforcement action are not used much. Their use and its legal bases are mostly limited to agency co-operation agreements that include often rather high-level comity provisions, and the actual relevance for enforcement co-operation in specific cases remains unclear. The establishment of explicit provisions allowing for positive and negative comity in national laws could mark an important step to facilitating comity and increasing its use, thus enabling also enhanced forms of enforcement co-operation.

Contrary to comity, notifications (Section V) play an important role in enforcement co-operation and their use by Adherents has increased, often with explicit reference to the 2014 Recommendation. At the same time, Adherents that have developed very close and trusting relationships with counterpart authorities will increasingly use less formalised forms of communications. In general, notifications are an enabling factor to enforcement co-operation in all enforcement areas and a prerequisite for the exchange of information, co-ordination of competition proceedings and investigative assistance in competition cases. Legal limitations usually do not stand in the way of notifications of cases to another competition authority, but where they exist, national laws could be adjusted to allow for the exchange of basic case information or to require parties to provide information on parallel proceedings or similar activities in other jurisdictions. The 2014 Recommendation suggests the use of any effective and appropriate means of communication. With the intensification of co-operative relationships between competition authorities on all levels of staff, informal co-operation and less formal ways of notification may become more important. This is a development that should be welcomed. However, Adherents may want to ensure that their staff is aware of all the instances in which any appropriate type of notification is required and have some internal co-ordination, to ensure that all Adherents can expect notifications in appropriate cases.

Similar to notifications, information exchange in competition investigations and proceedings (Section VII) is a further prerequisite to the co-ordination of enforcement actions or to the provision of investigative assistance. Considerable experience by Adherents exists with the exchange of various forms of information – public, agency confidential or confidential – and national laws as well as competition co-operation agreements provide for legal bases for such exchanges. Waivers are the most common and well-used tool but their use depends on the permission by the source of the information. Other legal bases to disclose information without consent to other competition authorities remain limited and have not increased significantly since the adoption of the 2014 Recommendation. No additional national gateway provisions were introduced, and only a few bilateral or multilateral competition agreements have since been implemented including the permission to exchange confidential information. This may present a serious obstacle and legal limitation to enforcement co-operation in particular in anticompetitive conduct cases, including for more advanced forms of co-operation and co-ordination. Non-Adherents face

considerably higher legal and factual obstacles to exchanging information. This indicates that more should be done to promote the dissemination of the 2014 Recommendation, to avoid limiting global enforcement co-operation.

Co-ordination of competition enforcement actions between competition authorities (Section VI) is part of Adherents' daily enforcement reality, in line with the 2014 Recommendation. Authorities often share information on the status of their investigations, and other, more frequent types of co-operation are the sharing of theories of harm and public information. In merger cases, obtaining waivers to exchange confidential information and the co-ordination with regard to remedies are also more common. Instances of co-ordination have increased since the adoption of the 2014 Recommendation. Most of these types of co-ordination will not require a specific legal basis, and the existence of national enforcement and information gathering powers provides a sufficient background for co-ordination in parallel cases. However, this may be mostly true for merger cases, where most of the co-ordination is reported. Less co-ordination by Adherents takes place in anticompetitive conduct cases, despite there being substantial potential for co-ordination. To improve the situation, the use of appropriate forms of formal and informal notification and information sharing, including the removal of legal obstacles, as mentioned above, should also be considered here. In addition, exploring new forms of co-ordination that enable or facilitate joint investigations and/or allow for work sharing between authorities, to avoid multiple, parallel investigations could be beneficial. Such forms of co-ordination would, however, require appropriate legal frameworks to enable the active support of another jurisdiction's investigation without there necessarily being a parallel, national investigation.

The same can be said for investigative assistance (Section VIII) that goes beyond informal information sharing of public or authority-internal information. Investigative assistance means supporting another competition authority in their investigation without there necessarily existing a similar or parallel case in the assisting jurisdiction. Such assistance is well developed within regional networks. Outside such networks it is a rare occurrence, despite Adherents reporting an increased use since the adoption of the 2014 Recommendation. Effective investigative assistance requires the existence of investigatory and enforcement powers as well as the ability to share confidential information without party permission for the benefit of another jurisdiction. In addition, it requires adequate resources that allow for such support not related to domestic cases. Enhanced co-operation as suggested by the 2014 Recommendation does not exist to date. It could come in the form of joint investigations and cases, lead agency models or recognition of another jurisdiction's decision, which, would require legislatory changes to address existing legal obstacles to such forms of co-operation and assistance. The implementation of such enhanced co-operation models could benefit from model agreements and procedural guidance.

The implementation of the 2014 Recommendation has benefitted from the instructions to the Competition Committee issued by the Council. The Committee has discussed topics related to the 2014 Recommendation on multiple occasions in its sessions and has created a contact list for international co-operation purposes. The Committee has not developed model waivers or provisions on the exchange of confidential information, nor has it developed model bilateral or multilateral competition co-operation agreements. To facilitate and inspire such agreements and provisions, the Secretariat has developed inventories of such agreements, including provisions on information exchange. In relation to waivers, this approach has also avoided duplication of work carried out by Adherents within the ICN. The development of enhanced co-operation tools was so far limited to the identification of such tools, such as joint investigations, lead agency models or recognition of decisions. First steps are currently being taken to consider options for future work, including the development of a competition enforcement co-operation template and a discussion of legal models for enhanced enforcement co-operation that took place in October 2021.

6.3. Continued relevance

The 2014 Recommendation is of continued relevance, and the Report demonstrates that there is significant room for more and better implementation of the existing provisions. This relates in particular to

- Removing legal obstacles to notifications, the exchange of confidential information without the consent of the parties to the proceedings and to investigative assistance in other jurisdictions' enforcement actions
- Creating national legal frameworks that allow for the easy implementation of comity principles by competition authorities
- Facilitation of co-ordination of enforcement action and in particular the development of enhanced types of international enforcement co-operation.

Depending on the needs that may be identified in the process of further implementation of the 2014 Recommendation in relation to the above mentioned points, a more significant update of the 2014 Recommendation may be required in the future, to take into account new enforcement realities and co-operation models, and possibly central co-ordination bodies hosted at regional or international organisation levels.

Minor aspects to be included at the occasion of a future revision of the 2014 Recommendation are

- A glossary of key defined terms in international enforcement co-operation, including an update of the current definition of confidential information, which may be too narrow at the moment
- A separate section on enhanced enforcement co-operation, which is currently included in the Section on investigative assistance and might benefit from more differentiated treatment.

6.4. Summary and next steps

The findings of this Report demonstrate that persistent legal limitations, differences in legal standards, and lack of precedent and models for traditional and enhanced co-operation prevent more and intensified international enforcement co-operation, in particular outside of regional networks. While international enforcement co-operation is part of the daily enforcement reality of many jurisdictions, it is often informal, bilateral, limited to the exchange of public information, and often restricted to parallel cases and proceedings. The observed instances of international enforcement co-operation are stagnating, and little to no progress was made to move towards conducting, for example, joint investigations, resource sharing or support of other agencies' work, or to enabling models of lead jurisdiction, one-stop-shop models, or deference to another jurisdiction's decision and remedies. There was also little progress in creating multi-lateral instruments that would enable and facilitate such co-operation.

At the same time, globalisation of trade and services keeps increasing. Digitalisation has created business models and truly global players that are similar all over the world. Notwithstanding the significant benefits for the global economy and consumers, competition risks and infractions are also increasing in geographic scope. They do not stop at national borders, and digital businesses develop at high speed. The challenges to national enforcement are obvious, and they limit effective investigations, interventions and sanctions; create a risk of parallel national cases that are not sufficiently aligned; and risk an overall ineffective enforcement against global infractions.

More effort is required to address the outlined challenges successfully and in a timely manner. Tackling these challenges is also necessary to help competition agencies remain relevant players in setting and protecting the economic and legal framework conditions essential for a functioning global market economy, where competition continues to increase productivity, innovation, employment, growth and consumer welfare, and fosters equality.

