

OECD/ICN REPORT ON INTERNATIONAL CO-OPERATION IN COMPETITION ENFORCEMENT



International Co-operation in Competition Enforcement

Report by the OECD and the International
Competition Network



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Foreword

The globalised and digitalised economy has created a highly interconnected world that has increased cross-border competition issues. The significant growth in the number of competition authorities and the increasing willingness of competition authorities, both young and mature, to engage in cross border cases has also driven this increase.

For effective and efficient enforcement of competition law in a globalised economy, national competition authorities must have the ability to co-operate with each other on these cross-border matters, in order to realise the economic and welfare goals of a sound competition policy.

The Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN) share a mission to promote international co-operation between competition authorities. Both have worked for many years to improve the resources, frameworks and opportunities required for effective collaboration.

This Report reflects the contributions of many individuals and competition authorities committed to improving enforcement co-operation. It is itself an example of the effective collaboration that is possible when there is a shared mission.

A main finding of the Report is that international enforcement co-operation is increasing, and while significant work has been undertaken to improve it, there is significantly more to be done to better address the long-term and well-known limitations to enforcement co-operation. The Report provides four key areas of focus to address these limitations:

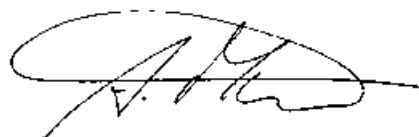
1. develop further enforcement co-operation work-products and networks
2. improve transparency and trust between competition authorities
3. provide policy and practical support for further developing effective regional enforcement co-operation
4. remove substantive and legal barriers to co-operation

The OECD and ICN are well placed to develop ambitious solutions to the identified challenges. Next to further improving, refining and expanding their work products, inspiration can also be derived from other areas of law and policy that are facing similar cross-border enforcement challenges.

It is time for both organisations to marshal their resources and to use the momentum of support for improving enforcement co-operation expressed by competition authorities to create a plan of action to address the main challenges the Report clearly identifies.



Frédéric Jenny
Chair of the OECD Competition
Committee



Andreas Mundt
President of the Bundeskartellamt and
International Competition Network.

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The “OECD/ICN Report on International Co-operation in Competition Enforcement” (Report) reflects the efforts of many people and organisations committed to improving international enforcement co-operation within the competition community, both through contributions to this Report and through developing international enforcement co-operation over many years through various recommendations, papers, tools, activities and networks.

The Report was drafted through a collaborative process involving both the Organisations for Economic Co-operation and Development (OECD) and International Competition Network (ICN). Drafting of the Report was led by Isolde Lueckenhausen, a secondee to the OECD from the Australian Competition and Consumer Commission (ACCC), an authority that is an active member of both the OECD Competition Committee and ICN.

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The authors of this Report would like to acknowledge the significant and invaluable contributions made by the authors of the past OECD and ICN papers, reports and documents relating to international enforcement co-operation, on which this Report relies. Key documents are noted in the Report and in the bibliography.

Finally, a special thanks is extended to all those authority staff members who were involved in preparing the response to the 2019 Survey and providing subsequent drafting comments. Effective global competition enforcement relies on this network of professionals, who are committed to improving international co-operation.

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Reader's guide

This Reader's Guide is designed to assist with focused reading and to highlight the parts of the Report that may be of highest relevance to most readers. The structure of the Report is summarised in *Section 2. Structure of the Report*.

At the start of each part and section there is an overview of what is covered in that part or section.

A summary of the methodology used to process, consider and present the Survey results is set out in *Section 8.7: Summary of methodology*, with a more detailed methodology set out in *Annex A: Methodology*.

Readers who would like a shorter overview should focus on the Executive Summary and Part I, which provides summaries of the main findings of the Report and proposed future areas of focus to improve international enforcement co-operation.

Readers who are particularly interested in areas for future work and next steps should focus on Part IV. Additionally, they may want to consult *Annex D: Overview of other legal models for enforcement co-operation*, which introduces potential legal models for international enforcement co-operation.

Key terms that are defined within this Report include:

- OECD/ICN Project on International Co-operation in Competition Enforcement (**Project**)
- OECD/ICN Report on International Co-operation in Competition Enforcement (**Report**)
- Survey of OECD and ICN members regarding on international enforcement co-operation conducted in 2019 (**Survey** - see *Annex B: 2019 Survey*)
- Survey of OECD and ICN members regarding on international enforcement co-operation conducted in 2012 (**2012 Survey**)
- OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings 2014 (**2014 OECD Recommendation** – see *Annex C: 2014 OECD Recommendation*)
- OECD Competition Committee Secretariat (**OECD Secretariat**)

Other terms are defined as they arise and abbreviations and acronyms are set out in the *Section: Abbreviations and Acronyms*.

A few OECD documents referenced in the Report have not been declassified and are only available to those who have access to the OECD O.N.E platform for the OECD Competition Committee. Any queries about these documents should be referred to the OECD Secretariat.

Abbreviations and acronyms

ACCC	Australian Competition and Consumer Commission
ACEN	ASEAN Competition Enforcement Network
ACF	African Competition Forum
AdC	Autoridade da Concorrência
AEGC	ASEAN Expert Group on Competition
AfCFTA	African Continental Free Trade Area
AGCM	Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority)
ANZCERTA	Australian New Zealand Closer Economic Relations Trade Agreement
APEC	Asia Pacific Economic Co-operation
ASEAN	Association of South-East Asian Nations
BEUC	Bureau Européen des Unions de Consommateurs
BRICS	Brazil, the Russian Federation, India, China and South Africa
CADE	Conselho Administrativo de Defesa Econômica. (Administrative Council for Economic Defense of Brazil)
CAN	Comunidad Andina (Andean Community)
CARICOM	Caribbean Community
CCB	Canadian Competition Bureau
CCC	CARICOM Competition Commission
CCPC	Competition and Consumer Protection Commission
CCSA	Competition Commission of South Africa
CEMAC	Central African Economic and Monetary Community
CLIP	Competition Law Implementation Program
CMA	Competition and Markets Authority of the United Kingdom
COFECE	Comisión Federal de Competencia Económica (Mexican Federal Economic Competition Commission)

COMESA	Common Market for Eastern and Southern Africa
COTED	Council for Trade and Economic Development
CSME	CARICOM Single Market and Economy
CWG	Cartel Working Group
CWTA	Canadian Wireless Telecommunications Association
DCCA	Danish Competition and Consumer Authority
DGIC	Discussion Group on International Co-operation
EA02	Enterprise Act 2002
EAC (CAE)	East African Community (Communauté d'Afrique de l'Est)
EACCA	EAC Competition Authority
EAEU	Eurasia Economic Union
EATOP	East Asian Top Level Officials' Meeting on Competition Policy
EC	European Commission
ECN	European Competition Network
ECOWAS (CEDEAO)	Economic Union of West African States (Communauté Economique Des Etats de l'Afrique de l'Ouest)
EEA	European Economic Area
EEC	Eurasian Economic Commission
EFTA	European Free Trade Association
EPAs	Economic Partnership Agreements
ERCA	ECOWAS Regional Competition Authority
ESA	EFTA Surveillance Authority
EU	European Union
FNE	Fiscalía Nacional Económica
FTAC	Fair Trade Authority of Curaçao
FTAs	Free Trade Agreements
FTC	US Federal Trade Commission
GDP	Gross Domestic Product
GVH	Hungarian Competition Authority (Gazdasági Versenyhivatal)
GWB	German Competition Act
ICN	International Competition Network

ICN CAP	International Competition Network Competition Authorities Procedures
ICTSD	International Centre for Trade and Sustainable Development
IGE	Intergovernmental Group of Experts
INDECOPI	Peruvian Competition Authority
IOSCO	International Organization of Securities Commissions
JFTC	Japan Fair Trade Commission
KFTC	Fair Trade Commission of the Republic of Korea
MAAC	Convention on Mutual Administrative Assistance in Tax Matters
MABRA	Mutual Assistance in Business Regulation Act 1992
MCAA	Multi-lateral Competent Authority Agreement
MCAA CBC	Multi-lateral Competent Authority Agreement Country by Country
MCAA CRS	Multi-lateral Competent Authority Agreement on Automatic Exchange of Financial Account Information
MERCOSUR (MERCOSUL)	Southern Common Market (Mercado Común del Sur or Mercado Comum do Sul)
MLATs	Mutual Legal Assistance Treaties
MMOU	Multi-lateral Memorandum of Understanding
MoU	Memorandum of Understanding
MTC	Model Tax Convention on Income and on Capital
MWG	Merger Working Group
NAEC	New Approaches to Economic Challenges
NAFTA	North American Free Trade Agreement
NCA	Norwegian Competition Authority
NDCR	National Development and Reform Commission of China
NGAs	Non governmental advisors
NZCC	New Zealand Commerce Commission
OECD	Organisation for Economic Co-operation and Development
OECD-GVH RCC	OECD-GVH Regional Centre for Competition
OECS	Organisation of Eastern Caribbean States
PCC	Philippines Competition Commission

PPP	Purchasing Power Parity
RCAs	Regional Competition Agreements
RECAC	Red Centroamericana de Autoridades Nacionales Encargadas del Tema de Competencia (Central American National Competition Authorities Network)
RIA+Supra	Regional Integration Arrangements with competition competencies and supra-national decision making bodies
SADC	Southern African Development Community
SAIC	State Administration for Industry and Commerce of China
SEP	Standard Essential Patent
TFEU	Treaty for the Functioning of the European Union
UCWG	Unilateral Conduct Working Group
UNCTAD	United Nations Conference on Trade and Development
US DOJ	US Department of Justice
US FTC	US Federal Trade Commission
USCMA	United States-Canada-Mexico Agreement
VCLT	1969 Vienna Convention on the Law of Treaties
WAEMU (UEMOA)	West African Economic and Monetary Union (Union économique et monétaire ouest-africaine)
WP3	Working Party 3

Executive summary

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.

Improving enforcement co-operation between competition authorities has been a priority for both the OECD and ICN for many years. Both organisations have engaged in initiatives to build international competition enforcement co-operation and developed a substantial body of resources and policy guidance designed to improve enforcement co-operation.¹ This work has included comparative reports, non-binding recommendations and frameworks, roundtable discussions and practical tools for improving enforcement co-operation in different enforcement areas.

This is the first Joint Report on International Enforcement Co-operation² (Report) by the Organisation for Economic Co-operation and Development (OECD) Secretariat and the International Competition Network (ICN). It follows the first joint survey on international enforcement co-operation by the OECD and ICN in 2012 (2012 Survey), which resulted in two separate reports, one from each organisation (OECD, 2013_[1]) (ICN, 2018_[2]).

The Report outlines key aspects of the current state of international enforcement co-operation between competition authorities based on: the drivers of international enforcement co-operation (*Section 10. Drivers of international enforcement co-operation*); a high-level review of key OECD and ICN initiatives to support international enforcement co-operation (see *Section 11. History of initiatives relating to international enforcement co-operation*); the results and analysis of the survey conducted of OECD and ICN members in 2019 (Survey); and comparisons with 2012 Survey results. These elements combined inform the development of the proposed future areas of focus as set out in detail in *Section 21. Proposed future areas of focus to improve international enforcement co-operation*.

The Report demonstrates that, in general, international enforcement co-operation has been increasing since 2012 in all enforcement areas, and that there are differences in intensity and frequency between different types of enforcement co-operation.³ It also demonstrates that authorities value the significant work that has been undertaken by the OECD, ICN and broader competition community to increase support for improving international

¹ See *Section 11*. For a history of the OECD and ICN's work on international enforcement co-operation.

² See *Section 9*. for a description and discussion of what is included in the term 'international enforcement co operation'

³ *Section 9*. describes some key types of co-operation and commonly used terms in this Report

enforcement co-operation. The key findings regarding the past and current status of international enforcement co-operation are that:

- 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 Report demonstrates that limitations and challenges to international enforcement co-operation remain, especially for certain types of co-operation. The Report presents the five key categories of challenges that limit international enforcement co-operation:

- resourcing
- co-ordination/timing
- legal limitations, especially relating to:
 - confidential information sharing
 - investigative assistance
 - enhanced co-operation⁴
- trust and reciprocity
- practical issues (e.g. language, time differences etc.).⁵

Competition authorities want the OECD and ICN to continue their work on improving international enforcement co-operation, including focusing on what has worked well to date and looking for new ways to address long-standing barriers to enforcement co-operation. The Report proposes some high-level future areas of focus and development for consideration by competition authorities, the OECD, the ICN and other interested parties. These include eight proposals in the following four future areas of focus:

- develop further enforcement co-operation work-products and networks (Focus Areas 1.1-1.5)
- improve transparency and trust (Focus Area 2)
- provide policy and practical support for further developing effective regional enforcement co-operation (Focus Area 3)
- remove substantive and legal barriers to co-operation (Focus Area 4).

⁴ See *Section 9.1* for a description of these three types of co-operation.

⁵ These challenges are described in further detail in *Section 15*.

Part I. Summary of the Report

1. Overview of Part 1

1. This Part provides an overview of the Report and summarises the main sections, including:
 - a description of the structure of the report (*Section 2. Structure of the Report*)
 - a summary of the 2019 respondents to the survey (*Section 3. The 2019 respondents to the Survey*)
 - a summary of the findings from the Report on the current situation of international enforcement co-operation (*Section 4. Summary of the current status of international enforcement co-operation*)
 - a summary of the views of competition authorities on what they would like the OECD and the ICN to work on in the future (*Section 5. Summary of the respondents' views on future work for OECD and ICN*);
 - a summary of the proposed future areas of focus designed to promote and improve international enforcement co-operation (*Section 6. Proposed future areas of focus to improve international enforcement co-operation*)

2. Structure of the Report

2. This Report is divided into four parts:
 - Part I: Summary of the Report
 - Part II: Context for considering the Survey results
 - Part III: Survey results and analysis
 - Part IV: Proposed future areas of focus
3. Part II provides context for the discussion of the Survey results and the comparative analysis with 2012 Survey results. Part II includes:
 - an overview of the Project itself, including; the parties to the Project, the respondents to the Survey, and a summary of the methodology used to analyse and present the data (*Section 8. OECD and ICN Joint Project on International Enforcement Co-operation*)
 - an explanation of the meaning of international enforcement co-operation and the conceptual framework used to describe the activities that it can encompass, including providing definitions of the key types of enforcement co-operation (*Section 9. What is international enforcement co-operation?*).
 - the drivers of enforcement co-operation (*Section 10. Drivers of international enforcement co-operation*)
 - a high-level overview of the history of OECD and ICN initiatives designed to improve international enforcement co-operation (*Section 11. History of initiatives relating to international enforcement co-operation*).
4. Part III of the Report includes the results of the 2019 Survey and a comparative analysis with the 2012 Survey results. It includes information regarding past, present and future issues in international enforcement co-operation. The Survey addresses the following key areas regarding international enforcement co-operation:
 - the frequency of international enforcement co-operation between competition authorities (including by enforcement area and type, and over time) (*Section 12. Frequency of international enforcement co-operation*)
 - the legal bases (*Section 13. Legal bases for co-operation*)
 - the objectives, benefits and usefulness (*Section 14. The value of international enforcement co-operation for authorities: objectives, benefits and usefulness*)
 - the limitations and challenges (*Section 15. Limitations and challenges to international enforcement co-operation*)
 - authority experience with different specific types of enforcement co-operation (*Sections: 16. Notification, comity and co-ordination; 17. Investigative assistance*)

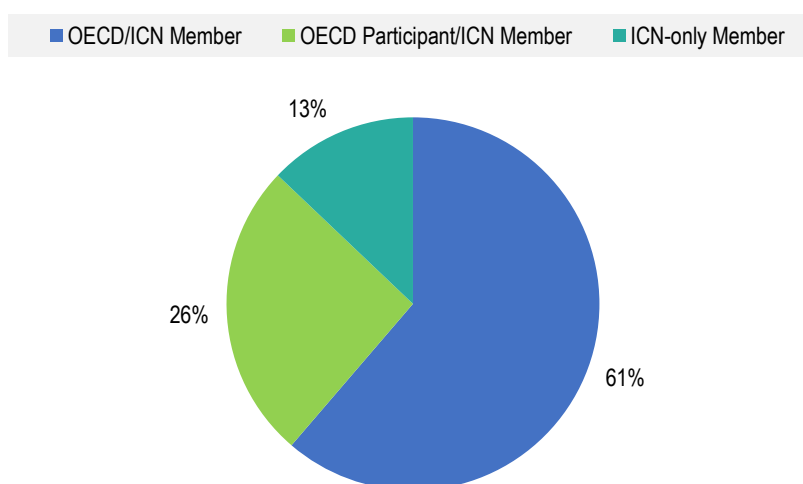
and enhanced co-operation; 18. Information sharing and confidentiality waivers; 19. Regional enforcement co-operation)

- views of authorities as to how to improve the quality and intensity of future international enforcement co-operation between authorities, in particular in relation to the utility of past OECD and ICN work and what future activities should be undertaken (*Section 20. Future vision and respondents' views on future work for OECD and ICN*).
5. Part IV of the Report concludes that while progress has been made since 2012, international enforcement co-operation can be still be significantly improved. It proposes some future areas of focus for consideration and development by competition authorities, the OECD, ICN and other interested parties.

3. The 2019 respondents to the Survey

6. The Survey received a total of 62 responses by competition authorities. All respondents were members of the ICN and 100% of OECD Members and Participants⁶ responded. There were 38 OECD Members,⁷ 16 OECD Participants and 8 ICN-only authorities (61%, 26% and 13% of respondents respectively). Accordingly, 46 of the respondents are engaged in both institutions.

Figure 3.1. Distribution of responses, by type of membership, 2019



Source: OECD/ICN Joint Survey 2019

7. In comparison to the 2012 Survey,⁸ the response rate has increased by 9% in total (57 in 2012 compared to 62 respondents in 2019) – see *Table 3.1*. In 2012, there were 35 OECD Members and 11 Participants, whereas in 2019 there were 38 OECD Members and 16 OECD Participants.⁹

⁶ For the purposes of this Report, OECD Competition Committee Associates will be grouped with OECD Participants. See *Section 8.1: The Organisation for Economic Co-operation and Development (OECD)* below relating to the composition of the OECD Competition Committee.

⁷ The European Commission is a Survey respondent and has been counted as an OECD Member for the purposes of this Report, as was done in 2012.

⁸ As is further explained in the methodology, this Report considers where and when comparisons between the two data sets are useful and clarifies any potentially misleading elements of the data that may arise as a result of differences between the 2012 and 2019 Surveys.

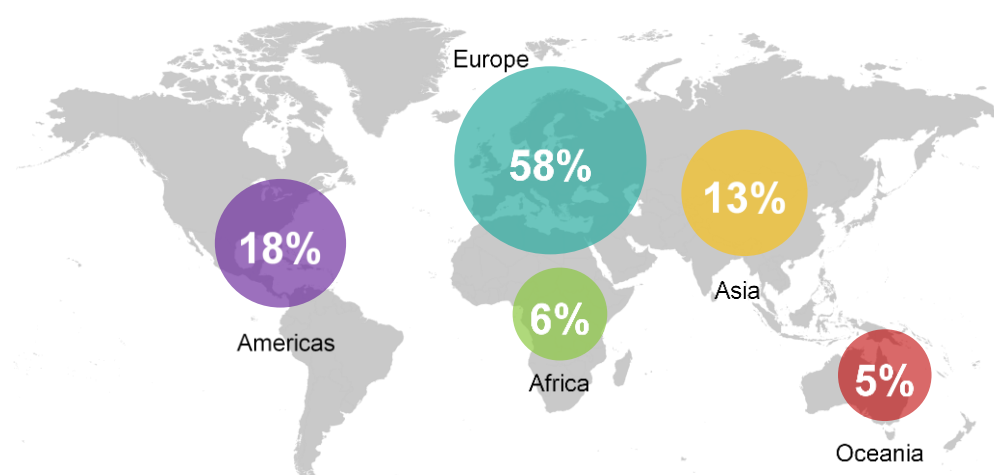
⁹ Details of these additions are included in *Section 8.6: Overview of the responses to the Survey*.

Table 3.1. Survey response rate, by type of membership, 2012 vs. 2019

Membership type	# 2012	Response Rate 2012	# 2019	Response Rate 2019	Var %
OECD/ICN Members	32	91%	38	100%	
OECD Participants/ICN Members	12	87%	16	100%	
ICN-only Members	11	---	8	---	
Total ICN Respondents	57	47%	62	48%	
TOTAL Respondents	57	---	62	---	9%

Source: OECD/ICN Joint Survey, 2012 and 2019.

8. In terms of the geographical distribution of respondents: 58% were from Europe, 18% from the Americas, 13% from Asia, 6% from Africa and 5% from Oceania, as is presented in *Figure 3.2* below.

Figure 3.2. Geographical distribution of responses, by region, 2019

Source: OECD/ICN Joint Survey

9. Respondents to the Survey account for approximately 80% of global GDP.¹⁰ Although 53% of the ICN membership did not respond to the Survey,¹¹ the OECD/ICN Joint Project on International Enforcement Co-operation drafting team sought feedback on the Report from the entire ICN membership and welcomed further engagement from authorities that did not submit a response to the 2019 Survey. No additional ICN members provided feedback at the drafting stage of the Report.

¹⁰ Data on the GDP, PPP (current international \$) (World Bank Data, 2018_[237]) (accessed on 10 February 2020) and (World Trade Organization, 2018_[238]) for Chinese Taipei (accessed on 10 February 2020).

¹¹ The non-respondents to the Survey are considered in further detail in *Section 8.6.4: Non-respondents to Survey*.

4. Summary of the current status of international enforcement co-operation

10. The overview of the current status of international co-operation is informed by analysis from both Parts II and III of the Report and summarised in this section. From Part II, there are findings relating to the drivers of international enforcement co-operation and the history of OECD and ICN initiatives. From Part III, there are findings regarding the past and current status of international enforcement co-operation based on a review of the Survey and 2012 Survey.

4.1. Key drivers of international enforcement co-operation

11. The key drivers for increasing and improving international enforcement co-operation for at least the last two decades are:
 - the increase in the number of competition authorities and the maturing and expansion of all authorities' competencies
 - the continued growth in international economic interconnectedness and interdependence
 - developments in the international digital economy.
12. These key drivers will have long-term relevance and mean that authorities are more likely to be considering the same or similar issues concurrently within their jurisdictions; investigating the same cross-border enforcement matters; and considering how their current tools, resources and laws are equipped to deal with these global developments.

4.2. History of initiatives relating to international enforcement co-operation

13. OECD and ICN work on international enforcement co-operation has improved the conceptual frameworks, practices and practical tools for international enforcement co-operation. Competition authorities support efforts to improve international enforcement co-operation given both the benefits to both domestic and global competition enforcement. The work that has been done to date by the OECD and ICN is part of the framework and support for improving international enforcement co-operation.
14. This section in the Report reviews the development of the OECD and ICN work over time. In relation to the OECD, it considers the work of various iterations of Recommendations relating to international enforcement co-operation, hard core cartels and mergers. It examines the more intensive work that led to the 2014 OECD Recommendation and the subsequent work of the OECD Secretariat in addressing key policy and practical issues relating to various aspects of enforcement co-operation. In relation to the ICN, it covers the key works developed to support enforcement co-operation, particularly the detailed enforcement co-operation guidance and frameworks prepared by the Cartels Working Group and Mergers Working Group.
15. The history of the work of both the OECD and ICN demonstrates that the practical and theoretical value and challenges of enforcement co-operation have been understood for many years. It shows that while some challenges have been addressed, some challenges

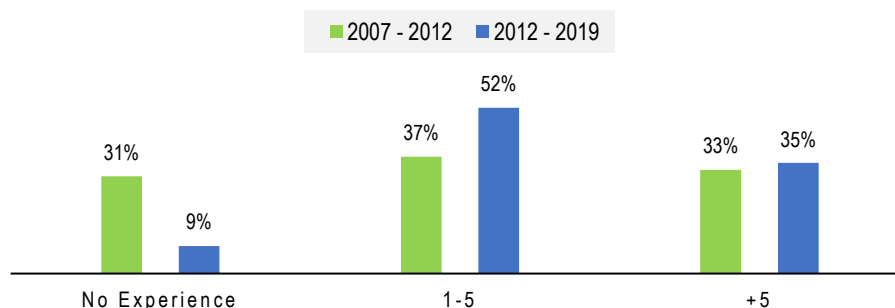
are unlikely to be resolved without new approaches. This past context is useful for evaluating any proposed future areas of work for both the OECD and ICN.

16. The history shows that the challenges of enforcement co-operation are various and that in many instances resolutions to these challenges are iterative and require a range of different responses: both high-level policy recommendations and advice (such as OECD recommendations), along with more practical approaches (such as templates and guidance for co-operating on mergers and cartel matters). The history outlined in this Section shows that the ICN and OECD have had distinct but over-lapping responsibilities and roles, and that continued efforts to co-ordinate and co-operate between the organisations are likely to advance efforts to improve enforcement co-operation.

4.3. Increase in instances of international enforcement co-operation

17. Enforcement co-operation between authorities outside of their established regional organisations and networks has increased overall since the 2012 Survey.¹² There was a slight decline in 2018, but the trend since 2012 points generally upwards.¹³ This trend of increasing enforcement co-operation is reflected in the comparison between the 2012 and 2019 Survey results regarding the number of “cases/investigations”¹⁴ in which authorities have co-operated, as shown in *Figure 4.1*. This trend is also mirrored in the 2012 and 2019 comparison of the “number of authorities with which an authority has co-operated”.¹⁵

Figure 4.1 Number of cases/investigations in which authorities have co-operated (enforcement areas combined), by percentage of respondents to the question, 2007 – 2012 vs. 2012 – 2018



Source: OECD/ICN Joint Survey 2019, Question 18 – Table 5.2

Data source type: defined data set

Figure depicts responses as proportions over total number of respondents to the question

¹² See *Section 12*. : Frequency of international enforcement co-operation for Survey results and *Section 19*. Regional enforcement co-operation for a description of regional organisations and networks and *Section 9.1.4* Regional enforcement co-operation for a definition.

¹³ See *Section 12*. : Frequency of international enforcement co-operation.

¹⁴ The term “case/investigation” was not defined in the Survey. Accordingly, the results may reflect differences between jurisdictions as to what they consider a “case” or “investigation”, including when it commences.

¹⁵ See *Section 12.3*: Frequency of enforcement co-operation - number of authority contacts.

Note: 'no response' included given it is a comparison between 2012 and 2019.
Response rate: 2012:84%, 2019: 82%

18. The Survey results show that merger co-operation (outside of regional networks)¹⁶ is occurring more frequently than enforcement co-operation relating to cartels and unilateral conduct, and that the different types of co-operation¹⁷ vary slightly between the enforcement areas.¹⁸ There is a significant decrease in the number of authorities with no experience in enforcement co-operation.¹⁹
19. For both international and regional enforcement co-operation, the majority of co-operation (when considered as a whole, not by enforcement type) occurs during an investigation (e.g. once case proceedings have been officially initiated), rather than pre- or post-investigation.²⁰ Some respondents identified beginning enforcement co-operation earlier in an investigation as a potential area for improvement.

4.4. Legal bases for enforcement co-operation and existing legal barriers

20. The Report shows the legal bases for enforcement co-operation between authorities are varied and depend on the type of co-operation involved. Authorities are co-operating effectively in many cases using existing informal and formal tools and resources to support enforcement co-operation.
21. The legal bases used by authorities for enforcement co-operation vary and depend on both the type of enforcement co-operation and enforcement area concerned. *Figure 4.2* shows the number of respondents who have one or more of the legal instruments listed in the Survey available as a basis for international enforcement co-operation, and includes results on the frequency of use and relevance of each of these.²¹ *Figure 4.2* shows that national law provisions, confidentiality waivers, multi-lateral competition agreements and letters rogatory have the highest scores in relevance and in frequency of use.²² In addition, those respondents who were part of a Regional Integration Arrangement (RIA),²³ noted this legal basis was one of the most frequent and relevant bases for their enforcement co-operation.

¹⁶ The Survey questions excluded regional networks, see *Section 8.5: Overview of the Survey questions*.

¹⁷ High-level descriptions of the types enforcement co-operation that exist are outlined in *Section 9.1: Commonly used key terms, concepts and definitions*, and in *Section 12.5: Frequency of types of enforcement co-operation by enforcement area*, respondents were provided with more detailed options of types of enforcement co-operation that can occur in a matter, and the frequency of these varied between enforcement areas.

¹⁸ See *Section 12.5: Frequency of types of enforcement co-operation by enforcement area*

¹⁹ See *Section 12.4: Frequency of enforcement co-operation - number of cases by enforcement area*

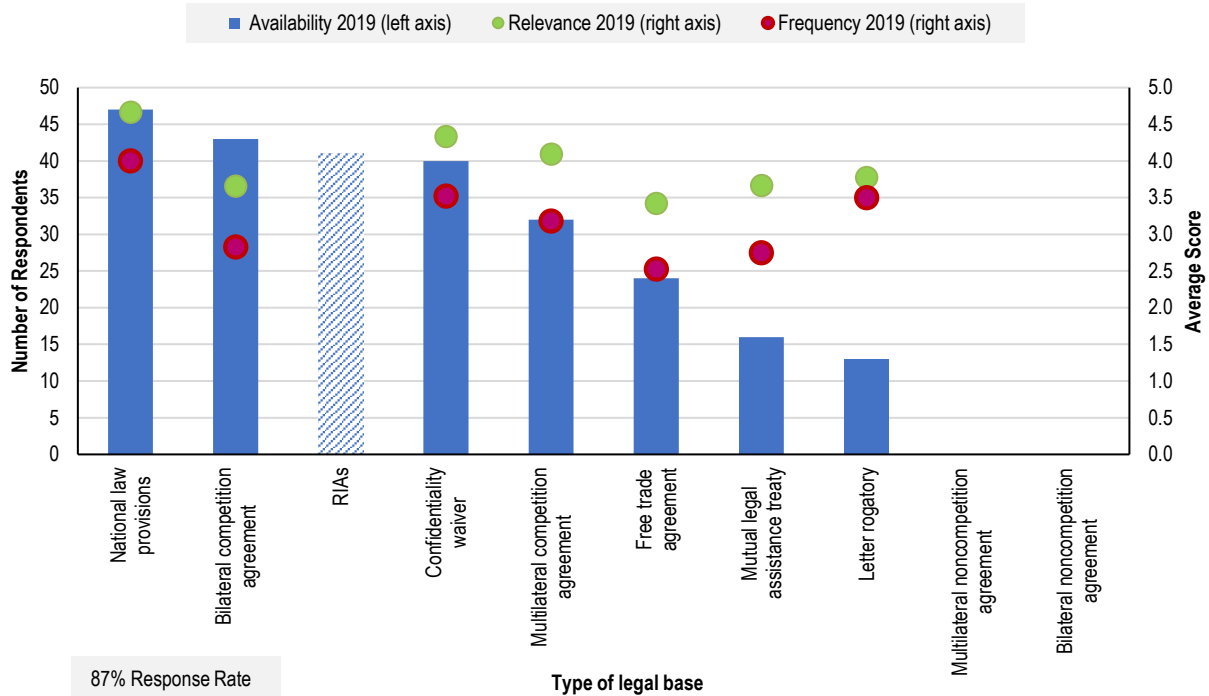
²⁰ See *Section 12.2: Frequency of co-operation at various stages of a case/investigation*

²¹ Survey participants were asked to assign a level of frequency of use and relevance to each legal basis. A score was assigned to each level: starting from 1 for never and not relevant, up to 5 for always and very relevant.

²² These terms are defined in *Section 13. Legal bases for co-operation*.

²³ RIA is defined in *Section 13. Legal bases for co-operation*.

Figure 4.2. Availability of legal bases for international enforcement co-operation with the average score on relevance and frequency of use, 2019



Source: OECD/ICN Joint Survey 2019, Question 8 – Table 2

Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts the average score, where options were [Frequently (>60% of cases) =3], [Occasionally (20-60% of cases) =2], [Seldom (<20%) =1], [Never=0], [High =3], [Medium =2] and [Low =1]

Relevance and frequency is calculated on the basis of those who have that legal bases available.

Note: As RIAs was a category not included in the Survey but created subsequently based on the Survey responses, it has been marked with a striped line to differentiate it and there are no results in relation to relevance or frequency.

22. There has been a significant increase in the number of first-generation²⁴ bi-lateral enforcement co-operation agreements and arrangements since 2012 (approximately 45 more compared to 2012), following a trend that began in 2007/2008.²⁵ However, only a few bi-lateral or multi-lateral second-generation enforcement co-operation agreements were completed in this same period, although a few more are currently being negotiated.²⁶ Although bi-lateral competition agreements are the most common legal basis for enforcement co-operation, according to respondents, they are not the most frequently used nor the most relevant.

²⁴ See definition of “first-generation agreements” and “second-generation agreements” in Section 9.1.2: First-generation and second-generation agreements.