Since legal obstacles and the lack of a coherent approach at the multilateral level to enable new and enhanced forms of international enforcement co-operation can be identified as major roadblocks for more effective enforcement co-operation, the ultimate goal should be to improve the use of traditional forms of international enforcement co-operation and the exchange of confidential information, but, more importantly, to enable new and enhanced forms that lead to an effective sharing of work and joint enforcement, and/or the option to agree on one lead agency with corresponding abilities to defer to another jurisdiction's decision. In addition, solutions to one-stop-shop models could be included, as they have the potential to significantly improve co-ordination, reduce enforcement cost to both businesses and agencies, and create trust in truly global enforcement solutions.

OECD precedent shows that options of existing legal instruments are available to create even seemingly visionary enforcement co-operation frameworks, which are inclusive, flexible and can be tailored to the specific needs of competition enforcement co-operation, and that can be used on an opt-in basis (i.e. optional co-operation with suitable jurisdictions).

To improve the implementation of the 2014 Recommendation, based on the shortcomings identified in this report, the expressed wish of Adherents that the Competition Committee continues its work on improving international enforcement co-operation, areas for future work as identified in the 2021 OECD/ICN Report,[120] the results of the OECD workshop on legal models for international enforcement co-operation,[121] the discussions in the meeting of WP3 on 30 November 2021, and in line with the instructions in the 2014 Recommendation, the Competition Committee could work towards the development of a multilateral legal model, inspired and informed by existing legal models in other fields that could be of use in competition enforcement co-operation.

The following activities could be prioritised to explore the most adequate options and solutions suitable to global competition enforcement co-operation:

1. Explore the most efficient and effective options for addressing the legal barriers to enforcement co-operation, and explore models for enforcement co-operation existing in other areas of law enforcement. This would benefit from an in-depth study of existing legal instruments as used in other policy and enforcement areas, within and outside the OECD. Such analysis can identify common approaches and approaches to solving specific problems such as the exchange of confidential information, approaches particularly suitable for competition enforcement co-operation, and needs for additional tools. It can also help to inform about the flexibility of such instruments, the safeguards included, and their inclusiveness with regard to non-Members.
2. Identify the main legal obstacles to enforcement co-operation and carry out an in-depth analysis of such legal barriers, by type of co-operation, including enhanced co-operation and one-stop-shop solutions. This would allow for the detailed identification of the limiting factors in national laws and in bilateral/regional/multi-lateral agreements, while clarifying the changes and provisions necessary for workable legal solutions.
3. Analyse existing multi-lateral/regional competition enforcement co-operation models and networks. This analysis can inform about procedural, substantive, and legal requirements for effective enforcement co-operation, and can highlight particular strengths and weaknesses, innovative approaches, safeguards, and processes that facilitate reaching such multi-lateral/regional enforcement co-operation models.

Additional activities can be carried out to support the priority analyses listed above and provide them with more detail and an empirical basis. Others could also serve as interim steps towards the creation of a broader, multi-lateral instrument. Examples are:

- Analysis of case-studies of existing or failed international co-operation, including an ex-post assessment of the benefits or harm of such cases. Such analyses can inform the work on legal barriers and appropriate legal instruments, and it can help to demonstrate the value of more and

better international co-operation by assessing benefits from co-operation, but more importantly harm from a lack of co-operation.

- Developing model bilateral and multilateral agreements that allow for the exchange of confidential information, easy use of comity, investigative assistance and/or implementation of enhanced enforcement co-operation models, and exploring minimum requirements for their implementation under national laws.
- Developing enhanced co-operation models and tools that can help reduce the overall costs associated with investigations or proceedings by multiple competition authorities, and at the same time avoid inconsistencies among enforcement actions. Particular attention should be paid to requirements for enhanced enforcement co-operation in relation to the digital sphere.
- Analysing the challenges to international co-operation related to digital ex-ante regulation, where inconsistent and scattered approaches can have serious consequences for the effectiveness of such regulation but also for innovation incentives and the cost of doing business. More work could aim to identify how to mitigate these risks, and to identify instruments that can avoid inconsistent regulation on a global scale

Further steps can address other identified shortcomings in the implementation and dissemination of the 2014 Recommendation:

- Promotion of non-Member adherence to the 2014 Recommendation to increase its relevance and international and regional scope.
- Co-ordination of the support for international enforcement co-operation with other international actors to avoid inconsistencies, and identify complementarities.
- Targeting dissemination efforts at additional levels of audiences – other government agencies and enforcement level staff. National governments have to understand the importance of international enforcement co-operation to help decrease legal barriers to effective co-operation; enforcement level staff needs to be aware of the benefits and instances for co-operation to ensure that it takes place whenever possible.
- Improving the availability of data to measure the volume, intensity and quality of international enforcement co-operation and including international co-operation data in the CompStats database.

The Competition Committee should continue to monitor the implementation of the 2014 Recommendation and the progress on the steps identified above every five years, as set out in the 2014 Recommendation.

Notes

[1] See *Section* 11 of the OECD/ICN Report (OECD, 2021[23]) for a history of the OECD and ICN's work on international enforcement co-operation.

[2] See (OECD, 2014[13]).

[3] OECD hearing to discuss enhanced enforcement co-operation and possible new and different forms of co-operation among authorities (OECD, 2014[123])..

[4] See following Competition Committee Roundtables: Enhanced Enforcement Co-operation (2014) (OECD, 2014[123]).; the local nexus and jurisdictional thresholds in merger control (2016) (OECD, 2016[124]); the extraterritorial reach of competition remedies (2017) (OECD, 2017[27]); Benefits and challenges of regional competition agreements (2018) (OECD, 2018[3]); Challenges and Co-Ordination of Leniency Programmes (2018) (OECD, 2018[30]); Access to the case file and protection of confidential information (2019) (2019 Confidential Information Paper) (OECD, 2019[31]); Competition provisions in trade agreements (2019) (OECD, 2019[32]); and Criminalisation of cartels and bid rigging conspiracies (2020) (OECD, 2020[125]).

[5] For example, training and related resources developed by the OECD Regional Centres for Competition, which provide training to authority staff on matters relating to enforcement co-operation and through their activities help facilitate the relationships required between authorities to support enforcement co-operation, see http://www.oecd.org/competition/budapestrcc; http://www.oecd.org/competition/seoulrcc ; https://www.oecd.org/daf/competition/oecd-regional-centre-for-competition-in-latin-america.htm.

[6] The 2019 Recommendation is a revision of the 1998 Recommendation on Hard Core Cartels (1998 Recommendation) (OECD, 1998[46])

[7] For example, the OECD Regional Centres, Competition Global Relations, http://www.oecd.org/daf/competition/competitionglobalrelations.htm) and Australian Competition and Consumer Commissions Competition Law Implementation Program (CLIP), which delivers targeted capacity building and technical assistance to Association of South-East Asian Nations (ASEAN) Member States (ACCC (2020), "Competition Law Implementation Program (CLIP)", *International Relations,* https://www.accc.gov.au/about-us/international-relations/competition-law-implementation-program-clip.

[8] See https://ec.europa.eu/competition-policy/european-competition-network/statistics_en.

[9] For example see: OECD webpage on Digital Economy, Innovation and Competition, https://www.oecd.org/competition/digital-economy-innovation-and-competition.htm, or digital focus on 2020 ICN Annual General Conference, https://www.internationalcompetitionnetwork.org/2020vac/.

[10] See various PARR reports: https://app.parr-global.com/intelligence/view/intelcms-kbp6zr; https://app.parr-global.com/intelligence/view/intelcms-m37q2f; https://app.parr-global.com/intelligence/view/intelcms-ps7frz; https://app.parr-global.com/intelligence/view/intelcms-4k4pv4, all accessed on 5 August 2021.

[11] See (Capobianco and Nyeso, 2018[126]); Digital Globalization: The New Era of Global Flow, https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Digital/Our%20Insights/Digital%20globalization%20The%20new%20era%20of%20global%20flows/MGI-Digital-globalization-Full-report.ashx, ("*Remarkably, digital flows—which were practically nonexistent just 15 years ago—now exert a larger impact on GDP growth than the centuries-old trade in goods*"); (Furman, 2019[127]); and (Crémer, de Montjoye and Schweitzer, 2019[128]); (Brandenburger and Hutton, 2021[129]).