²⁵ See Section: Bi-lateral competition agreements below.

²⁶ See Section: Second-generation bi-lateral and multi-lateral competition agreements relating for both a definition and discussion of ‘second-generation’ agreements, including agreements being currently negotiated.

23. Many authorities reported that they were co-operating effectively using their existing legal authority and instruments, together with tools, resources and networks that support their enforcement co-operation. However, while progress has been made towards improving enforcement co-operation since 2012, some authorities pointed out that significant legal barriers continue to exist in respect of: (i) exchanging confidential information absent a waiver, (ii) certain forms of investigative assistance and (iii) certain forms of enhanced co-operation.²⁷ The Report shows that even where these legal barriers do not exist, for all these three forms of enforcement co-operation to be effective, they generally require a strong relationship of trust and understanding of applicable laws, practices, procedures, and protections (*e.g.*, confidentiality and privilege) between authorities, which is frequently developed through informal co-operation and contacts that precede enforcement co-operation.

4.5. Key benefits of enforcement co-operation

24. The types of benefits obtained from international enforcement co-operation vary between authorities based on their size, maturity, resources and legal systems. However, 100% of respondents to the question confirmed that international enforcement co-operation is beneficial for their authority.²⁸ The benefits listed by authorities align with their responses regarding the objectives of international enforcement co-operation, providing further detail and reflecting similar benefits to those noted in the 2012 Survey. There are three key categories of benefit:

- opportunities for more efficient and effective consideration of competition matters
- further enhancing co-ordination and co-operation systems and practices among authorities
- improving relationships, trust and transparency.²⁹

25. Although some benefits were listed more frequently than others, in practice, many benefits are interrelated. For example, an exchange of sensitive information (such as information about a possible cartel or details about an authority's investigatory practices) may not occur if there is not trust in the relationship, reciprocity, transparency and an understanding of a counterpart authority's practices and procedures.

26. The Survey shows that given some of the practical, policy and legal differences between enforcement areas, different types of enforcement co-operation may be more or less useful for different enforcement areas. For example, remedy design and implementation is a more frequent area of co-operation in merger matters, while co-ordinating access to witnesses is more likely to be relevant in cartel cases.

²⁷ These terms are defined below in *Section 9.1: Commonly used key terms, concepts and definitions*.

²⁸ Eighty-even per cent [87%] of the Survey respondents answered Question 3.

²⁹ Further detail is provided in *Section 14.6: Benefits of international enforcement co-operation*

4.6. Key challenges and limitations to effective enforcement co-operation

27. The Survey demonstrates that limitations and challenges to international enforcement co-operation remain, especially for certain types of co-operation. The Report presents the five key categories of challenges that limit international enforcement co-operation:

- 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.).

28. *Table 4.1* provides a summary of some of the key challenges to effective enforcement co-operation. The most significant limitations are ‘the existence of legal limits’ and the ‘absence of waivers’.

Table 4.1. Limitations to international enforcement co-operation, by level of importance, 2019

	Average Importance Score	High Importance	Medium Importance	Low Importance	Total Respondents
Existence of a Legal Limit(s)	2.6	61%	39%	0%	33
Absence of Waiver(s)	2.2	45%	27%	27%	33
Lack of Resources / Time	2.0	38%	21%	42%	34
Low Willingness to Co-operate	2.0	39%	18%	42%	33
Other Differences Between Legal Systems	2.0	23%	48%	24%	31
Different Legal Standard(s)	1.9	22%	48%	27%	32
Lack of Knowledge of Involvement	1.9	35%	18%	48%	34
Lack of Trust	1.9	30%	27%	42%	33
Different Stages in Procedures	1.7	16%	36%	45%	32
Language / Cultural Differences	1.6	12%	36%	55%	34
Dual Criminality Requirement (Cartels):	1.6	21%	12%	58%	29
Different Time Zones	1.1	3%	3%	94%	33

Percentage of Survey respondents who completed this table: 77%

Source: OECD/ICN Joint Survey 2019, Question 29 – Table 7

Data source type: defined data set

Table depicts responses where respondents may have provided multiple responses

Table depicts the average importance score, where options were [High =3], [Medium =2] and [Low =1]

29. While respondents confirmed that the majority of enforcement co-operation can occur informally or within existing legal frameworks, many respondents noted there were still significant legal barriers (particularly limitations within national laws) that continue to prevent or restrict some enforcement co-operation activities (such as confidential information sharing absent a waiver, some forms of investigative assistance and some forms on enhanced co-operation). Respondents noted that efforts to resolve limitations were very challenging, particularly where they required changes

to national law or resource and time-intensive negotiation of second-generation agreements.³⁰

30. Respondents identified the need for the development of trust and relationships between authorities in order to improve the prospects and quality of enforcement co-operation, including having a clearer understanding of the legal frameworks and procedures of their counterparts (e.g. matters such as the treatment of confidential information).
31. Respondents noted both resource constraints and practical issues with timing and co-ordination of enforcement co-operation (especially where authorities had different procedural timeframes), as significant barriers to co-operation. Trying to resolve these issues as they arise (i.e. as enforcement co-operation is needed on a particular matter) meant that for some respondents, enforcement co-operation on some matters was not possible, even where it was likely to have been beneficial.

4.7. Regional enforcement co-operation

32. Many respondents noted that regional enforcement co-operation was often the most common and effective form of co-operation for their authority, although there are significant variations between types of regional enforcement co-operation and their effectiveness.³¹
33. The Survey asked a number of questions specific to regional enforcement co-operation³² and excluded it from other parts of the Survey,³³ primarily in order to get a picture of regional co-operation outside of European Union arrangements (given that EU members made up a significant proportion of the respondents). As a result, the Survey shows some useful information specific to regional enforcement co-operation, but does not capture data in the same detail as in the questions in other parts of the Survey, e.g. concerning levels of co-operation by enforcement area. Given the value attributed to these regional networks that facilitate enforcement co-operation by authorities of various sizes and maturity, it would likely be valuable to further consider how regional networks are operating and how they may be supported as a pathway to promote even broader international enforcement co-operation. This is addressed in the potential future areas of focus section of the Report.
34. The EU remains the most integrated and comprehensive example of regional enforcement co-operation. However, other regional models also provide for deep and effective enforcement co-operation, such as the Nordic Alliance and the Australia and New Zealand arrangements. Further, even where regional arrangements may be facing challenges³⁴ or are supported only by very high-level or limited enforcement co-

³⁰ This first requires a legal ability to make these – see national laws in *Section 13.2.1 National laws*.

³¹ See *Section 19. : Regional enforcement co-operation* for discussion of regional co-operation and *Annex J: Regional co-operation networks and organisations* for an overview of regional co-operation.

³² Part 8 of the Survey.

³³ Regional enforcement co-operation was excluded from Parts 3, 4, 5, 6 and 7.

³⁴ See for example the challenges facing some non-EU ‘Regional Co-operation Agreements’ outlined in *Benefits and challenges of regional competition agreements* (OECD, 2018_[13])

operation instruments; respondents noted regional relationships and networks are still the source of the most frequent enforcement co-operation for many authorities.

35. Many smaller EU authorities noted that they do not engage in much enforcement co-operation outside of the EU. It is possible that regional enforcement co-operation might come, for some authorities, at the 'cost' of more fulsome international enforcement co-operation if they feel their enforcement co-operation needs are mostly met through the membership in their regional organisation. In these instances, the international enforcement co-operation undertaken by the supra-national authority or larger member authorities can prove to be even more important in supporting global enforcement co-operation.

5. Summary of the respondents' views on future work for OECD and ICN

36. The Survey asked respondents about their vision for the future of enforcement co-operation,³⁵ their views on the OECD 2014 OECD Recommendation, the usefulness of the ICN's work to date³⁶ and the future areas of focus they would like to see addressed by each organisation, which are outlined below.³⁷

5.1. Future vision for improving enforcement co-operation

37. Many respondents to the Survey listed variations of the benefits outlined above as their vision for the future of international enforcement co-operation. The improvement respondents are seeking, fall into the following key categories:

- more effectively foster and utilise informal enforcement co-operation
- improve access to, and promotion of, successful tools and models for enforcement co-operation
- earlier/more timely enforcement co-operation, including better pre-investigation co-operation
- greater transparency about what information authorities may share and how
- more formal instruments to improve enforcement co-operation and remove legal barriers
- more enhanced and co-ordinated enforcement co-operation on matters of mutual concern (i.e. where enforcement co-operation on specific cases intersects with broader policy or enforcement issues, such as some of the challenges arising from the digital economy).

38. As with the responses to many other qualitative assessment questions in the Survey, it is unclear if all of these elements are valued by all authorities and with equal weight. However, they do align with other responses to the Survey regarding current challenges with, and limitations of, international enforcement co-operation, as well as the responses to the Survey questions regarding what could be improved.³⁸

5.2. Respondents' views on future work for OECD and the 2014 OECD Recommendation

39. Respondents were given a range of options for future work for the OECD and their responses are set out in *Figure 5.1*. These results, together with the responses to the open-ended queries and consideration of the overall Survey results, provide a useful

³⁵ Part 1, Question 6 of Survey.

³⁶ Parts 9 and 10, Questions 39 – 48 of Survey.

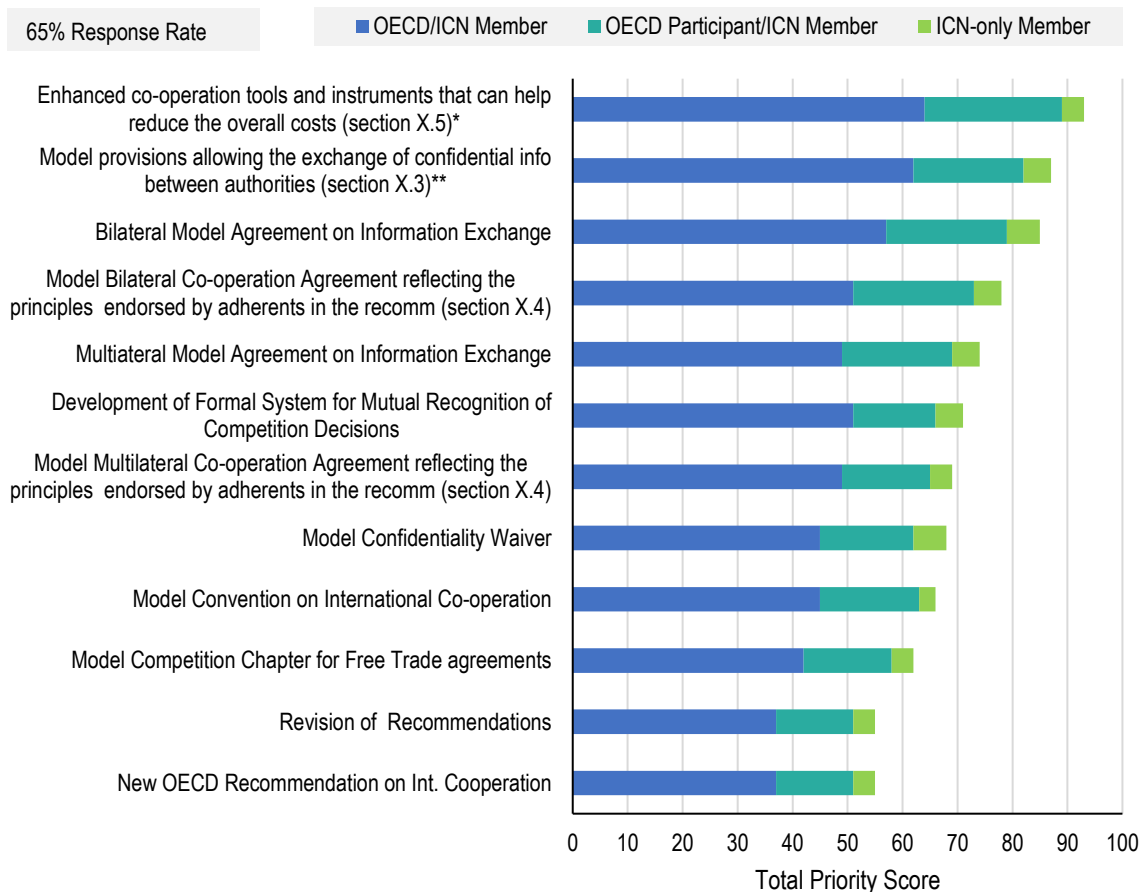
³⁷ Part 7, Questions 34 -36 of Survey.

³⁸ Part 7, Questions 34 -36 of Survey, see *Section 20*. Future vision and respondents' views on future work for OECD and ICN.

basis for potential future areas of focus for the OECD. The top four responses from the defined list of options are:

- 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 enforcement actions (as set out in Section X.5 of the 2014 OECD Recommendation)
- development of model provisions allowing the exchange of confidential information between competition authorities subject to safeguards, without the need to obtain the prior consent from the source of the information (as set out in Section X.3 of the 2014 OECD Recommendation)
- development of a bi-lateral model agreement on information exchange
- development of a model bi-lateral co-operation agreement reflecting the principles endorsed by in the 2014 OECD Recommendation (see Section X.4 of the 2014 OECD Recommendation).

Figure 5.1. Future work for the OECD, by priority score, by type of respondent, 2019



Source: OECD/ICN Joint Survey 2019, Question 44 – Table 10

Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts summed ordinal scores, where options were: [High = 3], [Medium=2] and [Low=1]

** Enhanced co-operation tools and instruments that can help reduce the overall costs associated with investigations or proceedings by multiple comp authorities and at the same time avoid inconsistencies among enforcement actions (section X.5)*

*** Model provisions allowing the exchange of confidential info between authorities without the need to obtain the prior consent from the source of the info and subject to the safeguards as provided in this Recomm (section X.3)*

40. In relation to the use and dissemination of the 2014 OECD Recommendation,³⁹ some respondents observed that while they did not often directly rely on it in enforcement co-operation cases, it was used regularly to develop internal co-operation policy documents, bi-lateral and multi-lateral agreements, and to train staff and inform other stakeholders on key elements of international enforcement co-operation. Eighty-three per cent of those who responded to the Survey question considered the OECD 2014 OECD Recommendation relevant, with the remainder having had no experience with it.⁴⁰

5.3. Respondents' views on ICN work to date and future focus

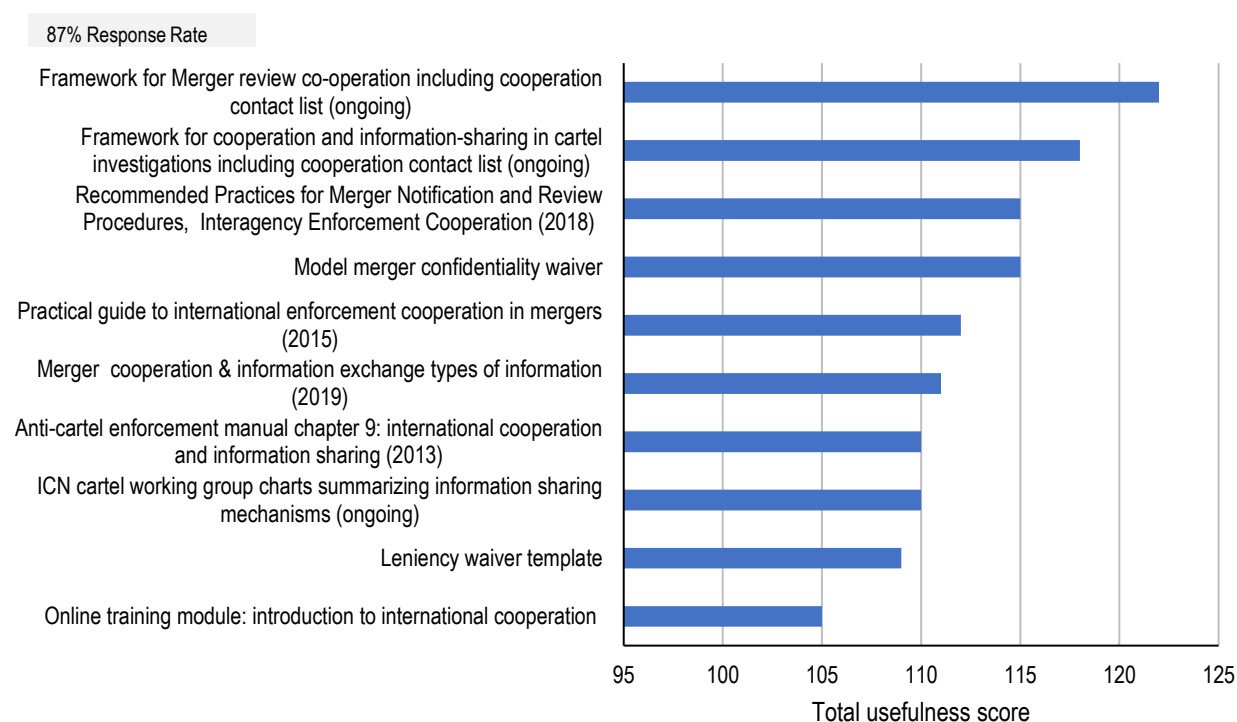
5.3.1. Respondents' views of ICN work to date

41. The qualitative and quantitative responses to the Survey show that ICN members value and use the ICN's work relating to international enforcement co-operation. As shown in *Figure 5.2* below, the top four most useful outputs are the Frameworks for Mergers and Cartels, the Recommended Practices for Merger Notification and Review Procedures, and the Model Merger Confidentiality Waiver. The reason why some were ranked lower than others was not clear from the qualitative responses and may be worthy of further consideration by the ICN, as authorities might not be sufficiently aware of these tools and resources rather than finding them not useful. As is noted in the proposals for future ICN work, the ICN might wish to evaluate whether the current tools and resources remain relevant, whether members are aware of these tools and resources, and whether there needs to be greater promotion of these tools and resources.

³⁹ Questions 39-42 of Survey.

⁴⁰ Fifty-six per cent [56%] of the Survey respondents answered Question 43.

Figure 5.2. Respondents' views on ICN work on international enforcement co-operation, by usefulness score, 2019



Source: OECD/ICN Joint Survey 2019, Question 45 – Table 11

Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts summed ordinal scores, where options were: [High = 3], [Medium = 2], [Low = 1]

5.3.2. Respondents' views as to future work for ICN and how best to foster enforcement co-operation

42. The respondents were asked about areas in which they would like to see the ICN carry out future work, what areas of the work are most useful and what the ICN can do to help foster both enforcement co-operation and broader general co-operation.⁴¹

43. The respondents' views regarding future work for the ICN primarily focused on the ICN continuing and expanding the work it has undertaken to date to strengthen enforcement co-operation between authorities. Many respondents noted the important role the ICN plays in bringing together authorities in general co-operation activities, creating harmonisation in competition enforcement, building relationships and trust, and being a venue for addressing new policy and practice challenges in competition enforcement. As one respondent noted:

The ICN should continue to be a vector of convergence between authorities, not only for substantial law and procedural law, but also for the application of competition law to new challenges, such as the digital economy.

⁴¹ Question 45-48, 2019 Survey.

44. Respondents commented that the ICN should focus on key areas of shared interest between authorities and ways to improve enforcement co-operation and practice in these key areas. The responses for future work in relation to enforcement co-operation (and more broadly) can be categorised into the following activities:
- evaluate, update and then further promote the ICN's existing work on enforcement co-operation including via webinars, workshops, events (potentially including a regional focus)
 - further develop co-operation-related case studies, best-practice tools, guidelines, templates and models
 - focus on specific sectors, markets or technical issues where enforcement co-operation can be challenging and consider where new enforcement investigation and analysis techniques may be useful (e.g. such as enforcement co-operation issues in the digital economy context)
 - promote mechanisms that can be used to overcome legal barriers to enforcement co-operation, such as wider adoption of information gateways
 - undertake outreach to younger authorities to raise awareness of the benefits and methods of international enforcement co operation
 - explore opt-in frameworks, like the ICN Framework for Competition Authorities Procedures (ICN, 2019^[31]), for addressing enforcement co-operation-related issues (e.g. regarding transparency and treatment of confidential information)
 - improve the network of contacts by providing an accessible and up-to-date list of authorities' contacts
 - co-ordinate and collaborate with other international organisations, including the OECD, EU and UNCTAD (the role of UNCTAD is set out further in *Annex E: Other international co-operation networks and international organisations working on international enforcement co-operation*).

6. Proposed future areas of focus to improve international enforcement co-operation

45. As noted above, the Survey shows considerable support for the work that competition authorities, the ICN and OECD have undertaken to date to improve enforcement co-operation. This Report outlines some possible future areas of focus that authorities, the OECD and ICN could consider in order to improve enforcement co-operation further – see *Table 6.1*.
46. The rationale for each and proposed next steps are outlined in a more detailed table in *Section 21. Proposed future areas of focus to improve international enforcement co-operation* (see *Table 21.1*). The proposed future areas of focus fall within the following categories:
- develop further enforcement co-operation work-products and networks
 - improve transparency and trust
 - provide policy and practical support for further developing effective regional enforcement co-operation
 - remove substantive and legal barriers to co-operation.
47. The future areas of focus are based on a review of the information covered in the Report, that is:
- suggestions made by Respondents (as set out in the Section above)
 - an analysis of all the Survey results
 - consideration of the work done by the OECD and ICN to date
 - consideration of the drivers of international enforcement co-operation.
48. The proposed future areas of focus intend to direct the discussion to activities that are of particularly high value for improving enforcement co-operation, respond to the requests of authorities and generate greater value from existing and new resources, networks and tools.

Table 6.1. Proposed future areas of focus for OECD and ICN

Category and No.	Description of proposed future area of focus
Focus Area 1: Develop enforcement co-operation work-products and networks	Focus Area 1.1 The OECD and ICN respectively and together consider options to improve communication, co-ordination and cross-promotion of their existing and planned respective work related to international enforcement co-operation.
	Focus Area 1.2 Audit existing enforcement co-operation work-products and tools and consider which ones need to be reviewed, retired and what new ones may be required.

Focus Area 1.3

Develop detailed case studies that model specific types of enforcement co-operation in different enforcement areas, which capture not only the legal basis for the co-operation but also how it occurred in practice.

Focus Area 1.4

Promote better understanding of the potential value of different types of enforcement co-operation at the case-handler level.

Focus Area 1.5

The OECD and ICN to consider ways to encourage and/or systemise better data recording on enforcement co-operation by member authorities.
The OECD and ICN respectively and together consider options to improve communication, co-ordination and cross-promotion of their existing and planned respective work related to international enforcement co-operation.

Focus Area 2: Provide policy and practical support for further developing effective regional enforcement co-operation

The OECD and ICN to respectively consider how regional co-operation can be supported and improved in a manner that is complementary to building broader international enforcement co-operation.

Focus Area 3: Improve transparency and trust

Consider mechanisms that create improved transparency and trust around the ability of jurisdictions to co-operate, in particular in relation to issues such as:

- ability to share confidential information and how confidential information from a counterpart would be handled in a co-operating jurisdiction: e.g. protections; possible mechanisms for access by third parties; and ability to agree to terms of provision.
- whether leniency or merger parties must notify if they have engaged with another authority on the same matter.
- ability to provide investigative assistance
- ability to engage in enhanced co-operation
- ability to enter into second-generation style agreements with other authorities.

Focus Area 4: Remove substantive and legal barriers to co-operation

Considering possible models to resolve key legal obstacles to improve the ability to co-operate on certain types of enforcement co-operation activities, such as sharing confidential information, enhanced co-operation and investigative assistance.

See examples in *Annex D: Overview of other legal models for enforcement co-operation*.

The work should consider options raised by the respondents and others and analyse their pros and cons in depth, such as: model bi-lateral agreements, model multi-lateral agreements and treaty options (e.g. ISOCO, OECD treaty and counterpart-matching multi-lateral agreement model), and OECD Recommendation and Decision processes.

49. The future areas of focus in *Table 6.1* are focused on potential OECD and ICN activities. However, competition authorities can play a central role in improving enforcement co-operation by considering how they can co-operate more effectively. Authorities and their staff have a better prospect of progressing international enforcement co-operation in line with their priorities and strategies when its value in

both specific enforcement cases and more broadly is understood by its staff and stakeholders. To this purpose, they can:

- review their own international enforcement co-operation activities and consider if they are as effective and efficient as possible
- review the resources they dedicate to international enforcement co-operation and if they are in line with their stated priorities
- review the OECD and ICN work and tools on enforcement co-operation and consider if they can be better implemented within their own organisations
- continue to contribute to the work of the OECD and ICN in improving enforcement co-operation, including supporting the development of the potential initiatives outlined above.

Part II. Context for considering the Survey results

7. Overview of Part II

50. There are four key contextual elements that are essential for considering the Survey results and the proposed future areas of focus for improving international enforcement co-operation, which are outlined in this part. They are:
- The overview of the Project itself, including; the parties to the Project, the respondents to the Survey, and a summary of the methodology used to analyse and present the data (*Section 8. OECD and ICN Joint Project on International Enforcement Co-operation*).
 - An explanation of the meaning of international enforcement co-operation and the conceptual framework used to describe the activities that it can encompass, including providing definitions of the key types of enforcement co-operation (*Section 9. What is international enforcement co-operation?*).
 - An explanation of the key drivers for international enforcement co-operation, including the global increase in competition law enforcement and authorities, along with economic and digital factors driving both an increase in enforcement co-operation and the need to improve the ways it is done (*Section 10. Drivers of international enforcement co-operation*).
 - An overview of the history of international enforcement co-operation to date, in particular, the guidance, recommendations and tools that have been developed by the OECD and ICN to support international enforcement co-operation, particularly those developed since the 2012 Survey (*Section 11. History of initiatives relating to international enforcement co-operation*).

8. OECD and ICN Joint Project on International Enforcement Co-operation

8.1. The Organisation for Economic Co-operation and Development (OECD)

51. The OECD is an international organisation that works to build better policies for better lives. Its goal is to shape policies that foster prosperity, equality, opportunity and well-being for all.
52. Together with governments, policy makers and citizens, the OECD works on establishing evidence-based international best practices and finding solutions to a range of social, economic and environmental challenges. The OECD provides a forum and knowledge hub for data and analysis, exchange of experiences, best practice sharing, and advice on public policies and international standard setting.
53. There are 37 OECD member countries.⁴² The Commission of the European Communities takes part in the work of the OECD. In addition to the 37 OECD members, the OECD has five Key Partners: Brazil, South Africa, India, Indonesia, and China (OECD, 2020^[4]).
54. All OECD Members are members of the Competition Committee. In addition, there are also:
 - Associate Members: Romania and Brazil.⁴³
 - Participants: Argentina, Bulgaria, Costa Rica, Croatia, Egypt, India, Indonesia, Kazakhstan, Malta, Peru, Russian Federation, South Africa, Chinese Taipei and Ukraine.
 - Observers: UNCTAD, the European Free Trade Association, the World Bank, and the World Trade Organisation.

⁴² They are: Australia, Austria, Belgium, Canada, Chile, Colombia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. Costa Rica has been invited to join and accession will take effect after it has taken the appropriate steps at the national level to accede to the OECD Convention, and deposited its instrument of accession with the French government, the depository of the Convention: see OECD (2020), OECD countries invite Costa Rica to join as 38th member, <https://www.oecd.org/newsroom/oecd-countries-invite-costa-rica-to-join-as-38th-member.htm>.

⁴³ For the purposes of this Report, Associates will be grouped with OECD Participants.

- Country⁴⁴ and organisation⁴⁵ invitees, which are invited to participate in the Competition Committee.⁴⁶
55. The OECD Competition Committee has two informal liaison roles in order to facilitate co-operation with the ICN (undertaken by the Portuguese Competition Authority - Autoridade da Concorrência) and with UNCTAD (undertaken by the Austrian Federal Competition Authority - Bundeswettbewerbsbehörde).

8.2. The International Competition Network (ICN)

56. The ICN is a membership network constituted of representatives from national and multinational competition authorities, devoted exclusively to competition law enforcement. Members produce work products through their involvement in flexible project-oriented and results-based working groups. Working group members work together largely by internet, telephone, teleseminars, and webinars, and meet in person at annual conferences and workshops. There are now 140 member-authorities from 129 jurisdictions (ICN, 2020^[5]).
57. Annual conferences and workshops provide opportunities to discuss working group projects and their implications for enforcement. The ICN does not exercise any rule-making function. Where the ICN reaches consensus on recommendations, or “best practices” arising from the projects, individual competition authorities decide whether and how to implement the recommendations, through unilateral, bi-lateral or multi-lateral arrangements, as appropriate.

8.3. Background: 2012 Survey and the OECD and ICN reports

58. In 2012, the OECD Competition Committee decided to focus its future work on two strategic themes: international co-operation in competition enforcement, and evaluation of competition interventions. At around the same time, the ICN, as an outcome of its Second Decade Project,⁴⁷ approved a Steering Group project on international enforcement co-operation.

⁴⁴ Albania, Algeria, Argentina, Armenia, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Benin, Bosnia, and Herzegovina, Botswana, Brunei Darussalam, Burkina Faso, Cambodia, Cameroon, China, Republic of the Congo, Côte d'Ivoire, Democratic Republic of the Congo, Dominican Republic, Ecuador, El Salvador, Fiji, Former Yugoslav Republic of Macedonia, Gambia, Georgia, Guatemala, Guinea, Guyana, Honduras, Hong Kong, , Jamaica, Jordan, Kenya, Kosovo, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Lebanon, Malawi, Malaysia, Mali, Mauritius, Moldova, Mongolia, Montenegro, Morocco, Myanmar, Namibia, Nicaragua, Niger, Nigeria, Pakistan, Panama, Papua New Guinea, Paraguay, Qatar, Rwanda, Saudi Arabia, Senegal, Serbia, Seychelles, Singapore, Sri Lanka, Swaziland, Tajikistan, United Republic of Tanzania, Thailand, Togo, Trinidad and Tobago, Tunisia, Uruguay, Uzbekistan, Bolivarian Republic of Venezuela, Viet Nam, and Yemen.

⁴⁵ Consumers International, Bureau Européen des Unions de Consommateurs (BEUC – also known as the European Consumer Organisation).

⁴⁶ Subject to their inclusion in the Competition Committee's Participation Plan.

⁴⁷ This project entailed a network-wide consultation and subsequent discussions to examine the ICN's strengths and improvements needed to address the challenges of the organization in its second decade. The final report is available at: International Competition Network “The ICN's Vision for

59. As part of their respective projects on international co-operation, the OECD Competition Committee and ICN SG decided to survey national practices on international enforcement co-operation (2012 Survey). The primary objective of the Survey was to understand the experiences of competition authorities with international co-operation in case-related enforcement activities.
60. ICN project leaders (the U.S. Department of Justice and the Turkish Competition Authority) worked closely with the OECD Secretariat to draft a single questionnaire on international enforcement co-operation, which was sent to all OECD and ICN members in July 2012.
61. The OECD Secretariat prepared the OECD's Report (OECD, 2013^[1]). A group of representatives from six enforcement authorities (who were both OECD and ICN members) worked closely with the OECD Secretariat during the drafting process of this report to ensure consistency in the review and analysis of the responses to the Survey.
62. The OECD's 2013 Report provided details of the responses to each question and included a section on potential areas for improvement in co-operation and future work for the OECD.
63. The ICN Report focused on the Survey questions relating to the ICN. The ICN report did not outline any potential future steps. However, future work on co-operation was anticipated by the report and led to the post 2013 work outlined below in 'ICN Initiatives to Support International Co-operation' (ICN, 2018^[2]).

8.4. 2019 Survey and drafting of 2020 Report

64. In June 2019, the OECD Secretariat and ICN Steering Group agreed to conduct a Joint Project on International Enforcement Co-operation and produce this joint Report.
65. In August 2019, the ICN Secretariat sent the Survey⁴⁸ to all ICN authorities (which included all OECD Members and Participants).
66. An overview of the draft Report was presented at a webinar for OECD and ICN members on 9 July 2020. The draft Report was released in July 2020 and accepted by the ICN Steering Group on 2 December 2020 and presented to the OECD Competition Committee Working Party 3 on Co-operation and Enforcement on 4 December 2020.

8.5. Overview of the Survey questions

67. The Survey was updated in 2019 primarily to reflect developments that had occurred since 2012 (such as the introduction of the 2014 OECD Recommendation). These amendments to the Survey are outlined in *Annex A: Methodology*. The Survey was divided into ten parts, each with a different focus on an aspect of international enforcement co-operation.

its Second Decade," Presented at the 10th annual conference, The Hague, May 2011. Available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/ICN2dDecade2011.pdf>.

⁴⁸ See *Annex B: 2019 Survey*

68. OECD Members and Participants who did not respond to the 2019 Survey at first instance were offered a shorter version of Survey made up of some of the key future-focused questions from the Survey.⁴⁹ Nine (9) respondents completed this shorter Survey. The majority of the responses to this shorter version of the Survey were very detailed in their answers to these questions and provided useful information that has helped inform the initiatives outlined in *Section 21. : Proposed future areas of focus to improve international enforcement co-operation.*
69. The 2019 Survey requested both qualitative and quantitative information in 48 questions and provided instructions on how to respond. Many of the questions include a number of sub-questions and respondents were requested to answer as many questions and sub-questions as possible. Respondents were also asked to provide data regarding the extent of their experience or to quantify the importance and/or frequency of their experience with specific categories of co-operation activities.
- **Part 1 Qualitative assessment of international enforcement co-operation and co-operation within regional networks or organisations:** respondents were asked to reflect at a general level on their experiences with international enforcement co-operation in both a regional and an international context. The questions in this section relate to the priority of co-operation in authority policy, general costs and benefits, overall experience, and assessment of the usefulness of co-operation to enforcement activities.
 - **Part 2 Legal basis for international enforcement co-operation or co-operation within regional networks or organisations:** respondents were asked for details of the legal bases upon which competition authorities rely in order to co-operate internationally in enforcement activities. Respondents were asked to list any national laws, international agreements (both binding and non-binding), and any other legal provisions and tools for co-operation in their jurisdiction.
 - **Part 3 Different types of international enforcement co-operation:** respondents were asked to provide details of their experience with various types of co-operation activities, such as questions relating to notification, comity, investigatory assistance, and enhanced co-operation provisions.
 - **Part 4 Frequency of international enforcement co-operation between competition authorities (outside regional networks or organisations):** requested information about the frequency of co-operation in enforcement cases by enforcement area.
 - **Part 5 Exchange of confidential information and confidentiality waivers (outside regional networks or organisations):** focused on the exchange of confidential information and use of confidentiality waivers. It requested information from respondents regarding the terms of confidentiality in their jurisdictions, the conditions for exchange of confidential information, and their experience with using confidentiality waivers from parties to the investigation to facilitate international enforcement co-operation.
 - **Part 6 Pros and cons of international enforcement co-operation between authorities (outside regional networks or organisations):** respondents were asked to weigh the pros and cons of international enforcement co-operation, and to

⁴⁹ Questions 6, 34-36, 40-48 from the Survey.

reflect on the costs of co-operative activities compared to the benefits of co-operation for their enforcement priorities. Respondents were also asked to assess limitations to effective co-operation, and consider the benefits and costs that could result from addressing these limitations.

- **Part 7 How to improve the quality and intensity of international co-operation between authorities (outside regional networks or organisations):** respondents were asked to suggest methods for improving international enforcement co-operation, specifically, methods by which the exchange of information could be facilitated while providing adequate protections for confidentiality.
- **Part 8 Regional co-operation:** respondents were asked to provide information on their participation in regional networks, including an assessment of the advantages and disadvantages of regional co-operation, and examples of solutions adopted at the regional level that might be useful in the international sphere.
- The Survey also included a number of OECD- and ICN-specific questions. **Part 9 OECD specific questions:** asked respondents about their experience with OECD work products and suggestions for future work for the OECD Competition Committee.
- **Part 10 ICN specific questions:** asked respondents about experience with ICN work products, and future work that the ICN might undertake to promote co-operation, both in enforcement casework and more generally.

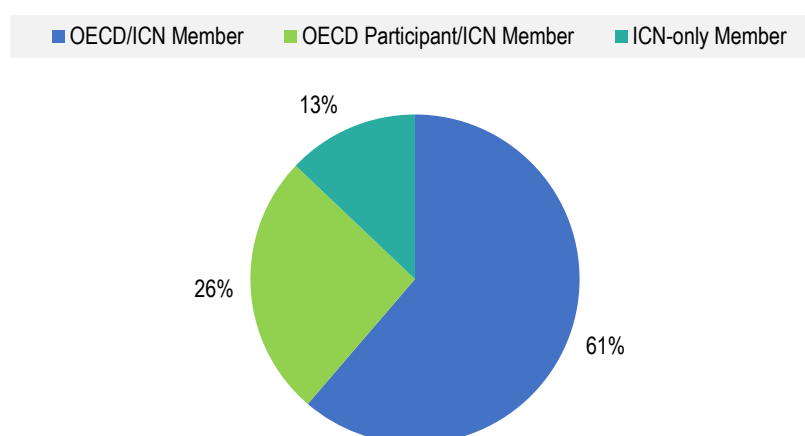
8.6. Overview of the responses to the Survey

8.6.1. Number of responses and membership of the OECD and ICN

70. The Survey received 62 responses. All respondents were members of the ICN and 100% of OECD Members and Participants⁵⁰ responded. There were 38 OECD Members,⁵¹ 16 OECD Participants and 8 ICN-only authorities (61%, 26% and 13% of respondents respectively) – see *Figure 8.1*. Accordingly, 46 (or 87%) of the respondents are engaged in both institutions.

⁵⁰ For the purposes of this Report, OECD Competition Committee Associates will be grouped with OECD Participants. See *Section: The Organisation for Economic Co-operation and Development (OECD)* below relating to constitution of OECD Competition Committee.

⁵¹ The European Commission is a Survey respondent and it had been counted as an OECD Member for the purposes of this Report, as was done in 2012.

Figure 8.1. Distribution of responses, by type of membership, 2019

Source: OECD/ICN Joint Survey 2019

71. In comparison to the 2012 Survey, as set out in *Table 8.1* below, the response rate has increased by 9% in total (57 in 2012 compared to 62 respondents in 2019). In 2012, there were 35 OECD Members and 11 Participants (OECD, 2013^[6]), whereas in 2019 there were 38 OECD Members and OECD 16 Participants.⁵² All respondents were also members of the ICN in 2012.

Table 8.1. Survey Response Rate, by type of membership, 2012 vs. 2019.

OECD Membership	# 2012	Response Rate 2012	# 2019	Response Rate 2019	Variance %
OECD/ICN Members	32	91%	38	100%	
OECD Participants/ICN Members	12	87%	16	100%	
ICN-only Members	11	---	8	---	
Total ICN Respondents	57	47%	62	48%	
TOTAL Respondents	57	---	62	---	9%

Source: OECD/ICN Joint Survey, 2012 and 2019

⁵² Argentina, Colombia, Costa Rica, Kazakhstan, Latvia and Lithuania are the new OECD Members or Participants since the 2012 Survey. In addition, Argentina, Austria, Ecuador, El Salvador, Iceland, Latvia, Luxembourg, Nouvelle Calédonie, Pérou, Russie, Seychelles, Sloveenie, and Ouzbékistan replied to the Survey this time but did not reply in 2012, while Barbados, CARICOM, Honduras, Macédoine, Malaisie et Zambie ont répondu la dernière fois mais n'ont pas répondu cette fois-ci.

8.6.2. List of respondents by region and membership type

72. A list of all Survey Respondents, by region and membership type, is in *Table 8.2*.

Table 8.2. Survey Respondents, by region and type of membership, 2019

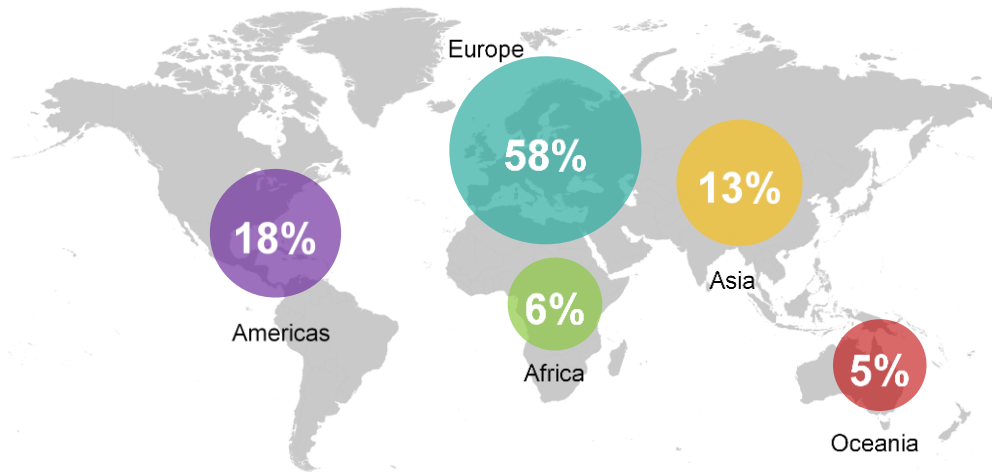
Country	Region	Type of Membership	Country	Region	Type of Membership
Egypt	Africa	OECD Participant/ICN Member	Lithuania	Europe	OECD/ICN Member
Kenya	Africa	ICN-only Member	Luxembourg	Europe	OECD/ICN Member
Seychelles	Africa	ICN-only Member	Malta	Europe	OECD Participant/ICN Member
South Africa	Africa	OECD Participant/ICN Member	Netherlands	Europe	OECD/ICN Member
Kazakhstan	Asia	OECD Participant/ICN Member	Norway	Europe	OECD/ICN Member
India	Asia	OECD Participant/ICN Member	Poland	Europe	OECD/ICN Member
Indonesia	Asia	OECD Participant/ICN Member	Portugal	Europe	OECD/ICN Member
Israel	Asia	OECD/ICN Member	Romania	Europe	OECD Participant/ICN Member
Japan	Asia	OECD/ICN Member	Russia	Europe	OECD Participant/ICN Member
Korea	Asia	OECD/ICN Member	Slovak Republic	Europe	OECD/ICN Member
Singapore	Asia	ICN-only Member	Slovenia	Europe	OECD/ICN Member
Uzbekistan	Asia	ICN-only Member	Spain	Europe	OECD/ICN Member
Chinese Taipei	Asia	OECD Participant/ICN Member	Sweden	Europe	OECD/ICN Member
Austria	Europe	OECD/ICN Member	Switzerland	Europe	OECD/ICN Member
Belgium	Europe	OECD/ICN Member	Turkey	Europe	OECD/ICN Member
Bulgaria	Europe	OECD Participant/ICN Member	Ukraine	Europe	OECD Participant/ICN Member
Croatia	Europe	OECD Participant/ICN Member	United Kingdom	Europe	OECD/ICN Member
Cyprus	Europe	ICN-only Member	Canada	North America	OECD/ICN Member
Czech Republic	Europe	OECD/ICN Member	Costa Rica	North America	OECD Participant/ICN Member
Denmark	Europe	OECD/ICN Member	El Salvador	North America	ICN-only Member
Estonia	Europe	OECD/ICN Member	Mexico	North America	OECD/ICN Member
European Union	Europe	OECD/ICN Member	United States	North America	OECD/ICN Member
Finland	Europe	OECD/ICN Member	Australia	Oceania	OECD/ICN Member
France	Europe	OECD/ICN Member	Nouvelle Calédonie	Oceania	ICN-only Member
Germany	Europe	OECD/ICN Member	New Zealand	Oceania	OECD/ICN Member
Greece	Europe	OECD/ICN Member	Ecuador	South America	ICN-only Member
Hungary	Europe	OECD/ICN Member	Argentina	South America	OECD Participant/ICN Member
Iceland	Europe	OECD/ICN Member	Brazil	South America	OECD Participant/ICN Member
Ireland	Europe	OECD/ICN Member	Chile	South America	OECD/ICN Member
Italy	Europe	OECD/ICN Member	Colombia	South America	OECD/ICN Member
Latvia	Europe	OECD/ICN Member	Peru	South America	OECD Participant/ICN Member

Source: OECD/ICN Joint Survey 2019

8.6.3. Geographical distribution of respondents

73. In terms of geographical distribution, 58% of the responses came from Europe, 18% from America, 13% from Asia, 6% from Africa and 5% from Oceania, as presented below (Figure 8.2).

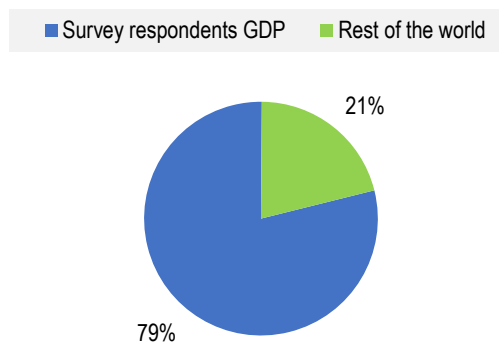
Figure 8.2. Geographical distribution of responses, by region, 2019



Source: OECD/ICN Joint Survey 2019

74. As shown in Figure 8.3, respondents to the Survey account for terms approximately 80% of global GDP.⁵³

Figure 8.3. Global GDP distribution of Survey participants, 2019



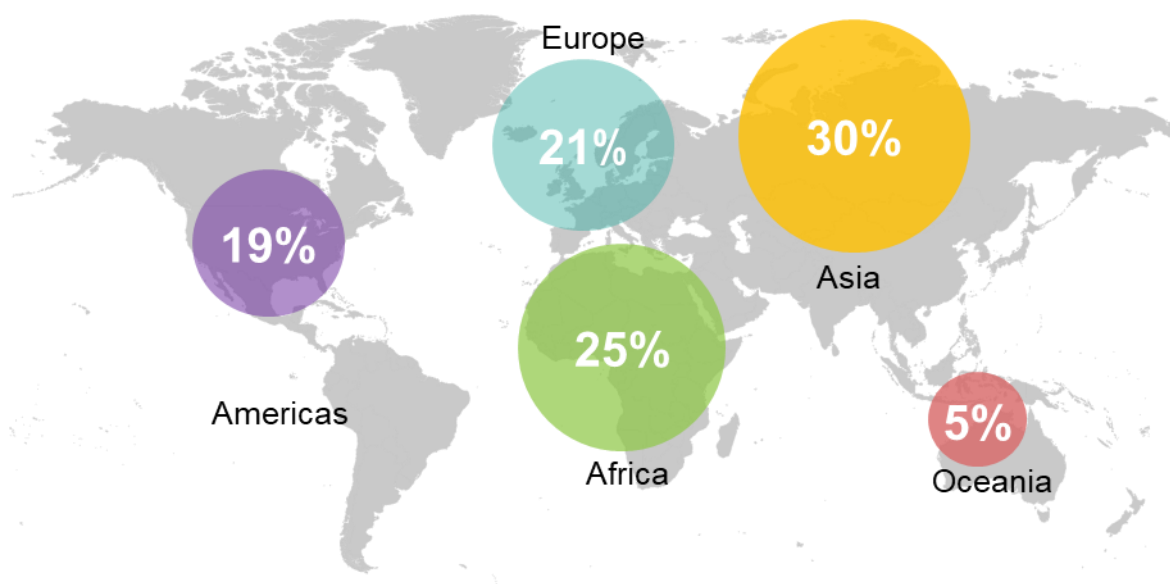
Source: World Bank Data, 2018⁵³

⁵³ Data on the GDP, PPP (current international \$) <https://data.worldbank.org/indicator/ny.gdp.mktpp.cd?end=2018&start=1990&view=map> (accessed on 10 February 2020) (World Bank Data, 2018_[237]) and https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/TW_e.pdf (accessed on 10 February 2020) for Chinese Taipei (World Trade Organization, 2018_[238]).

8.6.4. Non-respondents to Survey

75. Although 61% of the ICN Membership did not respond to the Survey, the OECD/ICN Joint Project on International Enforcement Co-operation drafting team sought feedback on the Report from the entire ICN membership and welcomed further engagement from authorities that did not submit a response to the 2019. No additional ICN members provided feedback at the drafting stage.
76. The geographical distribution of non-respondents shows an underrepresentation of Asia (30%), Africa (25%), and the Americas and Europe (respectively 19% and 21%), although as noted above, these jurisdictions account for 20% of the global GDP. Only 5% of non-respondents come from Oceania.

Figure 8.4. Geographical distribution of non-respondents, by region, 2019



Source: OECD/ICN Joint Survey 2019

77. The reasons that some respondents did not reply in 2012 and 2019 is unclear. It may be that some authorities do not have the resources to respond to the Survey or that they did not consider they had sufficient experience in enforcement co-operation to respond. This matter is addressed further in *Section 8.6.4: Non-respondents to Survey*.

8.7. Summary of methodology

78. The Report presents data and results that add meaningful information to the discussion regarding the status of international enforcement co-operation, the current challenges facing co-operation and the possible future areas of focus that could be adopted in the future. This section provides a high-level overview of the approach taken to treating and presenting the data, so that it can be easily understood by the reader. In particular, it highlights potential limitations, differences and other qualifications relating to the data. A more detailed methodology is contained in *Annex A: Methodology*.

8.7.1. Percentage of respondents who responded to each question

79. As the number of responses to each question and sub-question in the Survey varied, the number of respondents has been provided in relation to each figure. In figures relating only to the 2019 Survey, it is in the top left of most figures in the Report. Where it is a comparison between 2012 and 2019, the response rate is noted in the notes under that figure. The figures do not depict non-responses unless this is specifically indicated.

8.7.2. Distinctions between respondents by membership and geography

80. In the OECD 2013 Report on the 2012 Survey, many results were presented as a split between OECD Members and Non-OECD Members (which included OECD Participants). However, in reviewing the data from the 2019 Survey (noting the change in OECD membership since 2012), it was observed that in many instances, the OECD Participant responses were more similar to the OECD Member responses than the ICN-Only responses. Accordingly, combining OECD Participant and ICN-Only responses would hide certain trends or potentially even gave a misleading result for both groups. Consequently, in most instances the results for all respondents are presented together unless interesting or noteworthy differences between these three groups were observed.

81. Out of the OECD Members and the Participants, 27 of these are also members of the European Union and part of the European Economic Network (ECN). Given the centralised structure of the European Commission, the degree to which it engages in co-operation activities with non-European entities, and the ECN (discussed in further detail in *Annex I: EU Regional Integration Arrangements*).

8.7.3. Comparisons between 2012 and 2019 Survey results

82. As noted above in *Section 8.6: Overview of the responses to the Survey*, there were more responses to the 2019 Survey than in the 2012 Survey (62 vs. 57), although for some questions, there were more responses in the 2012 Survey. Where comparisons are made between the 2012 and 2019 Survey results, these are done (where possible) as a percentage of the number of respondents that responded to that particular question or as an average of the responses given to that question.

8.7.4. Presentation and treatment of data

83. The 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 Survey 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 Survey questions requested qualitative responses and these have been categorised into 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.*”

- **Comparison of 2012 v 2019 Survey results:** In those cases where comparison between 2012 and 2019 Survey results was done using number of respondents (for instance, number of respondents who said “X” in a particular question), data has been illustrated as a percentage of respondents who responded “X” over the total respondents to the question. These figures are marked: “Figure depicts responses as proportions over total number of respondents to the question”.

8.7.5. Depth and quality of the responses

84. The 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 that are noted in *Annex A: Methodology*. Importantly, many respondents noted that they did not systemically record enforcement co-operation activities and that their responses were estimates only (this is something that is addressed in the future areas of focus in *Section 21. Proposed future areas of focus to improve international enforcement co-operation* below).

9. What is international enforcement co-operation?

85. International enforcement co-operation between competition authorities can take many different forms and cover a range of possible activities however, it is generally characterised by being co-operation relating to specific cases or investigations (rather than cooperation relating to general competition law practices).. It can be bi-lateral, regional or multi-lateral. It can be supported by agreements between governments or between competition authorities. It can manifest as formal interactions and requests for assistance (e.g. for relying on treaties or diplomatic communications) or rely on informal contacts and methods of communication. It can include resource-intensive collaboration and co-ordination activities or can be as simple as a phone call between colleagues in counterpart authorities.
86. The Survey noted that for the purposes of the Survey, ‘international co-operation’ was defined as:
- ... co-operation between international enforcement agencies in specific enforcement cases, i.e. merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreement) cases. This questionnaire does not concern general co-operation on matters of policy, capacity-building, etc.; only international co-operation in the detection, investigation, prosecution or sanctioning of a specific anti-competitive behaviour or the investigation or review of mergers is covered.*
- The extent of international co-operation may vary from case to case, ranging from less extensive co-operation (for example, keeping each other informed on the stages of the investigation or having general discussions on substantive issues) to more extensive co-operation, such as parallel investigations, investigatory assistance ... and more enhanced co-operation.*
87. While the responses to the 2019 Survey were provided within the framework of this definition, it was also clear from the responses that in practice, there is not a bright dividing line between enforcement co-operation and more general co-operation for many authorities. As will be outlined below, the overall objectives and benefits of enforcement co-operation are much broader for authorities than the specific benefits they obtain through co-operation on a specific enforcement matter. They engage in case-specific enforcement co-operation with these objectives and benefits in mind, and relatedly, they engage in more general co-operation activities with the purpose of building the experience, trust, understanding and relationships needed for case-specific enforcement co-operation.
88. Many of the challenges authorities face in enforcement co-operation are ones that can be ameliorated by engaging in general co-operation activities. For example, engaging in fora that help build relationships and trust building; developing improved international standards and guidance; and improving transparency regarding an authority’s processes and practices. Accordingly, this Report focuses on enforcement

co-operation as defined in the Survey but incorporates comments from respondents and analysis that is related to general co-operation where directly relevant to enforcement co-operation.

89. The distinctions between different types of co-operation can seem somewhat artificial (e.g. informal vs formal), and in practice, different types of enforcement co-operation are often used simultaneously by co-operating authorities without clear distinctions between them.⁵⁴ However, despite potential overlap, a distinction of broad categories of co-operation is useful in developing a shared understanding around different types of enforcement co-operation activities, especially when it comes to identifying legal barriers to enforcement co-operation and developing agreements to commit to certain forms of enforcement co-operation.
90. This section provides a short overview of the key types of co-operation and terms that have a specific meaning within this Report, and the definitions used in the Survey to describe them.

9.1. Commonly used key terms, concepts and definitions

9.1.1. Informal and formal co-operation

91. While authorities distinguish between informal and formal co-operation in different ways, a commonly agreed key difference is that formal co-operation is supported through some written instrument. The Survey noted:

The questionnaire seeks information relating to both formal and informal international co-operation. Agencies are likely to have different views of what constitutes “formal” vs. “informal” international co-operation, and, where the characterization makes a difference in their international co-operation work, they should explain it in the narrative sections of their responses.

92. One of the areas of confusion that occurs when using the terms ‘informal’ and ‘formal’ relates to agreements or arrangements between authorities (such as bi-lateral Memorandum of Understanding (MoUs)),⁵⁵ which may provide a non-binding commitment to engage in informal forms of co-operation, ones that are already within the ability of an authority to undertake even absent the agreement. While this Report sets out some key aspects of what is commonly referred to as informal and formal co-operation below, these are not necessarily agreed definitions among all authorities. They are outlined in this Report in order to provide an introductory overview of the range of enforcement co-operation activities that are addressed in this Report and to highlight that some terms may be used differently among authorities.

⁵⁴ For example, an interaction on a merger matter where waivers have been provided may technically involve both informal and formal co-operation, information sharing of confidential and non-confidential information, consultation, co-ordination, investigative assistance and enhanced co-operation.

⁵⁵ The role and popularity of bi-lateral MoUs are discussed in *Section 13.2.3: Bi-lateral and multi-lateral competition agreements*.

Informal co-operation

93. Informal co-operation is the most common type of co-operation precisely because it can occur without burdensome formal processes, such as formal information or assistance requests, and can occur more easily at case-handler level.
94. In cross-border enforcement cases, informal co-operation may include activities such as keeping each other informed of the progress of cases of mutual interest, discussions on investigation strategies, exchanges of public information, sharing leads and comparing authorities' approaches to an issue in a case. Even in the absence of formal co-operation agreements, informal co-operation may enable the co-ordination of surprise inspections.⁵⁶ Without any express legal restrictions on informal co-operation with counter-part authorities, many authorities consider informal co-operation to be within the remit of their existing investigatory powers. As one respondent noted, "the ability to co-operate is inherent in our enforcement mission."
95. Respondents to the Survey noted that many of the key types of co-operation valued by their authority could be largely achieved through informal co-operation. Many respondents also noted it was often the most frequent and useful form of co-operation. In addition to case-specific informal co-operation, many respondents mentioned more general informal co-operation forms, including the sharing of best practice approaches and enforcement expertise aimed at improving the capacity and effectiveness of their organisation. For some respondents, there is a strong link between efforts to improve the enforcement skills of their staff (such as through technical assistance or secondments) and the building of the stronger relationships and trust needed for case-specific enforcement co-operation between authorities, formal or informal.

Formal co-operation

96. Formal co-operation includes a broad range of co-operation activities that are characterised by requiring some element of written instrument or legal formality. Co-operation instruments can be entered into at either government or authority level. They are generally considered more effective when complemented by informal co-operation. The legal bases for formal co-operation between authorities include: bi-lateral co-operation agreements, national statutory provisions, Mutual Assistance Legal Treaties, confidentiality waivers, letters rogatory and regional trade agreements.⁵⁷

⁵⁶ An example is the co-ordinated investigation carried out by the Competition Commission of South Africa (CCSA) together with the EU and the US DoJ in 2007 in relation to a cartel involving freight forwarding companies. The three authorities conducted simultaneous raids (See South Africa's written contribution to the 2008 OECD Roundtable on Cartel Jurisdictional Issues, Including the Effects Doctrine, (South Africa, 2018_[241]) and South Africa's written contribution to the 2012 OECD Roundtable on Improving international co-operation in cartel investigations (South Africa, 2012_[142]).

⁵⁷ The various legal bases for co-operation used by authorities are discussed in *Section 13*. Legal bases for co-operation.

9.1.2. *First-generation and second-generation agreements*⁵⁸

97. A specific form of formal co-operation agreements are first- and second-generation agreements, and they are distinct categories of agreements, which impose significantly different levels of commitment on the parties. They are commonly used to mean the following (including within this Report):

- **First-generation co-operation agreements** generally reflect co-operation activities that the authority could undertake even in the absence of an agreement, although they can establish a framework and commitment to undertake activities that can support co-operation. They generally only allow for the exchange of non-confidential information, or the exchange of confidential information subject to the consent of the information source.
- **Second-generation co-operation agreements** generally contain all the provisions of first generation co-operation agreements, 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, 2020_[7]) and (Demedts, 2018_[8]). Key examples of second-generation agreements are provided in *Annex F: Examples of second-generation agreements*.

9.1.3. *Confidential information*

98. Competition authorities' enforcement activities benefit greatly from access to sensitive, non-public information from businesses and consumers, and authorities recognise the importance of protecting the confidentiality of such information received from parties and foreign authorities. The Survey defined confidential information as:

... information the disclosure of which is either prohibited or subject to restrictions. For example, information could be defined as confidential if it constitutes business secrets of a company or if its disclosure could prejudice the legitimate commercial interests of a company.

99. The complex and contextual ways that authorities define “confidential information” is considered in detail in *Section 18.3: How is “confidential information” defined by authorities?* Although the Survey definition is useful, as identified in this Report, there is no single, clear and agreed definition between authorities. This is one of the reasons why the exchange of confidential information can be challenging, and why it is particularly important in the context of international co-operation for authorities to promote an understanding of their confidentiality rules as well as a reputation for respecting confidentiality.

9.1.4. *Regional enforcement co-operation*

100. The Survey defined regional co-operation as:

⁵⁸ For the purposes of this Report, the term “agreement” includes non-binding bi-lateral and multi-lateral arrangements, such as MOUs.

a subset of international co-operation activities that take place within a regional framework or organisation.

101. As with general international enforcement co-operation, regional co-operation covers a broad spectrum of co-operation activities. At one end are those jurisdictions that have created binding arrangements with supra-national bodies that have advisory, investigative or decision-making powers. At the other end, are those with looser alliances and limited (if any) formal commitments to each other. In practice, arrangements on this spectrum often have the following common elements: geographical proximity, a degree of economic interconnectedness (such as through trade agreements or cross-border business activity) and often historical, economic, cultural, linguistic or political commonalities. Regional enforcement co-operation is considered in detail in *Section 19. Regional enforcement co-operation* below.

9.1.5. Notification

102. Notification by one authority to another of enforcement activity relevant to the notified authority can be informal or formal. In some instances, notifications can be required pursuant to a formal legal instrument between authorities, such as an MoU.
103. The Survey defined notifications as:

...any means of officially informing another jurisdiction⁵⁹ of a planned or current investigation, proceeding or enforcement action that may affect the interests of that jurisdiction. Notifications are usually considered in the context of traditional comity, and usually involve written communications.

104. The OECD's review of its inventory of co-operation MoUs showed that the majority of MoUs have notification clauses that provide that parties will notify each other of enforcement activities affecting their important interests, and that few MoUs define specific notification requirements.⁶⁰ The use of notification by authorities is considered in further detail in *Section 16.2: Notifications of competition investigations or proceedings* below.

9.1.6. Comity – traditional (negative) and positive

105. 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.
106. Traditional comity, or negative comity as it is sometimes referred, was defined in the Survey as:

... a jurisdiction's consideration of how it may prevent its law enforcement actions from harming another jurisdiction's important interests. It generally implies

⁵⁹ The term "country" has been replaced with the term "jurisdiction" in any Survey definition.

⁶⁰ Australia-Japan (2015), and Korea-Mexico (2004), at (OECD, 2017_[217]).

*notifying another jurisdiction when enforcement proceedings carried out by a competition agency may affect other jurisdictions' important interests.*⁶¹

107. For example, a competition authority will consider if the outcome it is considering for a merger matter negatively influences the consideration of that same matter in another jurisdiction or the likely outcome in the other jurisdiction.

108. Positive comity was defined in the Survey 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.

109. The principle of comity (either traditional or positive) does not prevent a jurisdiction from ultimately making a decision that may adversely affect another jurisdiction. The use of comity by authorities is considered in further detail in *Section 16.3: Comity and consultation* below.

9.1.7. Investigative assistance

110. The term “investigative assistance” captures a range of co-operation activities. Investigative assistance is defined in the Survey as:

*... co-operation with another jurisdiction's investigation. It entails a variety of co-operative activities such as assisting with the gathering of evidence or taking witness statements, to providing information relevant to the investigation.*⁶²

111. The same definition was used in the 2012 Survey, which preceded the development of the 2014 OECD Recommendation.⁶³ The 2014 OECD Recommendation further elaborates on the Survey definition, noting it can include any of the following activities:

- providing information in the public domain relating to the relevant conduct or practice
- assisting in obtaining information from within the assisting authority
- employing on behalf of the requesting authority the assisting authority's powers to compel the production of information in the form of testimony or documents

⁶¹ The definition in the Survey included the line in bold: a country's consideration of how it may prevent its law enforcement actions from harming another jurisdiction's important interests. It generally implies notifying another country when enforcement proceedings carried out by a competition authority may affect other jurisdictions' important **interests or requesting another country to modify or cease its enforcement action to protect the requesting jurisdiction's own important interests.**

⁶² The definition in the Survey included the line in bold: **In contrast to positive comity, investigatory assistance does not involve a request to another authority for a particular remedial action.** However, Positive Comity is perhaps better explained as to be a request for a particular outcome not a particular remedial action, so this has been removed from the definition provided in this Report.

⁶³ See *Section 11.5: 2014 OECD Recommendation* and subsequent related work, which outlines the development of the 2014 OECD Recommendation.

- ensuring to the extent possible that official documents are served on behalf of the requesting authority in a timely manner
 - executing searches on behalf of the requesting authority to obtain evidence that can assist the requesting authority's investigation, especially in the case of investigations or proceedings regarding hard-core cartel conduct.
112. While engaging in investigative assistance activities can be part of a reciprocal and co-ordinated approach between two authorities working on the same matter (as is outlined in *Section 16.4: Co-ordination of competition investigations or proceedings* below relating to co-ordination of enforcement co-operation), it does not necessarily require a parallel investigation. In fact, the ability (or lack thereof) to provide investigative assistance in the absence of parallel investigations can be a key benefit of this form of co-operation and the legal barriers that prevent this in some jurisdictions are one of the challenges to enforcement co-operation identified by this Report.⁶⁴ The use of investigative assistance by authorities is considered in further detail in *Section 17. Investigative assistance and enhanced co-operation* below.

9.1.8. Enhanced co-operation

113. Enhanced co-operation can include both informal and formal co-operation activities, and is best considered as a spectrum of possible co-operation activities. At one end, enhanced co-operation can include informal resource sharing (e.g. case-handlers in each authority work together on the review and analysis of non-confidential information). At the other end of the spectrum, it can include deeper work-sharing arrangements, which may require a legal instrument (e.g. one authority taking the lead on an investigation and attending to all procedural matters, while the other authorities contribute advice and make decisions based on the investigation undertaken by the lead authority).

114. Enhanced co-operation was defined in the Survey as co-operation that:

*...can entail identifying a lead enforcement agency, setting up joint investigative teams, or entering into work sharing arrangements. Enhanced co-operation does not involve a withdrawal of jurisdiction over a case; parallel enforcement action can be taken by more than one [authority] ...*⁶⁵

115. Enhanced co-operation can include parallel enforcement and independent decision-making between authorities, however, it can also include 'lead authority' models and 'one-stop-shop' models (e.g. as is used in the EU). Even within 'lead authority' or 'one-stop-shop' models, they are generally supported by a system that allows for input,

⁶⁴ The exchange of information (including confidential information, information in the public domain and non-confidential information) is specifically addressed by Section VII of the 2014 OECD Recommendation.