[12] Germany and France provide an example for jurisdictions making an effort to align their conceptual frameworks, see https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.html;jsessionid=DFBC6A650E74A31674FD1DFEC555DF54.1_cid390?nn=4692668; and https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=DFBC6A650E74A31674FD1DFEC555DF54.1_cid390?__blob=publicationFile&v=2.

[13] In addition to the UK's Furman Report (Furman, 2019[127]), other key works relating to the digital economy include the Competition and Markets Authority's digital markets strategy (https://www.gov.uk/government/publications/competition-and-markets-authoritys-digital-markets-strategy/the-cmas-digital-markets-strategy); the CMA Online platforms and digital advertising: Market study final report (https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study); and the launch of the Digital Markets Taskforce (https://www.gov.uk/cma-cases/digital-markets-taskforce).

[14] See https://www.jftc.go.jp/en/pressreleases/yearly-2020/July/200729.html.

[15] See: ACCC welcomes comprehensive response to Digital Platforms Inquiry https://www.accc.gov.au/media-release/accc-welcomes-comprehensive-response-to-digital-platforms-inquiry; Digital Platforms Inquiry: Final Report, https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report; Sector-specific investigation into online advertising, https://www.autoritedelaconcurrence.fr/en/press-release/6-march-2018-sector-specific-investigation-online-advertising; Ex-post Assessment of Merger Control Decisions in Digital Markets, https://www.learlab.com/publication/ex-post-assessment-of-merger-control-decisions-in-digital-markets/; Digitalisation, online platforms and competition law: an overview of regulatory developments in the Netherlands, http://competitionlawblog.kluwercompetitionlaw.com/2019/12/02/digitalisation-online-platforms-and-competition-law-an-overview-of-regulatory-developments-in-the-netherlands-2019/; Report regarding trade practices on digital platforms, https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html.

[16] See www.internationalcompetitionnetwork.org/members/.

[17] See https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/icn-recs/ and https://www.internationalcompetitionnetwork.org/frameworks/.

[18] See https://www.oecd.org/daf/competition/roundtables.htm.

[19] See https://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm.

[20] Please see bibliography section of (OECD, 2021, pp. 209-211[23]), with list of all ICN documents consulted, as well as for UNCTAD (OECD, 2021, pp. 209-211[23]).

[21] See https://www.oecd.org/competition/inventory-competition-agency-mous.htm; and https://www.oecd.org/daf/competition/inventory-competition-agreements.htm.

[22] For example, , (Wong-Ervin and Heimert, 2020[130]); (Błachucki, 2020[131]); (Anderson et al., 2019[132]); (Laprévote, 2019[133]); (Pecman and Di Domenico, 2021[134]); (Pecman and Pham, 2020[135]).

[23] The 2019 Survey was sent to all Adherents and to the ICN membership, which goes beyond Adherents, and the OECD/ICN Report uses the aggregate numbers.

[24] At the time of the 2019 survey, the evaluation of the answers and the preparation of this Report, Costa Rica had not yet joined the OECD. For this reason, the answers from Costa Rica are not included in any numbers relating to Adherents. Answers from the European Union, despite it not being an Adherent, have been integrated in the numbers of the Adherents to ensure numbers can be compared with the 2012 Survey. For more details on the origins of the answers, see (OECD, 2021, pp. 209-211[23]).

[25] A full version of the 2019 Survey can be found as Annex B to the OECD/ICN Report (OECD, 2021, pp. 209-211[23]).

[26] Questions 39 – 44 of the OECD/ICN Survey.

[27] See (OECD, 2021, pp. 209-211[23]), Annex A Methodology.

[28] See https://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competition-enforcement-2021.htm; https://www.internationalcompetitionnetwork.org/featured/oecd-icn-report-on-international-cooperation-2021/.

[29] See https://www.oecd.org/daf/competition/enhanced-enforcement-cooperation.htm.

[30] See https://www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm.

[31] All reviews are accessible on https://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm.

[32] Antonio Capobianco, Senior Competition Expert, https://ec.europa.eu/competition-policy/cartels/icn-working-group/webinars_cs.

[33] Antonio Capobianco, Senior Competition Expert, https://www.eifr.eu/external_event/4988/regional-co-operations-among-regulators%20ACP%202017.

[34] Sabine Zigelski, Senior Competition Expert, https://www.concurrences.com/IMG/pdf/scf_newsletter_2015.pdf?30557/004481b9fa9f27adee41fba48834b3d33980b995.

[35] Sabine Zigelski, Senior Competition Expert, https://issuu.com/heliosmedia/docs/bundeskongress_compliance_managemen_655c0c07787ee8.

[36] Sabine Zigelski, Senior Competition Expert, http://www.euroforum.de/veranstaltung/pdf/p1106778.pdf.

[37] See http://www.oecd.org/competition/budapestrcc; http://www.oecd.org/competition/seoulrcc ; https://www.oecd.org/daf/competition/oecd-regional-centre-for-competition-in-latin-america.htm.

[38] See for example 2016 Budapest RCC event in March, https://www.oecd.org/daf/competition/gvh-Agenda_March_2016_ENG.pdf.

[39] See https://www.bundeskartellamt.de/EN/AboutUs/Conferences/InternationalConferenceonCompetition/internationalconferenceoncompetition_node.html.

[40] For example, https://www.ecdportugal2021.pt/.

[41] See https://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=534&bbsId=BBSMSTR_000000002417&bbsTyCode=BBST08.

[42] For example, http://en.cade.gov.br/5th-brics-icc-program.pdf.

[43] See https://www.internationalcompetitionnetwork.org/featured/2021-icn-virtual-annual-conference-copy/.

[44] See for example https://www.oecd.org/daf/competition/oecd-cofece-workshop-effective-cartel-detection-and-prosecution.htm, and https://www.oecd.org/daf/competition/oecd-agcm-workshop-on-abuse-of-dominance-in-digital-markets.htm.

[45] See https://ec.europa.eu/neighbourhood-enlargement/tenders/twinning_en; https://kt.gov.lt/en/news/eu-competition-twinning-project-in-ukraine-kick-off-event-outlines-main-results-to-achieve.

[46] See https://www.accc.gov.au/about-us/international-relations/competition-law-implementation-program-clip.

[47] See https://www.ftc.gov/policy/international/international-technical-assistance-program.

[48] See https://www.internationalcompetitionnetwork.org/news-events/events/.

[49] For UNCTAD, see https://unctad.org/Topic/Competition-and-Consumer-Protection.

[50] See https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/cooperation/.

[51] See https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/steering-group/steering-group-members/.

[52] See https://www.internationalcompetitionnetwork.org/working-groups/.

[53] Relevant to this and all following representations on the "use" of the different parts of the 2014 Recommendation: there is potential confusion by respondents to the 2019 Survey by what was meant by the question asking whether they had used certain provisions of the Recommendation. Adherents recorded low "use" on some provisions, however in other parts of the survey indicated they were engaging in those forms of co-operation. Accordingly, it may be that some Adherents interpreted "use" as meaning 'relied upon as the basis for undertaking the co-operation', which may not have been the case. Accordingly, where relevant, other data from the 2019 Survey has been included to provide more detail on how Adherents have engaged in the forms of co-operation foreseen in the 2014 Recommendation.

[54] See https://www.oecd.org/competition/inventory-competition-agency-mous.htm and https://www.oecd.org/competition/inventory-competition-agreements.htm.

[55] Second-generation agreements contain provisions enabling competition authorities to exchange confidential information in clearly prescribed circumstances, without the requirement to seek prior consent from the source of the information and in some instances, assist their counter-part authorities with investigation activities and engage in enhanced co-operation.

[56] United States-Australia (1999), The Australia - United States Mutual Antitrust Enforcement Assistance Agreement (Australia - USA, 1999[136])**;** Agreement between the European Union and the Swiss Confederation concerning co-operation on the application of their competition laws (2013); Co-operation Arrangement between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission in relation to the provision of compulsorily-acquired information and investigative assistance (2013).