⁶⁵ The definition in the Survey included the line in bold: "Enhanced co-operation does not involve a withdrawal of jurisdiction over a case; parallel enforcement action can be taken by more than one [authority] **if one [authority] is not in a position to safeguard the interests of the other jurisdiction(s) affected.**". However, aside from the EU arrangements, parallel enforcement in the context of enhanced co-operation is the norm (although some jurisdictions may not proceed with certain remedies if their own concerns are addressed by other authorities). This qualifying part of the sentence makes it seem as though this only occurs when the one authority is not in a position to safeguard the interests of the other jurisdictions affected when this is not the case.

advice, or consultation from the non-lead authorities. In addition, enhanced co-operation can include cross-appointments between authorities and co-operation at a court-level. The use of enhanced co-operation by authorities is considered in further detail in *Section 17.3: Experience with enhanced co-operation* below.

116. In the 2014 OECD Recommendation, investigative assistance is described as being included as a form of enhanced co-operation.⁶⁶ For the purposes of this Report it is generally considered as a distinct form of enforcement co-operation.

9.1.9. Mutual recognition of decisions

117. Mutual recognition of decisions was defined in the Survey as co-operation that:

... involves the recognition of decisions by enforcers or courts of another jurisdiction. The outside decision is recognised or even, in some cases, enforced by other countries, as if it was a decision taken by the agency of these latter countries.

118. This form of enforcement co-operation is not discussed in detail in this Report. However, it can be considered as one of the activities covered by the term “enhanced co-operation.”⁶⁷

⁶⁶ Section VIII, 2014 OECD Recommendation.

⁶⁷ See *Section 9.1.8: Enhanced co-operation*; *Section 11.4: 2014 OECD enhanced enforcement co-operation*; and *Section 17.3: Experience with enhanced co-operation*.

10. Drivers of international enforcement co-operation

119. The drivers for international enforcement co-operation have been the same for at least the last two decades:
- the increase in the number of competition authorities and the maturing and expansion of the competencies of these authorities
 - the continued growth in international economic interconnectedness and interdependence
 - the developments in the international digital economy.
120. In this inter-connected context, authorities are more likely to be considering the same or similar issues within their jurisdictions; investigating the same cross-border enforcement matters; and considering how their current tools, resources and laws are equipped to deal with these global developments.
121. In 2020, competition authorities around the world responded to the additional challenges presented by COVID-19 to competition enforcement practice and policy. The competition community have co-operated with each other, sharing views and approaches about the best way to respond.⁶⁸ Whether COVID-19 creates an economic situation that (in total) increases or decreases cross-border matters in the short to medium term is currently unclear. However, it is expected that the long-term drivers for improving enforcement co-operation will remain (Pham and Pecman, 2019^[9]).

10.1. Growth in, and maturing of, competition authorities

122. As noted in a June 2020 OECD Secretariat Paper on international enforcement co-operation (OECD, 2019^[10]), in the last 30 years the number of countries with a competition law increased by more than 600%: from fewer than 20 in 1990 to about 140 in 2016 (Kovacic and Mariniello, 2016^[11]; UNCTAD, 2017^[12]; OECD, 2018^[13]). Since 2014, the trend has remained positive, with new authorities being created and existing authorities expanding their competencies.
123. New competition regimes have been established, including in Hong Kong, China (2015), the Philippines (2015), Thailand (2017) (OECD, 2018^[14]), Curaçao (2017) and Myanmar (2018) (Ministry of Commerce, 2020^[15]; Fair Trade Authority of Curaçao, 2020^[16]). 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^[17]), strengthening of the general competition regime (e.g. Vietnam expanded laws relating to extra-territorial reach and the scope of domestic application of their regime) (Holian and Reeves, 2017^[18]) and mechanisms to

⁶⁸ Examples of this include the webinars hosted by ICN, OECD and UNCTAD at which authorities have shared experience and information.

investigate cartels (e.g. dawn raid powers in the Philippines) (Philippines Competition Commission, 2020_[19]).

124. Further, through various international and regional capacity building efforts,⁶⁹ younger and developing authorities have been building the expertise and processes to improve enforcement. Relatedly, the OECD's 2020 Competition Trends Report showed that in addition to more authorities and more competencies, many authorities have had growing budgets and staff numbers. While the growth in average budgets of competition authorities in OECD countries (2.1% increase) and non-OECD jurisdictions (2.6% increase) was comparable, the increase between 2015 and 2018 in number of staff displayed a starker difference: an almost 6% increase in OECD countries and almost 23% increase in non-OECD jurisdictions (OECD, 2020_[20]).
125. Accordingly, while younger authorities can face certain practical enforcement challenges (as outlined in the ICN's 2019 report entitled "Lessons to Be Learnt from the Experience of Young Competition Agencies") (ICN, 2019_[21]), the higher the number of enforcing jurisdictions, the higher the likelihood that competition authorities may be considering the same case or related cases, and consequently, the greater the need for more co-operation.

10.2. International economic interconnectedness and interdependence

126. 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. For example, in the World Trade Organisation's 'Global Value Chain Development Report 2019', Michael Spence, Nobel Laureate in Economics, observed:

At a more macro level, while trade continues to grow, especially in services (where there remain challenging measurement problems) the declines in trade relative to global GDP and the rising share of intraregional trade are understood to be largely the natural consequences of economic development and the early stages of the digital transformation of economies, and not mainly the result of trade frictions and resistance to globalization engendered by the adverse distributional features of growth patterns ... (World Trade Organization, 2019_[22])

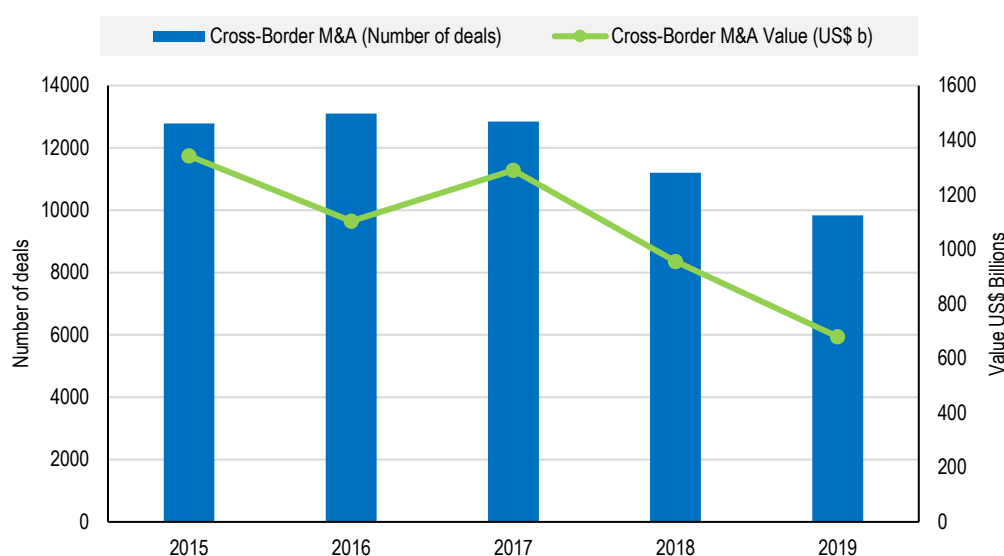
127. Even though the long-term effects the COVID-19 epidemic are unknown, if past long-term trends relating to economic interconnectedness continue, then economies will remain interconnected and interdependent (globally and/or regionally) in ways that are likely to continue to result in cross-border competition matters.

⁶⁹ For example, the OECD Regional Centres (OECD (2020), 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>).

10.2.1. International merger and cartel trends

128. Cross-border merger and cartel trends are an indicator of global economic interconnectedness. As was noted in the June 2019 OECD paper, 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^[10]). These numbers increased in the first half of 2018, when cross-border mergers hit their highest level of the last decade (Baker McKenzie, 2017^[23]) (Grocer, 2018^[24]). *Figure 10.1* sets out cross border mergers and acquisitions trends from deals between 2015-2019, showing ultimately a decline in 2018 and 2019.⁷⁰

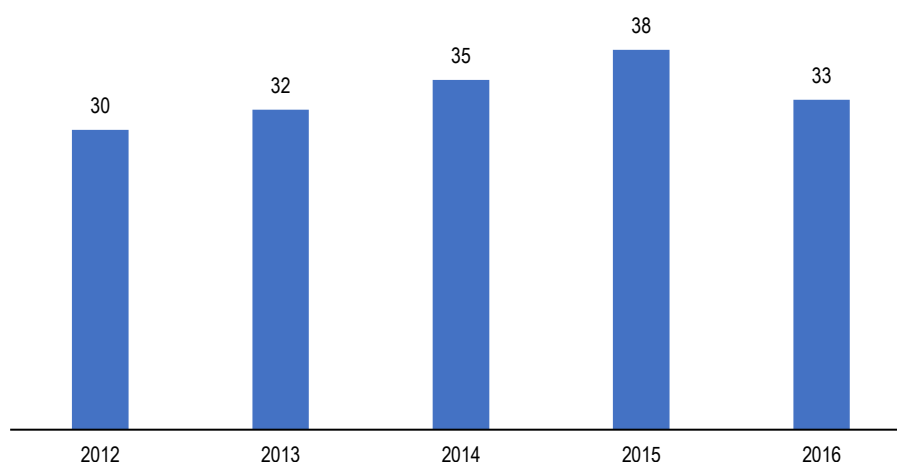
Figure 10.1. Cross-border merger trends, by number of deals and value (US\$ b), 2015 – 2019



Source: (McKenzie, 2019^[25])

129. As reported in the 2020 OECD Competition Trends report and outlined in *Figure 10.2* below, the number of cartels discovered and officially 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^[20]). 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 Survey responses show that enforcement co-operation between jurisdictions on cartel matters, as is outlined in *Section 12.4: Frequency of enforcement co-operation - number of cases by enforcement area*, has increased since the 2012 Survey.

⁷⁰ This trend was also mirrored in the frequency of merger co-operation in 2018, see *Section 10.2.1: International merger and cartel trends*.

Figure 10.2. 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.

10.3. Digital economy developments

130. 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 programs of both the ICN and OECD.⁷¹ The scale, scope and nature of the global digital economy means that businesses can now more easily operate across borders and that consequently competition issues identified in one national market in relation to one of these businesses, may arise in another.
131. 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). 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 or for there to be conflict in the methodologies used in the same or related cases and for there to be the potential for inconsistent enforcement outcomes.⁷² 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

⁷¹ For example see: OECD webpage on Digital Economy, Innovation and Competition (OECD, n.d._[143]) or digital focus on 2019 Annual General Conference: (ICN, 2019_[144]).

⁷² See Challenges for Competition Law Enforcement and Policy in the Digital Economy (Capobianco and Nyeso, 2017_[240]), Digital Globalization: The New Era of Global Flow (Manyika, 2016_[145]) (“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”), and the Report of the Digital Competition Expert Panel: Unlocking digital competition (HM Treasury, 2019_[146]) (known as the Furman Report)

as compared to the major global digital platforms and businesses. For example, by sharing resources to conduct a joint market study.⁷³

132. 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 significant reports from authorities in the United States, United Kingdom,⁷⁴ EU, Australia, France, Germany, Japan, and the Netherlands, which have been the subject of extensive discussion and review in the competition community.⁷⁵ The challenges outlined in some of these reviews are not limited to high-level issues of competition policy, but practical enforcement issues that can benefit from co-operation between authorities.

10.4. Business as a potential driver for co-operation

133. Business may also have incentives to improve international enforcement co-operation in some instances (and to dampen it in others). For example, in relation to the former, international merger parties may have an interest in improving co-operation in some circumstances by seeking to promote effective enforcement between authorities to minimize legal, administrative or timing burdens that would otherwise increase their transaction costs. More broadly, global businesses have an interest in advocating for a global economic outlook, one that has authorities considering the important interests of other jurisdictions and effective processes. This can in turn promote sound competition law and enforcement globally and improve global resource allocation.
134. Representatives of business (such as international law firms and international financial advisors) can also be drivers of efforts to improve inter-jurisdictional harmonisation, communication and co-operation on cases.
135. Conversely, in some instances it may not be in the interests of some businesses to improve enforcement co-operation if it exposes the business to a greater risk of investigation for anti-competitive conduct in more jurisdictions. Similarly, business

⁷³ Joint market studies conducted by the French Autorité de la Concurrence and the German Bundeskartellamt on big data and algorithms and their implications on competitions (Autorité de la concurrence and Bundeskartellamt, 2016_[147]), (Autorité de la concurrence and Bundeskartellamt, 2019_[148])

⁷⁴ In addition to the UK's Furman Report, other key works relating to the digital economy include the Competition and Markets Authority's digital markets strategy (UK CMA, 2019_[149]), the CMA Online platforms and digital advertising: Market study final report (UK CMA, 2020_[150]), and the launch of the Digital Markets Taskforce (UK CMA, 2020_[151]).

⁷⁵ See: ACCC welcomes comprehensive response to Digital Platforms Inquiry (ACCC, 2019_[152]), Digital Platforms Inquiry: Final Report (ACCC, 2019_[153]), Sector-specific investigation into online advertising (Autorité de la concurrence, 2018_[195]), Online advertising (Bundeskartellamt, 2018_[154]), Ex-post Assessment of Merger Control Decisions in Digital Markets (Lear, 2019_[155]) accessed on 21 October 2020, Digitalisation, online platforms and competition law: an overview of regulatory developments in the Netherlands (van de Sanden and Beetstra, 2019_[156]), Report regarding trade practices on digital platforms (JFTC, 2019_[157])

may not wish to promote enforcement cooperation due to concern over the control of their confidential business information.

11. History of initiatives relating to international enforcement co-operation

11.1. Overview of section

136. An overview of the history of international enforcement co-operation is important in understanding the results of the Survey for a number of interrelated reasons.⁷⁶ First, it provides context for the questions authorities were asked about enforcement co-operation, both on the international framework in which co-operation occurs and specifically on the past work and potential further work of both the OECD and ICN.
137. Second, the history demonstrates that the practical and theoretical value and challenges of enforcement co-operation have been understood for many years. It shows that while some challenges have been addressed, some challenges are unlikely to be resolved without new approaches. This past context is useful for evaluating any proposed future areas of work for both the OECD and ICN.
138. Third, as this is the first joint report between the OECD and ICN, it represents the first time the extensive work relating to co-operation of both organisations has been set out in detail in one document authored by these organisations. This body of work is part of the reason why there is such strong support and understanding of the value of international enforcement co-operation among authorities.
139. The history shows that the challenges of enforcement co-operation are various and that in many instances resolutions to these challenges are iterative and require a range of different responses: both high-level policy recommendations and advice (such as OECD recommendations), along with more practical approaches (such as templates and guidance for co-operating on mergers and cartel matters).⁷⁷ The history outlined in this Section shows that the ICN and OECD have had distinct but over-lapping responsibilities and roles, and that continued efforts to co-ordinate and co-operate between the organisations are likely to advance efforts to improve enforcement co-operation.
140. Finally, related to the previous point, in the cases of both ICN and OECD, the support, contributions and leadership of their members has been key to advancing the efforts to enhance co-operation by both organisations. For example, broad and detailed OECD delegate engagement was critical to getting the various recommendations outlined below developed and accepted. Equally, ICN Working Groups, led by their

⁷⁶ In addition to the OECD, ICN and Regional Networks covered in *Section 19*: Regional enforcement co-operation of this Report, there are other competition organisations, networks and alliances that support international enforcement co-operation (including UNCTAD), which are set out in *Annex E*: Other international co-operation networks and international organisations working on international enforcement co-operation.

⁷⁷ See *Annex G*: Key OECD and ICN international enforcement co-operation documents and resources for a list of the relevant OECD and ICN instruments.

co-chair authorities, have been instrumental in developing the key resources used by authorities. Accordingly, understanding the history of co-operation shows that engaging the respective membership of each organisation in future areas of focus to improve co-operation, including those to resolve long-standing challenges, will be important to their prospects of success.

141. The review of OECD and ICN work contained in this section does not include work that is not related to international enforcement co-operation, however in practice, the other activities of the OECD and ICN also promote understanding and convergence of policies and procedures that are instrumental to supporting cooperation, such as their respective work in relation to procedural fairness and confidentiality.⁷⁸

11.2. OECD work to support enforcement co-operation 1967 – 2013

142. Since 1967, the OECD has approved a series of Council Recommendations dealing directly or indirectly with international enforcement co-operation between competition authorities. The OECD Council has adopted five versions of the Recommendation over the years (see Table 11.1), with significant developments made in the 1995 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade (1995 Recommendation).

Table 11.1. The iterations of OECD Recommendations dealing with international enforcement co-operation between competition authorities

Year of adoption	Recommendations
1967	Recommendation of the Council concerning Co-operation between Member Countries on restrictive Business Practices Affecting International Trade
1973	Recommendation of the Council concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade
1979	Recommendation of the Council concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade
1986	Revised Recommendation of the Council concerning co-operation between Member Countries on Restrictive Business Practices affecting International Trade
1995	Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade
2014	Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings

Note: Add the note here. If you do not need a note, please delete this line.

Source: Add the source here. If you do not need a source, please delete this line.

11.2.1. Cartel related work

143. The 1998 Recommendation on Hard Core Cartels (1998 Recommendation) (OECD, 1998_[26]) marked the first time the OECD defined and condemned a particular kind of anti-competitive conduct. Importantly, this recommendation had components relating to co-operation: the second part of the recommendation stressed the common interest of Member countries in preventing hard core cartels and set forth principles concerning the “when” and the “how” of co-operating with respect to hard core cartels. The 1998 Recommendation was designed to contribute to the efficient operation of

⁷⁸ For example, see the work done by the ICN on the Framework for Competition Agency Procedures (CAP), <https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/>, and the many Roundtable discussion papers presented by the OECD Secretariat (e.g. Digital advertising markets (OECD, 2020_[158])).

international markets by promoting, inter alia, co-operation among Member and non-Member countries.

144. The 1998 Recommendation was reviewed in the 2019 Review of the 1998 OECD Recommendation concerning Effective Action against Hard Core Cartels (2019 Review) (OECD, 2019^[27]), which reflected the significant developments that had occurred in competition policy and practice relating to enforcement action against hard-core cartels since 1998. It included analysis based on a 2017 OECD survey of Member countries regarding their hard-core cartel enforcement practices, including the status of international enforcement co-operation between competition authorities. The 2019 Review noted:

Respondents described barriers in providing or receiving investigative assistance, and general challenges to effective international co-operation, such as: (i) a lack of co-operation agreements between competition authorities, in particular second-generation agreements, or information gateway provisions (both of which enable competition authorities to exchange confidential information without the need to seek prior consent from the source of the information); (ii) difficulties in co-operation and exchange of information between jurisdictions with and without criminal prosecutions for cartels; (iii) strict data privacy laws which impede the exchange of information; and (iv) difficulties in notifying foreign defendants, which can result in procedural deadlocks...

In summary, there is a trend towards increased investigative assistance and international co-operation in the last decade. Issues remain, essentially linked to: (i) the diversity of legal systems (in particular between criminal and administrative systems); (ii) rules concerning the exchange of confidential information; (iii) different powers of competition authorities; (iv) data privacy laws; and (v) resource prioritisation. The last point was mentioned as an obstacle to effective co-operation by many jurisdictions. (OECD, 2019^[27])

145. The 2019 Review led to the substantially revised 2019 Recommendation concerning Effective Action against Hard Core Cartels (2019 Hard Core Cartels Recommendation) (OECD, 2019^[28]). The revised 2019 Hard Core Cartels Recommendation also incorporated many of the issues covered in the OECD's 2005 "Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations." (OECD, 2005^[29])
146. The 2019 Hard Core Cartels Recommendation refers to the 2014 OECD Recommendation (see *Section 11.5: 2014 OECD Recommendation and subsequent related work*) and it was decided that co-operation matters should be primarily dealt with in the 2014 OECD Recommendation, rather than being included again separately in the 2019 Recommendation.

11.2.2. Merger related work

147. The 2005 Recommendation on Merger Review (Mergers Recommendation) (OECD, 2005^[30]) was designed to create a set of internationally recognised best practices for the merger review process, including co-operation among competition authorities in merger review. The Merger Recommendation deals specifically with co-ordination and co-operation on cross-border merger cases and invites Member countries to co-operate and to coordinate their reviews of transnational mergers to avoid inconsistencies.

148. Member countries are encouraged to consider actions, including national legislation, as well as bi-lateral and multi-lateral agreements or other instruments, by which they can eliminate or reduce impediments to co-operation and co-ordination. The Merger Recommendation was reviewed in 2013 in the ‘Report on Country Experiences with the 2005 OECD Recommendation on Merger Review’ (OECD, 2013^[31]). Relevant to the issue of co-operation between competition authorities it noted:

In some areas, most notably the co-ordination and co-operation with respect to transnational mergers, the Survey indicated that competition authorities are occasionally experiencing some practical difficulties, due to the existing legal obstacles to the exchange of confidential information on parallel merger case. (OECD, 2013^[31])

149. The 2013 Report did not recommend any amendments to the Mergers Recommendation. This suggests that any ongoing enforcement co-operation concerns relating to merger matters may be better addressed in the OECD’s consideration of the 2014 Co-operation Recommendation.⁷⁹

11.3. 2014 Challenges Report

150. In response to the findings of the 2012 Survey, the OECD drafted a report entitled “Challenges of international co-operation in competition law enforcement” (2014 Challenges Report), which ultimately led to the 2014 OECD Recommendation (OECD, 2014^[32]).

151. The 2014 Challenges Report was presented at the May 2014 Council Meeting at Ministerial Level in the framework of the OECD Initiative on New Approaches to Economic Challenges (NAEC). At the time the 2014 Challenges Report was prepared, an update and possible expansion of the 1995 Recommendation was under consideration by the Competition Committee.

152. The key conclusions of the 2014 Challenges Report remain relevant and are included below because they confirm longstanding trends and challenges in international enforcement co-operation:

- Co-operation in the enforcement of competition law has improved significantly since 1990. More countries are actively co-operating and efforts to converge in substantive approaches to competition law enforcement have borne fruit. While bi-lateral co-operation provides many satisfactory results now, with rapid change in competition law enforcement and increasingly more connected economies, it is appropriate to consider whether new approaches to co-operation will be needed in the future.
- Future challenges for co-operation arise from the significant increases in the complexity of co-operation, as the world economy continues to globalise and as the newer competition authorities in fast-growing emerging economies become more active. Methods and tools of co-operation could usefully evolve in order to address

⁷⁹ As is noted below, in *Section 11.6*: 2019 OECD Secretariat paper: ‘Developments in International Co-operation since 2014’ and initiating the 2014 OECD Recommendation monitoring report process, the OECD monitoring process of the 2014 OECD Recommendation has commenced with this Report.

future challenges. From 1990 to 2011, while the complexity of co-operation has increased, the legal mechanisms for co-operation have hardly evolved. The need for effective co-operation could outstrip the ability of existing bi-lateral mechanisms to cope.

- There are large costs that can arise from the lack of co-operation and co-ordination and these costs are not simply administrative. Substantial benefits would arise from improvements in the enforcement of competition laws across borders.
153. The 2014 Challenges paper presented a list of possible improvements, without suggesting that the list is exhaustive or agreed. Options included:
- improved bi-lateral co-operation, for example, to allow exchanges of confidential information between enforcers
 - developing standards for legislative/regulatory frameworks that would enable sharing of information and include legislative protections for information received from counterpart regulators
 - developing common form waivers and suggestions to facilitate the use of such waivers
 - adopting multi-lateral instruments that address the most pressing needs for co-operation. These could relate, for example, to sharing information, merger notification, or convergence of leniency policies for cartel investigations
 - developing international standards for formal comity, such as a legal instrument defining criteria for requesting an enforcement action in or assistance to another authority, and clarifying participating authorities' comity obligations
 - allowing authorities to choose to recognise the decisions of other competition authorities in the investigation of cross-border matters. There could even be an agreement for giving non-binding deference to one 'lead authority'
 - reaching a multi-lateral agreement for exchange of information, comity and deference standards based on jurisdictions voluntarily opting in to the agreement.
154. A number of these initiatives were progressed with the work relating to the 2014 OECD Recommendation (outlined below). In addition, where some have not progressed, they were considered as part of the future areas of focus proposed in *Section 21. : Proposed future areas of focus to improve international enforcement co-operation*

11.4. 2014 OECD enhanced enforcement co-operation work

155. Following the release of the 2013 Report and the 2014 Challenges Report, the OECD arranged for a hearing to discuss enhanced enforcement co-operation and possible new and different forms of co-operation among authorities (OECD, 2014^[33]). Four speakers from different spheres (academia, the judiciary and private practice) were invited to share their insights on possible new forms of co-operation,⁸⁰ along with

⁸⁰ Prof. Michal S. Gal (Faculty of Law, University of Haifa), Chief Judge Diana P. Wood (the US Court of Appeals for the Seventh Circuit), Dr. John Temple Lang (Partner, Cleary Gottlieb Steen &

contributions from OECD Competition Committee Members.⁸¹ The hearing discussed: i) the role of the courts in international enforcement co-operation; ii) reliance on foreign cartel decisions and iii) “lead agency” models⁸² and “one-stop-shop” models.⁸³ The OECD produced an executive summary of hearing, which found (among other things) that:

- In order to increase overall deterrence of international cartels, academics have proposed mechanisms that 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). If in place, 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.
 - The business community encourages governments to consider 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. Enforcement areas that would potentially lend themselves to one-stop shop models are those that require filings or applications by companies to multiple authorities, such as leniency and merger applications or merger filings.
 - In order to reduce the substantial transaction costs associated with unco-ordinated parallel antitrust proceedings, some academics have proposed new and more advanced ways in which authorities could co-operate more effectively. Some of these proposals 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.⁸⁴
156. This hearing reflects OECD efforts to consider longer-term and complex options for improving enforcement co-operation, which remain relevant, and can inform the future areas of focus suggested in this Report, in addition to the findings of the Survey.

11.5. 2014 OECD Recommendation and subsequent related work

157. In light of the Committee work reviewing the 1995 Recommendation and the findings of the 2014 Challenges Report, the OECD Council adopted the 2014 OECD Recommendation on 16 September 2014. As of December 2020, the 2014 OECD

Hamilton LLP), and Prof. Oliver Budzinski (Institute of Economics, Ilmenau University of Technology).

⁸¹ See Presentation by the EU on co-operation in inspections (European Union, 2014_[160]); and Presentation by the ACCC on Australia-New Zealand Co-operation (ACCC, 2014_[161]).

⁸² “Lead agency” models aim at introducing a common procedure led by one competition authority, instead of multiple uncoordinated procedures by several competition authorities: see Hearing on Enhanced Enforcement Co-operation: Detailed Summary of Discussion (OECD, 2014_[162]).

⁸³ “One-stop shop” model aim to have a matter primarily dealt with by one national or supra-national authority: see Hearing on Enhanced Enforcement Co-operation: Detailed Summary of Discussion (OECD, 2014_[162]), paper by John temple Lang (Temple Lang, 2014_[163]) .

⁸⁴ Seven key categories of findings were made, of which three are listed here: Executive Summary of the Hearing on Enhanced Enforcement Co-operation, (OECD, 2014_[164])

Recommendation has 40 adherents, which include non-OECD Members. The 2014 OECD Recommendation is divided into seven substantive sections:

- **Section II: on commitment to effective international co-operation** recommends steps to minimise direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities, including:
 - minimising the impact of legislation that might restrict or reduce co-operation between competition authorities
 - making publicly available sufficient information on their substantive and procedural rules
 - minimising inconsistencies between their leniency or amnesty programmes that adversely affect co-operation”.
- **Sections III and IV: on consultation and comity invites** Adherents to exchange views, and request or accept consultations on cases and practices affecting their important interests.
- **Section V: on notifications of investigations or proceedings** recommends mechanisms for notifications in cases of investigations or proceedings affecting another Adherent’s important interests.
- **Section VI: on the co-ordination of investigations or proceedings** in the same or related cases recommends the 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: on the exchange of information** 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: on investigative assistance** to another competition authority calls for 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.

158. In addition to making recommendations to Adherents, the 2014 OECD Recommendation provides instructions to the Competition Committee. This was an important aspect of the 2014 OECD Recommendation, as it recognised the valuable role that international organisations, such as the OECD, can play in supporting and developing co-operation between authorities. 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.
159. In line with the instructions to the Competition Committee, it hosted several roundtables on international co-operation in competition enforcement over the years, including roundtables on:
- Enhanced Enforcement Co-operation (2014) (OECD, 2014^[33])
 - The local nexus and jurisdictional thresholds in merger control (2016) (OECD, 2016^[34])
 - The extraterritorial reach of competition remedies (2017) (OECD, 2017^[35])
 - Benefits and challenges of regional competition agreements (2018) (OECD, 2018^[13])
 - Challenges and Co-Ordination of Leniency Programmes (2018) (OECD, 2018^[36])
 - Access to the case file and protection of confidential information (2019) (2019 Confidential Information Paper) (OECD, 2019^[37])
 - Competition provisions in trade agreements (2019) (OECD, 2019^[38])
 - Criminalisation of cartels and bid rigging conspiracies (2020) (OECD, 2020^[39])
160. As noted in *Section 11.2: OECD work to support enforcement co-operation 1967 – 2013*, the OECD Secretariat has worked on co-operation related Recommendations, including updating the Recommendation of the Council concerning Effective Action against Hard Core Cartels and drafting a Recommendation on OECD Transparency and Procedural Fairness (which aims to improve transparency of legal rules, as per Section II of the 2014 OECD Recommendation). (OECD, 2018^[40])
161. The OECD Secretariat has undertaken extensive dissemination of the co-operation work through articles, workshops and conferences. Of particular note is the work that has been done relating to co-operation in the OECD Regional Centres, both work in relation to co-operation and also as a way to achieve harmonisation in implementation of the law and to foster working level contacts, informal as well as formal co-operation. The importance and value of this regional work is considered further below in the context of regional co-operation in *Section 19. Regional enforcement co-operation* and *Annex I: EU Regional Integration Arrangements*.

162. As instructed, the OECD Secretariat has also established and periodically updates the list of contact points.⁸⁵
163. While the Competition Committee did not develop any model agreements, the OECD Secretariat prepared, first, an inventory of intergovernmental co-operation agreements on competition in 2015 (OECD, 2020_[71]) and, second, an inventory of international co-operation Memoranda of Understanding (“MoUs”) between competition authorities in 2016 (OECD, 2020_[41]).

11.6. 2019 OECD Secretariat paper: ‘Developments in International Co-operation since 2014’ and initiating the 2014 OECD Recommendation monitoring report process

164. In June 2019, the OECD Secretariat produced a report entitled “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” (June 2019 Paper). Key parts of this analysis have been included throughout this Report (OECD, 2019_[10]).
165. The decision of the June 2019 Competition Committee meeting began the process of monitoring the 2014 OECD Recommendation as is required by the OECD Council. A formal monitoring report will be prepared and presented to the Council once the Joint OECD/ICN Report has been finalised, as it will inform the proposals in the monitoring report. The monitoring report is expected to go to Council in 2021.

11.7. ICN initiatives to support international enforcement co-operation

166. Since its founding in 2001, the ICN has promoted and facilitated competition enforcement co-operation (US FTC, 2001_[42]). The ICN provides its member competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical aspects of competition policy and law enforcement.⁸⁶ The ICN’s working groups on Cartels, Mergers, and Unilateral Conduct provide fora for member authorities and non-governmental advisors (NGAs) to share effective co-operation strategies and practices.
167. The Cartel and Merger Working Groups have also developed tools and guidance to facilitate and improve co-operation, tailored to each type of investigation. Such tools include frameworks, to which authorities register, that enable authorities to co-operate.⁸⁷ In addition, many of the ICN’s recommendations and other work products have led to convergence of investigative and analytical tools and procedures (ICN,

⁸⁵ [DAF/COMP/WP3\(2017\)3](#)

⁸⁶ “Members produce work products through their involvement in flexible project-oriented and results-based working groups. Working group members work together largely by internet, telephone, teleseminars, and webinars. Annual conferences and workshops provide opportunities to discuss working group projects and their implications for enforcement. Where the ICN reaches consensus on recommendations, or “best practices,” arising from the projects, individual competition authorities decide whether and how to implement the recommendations, through unilateral, bi-lateral or multi-lateral arrangements, as appropriate.” (ICN, 2020_[165]).

⁸⁷ Frameworks are voluntary opt-in arrangements for competition agencies, supported by the ICN (ICN, 2016_[50]; 2012_[54]).

2018^[43]), which helps co-operating authorities more easily understand and communicate about the status and important elements in their respective investigations. Co-operation itself may also lead to converging approaches and procedures, which creates a virtuous cycle resulting in increased and improved co-operation.

11.7.1. Merger co-operation related guidance and activities

168. From the ICN's earliest days, the ICN's Merger Working Group (MWG) developed high-level principles and best practices supporting co-operation, and more recently, has focused on developing practical tools that enable authorities to implement effective co-operation practices. The first co-operation-related principle came in 2002, when the MWG recognized that, "Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs."⁸⁸ The MWG also addressed co-operation in its first set of Recommended Practices, regarding Merger Notification and Review Procedures, which identified the common goals for co-operation in merger review and recognised the role that merging parties play in facilitating co-operation.⁸⁹
169. To complement these high-level principles and support convergence, the MWG turned its attention to tools that facilitate co-operation. In 2005, the MWG produced a Model Confidentiality Waiver for Mergers, to serve as a template waiver of confidentiality for authorities and parties, and an accompanying report, which identifies the role for waivers of confidentiality in facilitating joint discussion and analysis among cooperating authorities (ICN, 2005^[44]). Another important MWG tool that helps authorities overcome practical impediments to effective merger co-operation is the Framework for Merger Review Co-operation, an opt-in framework that identifies possible approaches to information exchange. Registrants to this framework identify a liaison officer to facilitate co-operation and confirm they will protect confidential information (ICN, 2012^[45]).
170. As ICN member authorities and non-governmental advisors gained further experience with co-operation on merger matters, the MWG worked to distil lessons learned. These were published as the Practical Guide to International Enforcement Co-operation in Mergers (ICN, 2015^[46]). After these practical tools were developed, the MWG returned to its best practices to codify new learning in its Recommended

⁸⁸ ICN guiding principles are a common framework of high-level ideals that ICN members have agreed should inform and guide the enforcement process. (ICN, 2002^[166])

⁸⁹ Recommended Practices are best practices, adopted by consensus, and are ICN's highest profile and most influential work product. They provide sound non-binding benchmarks for agencies and governments. This set of RPs was originally titled "Recommended Practices for Merger Notification Procedures." The title was later changed to "Recommended Practices for Merger Notification and Review Procedures". See RP X.D. ("Competition agencies should encourage and facilitate the merging parties' co-operation in the merger coordination process"); RP X.D., Comment 1 ("Cooperation of the merging parties helps to facilitate effective interagency coordination. Examples of such co-operation include timing of notification in coordinating jurisdictions and granting confidentiality waivers. To encourage such co-operation, competition agencies should seek to further the transparency of the coordination process by informing parties of the benefits of coordination and addressing concerns raised by the exchange of information pursuant to voluntary waivers"). (ICN, 2004^[167])

Practices on Merger Notification and Review. The 2018 update to the Recommended Practice on Co-operation on Merger Notification and Review⁹⁰ reflects the evolution in co-operation practices, including the benefits that authorities have found from co-operating, the practical lessons ICN member authorities learned, the role that ICN and OECD work products play in facilitating co-operation,⁹¹ and the types of activities that co-operating authorities find most useful,⁹² including for co-operation on remedies (ICN, 2018_[47]) (See RP XI.E).

11.7.2. Cartel co-operation related guidance and activities

171. Enforcement co-operation has also been a key component of the ICN's Cartel Working Group's (CWG) experience-sharing and practical guidance since its earliest work. The CWG report, "Co-operation between Competition Agencies in Cartel Investigations", is based on the results of a questionnaire sent to ICN members. It identifies the types of co-operation possible in cartel investigations and possible ways to improve co-operation (ICN, 2007_[48]). Member authorities have found this report to be one of the most useful work products in supporting co-operation (ICN, 2013_[49]).
172. To facilitate authority-to-authority co-operation, the CWG created the ICN's Framework for the Promotion of the Sharing of Non-Confidential Information for Cartel Enforcement (ICN, 2016_[50]), which is a practical tool intended help authorities overcome previously identified barriers to effective co-operation by increasing the willingness of authorities to co-operate (OECD, 2013_[1]) (See Chapter 6: Limitations and constraints on international co-operation). CWG members also completed template charts summarising their information sharing mechanisms, and co-operating

⁹⁰ (RP XI. A, Interagency enforcement co-operation, Comment 5: "Enforcement co-operation increases familiarity among agency staff and mutual understanding of one another's merger review processes, which in turn may help foster trust and facilitate future co-operation, and greater procedural and analytical convergence."). The RP was retitled, "Interagency enforcement co-operation". (ICN, 2018_[47])

⁹¹ 2018 Recommended Practices included references to: Practical Guide to International Enforcement Cooperation in Mergers (ICN, 2015_[46]), Waivers of confidentiality in merger investigations (ICN, 2005_[44]), ICN framework for merger review co-operation (ICN, 2012_[45]), Recommendation of the OECD council concerning international co-operation on competition investigations and proceedings (OECD, 2014_[168])

⁹² (RP XI.C, Comments 4-6: "Comment 4: It is helpful for agencies to communicate at regular intervals throughout their respective procedures and, in particular, at key decision-making stages, during closely coordinated reviews. This includes agencies communicating the outcome of their investigation to "other cooperating agencies who may have already completed their review or who may still be investigating.") ("Comment 5: Cooperation involves the exchange of investigative information, usually, though not exclusively, through oral communications. It may occur based only on sharing publicly available information, as well as 'agency non-public information,' i.e. information that the agencies are not statutorily prohibited from disclosing, but normally treat as non-public. In closely coordinated reviews, co-operation typically involves voluntary waivers of confidentiality by the merging parties, which allows the agencies to exchange the parties' business confidential information. In some cases, agencies may also seek waivers from third parties to allow for a more fulsome discussion.") ("Comment 6: Enforcement co-operation typically involves discussions between investigative staff. Where beneficial, consultation as to investigative approaches and assessments may take place among senior officials or agency heads."). (ICN, 2018_[47])

authorities can rely on these to understand the types of information that may be requested and shared in cartel investigations and the role that regional networks play in facilitating co-operation (ICN, n.d.^[51]).

173. The CWG also developed a practical manual on enforcement co-operation in 2013 (ICN, 2013^[52]), leniency waiver templates (ICN, 2005^[44]), and “Guidance on Enhancing Cross-Border Leniency Co-operation” in 2020 (ICN, 2020^[53]), which also have allowed authorities to cooperate more effectively in cartel matters.

11.7.3. Unilateral co-operation related guidance and activities

174. The Unilateral Conduct Working Group (UCWG) has focused on facilitating practical experience-sharing to support co-operation. The working group has hosted teleseminars (ICN, 2012^[54]) to help authorities and NGAs better understand how and when co-operation can be effective in unilateral conduct investigations, although member authorities have noted that co-operation is less common in unilateral conduct matters. At UCWG workshops, participants have analysed hypothetical cases and discussed how opportunities to co-operate arise in unilateral conduct cases.⁹³

11.7.4. ICN young and developing authorities network

175. The ICN has created a network for young and developing authorities. The ICN has included specialised sessions for these authorities at its Annual General Conference since 2017 and undertaken project work to consider the main challenges that authorities face in their first years of competition enforcement and advocacy (ICN, 2019^[55]).

11.7.5. Other ICN guidance and activities

176. As the ICN working groups’ experience with co-operation developed over time, ICN also undertook horizontal, network-wide initiatives to support co-operation. This included practical experience-sharing and identifying common practices and obstacles to effective co-operation across all types of investigations. For example, in 2011, the ICN held a Roundtable on Enforcement Co-operation to deepen the discussion of co-operation among member authorities and NGAs. The roundtable specifically addressed international enforcement co-operation in cartel, merger, and unilateral conduct investigations. Before the Roundtable, 19 competition authorities shared experiences through a brief questionnaire. After the Roundtable, the ICN produced a report, and working groups were able to incorporate lessons learned and recommendations into their co-operation-related work products (ICN, 2011^[56]). Recently, the ICN’s virtual training academy developed the Training on Demand module, “Introduction to International Co-operation”. This module offers practical advice from ICN members’ experiences; highlights co-operation-related ICN work products; and focuses on how to initiate competition enforcement co-operation and the common features of such co-operation across merger, unilateral conduct, and cartel investigations (ICN, 2018^[57]).

⁹³ See e.g. UCWG Workshop on Refusals to Deal, November 2015, hosted by the Turkish Competition Authority.

Part III. Survey results and analysis

12. Frequency of international enforcement co-operation

12.1. Overview of section

177. This Section considers both qualitative and quantitative data from the 2012 and 2019 Surveys regarding:

- frequency of enforcement co-operation at various stages of a case/investigation⁹⁴
- frequency of enforcement co-operation between authorities and number of cases/investigations (outside of regional networks)
- frequency of enforcement co-operation by enforcement area and types of co-operation (outside of regional networks).

178. The Survey shows that most enforcement co-operation occurs during a case/investigation, rather than in the preliminary stages or after a decision is made (such as in monitoring a decision or remedy). It also shows a general trend towards increasing co-operation in all enforcement areas, with a slight decline in 2018 in all enforcement areas.⁹⁵ It shows a decrease in the number of authorities with no experience in enforcement co-operation and that the majority of enforcement co-operation occurs in relation to merger matters, with cartel and then unilateral conduct matters following.

12.2. Frequency of co-operation at various stages of a case/investigation

179. The Survey sought to determine at which stages during an investigation authorities were most likely to co-operate on enforcement matters. Competition authorities may co-operate and co-ordinate at the following stages:

- before opening formal investigations, (e.g. to discuss the case, timeframes or co-ordinate enforcement acts like information requests and inspections)
- in the course of the investigation (e.g. to discuss theories or share information)
- at the end of the investigation (e.g. to discuss possible remedies or sanctions, or to co-ordinate public release of information).

180. The Survey asked a series of qualitative questions about when co-operation occurs, how it is initiated and then asked respondents to identify in a table whether the co-

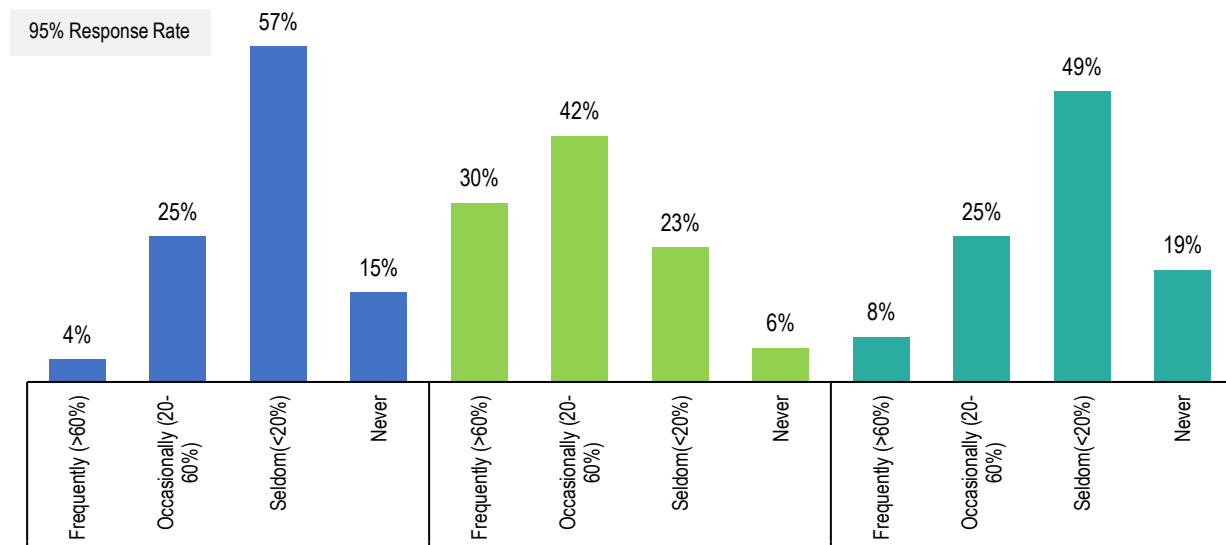
⁹⁴ The term “case/investigation” was not defined in the Survey. Accordingly, the results may reflect differences between jurisdictions as to what they consider a “case” or “investigation”, including when it commences.

⁹⁵ This decline was mirrored in the cross-border figures outlined in *Section 10.2.1: International merger and cartel trends*.

operation generally occurred pre-notification/before investigation, during the investigation or post investigation (based on frequency: never, seldom, occasionally or frequently). The question also included regional enforcement co-operation (Question 7).

181. *Figure 12.1* shows that the majority of enforcement co-operation (when considered as a whole, not by enforcement type) occurs during investigations, rather than pre- or post-investigation.⁹⁶

Figure 12.1 Frequency of co-operation at the stage of investigation, by percentage of respondents to the question, 2019



Source: OECD/ICN Joint Survey 2019, Question 7 – Table 1
Data source type: defined data set

182. In their qualitative responses, a number of respondents noted that whether they co-operate is decided on a case-by-case basis, although this was typically done as early as possible. One authority noted that in all circumstances an analysis was done to consider if the case may affect another jurisdiction’s interests and contact made as soon as possible if so.

183. A number of EU-member respondents noted EU-members co-operate through posting matters on the ECN intranet platform before an investigation is opens (see description of ECN network in *Annex I EU Regional Integration Arrangements*). A similar process was referred to by one respondent in relation to the Eurasian Economic Commission.

⁹⁶ Although Question 7 asked respondents if the stage of co-operation varied between enforcement areas, the table did not. In two [2] instances, respondents provided different answers for mergers and cartels. In these instances, whichever was the more frequent form of co-operation was selected, as this question was intended to give an overall picture of the stages of co-operation, while the qualitative responses give a better idea of when co-operation occurs by enforcement area.

184. Some respondents noted that whether engagement and co-operation was ongoing depended on whether after initial discussion and co-operation, it was deemed useful (e.g. if the markets and products affected by a merger are similar).
185. A number of respondents noted that in both cartel and merger matters legal requirements on the parties meant they were aware of which other jurisdictions were considering the same matter, although a number of respondents noted that this also occurred through informal relationships and networks.

12.2.1. Mergers and stages of co-operation

186. A number of authorities noted that they require parties to provide a list of other authorities that have been notified the transaction, and this was used as the basis for considering co-operation with other authorities. Some authorities ask that parties voluntarily identify other jurisdictions that have been or will be notified.
187. Some respondents noted that co-operation occurred more in the pre and post stages for merger matters, than with other enforcement areas. For example, one respondent noted they had more contact during the pre-notification phase for mergers, while another said they generally notify other authorities towards the end of merger cases.

12.2.2. Cartels and stages of co-operation

188. A number of authorities noted that they become aware of matters in other jurisdictions through immunity and leniency applications, which can require applicants to advise the authority of other jurisdictions they have approached with an immunity or leniency application.
189. A number of authorities noted that informal discussions can occur at early stages. One noted that deep co-operation occurs at the investigatory stage, and generally using formal legal instruments to support co-operation (such as MLATs, treaties and letters rogatory).

12.2.3. Frequency of international enforcement co-operation where co-operation would be feasible

190. The Survey asked respondents about the frequency of enforcement co-operation where it would be feasible and likely (outside of regional networks and organisations).⁹⁷ The question did not specify a particular enforcement area. A number of respondents noted that where enforcement co-operation was feasible, it would occur frequently or often, although a number of parties noted that resourcing, timing and practical challenges were still an issue.

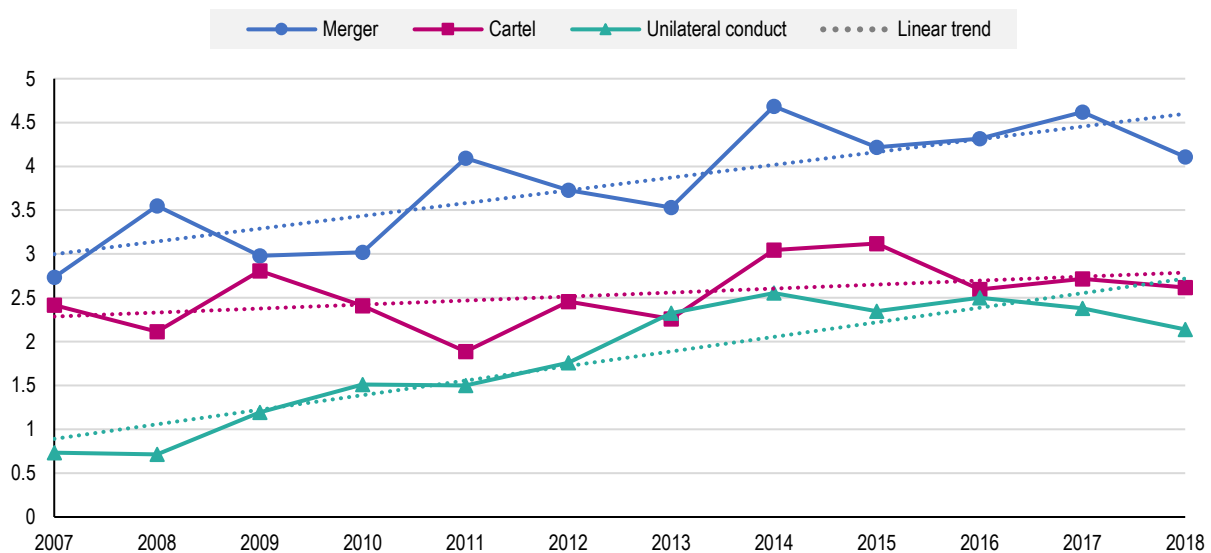
12.3. Frequency of enforcement co-operation - number of authority contacts

191. The trend toward increasing enforcement co-operation between authorities is demonstrated in *Figure 12.2* below, which is based on the average number of authorities with which respondents have co-operated over the years 2017 to 2018 by enforcement area. There are limitations in the data (e.g. double-counting when two or more authorities cooperating on the same matter respond or because the numbers averaged are medians of value ranges), however, the value of the data is that it reflects

⁹⁷ Question 17 of Survey.

a trend over time using data collected and represented in the same way. Rather than indicating a specific number of instances in which authorities have co-operated, it demonstrates a trend that shows merger co-operation involves a significantly higher number of authority contacts than cartel or unilateral conduct co-operation. This is not unexpected, as noted in *Section 10. Drivers of international enforcement co-operation* above, because cross-border mergers are likely to lead to more cross-border investigations/cases. Further, the higher number of co-operation incidents in merger matters also occur because merging parties notify the authorities of their planned mergers (i.e. rather than being detected or being the subject of a complaint), and they often have an incentive to co-operate so that the merger review process can be completed as soon as possible.

Figure 12.2 Average number of authorities with which the respondents have co-operated, by enforcement area, 2007 – 2018



Source: OECD/ICN Joint Survey 2019, Question 18 – Table 5.1

Data source type: defined data set

Figure depicts results where a median number has been used if ranges were provided by respondents. It reflects a trend only and the vertical axis figure should not be regarded as an accurate total, given potential double counting and the use of ranges in the respondents' answers.

This figure is a simple average of the total number of the authorities with which respondents have co-operated. Three more respondents answered this question in 2019 than 2012. The figure demonstrates a trend only.

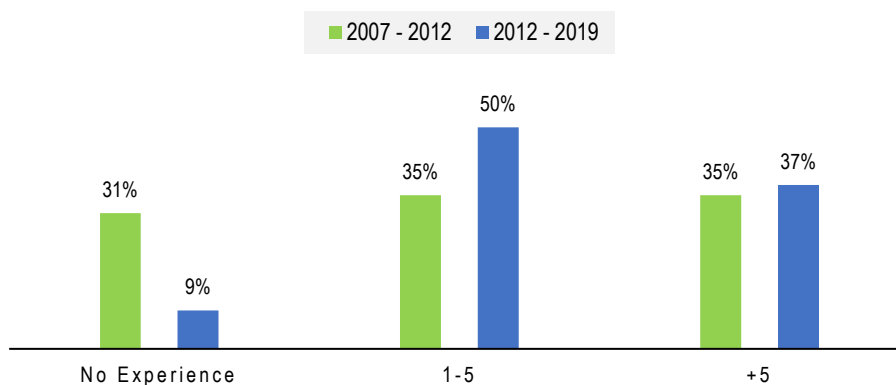
Response rate: 2012:84%, 2019: 82%

192. The trend towards increasing co-operation is also demonstrated in *Figure 12.3*, which shows the number of respondents who have co-operated with counterpart authorities⁹⁸ from 2007 to 2012 (the 2012 Survey) and from 2012 to 2018 (the 2019 Survey), with enforcement areas combined. The respondents with no experience have decreased (9%) compared to the previous period, while the number of respondents that have co-operated (within a range of one to five authorities) has increased (to 50%)

⁹⁸ Grouped into the following: “more than 5 authorities”, “from 1 to 5 authorities” or who have no experience in enforcement co-operation.

compared to the 2007 – 2012 period (from 35%). The number of authorities that have co-operated with more than five authorities has remained at similar levels.

Figure 12.3. Number of authorities with which respondents have co-operated (enforcement areas combined), by percentage of respondents to the question, 2007 – 2012 vs. 2012 – 2018



Source: OECD/ICN Joint Survey 2019, Question 18 – Table 5.1

Data source type: defined data set: experience co-operating with “more than 5 authorities” or “from 1 to 5 authorities”) or who have “no experience”

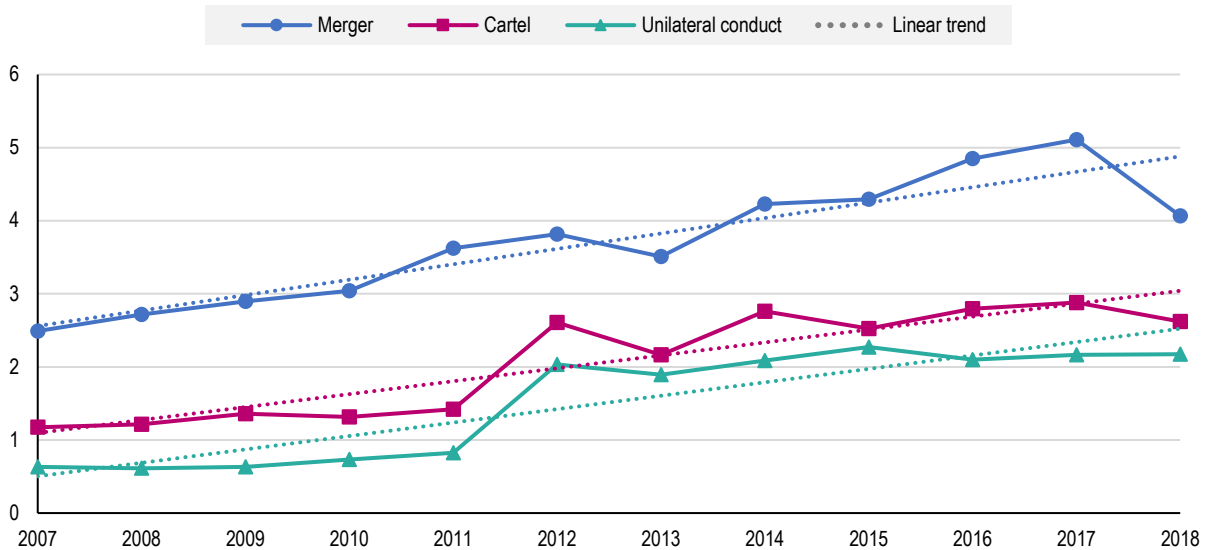
Figure depicts responses as proportions over total number of respondents to the question

Response rate: 2012:84%, 2019: 82%

12.4. Frequency of enforcement co-operation - number of cases by enforcement area

193. The Survey asked respondents to provide the number of cases/investigations where they have co-operated by enforcement area. *Figure 12.4* follows a similar trend toward increasing co-operation as was shown in *Figure 12.2* above in relation to the increase in co-operation between authorities. However, the same qualification provided in relation to *Figure 12.2* applies for *Figure 12.4*, that is, that the value of the data is that it reflects a trend over time using data collected and represented in the same way, rather than indicating a specific number of cases in involving international enforcement co-operation. It also shows a decline in 2018 in relation to merger and cartel matters. As with *Figure 12.2* there is more reported activity on merger matters than cartels and unilateral conduct cases.

Figure 12.4 Average number of cases involving international enforcement co-operation, by enforcement area, 2007 - 2018



Source: OECD/ICN Joint Survey 2019, Question 18 – Table 5.2

Data source type: defined data set

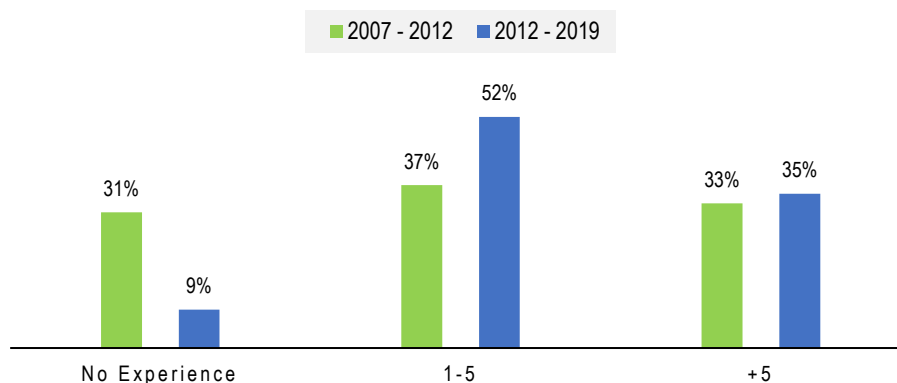
Figure depicts results where a median number has been used if ranges were provided by a respondent. It reflects a trend only and the vertical axis figure should not be regarded as an accurate total, given potential double counting and the use of ranges in the respondents' answers.

This figure is a simple average of the total number of the cases and investigations. Three more respondents answered this question in 2019 than in 2012. The figure demonstrates a trend only.

194. Response rate: 2012:84%, 2019: 82% The trend towards increasing co-operation is also demonstrated in Figure 12.5, which shows the number of respondents that have co-operated on case/investigations⁹⁹ from 2007 to 2012 (the 2012 Survey) and from 2012 to 2018 (the 2019 Survey), with enforcement areas combined. The respondents with no experience have decreased (19%) from the previous period, while the number of respondents that have co-operated (within a range of one to five authorities) has increased (23%) compared to the 2007 – 2012 period. The number of authorities that have co-operated on more than five case/investigations has remained at similar levels.

⁹⁹ Grouped into the following: “more than 5 case/investigations”, “from 1 to 5 cases/investigations”) or who have no experience in enforcement co-operation.

Figure 12.5 Number of cases/investigations in which authorities have co-operated (enforcement areas combined), by percentage of respondents to the question, 2007 – 2012 vs. 2012 – 2018



Source: OECD/ICN Joint Survey 2019, Question 18 – Table 5.2

Data source type: defined data set

Figure depicts responses as proportions over total number of respondents to the question

Response rate: 2012:84%, 2019: 82%

12.5. Frequency of types of enforcement co-operation by enforcement area

195. This Section considers the results from 2013 and 2019 Surveys regarding frequency levels of different types of co-operation (in cases where co-operation is feasible) for merger, cartel and unilateral conduct cases.
196. The responses follow a similar pattern to the results outlined in the previous sections relating to enforcement co-operation between authorities and on cases/investigations, with merger co-operation occurring at higher levels of frequency for different types of co-operation than co-operation relating to cartel and unilateral conduct.
197. In addition, the results outlined below demonstrate that co-operation in all these enforcement areas has increased in frequency since the 2012 Survey, although there are differences between the types of co-operation within the enforcement areas.

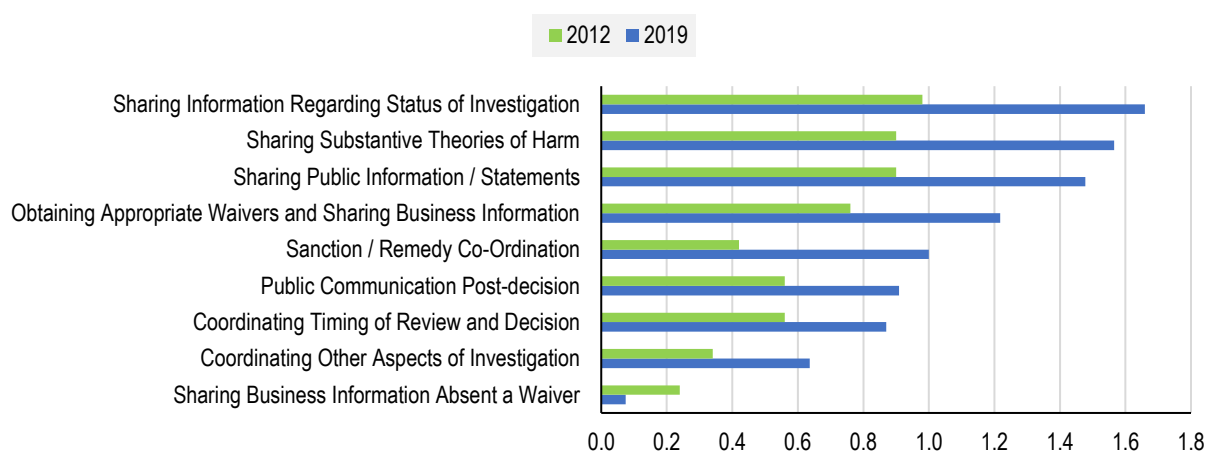
12.5.1. Merger co-operation

198. *Figure 12.6* shows the average frequency score given to each type of co-operation in merger cases as compared between the 2012 and 2019 Survey results, while *Table 12.1* provides the results for the 2019 Survey in table format. *Figure 12.6* illustrates that in all categories, the frequency of co-operation has increased between the respective Surveys. Compared with the 2012 Survey results, all types of enforcement co-operation have increased. For both the 2012 and 2019 Surveys, the most frequent types of co-operation in merger cases are:

- sharing information regarding status of investigation
- sharing substantive theories of harm
- sharing public information
- obtaining appropriate waivers and sharing business information.

199. Notably, the least frequent form of co-operation is “sharing business information absent a waiver”, that is, relying on other forms of legal instrument to share this information without the consent of the parties involved. For the purposes of this Report, the authors clarified with respondents who had initially indicated they did share information absent a waiver that “business information” meant “confidential business information”. Approximately 95% of respondents never share “confidential business information”, and those that confirmed they do share it said that doing so was rare and permitted pursuant to a national law based information sharing gateway or second-generation enforcement co-operation agreement.

Figure 12.6. Merger co-operation: ranking of types of co-operation, by average frequency score, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 19 – Table 6.1

Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts average frequency scores, where options were [Frequently (>60% of cases) =3], [Occasionally (20-60% of cases) =2], [Seldom (<20%) =1] and [Never=0]

Response rate: 2012:91% and 2019: 86% Note that the 2019 response rate reflects the percentage of respondents who completed table 6.1.

Table 12.1. Merger co-operation: ranking of types of co-operation by frequency, by percentage of respondents to the question, 2019

Type of co-operation	Frequently (> 60%)	Occasionally (20% - 60%)	Seldom (< 20%)	Never	Total Responses
Sharing Information Regarding Status of Investigation	34%	17%	30%	19%	47
Sharing Substantive Theories of Harm	26%	22%	35%	17%	46
Sharing Public Information / Statements	20%	23%	41%	16%	44
Obtaining Appropriate Waivers and Sharing Business Information	20%	15%	33%	33%	46
Sanction / Remedy Co-Ordination	11%	18%	31%	40%	45
Public Communication Post-decision	5%	16%	45%	34%	44
Coordinating Timing of Review and Decision	4%	20%	35%	41%	46
Coordinating Other Aspects of Investigation	0%	11%	41%	48%	44
Sharing Business Information Absent a Waiver	0%	3%	3%	95%	40

Source: OECD/ICN Joint Survey 2019, Question 19 – Table 6.1

Data source type: defined data set

Percentage of respondents to Survey who completed this table: 86%

12.5.2. Cartel co-operation

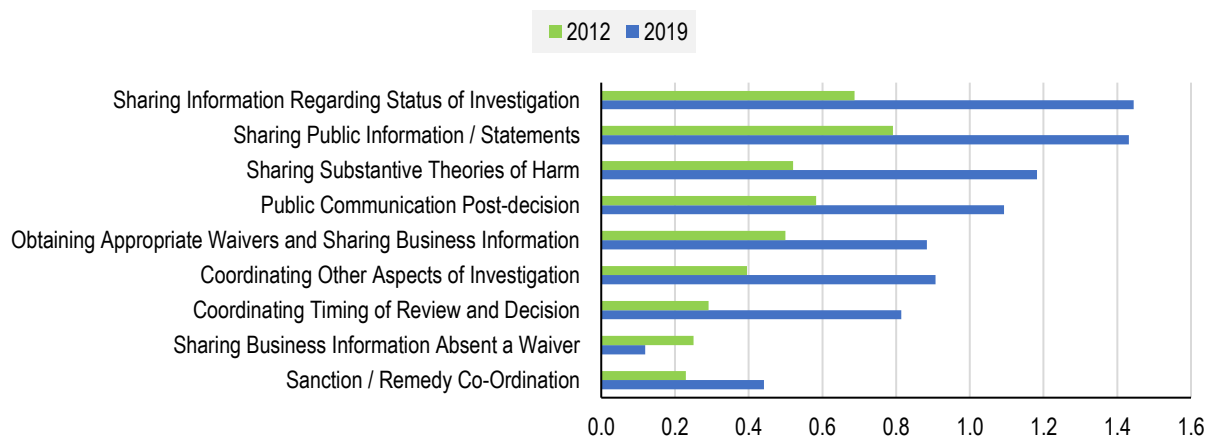
200. Figure 12.7 below shows the total frequency score given to each type of co-operation in cartel cases as compared between the 2012 and 2019 Survey results, while Table 12.2 provides the results for the 2019 Survey in table format. As with mergers co-operation, the figure illustrates that in all categories, the frequency of co-operation has increased between the Surveys.