[57] See World Trade Organisation RTA database: http://rtais.wto.org/UI/PublicSearchByCr.aspx. Well known RTAs with competition provisions include the EU, EFTA, COMESA, WAEMU, CARICOM, ASEAN, NAFTA, MERCOSUR, the Andean Community, RCEP, TEAEU, CPTPP, AfCFTA or USMCA.

[58] 72 of the 78 agreements were entered into by Adherents to the 2014 Recommendation.

[59] See OECD Executive Summary, Competition Provisions in Trade Agreements 2019, DAF/COMP/GF(2019)18.

[60] These regional arrangements are relevant when considering the effectiveness of international enforcement co-operation and the implementation of the Recommendation, as there are potentially significant differences in the ability of authorities to co-operate with each other depending on whether they are in one of these arrangements together. Accordingly, it can be useful to differentiate an authority's response regarding its co-operation practices between co-operation inside and outside of these arrangements. In order to address this issue (as outlined in the Methodology section of (OECD, 2021, pp. 209-211[23]) , Annex A), some questions in the 2019 Survey sought information only in relation to enforcement co-operation outside of regional arrangements.

[61] Out of the 41 Adherents, 55% [22] are a member of the EU, while 45% [19] are not a member. On the other hand, 81% [22] of the EU members are Adherents to the 2014 Recommendation, while the remaining 19% [5] have not adhered yet.

[62] For more detail, see Annex J, (OECD, 2021, pp. 209-211[23]).

[63] See for example the challenges facing some non-European Union 'Regional Co-operation Agreements' outlined in Benefits and challenges of regional competition agreements (OECD, 2018[29])

[64] See for example https://www.internationalcompetitionnetwork.org/news-events/events/.

[65] See https://www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm.

[66] See https://www.internationalcompetitionnetwork.org/working-groups/cartel/leniency/.

[67] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0001.

[68] See https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/.

[69] See https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/08/CAPparticipants.pdf and https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/cap-templates/.

[70] Question 29 and Table 7 of the 2019 Survey.

[71] The 2019 Survey shows an overall increase in enforcement co-operation, which may lead to more frequent experiences with the limitations to enforcement co-operation, and thus increasing numbers.

[72] Comity is a legal principle in international law whereby a jurisdiction should take the important interests of other jurisdictions into account when conducting its law enforcement activities. Generally, it is undertaken with an expectation of (contemporaneous or future) reciprocity and can help temper unilateral assertions of extraterritorial jurisdiction. Traditional comity, or negative comity as it is sometimes referred, can be defined as a jurisdiction's consideration of how it may prevent its law enforcement actions from harming another jurisdiction's important interests. It generally implies notifying another jurisdiction when enforcement proceedings carried out by a competition agency may affect other jurisdictions' important interests. Positive comity can be defined as 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. The principle of comity (either traditional or positive) does not prevent a jurisdiction from ultimately making a decision that may adversely affect another jurisdiction.

[73] Answers to question 9, 2019 Survey.

[74] Approximately half of the bi-lateral MoUs on enforcement co-operation reviewed by the OECD through its inventory include general provisions on "consultation". Some MoUs include a general provision that consultations may be requested by either party regarding any matter relating to the agreements, without setting forth formal duties of the parties in relation to the requests for consultation, and the responses: see OECD Inventory of International Co-Operation MoUs between Competition Agencies, Provisions on Consultation, www.oecd.org/daf/competition/mou-inventory-provisions-on-consultation.pdf. The same is true for provisions on negative comity, https://www.oecd.org/daf/competition/mou-inventory-provisions-on-negative-comity.pdf. Only very few MoU have provisions on positive comity.

[75] Numbers calculated based on the results of the 2012 Survey, question 9, and using the 2021 list of Adherents. In 2012, eight countries reported national law provisions, 16 bilateral agreements, and 9 multi-lateral agreements with comity provisions (ECN provisions not included).

[76] See for example: (Pecman and Di Domenico, 2021[134]); (Calvani and Stewart-Teitelbaum, 2016[137]).

[77] Frequency scores depict average frequency scores, where options were: [Frequently = 3], [Occasionally = 2], [Seldom = 1], [Never = 0]. The categories were defined as frequently > 60% of cases or investigations; occasionally 20% - 60% of cases or investigations; and seldom < 20% of cases or investigations.

[78] All MoUs included cover MoU where at least one party is an OECD Member or Associate/Participant to the Competition Committee – so the vast majority of entries in the inventory cover Adherents.

[79] See https://www.oecd.org/daf/competition/mou-inventory-provisions-on-coordination-of-investigations.pdf, Korea – US 2015.

[80] See http://www.oecd.org/daf/competition/mou-inventory-provisions-on-coordination-of-investigations.pdf.

[81] There are limitations in the data (e.g. double-counting when two or more Adherents co-operating on the same matter responded or because the numbers averaged are medians of value ranges), however, the data reflects a trend over time using data collected and represented in the same way.

[82] These conclusions are very tentative. The 2012 and 2019 Surveys did not ask for details on the identity of competition authorities with whom a respondent co-operated. For this reason, it cannot be taken for granted that the pairs of co-operating authorities the responses referred to did not change. However, the general experience in international co-operation suggests that most of the co-operation takes place in very similar constellations of jurisdictions.

[83] For the purpose of the comparison, the Adherence in 2021 is the basis for the calculation in 2012.

[84] See various PARR reports: https://app.parr-global.com/intelligence/view/intelcms-kbp6zr; https://app.parr-global.com/intelligence/view/intelcms-m37q2f; https://app.parr-global.com/intelligence/view/intelcms-ps7frz; https://app.parr-global.com/intelligence/view/intelcms-4k4pv4, all accessed on 5 August 2021.

[85] See for example Frédéric Jenny at UNCTAD on 8 July 2021, https://app.parr-global.com/intelligence/view/intelcms-7mkdhf, accessed on 5 August 2021; (Brandenburger and Hutton, 2021[129]).

[86] The question used the term 'national law provisions' but the responses show that authorities understood this to include competition law regimes that allowed for the use of waivers.

[87] A provision or ability under National Law allowing (confidential) information sharing between competition authorities without the need to obtain prior consent from the source of the information. The transmitting jurisdiction usually retains full discretion whether to provide the information under the information gateway, and may choose to provide it subject to restrictions on use or disclosure. See also section VII 10 - 16 of the 2014 Recommendation.

[88] Second-generation co-operation agreements generally contain all the provisions of first generation co-operation agreements (agreements that confirm a more general commitment to co-operation), while also enabling competition authorities to engage in deeper co-operation activities in clearly prescribed circumstances, such as sharing confidential information, providing investigative assistance, and engaging in enhanced co-operation. In some second-generation co-operation agreements, in some circumstances confidential information can sometimes be shared without the requirement to seek prior consent from the source of the information (OECD, 2021, p. 64[23]).

[89] Section 155AAA, www.australiancompetitionlaw.org/legislation/provisions /2010cca155AAA.html. On 1 January 2011, the Competition and Consumer Act 2010 superseded the Trade Practices Act 1974. The discretionary powers of the ACCC to share information, introduced originally in 2007 under Section 155AAA, were not affected by this change.

[90] Section 99I, and 99J, Commerce (International Co-operation, and Fees) Amendment Act 2012, Public Act 2012 No. 84, date of assent 23 October 2012, www.legislation.govt.nz/act/public/2012/0084/latest/DLM1576307.html. Notably, the New Zealand information gateway requires that an intergovernmental or inter-agency agreement is in place as a condition for using the national gateway.

[91] Section 29 Canadian Competition Act, https://laws-lois.justice.gc.ca/eng/acts/c-34/page-5.html#docCont; Information Bulletin on the Communication of Confidential Information under the Competition Act, Competition Bureau, 10 October 2007, www.competitionbureau.gc.ca /eic/site/cbbc.nsf/eng/01277.html; John Pecman, International Privacy Enforcement Meeting, Ottawa, Ontario June 4, 2015, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03957.html.

[92] Section 243 UK Enterprise Act 2002, www.legislation.gov.uk/ukpga/2002/40/section/243.

[93] § 50d (1) and 50e of the German Competition Act – GWB, available at: http://www.gesetze-im-internet.de/englisch_gwb/. The German Competition Act allows co-operation with authorities outside the European Union. In merger cases, such sharing of confidential information outside the EU requires a waiver from the source of information.

[94] Co-operation Arrangement between the Commissioner of Competition, Competition Bureau of the Government of Canada and the Fair Trade Commission of Japan in relation to the Communication of Information in Enforcement Activities (2017), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04243.html.

[95] Co-operation arrangement between the Commissioner of Competition (Canada) and the New Zealand Commerce Commission in relation to the sharing of information and provision of investigative assistance (2016), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04050.html.

[96] Co-operation Arrangement between the Australian Competition and Consumer Commission and the Fair Trade Commission of Japan (2015), https://www.jftc.go.jp/en/pressreleases/yearly-2015/April/150430.html.

[97] Co-operation Arrangement between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission in relation to the provision of compulsorily-acquired information and investigative assistance (2013), https://www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20New%20Zealand%20Commerce%20Commission%20and%20the%20Australian%20Competition%20and%20Consumer%20Commission.pdf.

[98] Agreement between the European Union and the Swiss Confederation concerning co-operation on the application of their competition laws (2013), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22014A1203%2801%29.

[99] United States-Australia (1999), The Australia - United States Mutual Antitrust Enforcement Assistance Agreement, https://www.state.gov/13033.

[100] Concluded 2017 between Denmark, Finland, Iceland, Norway and Sweden, https://www.kkv.fi/en/facts-and-advice/competition-affairs/international-cooperation-related-to-competition-affairs/nordic/agreement-on-cooperation-in-competition-cases/.

[101] Australia, Canada, New Zealand, UK and US, Multi-lateral Mutual Assistance And Cooperation Framework For Competition Authorities (MMAC) Memorandum Of Understanding 2020, https://www.accc.gov.au/system/files/MMAC%20-%20FINAL%20English%20-%202%20September%202020%2811501052.1%29.pdf.

[102] See also OECD inventories, https://www.oecd.org/daf/competition/inventory-competition-agency-mous.htm, and https://www.oecd.org/daf/competition/inventory-competition-agreements.htm.

[103] See https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-Investigative-Process.pdf.

[104] Enhanced co-operation can include a spectrum of co-operation activities. They can range from informal resource sharing to one authority taking the lead on an investigation, and may require the existence of appropriate legal instruments. Enhanced co-operation can include the mutual recognition of decisions, 'lead authority' or 'one-stop-shop' models, joint investigative teams and cross-appointments, or co-operation at court level. Enhanced co-operation will usually occur in parallel case proceedings, different from Investigative Assistance, which will usually support one authority in its case investigation.

[105] The results from respondents who included regional examples in their Survey responses were removed.

[106] See https://www.oecd.org/daf/competition/enhanced-enforcement-cooperation.htm.

[107] See https://www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm.

[108] See https://www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm.

[109] See https://www.oecd.org/daf/competition/benefits-and-challenges-of-regional-competition-agreements.htm.

[110] See https://www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm.

[111] See https://www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm.

[112] See https://www.oecd.org/daf/competition/competition-provisions-in-trade-agreements.htm.

[113] See https://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm.

[114] See latest list DAF/COMP/WP3(2021)2.

[115] See https://www.internationalcompetitionnetwork.org/portfolio/non-confidential-information-sharing/.

[116] See https://www.internationalcompetitionnetwork.org/working-groups/cartel/information-sharing/.

[117] See https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/cap-templates/.

[118] See https://www.oecd.org/competition/inventory-competition-agreements.htm.

[119] See https://www.oecd.org/daf/competition/inventory-competition-agency-mous.htm.

[120] See Section 20, (OECD, 2021[23]).

[121] See https://www.oecd.org/daf/competition/workshop-on-legal-models-for-international-enforcement-cooperation.htm.

References

ACCC/JFTC (2015), *Co-operation Agreement Between the Australian Competition and Consumer Commission and the Fair Trade Commission of Japan*, https://www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20Australian%20Competition%20%26%20Consumer%20Commission%20and%20the%20Fair%20Trade%20Commission%20of%20Japan.pdf. [43]

Anderson, R. et al. (2019), *Competition Policy, Trade and the Global Economy: An overview of existing WTO elements, commitments in regional trade agreements, some current challenges and issues for reflection*, https://one.oecd.org/document/DAF/COMP/GF(2019)11/en/pdf. [60]

Australia - USA (1999), *Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance*, http://www.ftc.gov/policy/co-operation-agreements/usaaustralia-mutual-antitrust-enforcement-assis. [64]

Baker McKenzie (2020), *Global transactions forecast 2020*, https://www.bakermckenzie.com/de/insight/publications/2019/10/global-transactions-forecast-2020. [19]

Baker Mckenzie (2017), *Cross-border M&A Index Q2 2017*, http://www.mergermarket.com/info/baker-mckenzie-cross-border-ma-index-q2-2017. [17]

Błachucki, M. (ed.) (2020), *International Cooperation of Competition Authorities in Europe: from Bilateral Agreements to Transgovernmental Networks*, ILS PAS, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3751630. [59]

Brandenburger, R. and C. Hutton (2021), "DIGITAL MARKETS: THE CHALLENGES OF NATIONAL ENFORCEMENT IN A GLOBAL WORLD", *CPI Antitrust Chronicle*, Vol. 8, https://www.competitionpolicyinternational.com/wp-content/uploads/2021/08/2-Digital-Markets-The-Challenges-of-National-Enforcement-in-a-Global-World-By-Rachel-Brandenburger-Christopher-Hutton.pdf. [57]

Calvani, T. and J. Stewart-Teitelbaum (2016), *IS THERE TOO MUCH TRAFFIC ON THE COMPETITION LAW ENFORCEMENT AUTOSTRADA: A ROLE FOR NEGATIVE COMITY?*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116315. [65]

Capobianco, A., J. Davies and S. Ennis (2014), "Implication of Globalisation for Competition Policy: The Need for International Co-Operation in Merger and Cartel Enforcement", https://ssrn.com/abstract=2450137. [39]

Capobianco, A. and A. Nagy (2016), "Developments in International Enforcement in the Competition Field", *Journal of European Competition Law & Practice*, Vol. 7/8, [40]

https://academic.oup.com/jeclap/article/7/8/566/2194490?login=true.

Capobianco, A. and A. Nyeso (2018), “Challenges for Competition Law Enforcement and Policy in the Digital Economy”, *Journal of European Competition Law & Practice*, Vol. 9/1, pp. 19-27, https://doi.org/10.1093/jeclap/lpx082. [54]

Caro de Sousa, P. (2020), “The Three Body Problem – Extraterritoriality, Comity and Cooperation in Competition Law”, *SSRN Electronic Journal*, http://dx.doi.org/10.2139/SSRN.3659083. [42]

Charbit, N. and S. Ahmad (eds.) (2020), *The Next Frontier of International Cooperation in Competition Enforcement*, Concurrences, https://www.concurrences.com/en/all-books/frederic-jenny-liber-amicorum-standing-up-for-convergence-and-relevance-in-en. [63]

Clifford Chance (2020), *Merger control in Latin America, Thresholds and guidance for antitrust filings*, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2020/01/merger-control-in-latin-america-january-2020.pdf. [8]

Crémer, J., Y. de Montjoye and H. Schweitzer (2019), *Competition policy for the digital era*, http://dx.doi.org/10.2763/407537. [56]

DHL (2020), *DHL GLOBAL CONNECTEDNESS INDEX*, https://www.dhl.com/global-en/spotlight/globalization/global-connectedness-index.html. [15]

Fair Trade Authoriry of Curaçao (2020), *About the FTAC*, http://www.ftac.cw/en/about-the-ftac/. [7]