201. In relation to cartels, the most frequent types of co-operation are:

- sharing information regarding status of investigation
- sharing public information and statements
- sharing substantive theories of harm
- public communication post-decision.

202. Notably, as compared to mergers, “sanction and remedy co-ordination” is used least frequently as compared to all other types of co-operation, followed by “sharing business information absent a waiver”. Table 12.2 shows that 32% of respondents do engage in “sanction and remedy co-ordination” either ‘occasionally’ or ‘seldom’, while 68% never do this. This could be so infrequent because cartel matters are usually resolved with prohibition and fines, which are calculated on the bases of the affected turnover within each jurisdiction. Respondents also reported sharing business information absent a waiver (9%) and noted this was rare and permitted pursuant to a national law based information sharing gateway or second-generation enforcement co-operation agreements.

Figure 12.7 Cartel co-operation: ranking of types of co-operation, by average frequency score, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 19 – Table 6.2

Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses\

Figure depicts average frequency scores, where options were [Frequently (>60% of cases) =3], [Occasionally (20-60% of cases) =2], [Seldom (<20%) =1] and [Never=0]

Response rate: 2012:87% and 2019:82% Note that the 2019 response rate reflects the percentage of respondents who completed table 6.2.

Table 12.2. Cartel co-operation: ranking of types of co-operation by frequency, by percentage of respondents to the question, 2019

Type of co-operation	Frequently (> 60%)	Occasionally (20% - 60%)	Seldom (< 20%)	Never	Total Responses
Sharing Information Regarding Status of Investigation	25%	20%	32%	23%	44
Sharing Public Information / Statements	18%	20%	48%	14%	44
Sharing Substantive Theories of Harm	14%	18%	41%	27%	44
Public Communication Post-decision	14%	19%	30%	37%	43
Coordinating Timing of Review and Decision	7%	23%	14%	56%	43
Obtaining Appropriate Waivers and Sharing Business Information	5%	28%	19%	49%	43
Coordinating Other Aspects of Investigation	5%	21%	35%	40%	43
Sharing Business Information Absent a Waiver	0%	2%	7%	90%	42
Sanction / Remedy Co-Ordination	0%	12%	21%	67%	43

Source: OECD/ICN Joint Survey 2019, Question 19 – Table 6.2

Data source type: defined data set

Percentage of respondents to Survey who completed this table: 82%

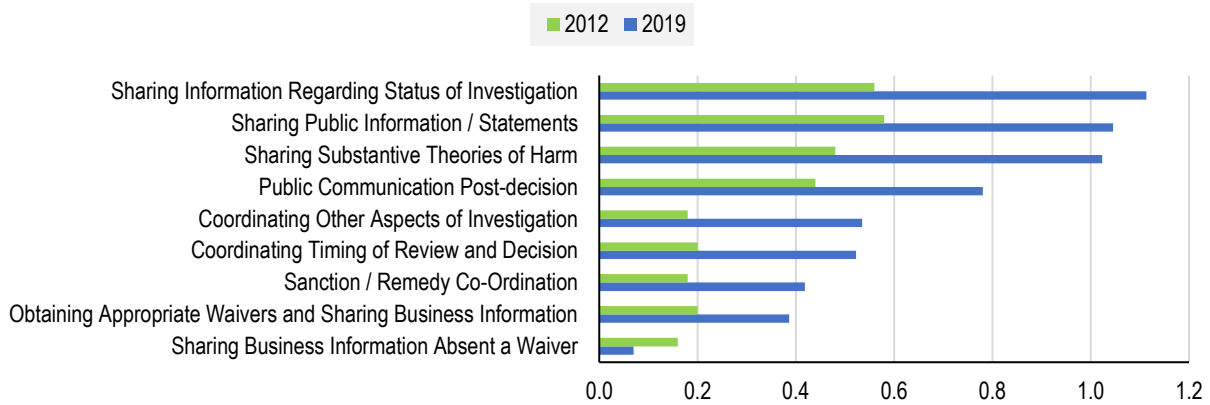
12.5.3. Unilateral conduct co-operation

203. As with *Figure 12.6* relating to mergers and *Figure 12.7* relating to cartels, *Figure 12.8* below shows the total frequency score for each type of co-operation in unilateral conduct cases as compared between the 2012 and 2019 Survey results, while *Table 12.3* provides the results for the Survey in table format. As before, the figure illustrates that in all categories, the frequency of co-operation has increased between the Surveys. In relation to unilateral conduct, the most frequent types of co-operation are:

- sharing information regarding status of investigation
- sharing public information and statements
- sharing substantive theories of harm
- public communication post-decision.

204. Notably, as with mergers, the least frequent form of co-operation is “sharing business information absent a waiver”. *Table 12.3* shows that approximately 4% of authorities do this either ‘occasionally’ or ‘seldom’, while approximately 95% never do this. As with merger matters, those respondents that reported sharing business information absent a waiver noted this was rare and permitted pursuant to a national law based information sharing gateway or second-generation enforcement co-operation agreements.

Figure 12.8. Unilateral conduct co-operation: ranking of types of co-operation, by average frequency score, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 19 – Table 6.3

Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts average frequency scores, where options were [Frequently (>60% of cases) =3], [Occasionally (20-60% of cases) =2], [Seldom (<20%) =1] and [Never=0]

Response rate: 2012:84% and 2019:80% Note that the 2019 response rate reflects the percentage of respondents who completed table 6.3.

Table 12.3. Unilateral conduct co-operation: ranking of types of co-operation by frequency, by percentage of respondents to the question, 2019

Type of co-operation	Frequently (> 60%)	Occasionally (20% - 60%)	Seldom (< 20%)	Never	Total Responses
Sharing Information Regarding Status of Investigation	11%	18%	41%	30%	44
Sharing Public Information / Statements	9%	14%	50%	27%	44
Sharing Substantive Theories of Harm	7%	23%	35%	35%	43
Public Communication Post-decision	5%	15%	34%	46%	41
Coordinating Timing of Review and Decision	2%	9%	27%	61%	44
Obtaining Appropriate Waivers and Sharing Business Information	0%	7%	26%	67%	43
Coordinating Other Aspects of Investigation	0%	14%	26%	60%	43
Sanction / Remedy Co-Ordination	0%	7%	28%	65%	43
Sharing Business Information Absent a Waiver	0%	2%	2%	95%	43

Source: OECD/ICN Joint Survey 2019, Question 19 – Table 6.3

Data source type: defined data set

Percentage of respondents to Survey who completed this table: 80%

13. Legal bases for co-operation

13.1. Overview of section

205. The Report shows the legal bases for enforcement co-operation between authorities are varied and depend on the type of co-operation involved. Authorities are co-operating effectively in many cases using existing informal and formal tools and resources to support enforcement co-operation.
206. Understanding the legal bases for enforcement co-operation between authorities helps to identify any legal limitations that are inhibiting enforcement co-operation, and relatedly, possible ways to address these limitations. Question 8, Part 2 of the 2019 Survey focused on the legal bases for international enforcement co-operation *and/or* enforcement co-operation within regional networks or organisations, i.e., it includes regional agreements, such as the EU enforcement co-operation arrangements. This section provides a description of the legal bases used to facilitate co-operation and then reviews the 2019 Survey results in relation to these legal bases.
207. The legal bases were not defined in the Survey or 2012 Survey. A review of the initial 2019 responses to Question 8 and related questions indicated that there was some confusion about the definitions of various legal bases, and this was confirmed by responses from authorities to a draft version of the Report and follow-up questions. To address this, the responses have been categorised according to the descriptions of legal bases outlined in this Report, based on both the original and additional data provided by respondents and other sources regarding the arrangements between competition authorities (such as publicly available information about co-operation arrangements with other authorities). Because of the re-categorisation of the 2019 Survey data and the additional information used to inform the categorisation, there is no comparison with the 2012 data in this section. Importantly, a new category has been added: jurisdictions that are part of regional arrangements that establish legal and/or economic integration that facilitate competition related enforcement co-operation (Integrated Regional Arrangements see *Section 13.2.2: Regional Integration Arrangements*).
208. The Report shows that there has been a significant increase in the number of first-generation¹⁰⁰ bi-lateral agreements since 2012 (more than 45), following a trend that began in 2007/2008.¹⁰¹ In contrast, only few bi-lateral or multi-lateral second-generation agreements were completed.¹⁰² The results in this section illustrate that the availability of legal bases does not match the frequency of use or relevance of these

¹⁰⁰ See definition of first and second-generation agreements in *Section 9.1.2: First-generation and second-generation agreements*.

¹⁰¹ See *Section: Bi-lateral competition agreements* below.

¹⁰² See definition of first and second-generation agreements in *Section 9.1.2: First-generation and second-generation agreements*.

legal bases. While bi-lateral competition agreements are one of the most available legal basis for co-operation, they are not the most frequently used, nor the more relevant. The results show that national law provisions, confidentiality waivers, multi-lateral competition agreements and letters rogatory have higher scores in relevance and in frequency of use. In addition, those respondents who were part of an Regional Integration Arrangement (RIA), noted in their qualitative responses to the original survey and to follow-up questions and in their responses to Part 8 (relating to Regional Co-operation), that this legal basis was one of the most frequent and relevant bases for their enforcement co-operation.

13.2. Description of legal bases for co-operation

209. This sub-section describes the key aspects of the legal bases for enforcement co-operation, noting also where there may be overlaps.

13.2.1. National laws

210. National laws may provide a legal basis for co-operation between authorities or jurisdictions. This includes laws that allow enforcement co-operation as part of a general role in facilitating international relations and co-operation, as well as provisions that allow for specific or deeper forms of co-operation (e.g. national provisions that create gateways for sharing confidential information or providing investigative assistance, or provisions that allow authorities to enter into second-generation agreements). For the purposes of this Report, both these types of national laws are covered when respondents selected “National laws” as a legal basis .

211. In relation to the general co-operation provisions in national laws, they include provisions that cover all government activities within a jurisdiction, such as Article 226 of the Political Constitution of Colombia, which expressly mentions the State’s responsibility to promote “the internationalization of political, economic, social and ecological relations on the basis of equity, reciprocity and national convenience”.¹⁰³ They also include general provisions in competition specific legislation, such as Article 30 of the Croatian Competition Act, which allows for the Council to:

*facilitate international co-operation, referring to the realization of the international commitments undertaken by the Republic of Croatia and given to the powers of the Agency, as well as relating to running the projects of international and European economic integrations and cooperate with international competition authorities and international organisations and institutions...*¹⁰⁴

212. Two types of national laws allow specific or deeper forms of co-operation: 1) national laws that provide a ‘gateway’ to confidential information¹⁰⁵ sharing absent a waiver and 2) national laws that allow an authority to enter into second-generation

¹⁰³ Examples of jurisdictions with general national laws relating to co-operation that relate to all government activities: Colombia, Ecuador.

¹⁰⁴ Examples of jurisdictions with general national laws relating to co-operation with competition specific legislation: Croatia, Czech Republic, Estonia, France, Germany.

¹⁰⁵ The definition of confidential information is discussed in *Section 18.3: How is “confidential information” defined by authorities?* below.

international agreements. A summary of key examples of national laws that enable deeper enforcement co-operation is set out in *Annex H::National laws that enable deeper enforcement co-operation*. Mutual Legal Assistance Treaties (MLATs) are considered separately in *Section 13.2.5: Mutual Legal Assistance Treaties*.

213. In relation to the first type of national law, the following jurisdictions are examples of those that can share confidential information absent a waiver in limited circumstances with another authority (outside of an MLAT process): Australia,¹⁰⁶ New Zealand,¹⁰⁷ Canada,¹⁰⁸ the United Kingdom,¹⁰⁹ and Germany.¹¹⁰
214. In relation to the second type of national law, 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 States¹¹¹ and Ireland.¹¹²
215. There are jurisdictions that have both ‘gateways’ and the ability enter into second-generation bi-lateral and multi-lateral co-operation agreements with other jurisdictions that also provide a basis for sharing confidential information, suggesting that these co-operation agreements have added utility. This could include formalising the types of co-operation the parties will engage in and how this should occur, or even engaging in additional forms of co-operation, such as providing investigative assistance or enhanced co-operation.

13.2.2. Regional Integration Arrangements

216. The legal basis of a “Regional Integration Arrangement” was created for the Report and was not an option originally provided in Survey. After reviewing the responses to the Survey and further responses from some authorities to follow-up queries, it was

¹⁰⁶ 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 (Australian Competition Law, 2007_[169]).

¹⁰⁷ Notably, the New Zealand information gateway requires that an intergovernmental or inter-authority agreement be in place as a condition for using the national gateway (New Zealand Legislation, 2012_[170]) (Section 99I, and 99J).

¹⁰⁸ Section 29 of the Canadian Competition Act (Canada Justice Laws, 1985_[111]), (Competition Bureau, 2013_[112]), (Competition Bureau, 2015_[171])

¹⁰⁹ UK Enterprise Act 2002: Section 243 (Legislation UK, 2002_[128])

¹¹⁰ The German Competition Act allows co-operation with authorities outside the European Union, on condition that the sharing of confidential information outside the EU is based on a waiver from the source of information (§ 50b) (Bundesministerium der Justiz und für Verbraucherschutz, 2018_[119]) (§ 50, § 50a, § 50b, § 50c of the German Competition Act). See also Background Note (OECD, 2019_[37])

¹¹¹ Note, only one agreement, with Australia, has been executed on this basis so far (US FTC, 1994_[183]).

¹¹² Specifically permits the CCPC to enter into co-operation agreements with foreign competition authorities (Note: No agreement has been executed based on this section so far.) (Irish Statue Book, 2014_[121]) (Section 23).

clear that they had had some difficulty in categorising the legal basis for enforcement co-operation created by some regional arrangements, which were inaccurately described as “Multi-lateral Competition Agreements” or “Free Trade Agreements” (both terms described below and from the Survey). For example, multiple EU respondents initially categorised the European Competition Network (ECN) as a “Multi-lateral Competition Agreement” or “Free Trade Agreement”, and it is neither, but rather a treaty based co-operation and communication mechanism between EU authorities (an explanation of the ECN and EU arrangements is set out in *Annex I: EU Regional Integration Arrangements*).

217. The new category, Regional Integration Arrangement, is defined for the purposes of this Report as regional arrangements that allow (at least technically) for deeper enforcement co-operation, such as sharing confidential information, providing investigative assistance or engaging in other forms of enhanced co-operation,¹¹³ and which form part of a set of rules or arrangements designed to allow for deeper economic or legal integration (such as a common market, customs union, trade agreement to establish economic relations).
218. They include all regional arrangements that create supranational competition authorities as well as the arrangements between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission (2013) arrangements.¹¹⁴ The benefits, challenges and forms of Regional Integration Arrangements are discussed in detail in *Section 19. Regional enforcement co-operation* and *Annex J: Regional co-operation networks and organisations*, which sets out examples of the various arrangements in detail.
219. The New Zealand Commerce Commission and the Australian Competition and Consumer Commission arrangements have been included in this category as the competition-related bi-lateral and multi-lateral arrangements between the authorities are directly supported by economic integration and trade arrangements.¹¹⁵

13.2.3. Bi-lateral and multi-lateral competition agreements

220. Bi-lateral and multi-lateral competition agreements between jurisdictions relating to enforcement co-operation can be at the authority or government level. They can vary in the extent to which they are binding and the degree to which they seek to impose specific obligations on each party. For example, a Memorandum of Understanding

¹¹³ See definitions in *Section Confidential information*, *Section Investigative assistance*, and *Section Enhanced co-operation*.

¹¹⁴ 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 (New Zealand - Australia, 2013_[172])

¹¹⁵ The Nordic Alliance can be distinguished from these arrangements and is better classified as a multi-lateral second-generation style agreement because although there are close economic ties between the Nordic countries and many business may treat them as a single market because of their legal similarities, the agreement itself is between the competition authorities themselves and does not refer to other trade or economic arrangements.

(MoU) between authorities is generally considered to be non-binding,¹¹⁶ while other international instruments between governments may be considered more binding.¹¹⁷ For the purposes of the discussion regarding the legal bases of enforcement co-operation within this Report, MoUs are also referred to as agreements.

221. As noted above, bi-lateral and multi-lateral competition agreements can be distinguished from Regional Integration Arrangements (such as the European Union) and Free Trade Agreements, which have competition elements but are generally part of a broader integration or trade arrangement.

Bi-lateral competition agreements

222. A key development in enforcement co-operation has been the proliferation of bi-lateral competition agreements, which have become more numerous, comprehensive and detailed over time.¹¹⁸ Bi-lateral enforcement co-operation agreements can include inter-governmental agreements (OECD, 2015_[58]) or inter-authority agreements (OECD, 2016_[59]). Bi-lateral MoUs between authorities are the most widely used model of bi-lateral competition agreement, and have continued to grow in popularity (see *Figure 13.3 in Section 13.3: Availability, relevance and frequency of use different legal bases for co-operation*).

223. While the MoUs may often amount to ‘best endeavours’ agreements between competition authorities, some of these agreements formalise existing working relationships, while others mark a new level of engagement between competition authorities. They can be an important part of establishing a closer working relationship if this has not existed in the past.

224. The OECD Secretariat’s inventory of MoUs showed that there were a number of common clauses that dealt with the following substantive topics:

- transparency
- notifications
- enforcement co-operation and investigative assistance
- exchange of information
- co-ordination of investigations and proceedings
- negative comity

¹¹⁶ For examples of clauses listed see “Miscellaneous Provisions” *Competition co-operation and enforcement*, (OECD, 2020_[41])

¹¹⁷ There is a potential difference between the status of MOUs in private, commercial law and practice (where they are generally considered non-binding and to be differentiated from other forms of binding agreement) and the status of MOUs in international law (where they may be considered a form of treaty if made between governments). This discussion is beyond the scope of this Report but worth noting as the legal status of an MOU can potentially vary depending on the parties and context in which it is made.

¹¹⁸ For examples see OECD inventory of international co-operation agreements on competition (OECD, 2020_[7]) and OECD inventory of international co-operation agreements between competition agencies (MoUs) (OECD, 2020_[41])

- positive comity
- consultation
- regular meetings
- confidentiality
- existing law
- communication (OECD, 2020_[41]).

Multi-lateral competition agreements

225. For the purposes of this Report, “multi-lateral competition agreements” are those that relate primarily to enforcement co-operation between competition authorities and which are not Regional Integration Arrangements. They can be both first-generation and second-generation agreements.

226. The OECD Inventory of International co-operation MOUs Between Competition Agencies (OECD, 2020_[41]) includes a number of first-generation multi-lateral competition agreements.¹¹⁹ In addition, there are multi-lateral competition arrangements that focus on competition law and policy and a more general level of co-operation, such as the MoU between Brazil, the Russian Federation, India, China and South Africa (BRICS) (BRICS, 2016_[60]). The BRICS MOU created a framework for multi-lateral co-operation and to set up an institutional partnership, aimed at promoting and strengthening the co-operation in competition law and policy between the parties (see more detail on this alliance in *Annex E: Other international co-operation networks and international organisations working on international enforcement co-operation*).

Second-generation bi-lateral and multi-lateral competition agreements

227. Following the adoption of the 2014 OECD Recommendation, there has been an increase in second-generation agreements between jurisdictions (i.e. including country-level agreements and authority level agreements), although there is still a very small total number of such agreements between authorities (Demedts, 2018_[8]).

228. Before 2013, the Australia-United States Mutual Antitrust Enforcement Assistance Agreement (April 1999) was the only second-generation agreement relating only to competition co-operation (Australia - USA, 1999_[61]). However, since 2013, a few more bi-lateral second-generation agreements have been finalised, including: the EU and Switzerland (2013) (EU – Switzerland, 2013_[62]), the New Zealand Commerce

¹¹⁹ For example: Memorandum of Understanding amongst competition authorities of the Member States of the Southern African Development Community on cooperation in the field of competition policy, law and enforcement (Southern African Development Community, 2016_[173]), Memorandum Regarding Co-operation in Competition Policy (KFTC, CCR Latvia, CC Romania, Interstate Council for Antimonopoly Policy of CIS countries, 2003_[174])

Commission and Canada (2016) (Canada – New Zealand, 2016^[63]), and the Nordic Alliance (Denmark, Finland, Iceland, Norway and Sweden) (2017).^{120,121}

229. In addition, in October 2020, the Multi-lateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC) between Australia, Canada, UK, US and New Zealand) (2020) was signed.¹²² The MMAC provides the only example of a multi-jurisdiction model for second-generation competition agreements that is not regional. Detailed information about all these agreements and the MMAC is provided in *Annex F: Examples of second-generation agreements*.

13.2.4. Free Trade Agreements

230. Free Trade Agreements (FTAs), made between governments, commonly have chapters relating to competition, sometimes including provisions relating to co-operation and co-ordination on competition between the signatory jurisdictions and dispute settlement mechanisms for conflicts on competition between the signatory jurisdictions.¹²³ They can provide the basis for the creation of new national competition laws in order to ensure compliance with the FTA and/or facilitate further formal co-operation between authorities.

13.2.5. Mutual Legal Assistance Treaties

231. Mutual Legal Assistance Treaties (MLATs) are bi-lateral treaties creating reciprocal international obligations between sovereign governments, and are not specific to competition investigations. An MLAT normally allows the signatories to request various types of assistance from each other, including the use of formal investigative powers (such as taking evidence and execution of searches and seizures) and sharing of confidential information.

¹²⁰ Agreement on Cooperation in Competition Cases (Denmark, Finland, Iceland, Norway and Sweden, 2017^[109]). This agreement is also discussed in the context of regional enforcement co-operation arrangements in *Section 19. Regional enforcement co-operation and Annex J: Regional co-operation networks and organisations*.

¹²¹ Two second-generation co-operation competition agreements are under negotiation: EU-Japan (<http://ec.europa.eu/competition/international/bilateral/japan.html>), and EU-Canada (Demeds, 2018^[8]).

¹²² The MMAC is structured as an ‘in-principle’ non-binding multi-lateral memorandum of understanding (the Framework MOU), which attaches a model bi-lateral/multi-lateral agreement as an annexure (the Model Agreement). All parties have agreed in the MMAC to implement the Model Agreement between themselves bi-laterally (or multi-laterally) in as close as possible a form. The Model Agreement is a second-generation agreement. This agreement is also discussed in *Annex F Examples of second-generation agreements*.

See Multi-lateral Mutual Assistance And Cooperation Framework For Competition Authorities Memorandum Of Understanding (ACCC et al., 2020^[103])

¹²³ See discussion of this system and FTA agreements in the Competition Provisions in Trade Agreements: Call for country contributions (OECD, 2019^[175]).

Examples of such agreements include the Mexico-Uruguay Free Trade Agreement 2004 (Mexico - Uruguay, 2004^[176]), and the Central America-Chile Free Trade Agreement (Central America - Chile, 1999^[177]). For a more comprehensive discussion see Competition policy within the context of Free Trade Agreements (OECD, 2019^[178]).

232. The ICN’s 2020 “Guidance on Enhancing Cross-Border Leniency Co-operation” developed a list of key issues with MLATs based on the OECDs 2012 paper “Improving International Co-operation in Cartel Investigations” (OECD, 2012_[64]):

- MLATs require the underlying offence to be a crime in at least the requesting authority’s jurisdiction, sometimes both (“dual criminality”).
- The jurisdictions involved may have different legal standards. For example, the law of some jurisdictions requires that in order to be used in court, evidence gathered pursuant to an MLAT must be gathered respecting the rights of defence applied in the requesting jurisdiction.
- Certain investigatory methods available to the requesting jurisdiction may not be available to the requested jurisdiction (e.g., the interception of private communications).
- MLAT requests may take a lot of time. The requests may need to go through the relevant Ministry rather than the competition authority. Legal challenges can also result in delays. In many cases, it can take more than a year to receive the requested information after sending a request.
- The use of MLATs can be human and financially resource-intensive.” (ICN, 2020_[53])

13.2.6. Confidentiality waivers

233. Waivers are the primary way in which authorities share confidential information.¹²⁴ The Survey defined waivers as:

... permission granted by a party under investigation or a third party in a case/investigation that enables investigating agencies in different jurisdictions to discuss and/or exchange information, protected by confidentiality rules of the jurisdiction(s) involved, that has been obtained from the party in question.

234. The granting of waivers may help to avoid the need to use official channels in formal co-operation procedures, and the consequent delays this can entail. Waivers are commonly used in cross-border merger matters, where the parties can have an incentive to ensure their matter is considered as quickly and efficiently as possible by the reviewing authorities. In relation to waivers in cartel matters where there is a leniency applicant, the ICN describes two common forms of waivers: ‘procedural’ and ‘full’. In relation to the procedural waivers, these “typically cover issues such as the identity of the leniency applicant in a specific sector or the likely location of the main evidence” (ICN, 2014_[65]). In relation to full waivers, these allow authorities to “coordinate on the procedural aspects of an investigation as well as exchange information on the substance of a leniency applicant’s submission” (ICN, 2014_[65]). In addition to this Section, the use of waivers is considered in detail in *Section 18. Information sharing and confidentiality waivers*.

¹²⁴ Several agencies from those jurisdictions that have had the most opportunities to cooperate (e.g. Canada, the European Commission, several EU Member States, and the United States), have developed “model” waiver forms that provide flexibility as to scope and conditions, reflecting the voluntary nature of the instrument. The ICN has also developed several model waivers of confidentiality See (ICN, 2005_[44]). See (European Commission, n.d._[179]). See (US FTC, 2015_[184]).

13.2.7. Letters rogatory

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

13.2.8. Bi-lateral and multi-lateral non-competition agreements

236. The 2012 and 2019 Survey asked respondents about these bases of their legal co-operation (Question 8), and gave the options of “multi-lateral non-competition agreement” and “bi-lateral non-competition agreement”. These terms were not defined in the Survey.

237. Upon seeking clarification from respondents in a draft Report circulated to all competition authorities as to what “non-competition” agreements they used as a legal basis for enforcement co-operation (that were not Regional Integration Arrangements or Free Trade Agreements), many respondents confirmed they did not rely on any additional “non-competition” agreements.

238. A few respondents noted that they considered OECD, ICN, World Trade Organisation and UNCTAD recommendations, guidance and arrangements to also be “non-competition” agreements. Examples of OECD and ICN work products referenced by respondents included: the 2014 OECD Recommendation (OECD, 2014_[32]), the ICN’s Recommended Practice on Co-operation on Merger Notification and Review (ICN, 2018_[47]); and the ICN’s International co-operation and information sharing: Anti-Cartel Enforcement Manual (ICN, 2013_[52]). For the purposes of this Report these responses have been excluded because although these international recommendations, guidance and arrangements play an important part of in informing the norms and practices relating to enforcement co-operation, they either a) do not actually create a legal basis and/or b) would likely apply to all respondents such that their inclusion could be misleading.

13.3. Availability, relevance and frequency of use different legal bases for co-operation

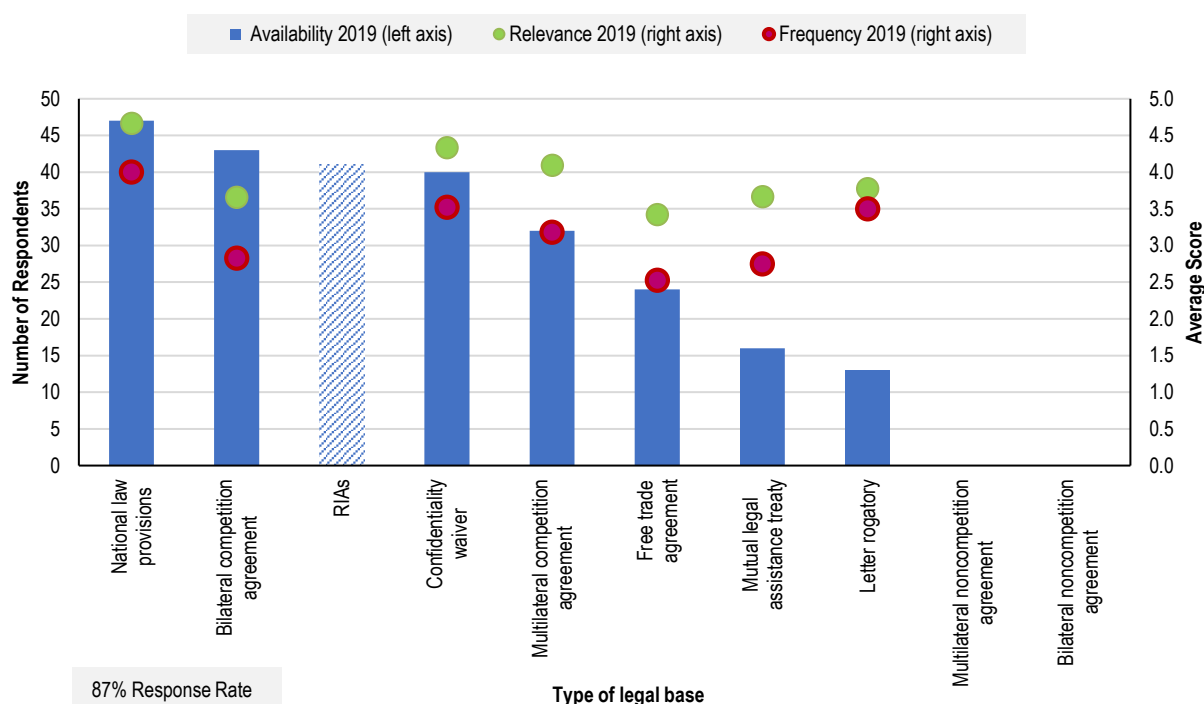
239. The 2019 Survey results show some interesting data regarding what legal bases authorities have available interact, what they use in practice and their views as to the utility of these legal bases. The responses relate to legal bases in both international and regional enforcement co-operation. This section does not consider which bases are used for what types of co-operation. However, where there are legal barriers relating to a specific type of co-operation, they are considered further within the sections below (such as, exchanging confidential information, investigative assistance, and enhanced co-operation – see *Section 17. Investigative assistance and enhanced co-operation* and *Section 18. Information sharing and confidentiality waivers*).

240. *Figure 13.1* below shows the number of respondents who confirmed that they have one or more of the legal bases listed in the 2019 Survey as a basis for enforcement co-operation available to them. The figure also includes results on the frequency of use

and relevance of each of these.¹²⁵ The figure illustrates that the availability does not match the frequency or relevance, showing that the existence of a legal basis of co-operation does not mean it is utilised. National law provisions are the most commonly available legal basis for co-operation, followed by bi-lateral competition agreements, Regional Integration Arrangements and confidentiality waivers. However, national law provisions, confidentiality waivers and multi-lateral competition agreements/arrangements, have the highest score in relevance and in frequency of use. In addition, those respondents who were part of a Regional Integration Arrangement (RIA), noted in their qualitative responses to the original survey and to follow-up questions and in their responses to Part 8 (relating to Regional Co-operation), that this basis was one of the most frequent and relevant bases for enforcement co-operation.

241. In relation to national laws or agreements that enabled some respondents to share confidential information in certain limited circumstances, a number of respondents noted that while they had that capacity, they did not actually use it in practice very often, especially if an exchange of information could be arranged based on a waiver.

Figure 13.1. Availability of legal bases for international enforcement co-operation with the average score on relevance and frequency of use, 2019



Source: OECD/ICN Joint Survey 2019, Question 8 – Table 2

Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts the average score, where options were [Frequently (>60% of cases) =3], [Occasionally (20-60% of cases) =2], [Seldom (<20%) =1], [Never=0], [High =3], [Medium =2] and [Low =1]

Relevance and frequency is calculated on the basis of those who have that legal bases available.

¹²⁵ Survey participants were asked to assign a level of frequency of use and relevance to each legal basis. A score was assigned to each level: starting from 1 for never and not relevant, up to 5 for always and very relevant.