Furman, J. (2019), *Unlocking digital competition Report of the Digital Competition Expert Panel*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf. [55]

Grocer, S. (2018), “DealBook: A record $2.5 Trillion in Mergers Were Announced in the First Half of 2018”, *The New York Times*, http://www.nytimes.com/2018/07/03/business/dealbook/mergers-record-levels.html. [18]

Holian, J. and A. Reeves (2017), *Tracking Global Merger Control Changes for 2017*, Law360, http://www.lw.com/thoughtLeadership/byline-tracking-global-merger-control-changes-for-2017. [9]

ICN (2019), *Lessons to Be Learnt from the Experience of Young Competition Agencies*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf. [12]

ICN (2018), *ICN Report on OECD/ICN Questionnaire on International Co-operation Enforcement*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/ICNOECDCooperationReport2013.pdf. [26]

International Competition Network (2019), *Framework on Competition Agency Procedures*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf. [50]

International Competition Network (2019), *Recommended Practices for Investigative Process*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-Investigative-Process.pdf. [49]

Kovacic, W. and M. Mariniello (2016), *Competition Agency Design in Globalised Markets*, E15Initiative, https://e15initiative.org/publications/competition-agency-design-in-globalised-markets/. [1]

Laprévote, F. (2019), *COMPETITION POLICY WITHIN THE CONTEXT OF FREE TRADE AGREEMENTS*, https://one.oecd.org/document/DAF/COMP/GF(2019)5/en/pdf. [61]

Ministry of Commerce, R. (2020), *Establishment of Myanmar Competition Commission*, http://www.commerce.gov.mm/en/article/myanmar-competition-commission-mmcc. [6]

OECD (2021), *Government at a Glance 2021*, OECD Publishing, Paris, https://dx.doi.org/10.1787/1c258f55-en. [11]

OECD (2021), *OECD/ICN Report on International Co-operation in Competition Enforcement*, http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competition-enforcement-2021.htm. [23]

OECD (2020), *Costa Rica: Assessment of Competition Law and Policy 2020*, https://www.oecd.org/daf/competition/costa-rica-assessment-of-competition-law-and-policy2020.pdf. [36]

OECD (2020), *Criminalisation of cartels and bid rigging conspiracies*, https://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm. [53]

OECD (2020), *Government at a Glance: Latin America and the Caribbean 2020*, OECD Publishing, https://dx.doi.org/10.1787/13130fbb-en. [33]

OECD (2020), *OECD Competition Trends 2020*, https://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf. [4]

OECD (2020), *OECD Peer Reviews of Competition Law and Policy: Mexico*, https://www.oecd.org/daf/competition/Mexico-Peer-Reviews-of-Competition-Law-and-Policy-en.pdf. [38]

OECD (2019), *Access to the case file and protection of confidential information*, http://www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm. [31]

OECD (2019), *Competition provisions in trade agreements*, https://www.oecd.org/daf/competition/competition-provisions-in-trade-agreements.htm. [32]

OECD (2019), *Developments in international co-operation in competition cases since 2014 : monitoring the implementation of the Recommendation of the Council concerning International Co-Operation on Competition Investigations and Proceedings*, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2019)3&docLanguage=En. [24]

OECD (2019), *Independent Sector Regulators DAF/COMP/WP2(2019)3*, https://www.oecd.org/daf/competition/independent-sector-regulators.htm. [16]

OECD (2019), *OECD Peer Reviews of Competition Law and Policy: Brazil*, https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-brazil-ENG-web.pdf. [37]

OECD (2019), *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, http://OECD/LEGAL/0452. [34]

OECD (2019), *Review of the 1998 OECD Recommendation concerning Effective Action against* [4

Hard Core Cartels, https://www.oecd.org/daf/competition/oecd-review-1998-hard-core-cartels-recommendation.pdf. [7]

OECD (2018), *Benefits and challenges of regional competition agreements*, http://www.oecd.org/daf/competition/benefits-and-challenges-of-regional-competition-agreements.htm. [3]

OECD (2018), *Challenges and Co-ordination of Leniency Programmes*, https://www.oecd.org/competition/challenges-and-coordination-of-leniency-programmes.htm. [30]

OECD (2018), *Competition Law in Asia-Pacific, A Guide to Selected Jurisdictions,*, OECD/Korea Policy Centre Competition Programme, http://www.oecd.org/daf/competition/Competition-Law-in-Asia-Pacific-Guide-2018.pdf. [5]

OECD (2018), *Cost-Benefit Analysis and the Environment: Further Developments and Policy Use*, OECD Publishing, Paris, https://dx.doi.org/10.1787/9789264085169-en. [29]

OECD (2018), *Gun Jumping in Merger Control*, https://one.oecd.org/document/DAF/COMP(2018)11/en/pdf. [45]

OECD (2018), *Treatment of Legally Privileged Information in Competition Proceedings*, https://one.oecd.org/document/DAF/COMP/WP3(2018)5/en/pdf. [28]

OECD (2017), *Competition co-operation and enforcement, Inventory of international co-operation MoUs between competition agencies: Provisions on co-ordination of investigations and proceedings*. [44]

OECD (2017), *The extraterritorial reach of competition remedies*, https://www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm. [27]

OECD (2016), *COLOMBIA: ASSESSMENT OF COMPETITION LAW AND POLICY*, https://www.oecd.org/daf/competition/Colombia-assessment-competition-report-2016.pdf. [35]

OECD (2016), *The local nexus and jurisdictional thresholds in merger control*, https://www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm. [52]

OECD (2014), *Challenges of International Co-operation in Competition Law Enforcement*, https://www.oecd.org/competition/challenges-international-coop-competition-2014.htm. [13]

OECD (2014), *Enhanced Enforcement Co-operation*, http://www.oecd.org/daf/competition/enhanced-enforcement-cooperation.htm. [51]

OECD (2013), *Secretariat Report on the OECD/ICN Survey on International Co-operation Enforcement*, https://www.oecd.org/competition/oecd-icn-international-co-operation-Survey.htm. [25]

OECD (1998), *Recommendation of the OECD Council concerning effective action against hard core cartels*, http://C(98)35/FINAL. [46]

OECD (n.d.), *SME Policy Index*, OECD Publishing, Paris, https://dx.doi.org/10.1787/24136883. [48]

OECD/Eurostat (2005), *The Measurement of Scientific and Technological Activities: Guidelines for Collecting and Interpreting Innovation Data: Oslo Manual*. [20]

Pecman, J. and A. Di Domenico (2021), "In Comity We Trust: Utilizing International Comity to Strengthen International Cooperation and Enforcement Convergence in Multijurisdictional [62]

Matters", *Competition Policy International*, https://www.competitionpolicyinternational.com/in-comity-we-trust-utilizing-international-comity-to-strengthen-international-cooperation-and-enforcement-convergence-in-multijurisdictional-matters/ (accessed on 2 August 2021).

Philippines Competition Commission (2020), *PCC: SC rules on dawn raids to bolster cartel investigations,*, https://phcc.gov.ph/press-releases/pcc-sc-rules-on-dawn-raids-to-bolster-cartel-investigations/. [10]

Taurula, M. (2020), *Background and Benefits of the Cooperation Agreement between the Nordic Competition Authorities*, Publishing House of ILS PAS, http://148.81.192.203:8080/xmlui/handle/123456789/198. [41]

UNCTAD (2018), *Guiding Policies and Procedures under Section F of the UN Set on Competition*, https://unctad.org/system/files/official-document/ccpb_comp1_%20Guiding_Policies_Procedures.pdf. [22]

UNCTAD (2017), *Enhancing international co-operation in the investigation of cross-border competition cases: Tools and procedures - Note by the UNCTAD secretariat*, https://unctad.org/meetings/en/SessionalDocuments/ciclpd44_en.pdf. [2]

UNCTAD (2000), *The United Nations Set of Principles and Rules on Competition : the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, https://unctad.org/system/files/official-document/tdrbpconf10r2.en.pdf. [21]

Wong-Ervin, K. and A. Heimert (2020), *Extraterritoriality: Approaches Around the World and Model Analysis*, Concurrences, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3518661 (accessed on 2 August 2021). [58]

World Trade Organisation (2019), *Global Value Chain Development Report 2019: Technological Innovation, Supply Chain Trade, and Workers in a Globalized World*, https://www.wto.org/english/res_e/booksp_e/gvc_dev_report_2019_e.pdf. [14]

Annex

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

On 16 September 2014, the OECD Council adopted a Recommendation Concerning International Co-operation on Competition Investigations and Proceedings. The following text of the Recommendation was extracted from the Compendium of OECD Legal Instruments, where additional information and any future updates can be found: https://legalinstruments.oecd.org/en/

THE COUNCIL,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

On the proposal of the Competition Committee:

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

- "Adherents" refers to Members and non-Members adhering to this Recommendation;
- "Anticompetitive practice" refers to business conduct that restricts competition, as defined in the competition law and practice of an Adherent;
- "Competition authority" means an Adherent's government entity, other than a court, charged with primary responsibility for the enforcement of the Adherent's competition law;
- "Confidential information" refers to information the disclosure of which is either prohibited or subject to restrictions under the laws, regulations, or policies of an Adherent, e.g., non-public business information the disclosure of which could prejudice the legitimate commercial interests of an enterprise;

- "Co-operation" includes a broad range of practices, from informal discussions to more formal co-operation activities based on legal instruments at the national or international level, employed by competition authorities of Adherents to ensure efficient and effective reviews of anticompetitive practices and mergers with anticompetitive effects affecting one or more Adherents. It may also include more general discussions relating to competition policy and enforcement practices;
- "Investigation or proceeding" means any official factual inquiry or enforcement action authorised or undertaken by a competition authority of an Adherent pursuant to the competition laws of the Adherent;
- "Merger" means merger, acquisition, joint venture or any other form of business amalgamation that falls within the scope and definitions of the competition laws of an Adherent governing business concentrations or combinations;
- "Merger with anticompetitive effects" means a merger that restricts or is likely to restrict competition, as defined in the competition law and practice of an Adherent and, for the purpose of this Recommendation, may include a merger that is under review by the competition authority of an Adherent according to its merger laws with a view to establishing if it has anticompetitive effects;
- "Waiver" or "confidentiality waiver" means permission granted by a party subject to an investigation or proceeding, or by a third party, that enables competition authorities to discuss and/or exchange information, otherwise protected by confidentiality rules of the Adherent(s) involved, which has been obtained from the party in question.

Commitment to Effective International Co-operation

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

To this end, Adherents should aim inter alia to:

1. minimise the impact of legislation and regulations that might have the effect of restricting co-operation between competition authorities or hindering an investigation or proceeding of other Adherents, such as legislation and regulations prohibiting domestic enterprises or individuals from co-operating in an investigation or proceeding conducted by competition authorities of other Adherents;

2. make publicly available sufficient information on their substantive and procedural rules, including those relating to confidentiality, by appropriate means with a view to facilitating mutual understanding of how national enforcement systems operate; and

3. minimise inconsistencies between their leniency or amnesty programmes that adversely affect co-operation.

Consultation and Comity

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

1. To this end, without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision, the Adherent so addressed should give full and sympathetic consideration to the views expressed by the requesting Adherent, and in particular to any

suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding.

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

1. Entering into such consultations is without prejudice to any action under the competition law and to the full freedom of ultimate decision of the Adherents concerned.

2. Any Adherent so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting Adherent and, in particular, to the nature of the alleged anticompetitive practices or mergers with anticompetitive effects in question, the enterprises or individuals involved and the alleged harmful effects on the interests of the requesting Adherent.

3. If the Adherent so addressed agrees that enterprises or individuals situated in its territory are engaged in anticompetitive practices or in mergers with anticompetitive effects harmful to the interests of the requesting Adherent, it should take whatever remedial action it considers appropriate, including actions under its competition law, on a voluntary basis and considering its legitimate interests.

4. In requesting consultations, Adherents should explain the national interests affected in sufficient detail to enable their full and sympathetic consideration.

5. Without prejudice to any of their rights, the Adherents involved in consultations should endeavour to find a mutually acceptable solution in light of the respective interests involved.

Notifications of Competition Investigations or Proceedings

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

1. Circumstances that may justify a notification include, but are not limited to (i) formally seeking non-public information located in another Adherent; (ii) the investigation of an enterprise located in or incorporated or organised under the laws of another Adherent ; (iii) the investigation of a practice occurring in whole or in part in the territory of another Adherent, or required, encouraged, or approved by the government of another Adherent; or (iv) the consideration of remedies that would require or prohibit conduct in the territory of another Adherent.

2. The notification should be made by the competition authority of the investigating Adherent through the channels requested by each Adherent as indicated in a list to be established and periodically updated by the Competition Committee; to the extent possible, Adherents should favour notifications directly to competition authorities. Notifications should be in writing, using any effective and appropriate means of communication, including e-mail. To the extent possible without prejudicing an investigation or proceeding, the notification should be made when it becomes evident that another Adherent's important interests are likely to be affected, and with sufficient detail so as to permit an initial evaluation by the notified Adherent of the likelihood of effects on its important interests.

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

Co-ordination of Competition Investigations or Proceedings

VI. RECOMMENDS that where two or more Adherents investigate or proceed against the same or related anticompetitive practice or merger with anticompetitive effects, they should endeavour to co-ordinate their investigations or proceedings where their competition authorities agree that it would be in their interest to do so.

To this end, co-ordination between Adherents:

1. should be undertaken on a case-by-case basis between the competition authorities involved;

2. should not affect Adherents' right to make decisions independently, based on their own investigation or proceeding;

3. should aim to:

   (i) avoid possible conflicting approaches and outcomes among Adherents, including remedies; and

   (ii) reduce duplication of enforcement costs and make the best use of the enforcement resources of Adherents involved;

4. might include any of the following steps, insofar as appropriate and practicable, and subject to appropriate safeguards including those relating to confidential information:

   (i) Providing notice of applicable time periods and schedules for decision-making;

   (ii) Co-ordinating the timing of procedures;

   (iii) Requesting, in appropriate circumstances, that the parties to the investigation and third parties voluntarily grant waivers of confidentiality to co-operating competition authorities;

   (iv) Co-ordinating and discussing the competition authorities' respective analyses;

   (v) Co-ordinating the design and implementation of remedies to address anticompetitive concerns identified by competition authorities in different Adherents;

   (vi) In Adherents in which advance notification of mergers is required or permitted, requesting that the notification include a statement identifying notifications also made or likely to be made to other Adherents; and

   (vii) Exploring new forms of co-operation.

Exchange of Information in Competition Investigations or Proceedings

VII. RECOMMENDS that in co-operating with other Adherents, where appropriate and practicable, Adherents should provide each other with relevant information that enables their competition authorities to investigate and take appropriate and effective actions with respect to anticompetitive practices and mergers with anticompetitive effects.

1. The exchange of information should be undertaken on a case-by-case basis between the competition authority of the Adherent that transmits the information ("the transmitting Adherent") and the competition authority of the Adherent that receives the information ("the receiving Adherent"), and it should cover only information that is relevant to an investigation or proceeding of the receiving Adherent. In its request for information, the receiving Adherent should explain to the transmitting authority the purpose for which the information is sought.

2. The transmitting Adherent retains full discretion when deciding whether to transmit information.

3.In order to achieve effective co-operation, Adherents are encouraged to exchange information that is not subject to legal restrictions under international or domestic law, including the exchange of information in the public domain and other non-confidential information.

4. Adherents may also consider the exchange of information internally generated by the competition authority that the authority does not routinely disclose and for which there is no statutory prohibition or restriction on disclosure, and which does not specifically identify confidential information of individual enterprises. In this case, the transmitting Adherent may choose to impose conditions restricting the further dissemination and use of the information by the receiving Adherent. The receiving Adherent should protect it in accordance with its own legislation and regulations and should not disclose the views of the transmitting Adherent without its consent.