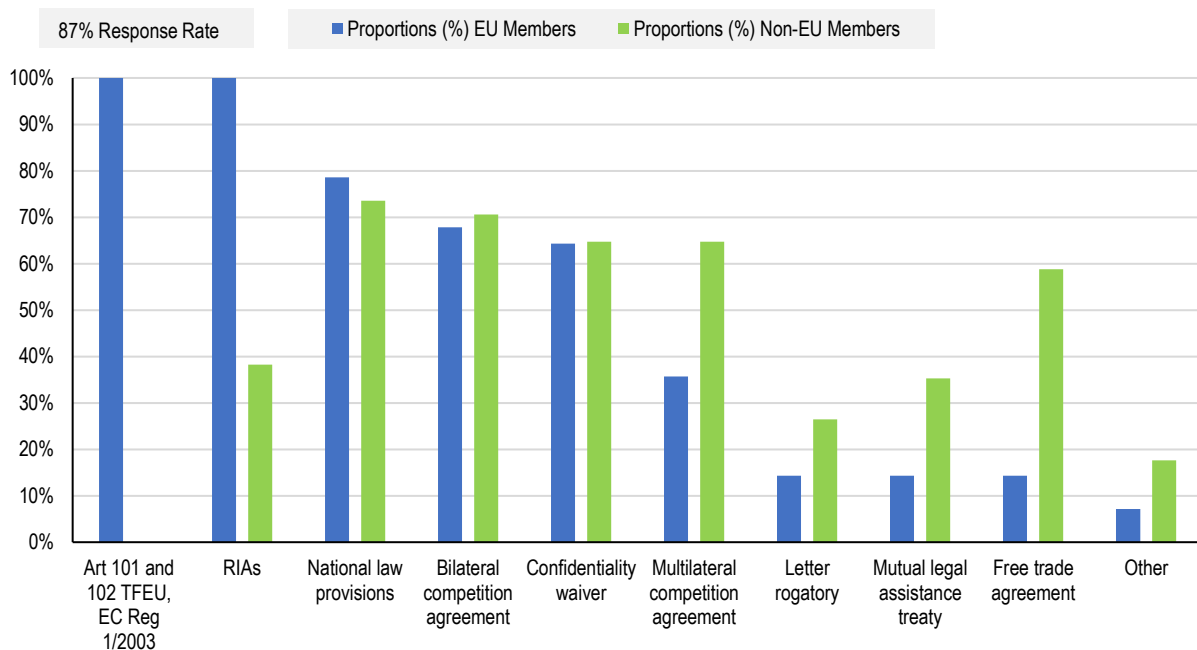
Note: As RIAs was a category not included in the Survey but created subsequently based on the Survey responses, it has been marked with a striped line to differentiate it and there are no results in relation to relevance or frequency.

242. The responses in *Figure 13.1* above align with the qualitative responses to the question. While the respondents did not address each legal bases in their free-text responses, many listed laws that allowed them to co-operate. As demonstrated in the description of national laws above, this type of legal basis covers a broad range of potential types of national law and in turn a range of co-operation activities. A number of respondents also noted that RIAs support co-operation within their regional networks, which many respondents noted were fundamental to their most frequent co-operation with counterparts.

243. A change was made in the 2019 Survey to address commentary in the 2012 Survey by EU-respondents that the majority of their co-operation was through Reg 1/2003 of the Treaty on the Functioning of the European Union (see *Annex I: EU Regional Integration Arrangements* below on the EU and ECN), which had not been provided as separate options in 2012, but were included separately in 2019.

244. *Figure 13.2* below shows the proportion of EU member states versus non-EU respondents who confirmed they have one or more of the legal bases listed available to them for international co-operation. It confirms that Articles 101 and 102 and Reg 1(2003) and RIAs are the most available legal basis for co-operation to EU-members (the former not being available to non-EU members). Removing that category from other results, shows that non-EU members rely more on free trade agreements, mutual legal assistance treaties and multi-lateral competition agreements in order to co-operate internationally, as compared to with EU members.

Figure 13.2. Availability of legal bases for international co-operation,* by proportion (%), EU vs. Non EU, 2019



Source: OECD/ICN Joint Survey 2019, Question 8 – Table 2

Data source type: defined data set

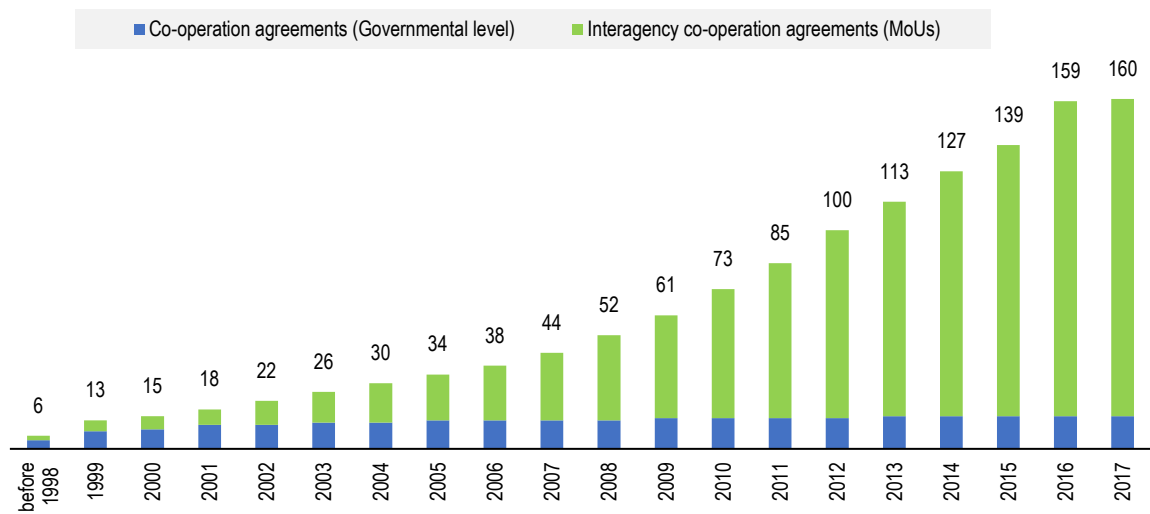
Figure depicts responses where respondents may have provided multiple responses

Figure depicts results as a proportion of each group

*Noting Reg 1(2003) is not available to non-EU members.

245. The prevalence of bi-lateral agreements was also noted in the June 2019 Paper (OECD, 2019_[10]), as at the end of April 2017, there were at least 180 MoUs where at least one of the signatories is the European Commission, a competition authority of an OECD Member, or an Associate or Participant in the Competition Committee. In contrast to the growth in inter-authority agreements, the number of bi-lateral co-operation agreements between governments has not grown much (OECD, 2019_[10]).

Figure 13.3. Growth of co-operation agreements, 1999-2017



Source: OECD (2019_[10]; 2017_[66])

Note: This graph includes inter-governmental co-operation agreements (concluded up until June 2015) and inter-authority MoUs (concluded up until April 2017) where at least one of the signatories is an OECD Member or a competition authority of an OECD Member, Associate, or Participant in the Competition Committee, or the European Commission. This graph includes only 145 inter-authority MoUs for which information on their date of execution is available; such information is unavailable for an additional existing 35 MoUs. Free Trade Agreements (FTAs) or Economic Partnership Agreements (EPAs) are not included.

14. The value of international enforcement co-operation for authorities: objectives, benefits and usefulness

14.1. Overview of section

246. The 2019 Survey results and other data indicators¹²⁶ confirm that enforcement co-operation (both outside and within regional networks) delivers many benefits to competition authorities. Understanding these benefits along with the limitations and challenges of enforcement co-operation is key to being able to improve enforcement co-operation.
247. This Section and the *Section 15. Limitations and challenges to international enforcement co-operation* consider responses to questions 1-5 in Part 1 of the 2019 Survey relating to ‘Qualitative assessment of international co-operation and co-operation within regional networks or organisations’ and all questions in Part 6. ‘Pros and cons of international co-operation between agencies outside regional networks or organisations’ (Questions 27- 33).
248. This Section considers the benefits and usefulness, while *Section 15. Limitations and challenges to international enforcement co-operation*, considers the limitations and challenges. There is a degree of repetition to these questions and answers covered by these Parts of the Survey, despite the differences in their scope and sub-questions. For example, the inverse of a benefit or advantage is often the potential challenge or limitation. However, there are differences between the questions that provide valuable insights.
249. Part 1 of the Survey asked authorities for a more general view of international enforcement co-operation (including both international and regional enforcement co-operation), focusing on the objectives, priority, what they found beneficial and least beneficial, usefulness and on identifying those types of enforcement co-operation that are most beneficial. Part 1 also addressed the main costs of international enforcement co-operation and how competition authorities weight them against benefits. Finally, this Part sought to highlight differences between informal and formal enforcement co-operation and evaluate their suitability for different enforcement co-operation circumstances.
250. Part 6 of the Survey sought to examine the pros and cons of international enforcement co-operation enforcement, outside of regional networks and organisations. It asked authorities about the advantages and disadvantages of enforcement co-operation, the most important limitations and the potential for improvement if these limitations were removed. The rationale for excluding regional networks in Part 6 is that for many authorities (particularly those in the EU), regional

¹²⁶ Such as authority involvement in OECD, ICN and UNCTAD work and projects related to international enforcement co-operation.

enforcement co-operation through a centralised supra-national authority is the key form of inter-authority enforcement co-operation, so the Survey was seeking data on enforcement co-operation outside of these networks. The role of regional enforcement co-operation was considered in Part 8, which is covered in *Section 19. Regional enforcement co-operation* below. In summary, the data across the Survey showed that some of the limitations and challenges were often greater outside of well-functioning regional networks.

251. This Section demonstrates that when authorities co-operate on enforcement matters they can experience both direct benefits to their matters and also more generalised benefits. Commonly identified limitations and challenges are: resourcing; co-ordination/timing; legal limitations (especially confidential information sharing, investigative assistance and enhanced co-operation); trust and reciprocity and practical issues (e.g. language, time differences).

14.2. Value of enforcement co-operation well-established

252. After many years of activity, the theoretical and practical benefits of international enforcement co-operation are relatively well known, especially amongst those who have been engaged with supporting and tracking its development. This is reflected in key the OECD and ICN documents relating to enforcement co-operation, which in-turn reflects the views of their constituent membership. The pre-amble to the 2014 OECD Recommendation recognises the benefits, including the following:

...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...

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 analysis...

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

253. The 2018 “ICN Recommended Practices for Merger Notification and Review Procedures” noted:

Enforcement co-operation is beneficial in the review of transactions that raise similar competition issues or remedial concerns, in particular but not exclusively in cases that raise competition concerns in cross-border or global markets. Enforcement co-operation may also be beneficial in transactions that raise different competition concerns in different jurisdictions but where remedies in one jurisdiction may impact another jurisdiction.

254. The 2018 “ICN Recommended Practices for Merger Notification and Review Procedures” noted:

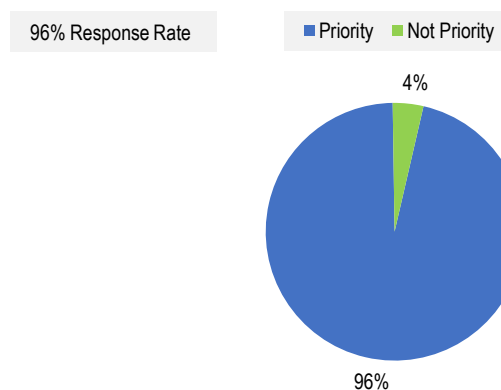
Co-operation can be beneficial for both competition agencies and leniency applicants...Co-operation in cartel cases is voluntary and does not limit an agency's discretion or independence. The need for and the benefits gained from co-operation will vary from case to case. Accordingly, competition agencies retain full

discretion to determine the nature and extent of any co-operation with other jurisdictions in any given case...Effective co-operation requires mutual trust and a commitment to relationship-building between agencies.

14.3. Priority of international enforcement co-operation for authorities

255. International enforcement co-operation is a policy priority for the vast majority of respondents to the Survey, as outlined in *Figure 14.1*. Multiple respondents noted that enforcement co-operation was increasingly important in the context of global, integrated and digital markets, which they expected would intensify the need to co-operate.

Figure 14.1. Priority of international enforcement co-operation for authority, by percentage of respondents to the question, 2019



Source: OECD/ICN Joint Survey 2019, Question 2
Data source type: quantitative representation categorised free text

256. This priority is reflected in policy and practical approaches to international enforcement co-operation taken by authorities. For example, in its Survey response, Brazil emphasised that international enforcement co-operation is of significant value in CADE’s enforcement strategy, as it enables the authority to learn from the errors and success experiences of its counterparts, to share information, impressions, and documents, reducing the costs and time of assessment of ongoing cases. Australia noted international enforcement co-operation was a priority in its enforcement strategy given the significant number of matters that had an international component (10-15% of merger matters and about half of its cartel matters).

257. This priority is also evidenced in the public documents of many authorities. For example, in its strategic plan 2016-2020, the European Commission’s Directorate General for Competition indicated the promotion of international enforcement co-operation and convergence as one of the priorities of the Commission.¹²⁷ Similarly, the US Federal Trade Commission included as one of the objectives in its strategic plan 2018-2022 the collaboration with domestic and international partners to preserve and

¹²⁷ See: Strategic Plan 2016-2020 (European Commission, 2016₍₁₈₀₎)

promote competition.¹²⁸ Canada also has a similar approach evident in its 2019-20 Annual Plan: Safeguarding the Future of Competition, where the priorities include to: “Build and strengthen strategic relationships with domestic and international partners to advance competition policy, promote convergence and support enforcement.”¹²⁹

14.4. Objectives of international enforcement co-operation.

258. The authorities identified the objectives of international enforcement co-operation (Question 1 of the 2019 Survey) and they help further explain why it is a policy priority. The respondents outlined their primary objectives when co-operating on matters and these could be categorised into the same categories identified in 2012:

- sharing case-related evidence or background information
- receiving investigatory assistance
- co-ordinating to prevent destruction of documents
- co-operating to avoid unnecessarily conflicting outcomes
- sharing analytical techniques and best practices
- facilitating the co-ordination of remedies.

259. In addition, similar to the finding of 2012, respondents noted that in addition to matter-specific objectives, they identified broader, longer-term objectives from being engaged in enforcement co-operation, including:

- increased detection and improved deterrence of anti-competitive conduct
- efficient merger reviews
- promotion of trust, transparency and predictability of approach between authorities
- promotion of effective, efficient and coherent global enforcement
- improvement of enforcement practices through sharing techniques, practices, theoretical tools, technical tools and approaches
- raising the profile and standing of an authority within the competition authority community (e.g. as one that is able to effectively co-operate with other authorities)
- related to the above, improving an authority’s ability to enforce matters domestically when parties are aware that it is able to co-operate effectively with international authorities if needed.

260. The objectives outlined above cover international enforcement co-operation activities that both require formal, legal frameworks and those that can be arranged in the absence of these formal legal instruments. The Survey data alone is not sufficient to conclude that all these objectives are of value or equal value to each of the competition authorities; however, viewed collectively, they indicate that the objectives

¹²⁸ See: Strategic Plan for Fiscal Years 2018 to 2022 (US FTC, 2018_[185])

¹²⁹ See: 2019-20 Annual Plan – Safeguarding the Future of Competition, (Competition Bureau, 2019_[196])

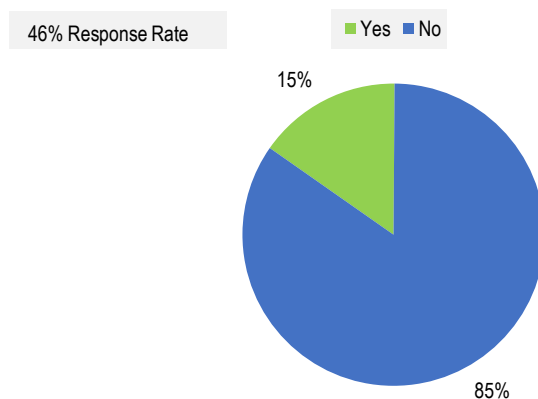
of enforcement co-operation (consistent with responses in 2012) are broad, aspirational and go beyond just seeking transactional enforcement outcomes on a particular case.

14.5. Principle of reciprocity

261. In a number of responses in different parts of the Survey, respondents noted the importance of reciprocity as a component of successful co-operation between authorities. Some respondents require reciprocity be provided in a particular type of enforcement co-operation, while others require general reciprocity on future matters. Some respondents require reciprocity as a legal condition of sharing confidential information, while others adopt it more as a matter of principle. Even where the absence of reciprocity may not prevent enforcement co-operation, it may limit the extent of it.

262. Despite the support for the principle of reciprocity in various answers by respondents across the Survey, a vast majority of authorities did not have reciprocity as a condition precedent for sharing confidential information. *Figure 14.2* below set out the number of respondents who responded ‘yes’ or ‘no’ to whether reciprocity is a condition of providing third party confidential information. It demonstrates that despite the importance of reciprocity, it is rarely a formal condition of enforcement co-operation.

Figure 14.2. Require reciprocity, by percentage of respondents to the question, 2019



Source: OECD/ICN Joint Survey 2019, Question 22

Data source type: quantitative representation categorised free text

Figure depicts responses as proportions over total number of respondents to the question

263. Reciprocity is an important element in considering improvements to future enforcement co-operation, as it is an important element of what authorities consider when determining whether to provide enforcement co-operation. It may not require formal commitment, but there needs to be trust that it can and will be offered.

14.6. Benefits of international enforcement co-operation

264. All respondents to the question confirmed that international enforcement co-operation is beneficial for their authority. The benefits listed by authorities align with

their responses regarding the objectives of international enforcement co-operation, providing further detail and reflecting similar benefits to those noted in the 2013 Report. They relate to three key categories:

- opportunities for more efficient and effective consideration of competition matters
- further enhancing the co-ordination and co-operation systems and practices among authorities
- improving relationships, trust and transparency.

265. Although some benefits were listed more frequently than others, in practice, many of the benefits are likely to be interrelated. For example, an exchange of sensitive information (such as information about a possible cartel or details about an authority's investigatory practices) may not occur if there is not trust in the relationship or transparency around authority practice and procedures.

266. Importantly, the benefits may vary between authorities depending on their size, maturity, resources and legal systems. A number of smaller authorities noted that while they had fewer resources to invest in international enforcement co-operation, they also gained significant advantages from it given their more limited capacity. For example, one smaller, non-EU authority noted:

..in an increasingly global world we can be more effective if we work in co-operation with other agencies. We also have less resources than other agencies and co-operation with other agencies on training or to understand emerging markets is beneficial for us.

267. Younger authorities that reported lower levels of enforcement co-operation were also more likely to list more general benefits from co-operation (such as skill sharing, technical capacity building and improving policy and practice) as the main benefits of enforcement co-operation.

268. A number of the more mature authorities noted that they had well-established systems on enforcement co-operation with key partners (sometimes supported by legal arrangements), although many respondents of various sizes noted that they achieved the benefits through their regional networks and organisations. The specific benefits of regional enforcement co-operation are discussed separately in *Section 19. Regional enforcement co-operation* below.

269. As in 2012, many respondents noted that the most beneficial form of enforcement co-operation was informal co-operation, which allowed authorities to share information, consult and co-ordinate with authorities efficiently. Many respondents also noted, as in 2012, that this type of enforcement co-operation also required relationships of trust, which are often supported by regular contact (especially at the manager and case-handler level). However, for one respondent the distinction was not that relevant and that authority considered most enforcement co-operation it undertook as 'formal' given it occurred based on some form of formal agreements.

270. Formal co-operation, although less frequent, was also valued, especially where it enabled the exchange of information or the provision of investigative assistance that would not have been permitted without certain formal legal frameworks. Respondents who used formal co-operation mentioned a range of mechanisms that were noted in *Section 13. Legal bases for co-operation*.

271. To give a better idea of the benefits competition authorities derive from international enforcement co-operation, outlined below is a more detailed list of the benefits resulting from the key benefits identified by Respondents:

14.6.1. 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.

14.6.2. Further enhancing the co-ordination and co-operation systems/practices 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.

14.6.3. 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

14.7. Usefulness of international enforcement co-operation by enforcement area

272. The Survey sought to determine how useful enforcement co-operation had been and the substantive difference it had made to the enforcement activities of the respondents (Question 4). In response, some provided a generalised response across enforcement areas, while others differentiated between enforcement areas (mergers, cartels and unilateral conduct cases). The generalised responses were very similar to the benefits identified above. The specific responses are discussed below. They demonstrate that given differences between enforcement areas, different types of co-operation can be useful. For example, remedy design and implementation is a more frequent type of co-operation in merger matters, while co-ordinating access to witnesses is more likely to be relevant in cartel cases.

14.7.1. Merger cases

273. Respondents noted that merger co-operation results in a useful exchange of ideas on how to approach mergers, improves the understanding of the procedural phases of other jurisdictions and assists with co-ordinating the timing of the review. Discussions that occur during co-operation between or among authorities reviewing the same merger helps authorities clarify and define analytical criteria or technical points (e.g. market definition or how competition in a specific market, product or service functions in practice).

274. Some respondents noted that these discussions are particularly useful when they happen at the pre-notification stage, which helps authorities to find pragmatic solutions to coordinate and align procedures. Another highlighted benefit was consistent remedies and improved enforcement. It was noted that where authorities agree on the definition and the application of remedies, they are more likely to be properly enforced.

275. Several respondents found a number of activities aimed at strengthening authority understanding of the competitive effects of the mergers very useful, ranging from sharing non-confidential information or exchanging views on key aspects of the economic analysis of the transaction to sharing confidential information. In some instances, such activities were facilitated by using parties' waivers and/or coordinating the investigation strategy (such as conducting joint interviews).

276. Set out below are some examples of the benefits of co-operation at various stages of merger review relating to:

- co-operation to align timetables for merger review
- co-operation in remedy design and implementation
- sharing information and analysis, discussing theories of harms and sharing views
- support in court review proceedings

Cooperation to align timetables for merger review

277. In the ASML/Cymer (2013) case (Japan Fair Trade Commission, 2013^[67]), the Japan Fair Trade Commission ("JFTC") obtained information that the transaction had been notified to the US Department of Justice (US DOJ), the Fair Trade Commission of the Republic of Korea (KFTC) and other authorities by asking the party concerned which other jurisdictions were reviewing or were expected to review the transaction. The JFTC exchanged information with US DOJ, KFTC and other authorities on time

schedules and this facilitated successful co-operation at key stages of the investigation. This initial contact was made by using the contact list in the ICN's Framework for Merger Review Cooperation (ICN, 2012_[45]).

278. In the GE / ALSTOM case, Mexico's competition authority COFECE cooperated with the US DOJ to ensure timing alignment. COFECE issued its resolution two days after the merger was cleared in the US with remedies, which reduced the likelihood of competition concerns in the Mexican markets. As a result, to align the timing, the parties had to withdraw their filing in Mexico and filed it again the next day in order to amend the deadline timeline.

Cooperation in the remedy design and implementation

279. In Continental/Veyance (2014), a merger which had effects throughout the NAFTA region and where the companies' assets were in Mexico, the United States and Canada, the design of remedies was coordinated by the Mexican and the U.S. competition authorities and the remedy package involved the divestiture of Veyance's air springs business in North America, including manufacturing and assembly facilities in the Mexican State of San Luis Potosi; and access to R&D facilities located in Ohio, US. These measures satisfied competition concerns raised in Mexico and the United States. International co-operation between NAFTA's parties in this case was key when crafting extraterritorial remedies. Both COFECE and US DOJ effectively cooperated also in the analysis of the viability of the potential buyer¹³⁰.
280. In the ThermoFisher/Life Technologies (2014), the number of jurisdictions involved in reviewing and remedying the transaction (Australia, Canada, China, the European Union, Japan, Korea and US) posed challenges for effective coordination especially in remedy design and implementation. This was achieved through the creation of a common timetable that allowed the reviewing authorities to take account of each other's remedies to ensure compatibility. In lieu of serial bi-lateral discussions, the European Commission (EC) informally took the lead on collecting and communicating information about timeframes and progress among all reviewing authorities to each of the cooperating authorities, which made international enforcement co-operation far more efficient and effective for both authorities and parties.
281. The US Federal Trade Commission (US FTC) noted that in this case the remedy was particularly complex because the divestiture transaction required notifications to jurisdictions that had not reviewed the primary transaction. Thanks to support and close coordination with other competition authorities, and their willingness to prioritize review, the transaction was closed in the time allowed under the US FTC order. The FTC and the EC approved GE Healthcare as the divestiture buyer on the same day, which was facilitated by close co-operation¹³¹.
282. In Praxair/Linde (2018), the US FTC cooperated with several antitrust authorities in Argentina, Brazil, Canada, Chile, China, Colombia, the European Union, India,

¹³⁰ See the US DOJ press release: <https://www.justice.gov/opa/pr/justice-department-requires-divestiture-commercial-air-springs-business-connection> (US DOJ, 2014_[181])

¹³¹ See the US FTC press release: <https://www.ftc.gov/enforcement/cases-proceedings/131-0134/thermo-fisher-scientific-inc-matter> (US FTC, 2014_[182])

Korea, and Mexico, so that coordination on timing was paramount, especially related to remedies. Remedies were ultimately required by antitrust authorities in Brazil, Canada, Chile, China, Colombia, the European Union, India, Korea, and the United States. The Americas divestiture package, for example, included assets from the U.S., Canada, Brazil, Colombia, and Chile. Cooperation facilitated the development of compatible remedies.¹³²

283. In Bayer/Monsanto (2018), the parties granted waivers for discussions between the US DOJ and thirteen other authorities, allowing the US DOJ to collaborate closely with its counterparts at the European Commission, in Canada and Brazil, as well as with a number of other competition authorities, including those of Australia, China, India, and South Africa. The US DOJ also was in contact, without waivers, with several international authorities, primarily to discuss the timing of those authorities' review of the transaction. The review was complicated by the misalignment of the timetables: for example, the European Commission was able to announce months before the completion of the US DOJ's investigation that it had granted conditional approval to the transaction, which was based on the effects of the transaction in Europe, which differed, in part, from its effects in the United States. Despite differences between the substance and timing of the US DOJ's investigation and those of some other authorities, the US DOJ nonetheless attempted to routinely confer with other authorities with respect to its competitive concerns and remedy considerations¹³³.

Sharing information and analysis, discussing theories of harms and sharing views

284. Colombia highlighted that, in reviewing the merger Praxair/Linde (2018), it was very useful to share information and analysis with the US FTC, the Chilean FNE and the European Commission, as it allowed for a discussion of issues and a clarification of doubts regarding some specific economic aspects of the assessment, such as relevant geographic markets and the importance of product differentiation, which helped to advance the review of the transaction by the Colombian authority. Korea made similar comments in relation to the same merger that it assessed in close co-operation with the US FTC. In particular, Korea stressed that when mergers involve global companies and innovative technologies, it is not always easy to define relevant markets and assess competitive effects; therefore, international enforcement co-operation is very useful to ensure the credibility and acceptability of remedies.
285. In the Bayer/Monsanto (2018) merger, the Competition Commission of South Africa (CCSA) engaged other jurisdictions (including the EU, China, US, Russia and Brazil) from the early stages of the investigation on content (i.e. market definition, theories of harm etc.), which was critical in identifying issues likely to arise from the transaction; this activity enabled the CCSA to also consider whether similar issues would arise in South Africa.

¹³² See the US FTC press release: <https://www.ftc.gov/enforcement/cases-proceedings/171-0068/linde-ag-praxair-inc> (US FTC, 2019_[186])

¹³³ See the US DOJ press release at: <https://www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened> (US DOJ, 2018_[87])

286. In the Louisiana Pacific/Ainsworth (2014) case¹³⁴, the US DOJ was able to achieve an extensive level of co-operation with the Canadian Competition Bureau (CCB), thanks to waivers from the parties early in the investigation. The US DOJ and the CCB conducted joint interviews, CCB staff attended party depositions taken by the US DOJ, and both US DOJ and CCB attorneys and economists held frequent, almost daily, calls on theories of harm and analytical approaches. This level of co-operation allowed each authority to reach its own independent determination of how to proceed, but in a more efficient manner than working alone. The parties ultimately abandoned the transaction due to the authorities' shared anticompetitive concerns.

Support in court review proceedings

287. In reviewing the proposed Staples/Office Depot (2016) merger, simultaneous court challenges were filed for the first time by Canadian and American authorities¹³⁵, which were subsequently withdrawn as the parties eventually abandoned the transaction. This was made possible by the regular communication regarding timelines and major case milestones between the Canadian Competition Bureau and the US FTC. Furthermore, in challenging the transaction before the US Courts, the US FTC worked closely with Canada and the European Commission.

288. When the US DOJ filed to block the proposed \$34 billion Halliburton/Baker Hughes merger (2016), two of the top three oil field services companies in the world, the US DOJ's co-operation with its international counterparts extended beyond the filing to challenge the transaction. When the parties sought to argue to the U.S. court that they needed the lawsuit transferred to a different venue to ensure a faster resolution, the European Commission (EC) provided the US DOJ with a letter setting forth the deadline for the EC's investigation of the matter (prior to which the parties would not be able to consummate the transaction) and suggesting that EC staff still had concerns about a number of markets. The US DOJ shared this letter with the court to counter the parties' asserted need for transfer. The parties abandoned the merger shortly after¹³⁶.

14.7.2. Cartel and anti-competitive agreement cases

289. Respondents noted that co-operation on cartel and anti-competitive agreement matters can allow parties to share critical confidential information (including authority confidential information), coordinate the timing of dawn raids and share the progress of their respective investigations. They noted that sharing authority confidential information or public information located in different jurisdictions can help authorities establish the existence of cross-border cartels, and was one of the key ways to identify international cartels outside of leniency programmes.

¹³⁴ See the US DOJ press release: <https://www.justice.gov/opa/pr/louisiana-pacific-corp-abandons-its-proposed-acquisition-ainsworth-lumber-co-ltd> (US DOJ, 2014_[187])

¹³⁵ See Canada press release at: <https://www.canada.ca/en/competition-bureau/news/2016/05/competition-bureau-withdrawing-its-court-challenge-of-staples-acquisition-of-office-depot.html> (Competition Bureau, 2016_[188])

¹³⁶ See the US DOJ press release: <https://www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal> (US DOJ, 2016_[189])

290. It was also emphasised that informal co-operation is the most commonly used form of enforcement co-operation in cartel matters. One of the most beneficial activities has been coordinating the timing regarding compulsory evidence gathering (e.g. production of records, search warrants). Others noted that co-operation helped authorities to ascertain the most appropriate sanctions and avoid unnecessary duplication of work.

291. Some respondents noted co-operation is also useful before the opening of an investigation, as it can help authorities to assess the quality of the information they already have. Similarly, authorities can benefit from previous work done by another authority on the same investigation, saving time and resources. Some respondents noted that they have overcome delays in accessing witnesses from foreign jurisdictions through the coordination of the timing of interviews with neighbouring authorities.

292. Canada summarised the usefulness of co-operation on cartel matters:

International co-operation has improved the effectiveness of formal powers by preserving the element of surprise in all cooperating jurisdictions. Delays in accessing witnesses from foreign jurisdictions have also been overcome through the coordination of the timing of interviews with neighbouring agencies. In addition, formal tools have been used to obtain access to evidence located in other jurisdictions. Applying comity principles has also contributed to effective and efficient enforcement.

293. A number of respondents noted that cartel specific meetings, workshops and webinars with counterpart authorities had a significant impact on their enforcement practices and policies. For example, one EU respondent noted their enforcement case co-operation was supported by attendance at a biannual ECN Cartel Working Group meeting, the annual ICN Cartel Workshops, and webinars to better understand best practice in the investigation of cartels and the challenges around leniency/ immunity applications and reviewing electronic data. However, one respondent noted that co-operation is not an indispensable part of their cartel enforcement strategy and seldom affected the authority's ability to investigate.

Examples of usefulness of co-operation in cartel and anti-competitive agreement cases

294. In cartel enforcement, one of the most beneficial co-operation activities mentioned by respondents is the coordination of inspections / dawn raids in parallel proceedings, which is considered fundamental in order not to compromise an authority's cartel investigations.

Co-ordination

295. The importance of successful coordination of searches in multiple time zones was mentioned by Canada and US in the Nishikawa auto parts bid-rigging case (2016)¹³⁷, following an extensive collaboration between the Canadian Competition Bureau and the Antitrust Division of the US DOJ. At the same time, the Competition Bureau of Canada reported an instance when coordination of searches in a cartel investigation

¹³⁷ See press release: <https://www.canada.ca/en/competition-bureau/news/2016/07/unprecedented-cooperation-with-us-antitrust-enforcement-authority-leads-to-major-cartel-crackdown.html> (Competition Bureau, 2016^[190])

was not possible, as it had learned the dates of the foreign authority's inspection too late.