5. When the exchange of the above information cannot fully meet the need for effective co-operation in a matter, Adherents should consider engaging in the exchange of confidential information subject to the following provisions.

Exchange of confidential information through the use of confidentiality waivers

6. Where appropriate, Adherents should promote the use of waivers, for example by developing model confidentiality waivers, and should promote their use in all enforcement areas.

7. The decision of an enterprise or an individual to waive the right to confidentiality protection is voluntary.

8. When receiving confidential information pursuant to a confidentiality waiver, the receiving Adherent should use the information received in accordance with the terms of the waiver.

9. The information should be used solely by the competition authority of the receiving Adherent, unless the waiver provides for further use or disclosure.

Exchange of confidential information through "information gateways" and appropriate safeguards

10. Adherents should consider promoting the adoption of legal provisions allowing for the exchange of confidential information between competition authorities without the need to obtain prior consent from the source of the information ("information gateways").

11. Adherents should clarify the requirements with which both the transmitting and receiving authorities have to comply in order to exchange confidential information and should establish sufficient safeguards to protect the confidential information exchanged, as provided in this Recommendation. Adherents might differentiate the application of the provisions, e.g., on the basis of the type of investigation or of the type of information.

12. The transmitting Adherent should retain full discretion whether to provide the information under the information gateway, and may choose to provide it subject to restrictions on use or disclosure. When deciding whether to respond positively to a request to transmit confidential information to another Adherent, the transmitting Adherent may consider the following factors in particular:

The nature and seriousness of the matter, the affected interests of the receiving Adherent, and whether the investigation or proceeding is likely to adequately safeguard the procedural rights of the parties concerned;

(i) Whether the disclosure is relevant to the receiving authority's investigation or proceeding;

(ii) Whether competition authorities of both the transmitting and receiving Adherents are investigating the same or related anticompetitive practice or merger with anticompetitive effects;

(iii) Whether the receiving Adherent grants reciprocal treatment;

(iv) Whether the information obtained by the transmitting Adherent under an administrative or other non-criminal proceeding can be used by the receiving Adherent in a criminal proceeding; and

(v) Whether the level of protection that would be granted to the information by the receiving Adherent would be at least equivalent to the confidentiality protection in the transmitting Adherent.

13. The transmitting Adherent should take special care in considering whether and how to respond to requests involving particularly sensitive confidential information, such as forward-looking strategic and pricing plans.

14. Before the transmission of the confidential information can take place, the receiving Adherent should confirm to the transmitting Adherent that it will:

(i) Maintain the confidentiality of the exchanged information to the extent agreed with the transmitting Adherent with respect to its use and disclosure;

(ii) Notify the transmitting Adherent of any third party request related to the information disclosed; and

(iii) Oppose the disclosure of information to third parties, unless it has informed the transmitting Adherent and the transmitting Adherent has confirmed that it does not object to the disclosure.

15. When an Adherent transmits confidential information under an information gateway, the receiving Adherent should ensure that it will comply with any conditions stipulated by the transmitting Adherent. Prior to transmission, the receiving Adherent should confirm to the transmitting Adherent the safeguards it has in place in order to:

(i) Protect the confidentiality of the information transmitted. To this end, the receiving Adherent should identify and comply with appropriate confidentiality rules and practices to protect the information transmitted, including: (a) appropriate protection, such as electronic protection or password protection; (b) limiting access to the information to individuals on a need-to-know basis; and (c) procedures for the return to the competition authority of the transmitting Adherent or disposal of the information transmitted in a manner agreed upon with the transmitting Adherent, once the information exchanged has served its purpose; and

(ii) Limit its use or its further dissemination in the receiving Adherent. To this end, the information should be used solely by the competition authority of the receiving Adherent and solely for the purpose for which the information was originally sought, unless the transmitting Adherent has explicitly granted prior approval for further use or disclosure of the information.

16. The receiving Adherent should take all necessary and appropriate measures to ensure that unauthorised disclosure of exchanged information does not occur. If an unauthorised disclosure occurs, the receiving Adherent should take appropriate steps to minimise any harm resulting from the unauthorised disclosure, including promptly notifying and, as appropriate, co-ordinating with the transmitting Adherent, to ensure that such unauthorised disclosure does not recur. The transmitting Adherent should notify the source of the information about the unauthorised

disclosure, except where to do so would undermine the investigation or proceeding in the transmitting or receiving country.

Provisions applicable to information exchange systems

17. The Adherent receiving confidential information should protect the confidentiality of the information received in accordance with its own legislation and regulations and in line with this Recommendation.

18. Adherents should provide appropriate sanctions for breaches of the confidentiality provisions relating to the exchange of confidential information.

19. The present Recommendation is not intended to affect any special regime adopted or maintained by an Adherent with respect to exchange of information received from a leniency or amnesty applicant or an applicant under specialised settlement procedures.

20. The transmitting Adherent should apply its own rules governing applicable privileges, including the privilege against self-incrimination and professional privileges, when transmitting the requested confidential information, and endeavour not to provide information deemed privileged in the receiving Adherent. The transmitting Adherent may consider working with the parties to identify privileged information in the receiving Adherent in appropriate cases.

21. The receiving Adherent should, to the fullest extent possible:

(i) not call for information that would be protected by those privileges, and

(ii) ensure that no use will be made of any information provided by the transmitting Adherent that is subject to applicable privileges of the receiving Adherent.

22. Adherents should ensure an appropriate privacy protection framework in accordance with their respective legislation.

Investigative Assistance to Another Competition Authority

VIII. RECOMMENDS that regardless of whether two or more Adherents proceed against the same or related anticompetitive practice or merger with anticompetitive effects, competition authorities of the Adherents should support each other on a voluntary basis in their enforcement activity by providing each other with investigative assistance as appropriate and practicable, taking into account available resources and priorities.

1. Without prejudice to the applicable confidentiality rules, investigative assistance may include any of the following activities:

(i) Providing information in the public domain relating to the relevant conduct or practice;

(ii) Assisting in obtaining information from within the assisting Adherent;

(iii) Employing on behalf of the requesting Adherent the assisting Adherent's authority to compel the production of information in the form of testimony or documents;

(iv) Ensuring to the extent possible that official documents are served on behalf of the requesting Adherent in a timely manner; and

(v) Executing searches on behalf of the requesting Adherent country to obtain evidence that can assist the requesting Adherent country's investigation, especially in the case of investigations or proceedings regarding hard core cartel conduct.

2. Any investigative assistance requested should be governed by the procedural rules in the assisting Adherent and should respect the provisions and safeguards provided for in this Recommendation. The request for assistance should take into consideration the powers, authority and applicable confidentiality rules of the competition authority of the assisting Adherent.

3. Adherents should take into account the substantive laws and procedural rules in other Adherents when making requests for assistance to obtain information located abroad. Before seeking information located abroad, Adherents should consider whether adequate information is available from sources within their territory. Requests for information located abroad should be framed in terms that are as specific as possible.

4. When the request for assistance cannot be granted in whole or in part, the assisting Adherent should inform the requesting Adherent accordingly, and consider providing the reasons why the request could not be complied with.

5. The provision of investigative assistance between Adherents may be subject to consultations regarding the sharing of costs of these activities, upon request of the competition authority of the assisting Adherent.

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

X.INSTRUCTS the Competition Committee to:

1. serve periodically or at the request of an Adherent as a forum for exchanges of views on matters related to the Recommendation;

2. establish and periodically update a list of contact points in each Adherent for purposes of implementing this Recommendation;

3. consider developing, without prejudice to the use of confidentiality waivers, model provisions for adoption by Adherents allowing the exchange of confidential information between competition authorities without the need to obtain the prior consent from the source of the information and subject to the safeguards as provided in this Recommendation;

4. consider developing model bilateral and/or multilateral agreements on international co-operation reflecting the principles endorsed by Adherents in this Recommendation;

5. consider developing enhanced co-operation tools and instruments that can help reduce the overall costs associated with investigations or proceedings by multiple competition authorities, and at the same time avoid inconsistencies among Adherents' enforcement actions; and

6. monitor the implementation of this Recommendation and to report to the Council every five years.

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