296. In 2014-2015 France, Italy and Sweden conducted parallel investigations concerning parity clauses in the agreements between online hotel booking platforms and accommodation providers. The three cooperating authorities, supported by the European Commission, had very useful discussions on the substantive issues at stake, which ultimately paved the way for an alignment of their decisions to accept the same package of EU-wide commitments and to communicate that decision on the same day¹³⁸. On the procedural side, Italy considered it important to align its investigation timetable to ensure the continued coordination with the other authorities: the deadline for the submission of the final commitments envisaged in the Italian legislative framework was extended to allow the continuation of the discussions among the coordinating authorities and to facilitate the efforts of the undertakings concerned in dealing with several authorities to elaborate a common commitment package.

Investigative assistance

297. Another beneficial co-operation activity is investigative assistance provided by one authority on behalf of a requesting authority, when the party under investigation has premises located outside the jurisdiction of the investigating authority. For instance, in 2013 the Italian competition authority undertook unannounced inspections of undertakings in Italy on behalf of the Competition Council of Lithuania for suspected resale price maintenance agreed among the investigated undertakings, some of which were established in Italy. Similarly, in 2017 the Competition Council of Lithuania collaborated with the Latvian competition authority in order to undertake inspections in Latvia.

Case allocation

298. In regional networks with a supranational authority like the European Commission and a formal basis for co-operation like the ECN (see *EU Regional Integration*), another beneficial co-operation activity is the presence of a mechanism of case allocation to a lead or single authority among those that have potential jurisdiction. In a case in the home appliances sector, the French Autorité and the European Commission cooperated in order to determine a single well-placed authority to deal with the investigation. In the end, the case was investigated by France in close co-operation with the European Commission.¹³⁹

14.7.3. Unilateral conduct cases

299. Respondents confirmed that co-operation experience in unilateral conduct cases is more limited and occurs less frequently than co-operation in mergers and cartel matters (both in terms of enforcement and more general co-operation). However, the benefits of co-operating are similar to those in merger and cartel matters – unilateral conduct

¹³⁸ See press release from Italy at: <https://en.agcm.it/en/media/press-releases/2015/4/alias-2207> (AGCM, 2015_[192]); Sweden at: <http://www.konkurrensverket.se/en/news/commitments-given-by-booking-com-benefit-consumers/> (Konkurrensverket, 2015_[191]); France at: <https://www.autoritedelaconcurrence.fr/en/communiqués-de-presse/21-april-2015-online-hotel-booking-sector> (Autorité de la Concurrence, 2015_[193])

¹³⁹ Information received from the French Autorité de la Concurrence as part of their response to Question 3 of the Survey.

co-operation was useful in developing theories of harm, understanding the industry and identifying relevant industry and economic experts, as well as aligning the timing of investigations.

Examples of usefulness of co-operation in unilateral conduct cases

300. In unilateral conduct investigations, respondents valued coordination on commitments provided by parties and the discussion of theories of harm or policy approaches being used in relation to similar cases in order to promote convergence. For example, the Competition Bureau of Canada investigated Google's conduct related to online search and search advertising as well as display advertising in close cooperation with the US FTC.¹⁴⁰
301. An area of general co-operation between the European Commission and the US authorities concerns Standard Essential Patent (SEP) policy and the authorities also co-operate on common cases with the aim to develop convergent policy approaches and consistent case outcomes. When co-operating on cases, the US and EU authorities engage in activities such as regular phone calls and bi-lateral meetings to discuss the case; sharing and testing of theories of harm and discussing key evidence, facilitated by waivers.
302. In some instances, a useful co-operation activity is to request investigatory assistance when the undertaking concerned is located in another jurisdiction. For instance, Italy reported that it benefitted from the assistance of another authority in carrying out inspections on its behalf, in the Aspen case (2016), for which inspections were carried out in Ireland and Italy simultaneously. This type of investigatory assistance was possible pursuant to article 22 of European Commission Regulation No. 1/2003 (see *Annex I: EU Regional Integration Arrangements*).

14.8. Advantages of different types of international enforcement co-operation

303. In addition to the general benefits of enforcement co-operation and the usefulness of co-operation in specific enforcement areas discussed above, in Question 28, the Survey sought to identify the advantages¹⁴¹ of enforcement co-operation in relation to the particular types of enforcement co-operation that were considered in Part 3 of the Survey. Those respondents that answered this question¹⁴² mainly did so with a description of general advantages of enforcement co-operation, which aligned with the benefits identified above.

¹⁴⁰ See <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html> (Competition Bureau, 2016_[221])

¹⁴¹ It also addressed disadvantages, as will be discussed in *Section 15.6: Disadvantages of different types of international enforcement co-operation*.

¹⁴² Sixty-eight per cent [68%] of respondents answered this question, and of these, 36% replied that their experience was too limited to answer in detail or at all.

304. In relation to advantages of specific types of co-operation, respondents noted the following:

- **Notifications:** some authorities found notifications useful but not all were referring to formal notifications and some identified that informal notifications were more advantageous.¹⁴³
- **Requests for investigatory assistance:** some respondents noted that such requests are, or would be, particularly useful in being able to progress matters.¹⁴⁴
- **Enhanced co-operation mechanisms:** some respondents noted that the ability to engage in enhanced co-operation does, and would, improve the efficacy and efficiency of competition investigations.¹⁴⁵

¹⁴³ See *Section 16.2*: Notifications of competition investigations or proceedings relating to notifications for further discussion of this topic.

¹⁴⁴ See *Section 9.1.7*: Investigative assistance and *9.1.8*: Enhanced co-operation below for further discussion of this topic.

¹⁴⁵ See *Section 17.3*: Experience with enhanced co-operation below for further discussion of this topic.

15. Limitations and challenges to international enforcement co-operation

15.1. Overview of section

305. Since 2012, competition authorities, the OECD, the ICN and others in the competition community have undertaken a significant amount of work to improve enforcement co-operation aimed at addressing some of the key limitations and challenges.¹⁴⁶ For example, in relation to improving transparency, authorities have increasingly made information on their substantive and procedural rules publicly available,¹⁴⁷ and improved accessibility to their decisions.¹⁴⁸
306. As noted in the previous *Section 14. The value of international enforcement co-operation for authorities: objectives, benefits and usefulness*, this Section is based on the Survey responses from Part 3 and Part 6 of the Survey. It shows that despite these benefits and the usefulness of current enforcement co-operation, limitations and

¹⁴⁶ See *Section 11*. History of initiatives relating to international enforcement co-operation above for an outline of OECD and ICN enforcement co-operation initiatives since 2012 and prior.

¹⁴⁷ For example (i) the Bundeskartellamt webpage, www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/legislation/legislation_node.html (Bundeskartellamt, n.d._[233]); (ii) the French Autorité de la concurrence webpage, www.autoritedelaconcurrence.fr/user/standard.php?id_rub=556&lang=en; (Autorité de la concurrence, n.d._[234]) (iii) the Italian Autorità Garante della Concorrenza e del Mercato webpage, <https://en.agcm.it/en/scope-of-activity/competition/legislation>; (AGCM, n.d._[235]) (iv) the Japan Fair Trade Commission webpage, https://www.jftc.go.jp/en/legislation_gls/index.html (JFTC, n.d._[232]). A number of authorities noted the 2019 framework on ICN Competition Authority Procedures (ICN CAP) as an example of effective co-operation to improve transparency. Seventy-two competition authority participants agreed (in a non-binding document) to adhere to substantive principles on procedural fairness set forth in the CAP and to publish details as to their adherence to these principles in an agreed template. Both the OECD and ICN have promoted the alignment of substantive and procedural enforcement rules and the elimination of legislative obstacles to international co-operation through their respective activities as outlined above in *Section 11*. History of initiatives relating to international enforcement co-operation. Transparency obligations can be found in competition chapters of Free Trade Agreements (e.g. Article 21.5: Transparency, in United States-Canada-Mexico Agreement (USCMA)).

¹⁴⁸ For example: publishing decisions in English, such as (i) the interim measures decision in the case Autorité de la Concurrence (2019), Decision 19-MC-01 Amadeus v Google, (Autorité de la Concurrence, 2019_[194]);

(ii) the case summary by the Bundeskartellamt on the Facebook decision, B6-22/16, Bundeskartellamt (2019) Decision under Section 32 (1) German Competition Act (GWB), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3 (Bundeskartellamt, 2019_[197]), and full decision, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5 (Bundeskartellamt, 2019_[198]).

challenges remain, especially for certain types of co-operation. The Survey shows five key categories of challenges that limit enforcement co-operation:

- resourcing
 - co-ordination/timing
 - legal limitations, especially relating to:
 - sharing confidential information
 - investigative assistance
 - enhanced co-operation
 - trust and reciprocity
 - practical issues (language, time differences)
307. These limitations and challenges have informed the future areas of focus proposed in *Section 21. Proposed future areas of focus to improve international enforcement co-operation*.

15.2. Limitations by frequency and level of importance

308. Respondents were asked to provide qualitative responses on the limitations of enforcement co-operation (Question 29) and to complete a table (Table 7), ranking different limitations to effective international enforcement co-operation by importance and frequency. The data is set out in *Table 15.1* (by level of importance) and *Table 15.2* (by level of frequency).

Table 15.1. Limitations to international enforcement co-operation, by level of importance, 2019

	Average Importance Score	High Importance	Medium Importance	Low Importance	Total Respondents
Existence of a Legal Limit(s)	2.6	61%	39%	0%	33
Absence of Waiver(s)	2.2	45%	27%	27%	33
Lack of Resources / Time	2.0	38%	21%	42%	34
Low Willingness to Co-operate	2.0	39%	18%	42%	33
Other Differences Between Legal Systems	2.0	23%	48%	24%	31
Different Legal Standard(s)	1.9	22%	48%	27%	32
Lack of Knowledge of Involvement	1.9	35%	18%	48%	34
Lack of Trust	1.9	30%	27%	42%	33
Different Stages in Procedures	1.7	16%	36%	45%	32
Language / Cultural Differences	1.6	12%	36%	55%	34
Dual Criminality Requirement (Cartels):	1.6	21%	12%	58%	29
Different Time Zones	1.1	3%	3%	94%	33

Percentage of Survey respondents who completed this table: 77%

Source: OECD/ICN Joint Survey 2019, Question 29 – Table 7

Data source type: defined data set

Table depicts responses where respondents may have provided multiple responses

Figure depicts the average importance score, where options were [High =3], [Medium =2] and [Low =1]

Table 15.2. Limitations to international enforcement co-operation, by level of frequency, 2019

	Average Frequency Score	Frequently (>60%)	Occasionally (20 – 60%)	Seldom(20%) / Never	Total Respondents
Existence of a Legal Limit(s)	2.0	29%	46%	24%	41
Different Stages in Procedures	1.7	13%	40%	48%	40
Different Legal Standard(s)	1.6	10%	44%	46%	41
Lack of Resources / Time	1.6	13%	31%	56%	39
Other Differences Between Legal Systems	1.6	5%	46%	49%	39
Absence of Waiver(s)	1.5	10%	29%	61%	41
Language / Cultural Differences	1.4	3%	35%	63%	40
Lack of Knowledge of Involvement	1.3	2%	29%	68%	41
Low Willingness to Co-operate	1.3	2%	22%	76%	41
Different Time Zones	1.2	0%	24%	76%	41
Lack of Trust	1.2	2%	19%	79%	42
Dual Criminality Requirement (Cartels)	1.2	3%	9%	88%	32

Source: OECD/ICN Joint Survey 2019, Question 29 – Table 7

Data source type: defined data set

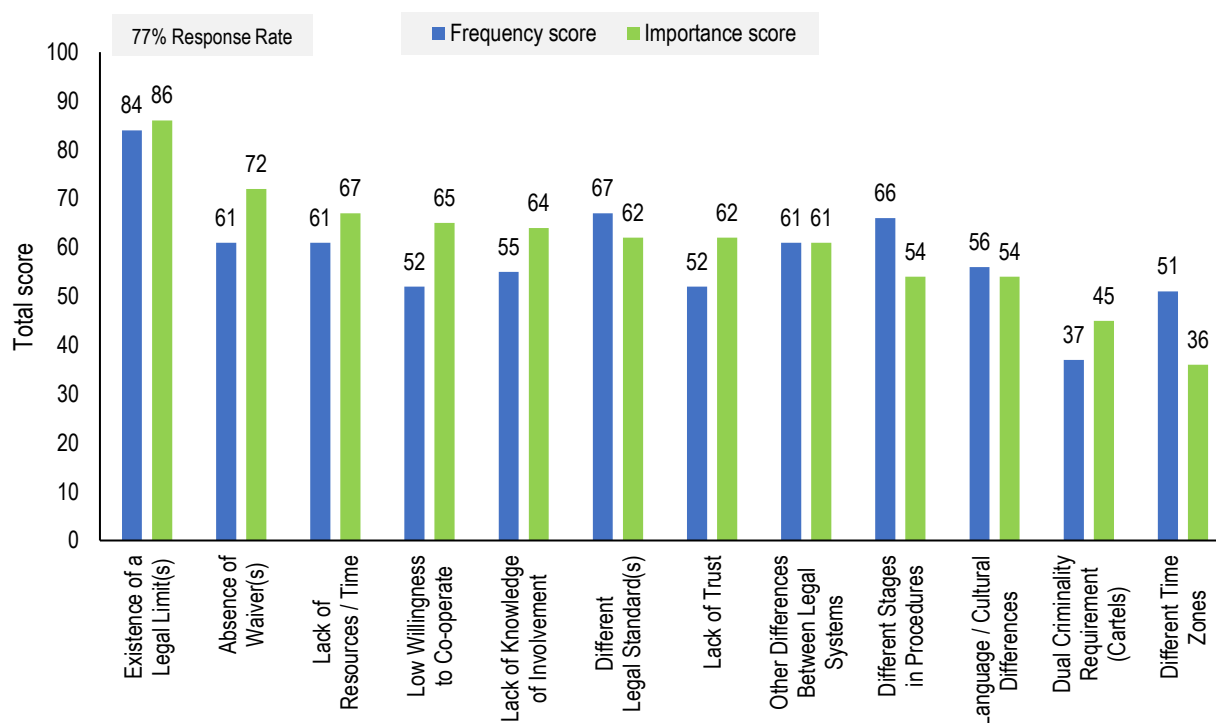
Figure depicts responses where respondents may have provided multiple responses

Figure depicts the average frequency score, where options were [Frequently (>60% of cases) =3], [Occasionally (20-60% of cases) =2] and [Seldom (<20%)/Never =1]

Percentage of respondents to Survey who completed this table: 77%

309. The data from the tables above, depicted in *Figure 15.1*, allows for a comparative analysis between the frequency and importance dimension of the responses. It shows that ‘The existence of legal limits’ is both the most frequent and most important limitation of enforcement co-operation, with ‘Absence of waiver’ (i.e. the inability to share confidential information without an alternative legal provision) and ‘Lack of resources/time’ being the next most important limitations. The least important limitations being ‘Different time zones’ and ‘Dual criminality Requirement (Cartels)’.

Figure 15.1. Limitations to international enforcement co-operation by frequency and importance, by scores of frequency and importance, 2019



Source: OECD/ICN Joint Survey 2019, Question 29 – Table 7

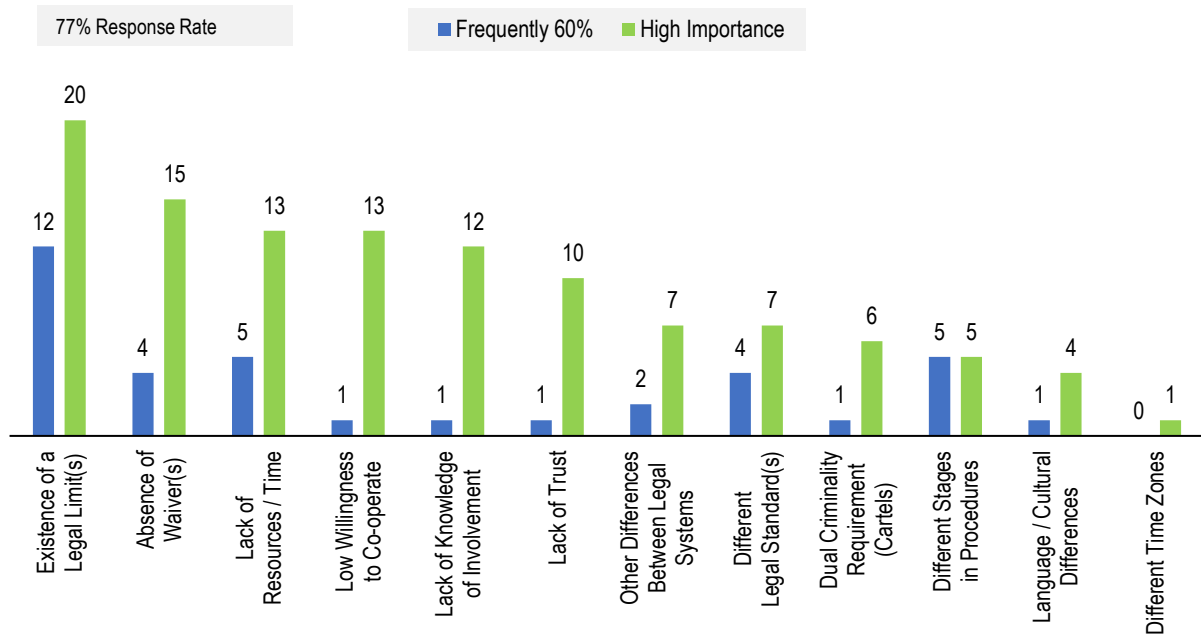
Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts summed ordinal scores, where options were [Frequently (>60% of cases) =3], [Occasionally (20-60% of cases) =2], [Seldom (<20%)/Never =1], [High =3], [Medium =2] and [Low =1]

310. Whereas *Figure 15.1* above depicts summed original scores across the four ranges of importance and across the three ranges of frequency, *Figure 15.2* ranks the limitations only by high importance and most frequently occurring. It shows that the order remains the same as in *Figure 15.1* for importance, but that the first six limitations are of more importance in *Figure 15.2* than in *Figure 15.1*. *Figure 15.2* shows that ‘The existence of legal limits’ is of most concern when considering issues of ‘high’ importance and that it arises more frequently than other limitations.

Figure 15.2. Limitations to international enforcement co-operation by ‘High Importance’ and ‘Frequently (>60% of cases)’, by number of respondents, 2019



Source: OECD/ICN Joint Survey 2019, Question 29 – Table 7

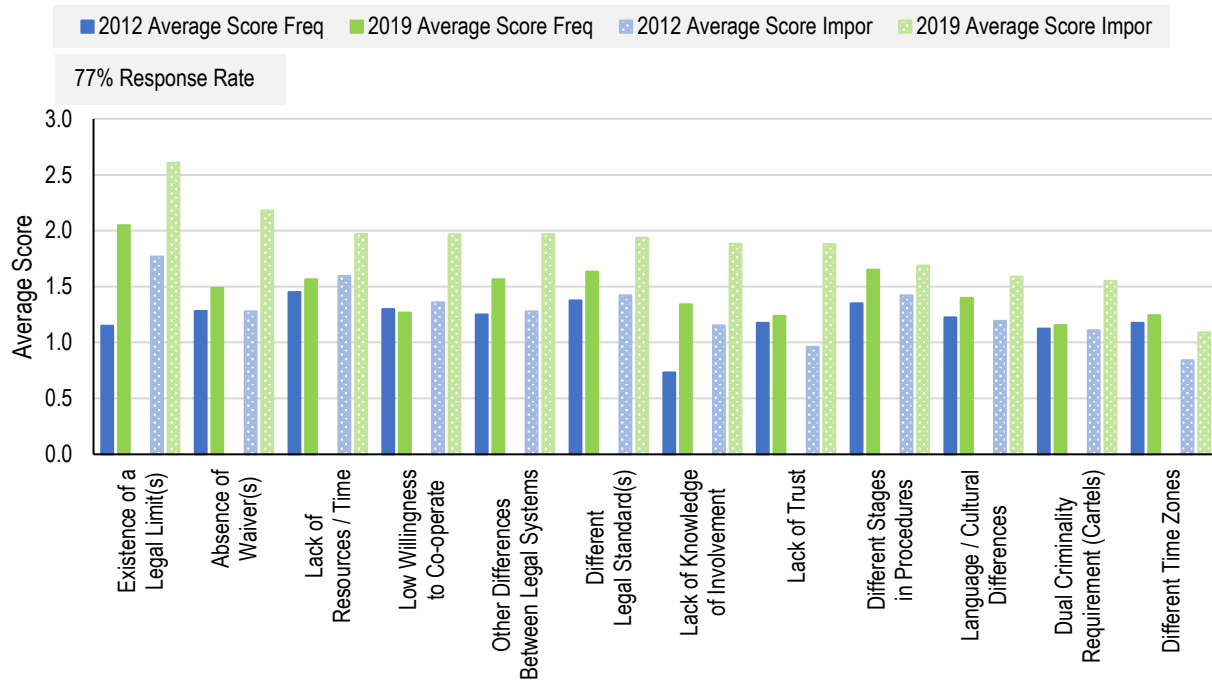
Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

311. A comparison of the importance and frequency of limitations to enforcement co-operation between 2012 and 2019 Survey results in *Figure 15.3* below shows that both the importance and frequency of all limitations have increased. This is possibly related to other results in the Survey that show an increase in enforcement co-operation.¹⁴⁹ An increase in enforcement co-operation may lead to more frequent experiences with the limitations to enforcement co-operation.

¹⁴⁹ See *Section 12. Frequency of international enforcement co-operation*

Figure 15.3. Limitations to international enforcement co-operation by importance and frequency average scores, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 29 – Table 7 and OECD 2012 Survey Results

Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts average importance and frequency scores, where options were [Frequently (>60% of cases) =3], [Occasionally (20-60% of cases) =2], [Seldom (<20%/Never) =1], [High =3], [Medium =2] and [Low =1]

Response rate: 2012:74% and 2019: 77%

312. In addition to the limitations shown in *Figure 15.1 – Figure 15.3*, respondents' qualitative responses to Question 29 provide more detail about these and additional limitations. Thirty-five per cent of respondents emphasised that there are significant limitations arising from the exchange of information and the different treatment of confidential information in other jurisdictions (while also recognising the importance of protecting confidential information in any exchanges). Some respondents noted that limitations on sharing publicly available information about investigations and decisions taken in other jurisdictions reduced the level of transparency and trust between authorities. Other respondents noted a lack of bi-lateral or multi-lateral agreements to facilitate investigative assistance, but also noted the time and resources involved in negotiating such agreements.

313. When asked about the benefits of enforcement co-operation if limitations were removed (Question 31), all respondents to the question¹⁵⁰ agreed that enforcement co-operation would become more effective and efficient. The qualitative responses regarding improvements mentioned objectives and benefits of enforcement co-

¹⁵⁰ Seventy-nine percent responded: Survey 2019.

operation similar to those identified in *Section 14.6: Benefits of international enforcement co-operation* above.

314. A few respondents noted that some limitations and challenges would always exist to some degree. For example, even where there is a legal ability to co-operate with another authority, there may not be the resource capacity to do so, particularly as resources can vary over time (*e.g.*, due to political support for competition policy and enforcement and a jurisdiction's economic situation.). Further, it was noted that while the removal of limitations would be ideal, efforts to do so could be very costly and resource-intensive. For instance, a few respondents noted that achieving the harmonisation between legal systems that allows for very deep and effective co-operation can be difficult and requires considerable time, effort and political will to amend laws.
315. Respondents were asked how the absence of co-operation would create challenges (Question 32). They listed issues that are the inverse of the benefits listed in *Section 14.6: Benefits of international enforcement co-operation* above, including:
- having less information available about other jurisdictions, specific markets and investigations
 - lack of relevant evidence
 - absence of co-ordination when sending notifications and in conducting dawn raids
 - lack of consistency between authorities about important technical or definitional matters
 - conflicting or otherwise different remedies that could prove problematic.
316. Respondents noted these challenges could lead to various detrimental outcomes including:
- an inability to detect and investigate certain anti-competitive conduct
 - an unnecessary duplication of efforts
 - risking the of destruction of evidence
 - an overall deterioration in the effectiveness of competition enforcement.

Box 15.1. Example of a limitation of enforcement co-operation: Denmark and Norway

In August 2016, the Norwegian Competition Authority (NCA) contacted the Danish Competition and Consumer Authority (DCCA). Since Norway is not part of the EU, the DCCA could not assist with any inspection or other fact-finding measures under EU Regulation 1/2003. Nor does the “Agreement on Cooperation in Competition Cases” provide a legal basis for such assistance, since the agreement only provides a legal basis for notifications and the exchange of confidential information. As a result, the NCA decided to limit its formal enforcement action to Norway and to seek information from the party involved in Denmark on a voluntary basis. This case provides a clear example of a situation where additional tools within the Agreement on Cooperation in Competition

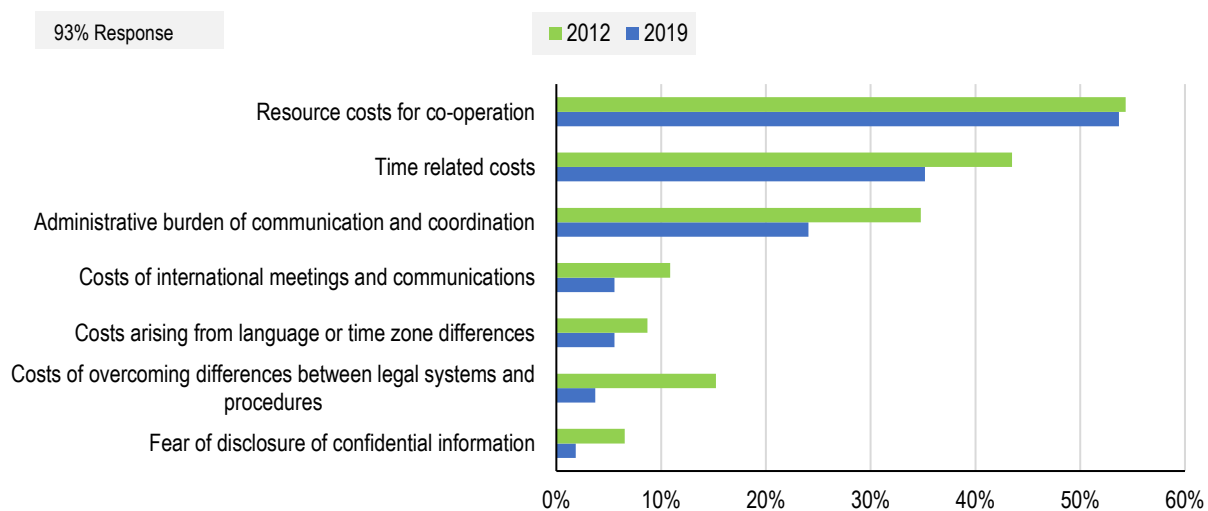
Cases would have been helpful to provide the best support to the NCA. This has been resolved with the revised 2017 Agreement on Cooperation in Competition Cases.

15.3. Costs of international enforcement co-operation

317. Authorities must balance any costs in pursuing enforcement co-operation activities against the prospective benefits. Question 5 asked about the costs of co-operation and the responses provided more detail regarding the resource costs previously mentioned in relation to the limitations on effective enforcement co-operation.

318. The majority of respondents (54%)¹⁵¹ stated that one of the main costs of enforcement co-operation was resource costs,¹⁵² followed by time related costs¹⁵³ (e.g. processing time, counterpart timing requirements and potential delays) (35%), and the administrative burden of communication and co-ordination (24%). These results, illustrated in *Figure 15.4*, show that the costs of enforcement cooperation are similar to those identified in the 2012 Survey Results.

Figure 15.4. Cost of international enforcement co-operation, by number of respondents, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 5 and OECD 2012 Survey Results

Data source type: quantitative representation categorised free text

Figure depicts responses where respondents may have provided multiple respondents

Figure depicts responses as proportions over total number of respondents to the question

¹⁵¹ Eighty-seven per cent [93%] of Survey participants responded to Question 5.

¹⁵² The 2012 Survey used the term ‘resource constraints’, but we have amended it as it sounded like a restraint rather than a cost.

¹⁵³ The 2012 Survey used the term ‘processing time and constraints in timing of investigations’, however, this was amended to make it clearer as ‘time related costs’.

Response rate: 2012:95% and 2019: 93%

319. A number of both younger and more mature authorities noted there were costs linked to co-ordination between authorities and parties when ensuring timely investigations. Enforcement co-operation can increase bureaucracy between authorities and parties (e.g. to obtain official approvals to co-operate, obtain waivers, and engage in inter-authority consultation processes) that may slow down investigations. Further, a number of authorities noted that they have tight statutory provisions for merger reviews and these may not be met if enforcement co-operation caused delays (which one authority noted as a reason for its limiting enforcement co-operation in some circumstances).
320. Respondents noted that enforcement co-operation is more effective and efficient when it can occur directly between authorities, but this is not possible for all authorities, especially in the absence of either national law provisions or bi-lateral or multi-lateral agreements or treaties. These factors can delay enforcement activity and reduce the effectiveness of investigations. Relatedly, a number of authorities noted a preference for informal co-operation as a means of reducing these costs.
321. A number of respondents identified costs associated with understanding different legal systems and addressing language barriers. These costs arise in relation to case specific enforcement co-operation, but also more generally in the informal co-operation and network building that results from engagement in international collaboration. For example, one respondent noted
- All those [co-operation] activities require translation/interpretation to be carried out by the European Integration and International Relations Unit, which consists of 5 people. Thus, the language problem causes additional workload on the abovementioned unit. Consequently, the unit has to devote a significant part of its resources to translation/interpretation, which limits its ability to focus on the main objective – fostering and carrying out international enforcement co-operation activities.*
322. The additional resource costs for a number of authorities included ensuring they were providing relevant and consistent analysis and insightful material, while noting that considering the perspective of counterpart authorities could raise new topics for analysis, making it more complex and resource intensive for staff.
323. A number of smaller authorities noted that enforcement co-operation requires an initial additional resource cost (even if, ultimately, resulting in benefits and efficiencies), and budgeting for these costs can be difficult, given that the scale of co-operation and opportunities to co-operate may be unknown. In contrast, some more mature authorities have established regular systems to support enforcement co-operation and therefore have better opportunities for making the investment of resources necessary to achieve the benefits of co-operation. Future areas of focus could concentrate on the key value of enforcement co-operation for smaller authorities and how to engage with counterpart authorities efficiently and effectively. Some of these are outlined in *Section 21. Proposed future areas of focus to improve international enforcement co-operation.*
324. The potential effects of enforcement co-operation on the behaviour of businesses within a jurisdiction was also considered a potential cost, especially in relation to cartel matters. One respondent noted:

The downside of international co-operation could be the chilling effect on the corporate leniency in that firms may be reluctant to cooperate when they are aware that the Commission will share the information with other jurisdictions where they will be exposed to fines.

325. The issue of the potential chilling effect in cartel matters intensifies where at least one authority has criminal sanctions, especially where the other does not (which may prevent or limit enforcement co-operation between authorities in the first place). This particular aspect has been the subject of significant international discussion in the competition community, including at OECD Competition Committee discussion on ‘Criminalisation of cartels and bid rigging conspiracies: a focus on custodial sentences’ in June 2020 (OECD, 2020_[68]). The background note stated:

criminalisation may present practical disadvantages for international co-operation due to resistance by non-criminalised jurisdictions to co-operate (and in particular to share information) with jurisdictions in which enforcement proceedings may result in the incarceration of individuals.

326. Respondents suggested possible solutions to some of the specific challenges of cartel enforcement co-operation for future OECD and ICN work considered in *Section 21. Proposed future areas of focus to improve international enforcement co-operation* below.

15.4. Balancing benefits against costs

327. The majority of respondents to the Survey agreed that benefits of enforcement co-operation generally outweigh costs, and that they prefer to co-operate when possible.
328. The benefits of enforcement co-operation are perceived as being greater than the costs because not only does enforcement co-operation provide benefits for specific cases or initiatives, it yields broader and long-term benefits that authorities obtain from co-operating with counterparts. These include:
- developing stronger and better relationships with counterpart authorities
 - improved staff and organisational practices
 - improved international and domestic reputation
 - improved staff and authority knowledge of other jurisdictions and sectors.
329. Further, respondents were cognisant of the drivers of enforcement co-operation and the increased likelihood of considering matters that were also relevant to counter-part authorities. For example, one respondent noted that it: “understands the necessity to embody an international cooperative approach in order to adapt to transnational organized companies and worldwide commerce.”
330. Listed and grouped below, the responses indicated that in order to prioritise and decide which costs to incur (especially in cases where the case-specific benefits of enforcement co-operation may be less certain), authorities consider the following factors:
- existing enforcement priorities and organisation strategies: for example, compliance and enforcement statements, enforcement co-operation strategies or other authority enforcement related policy documents

- the return they will receive for their co-operation ‘investment’: for example, the prospect of future assistance/co-operation, or increased standing in the international competition community
 - expected harm if co-operation does not occur: although fewer authorities mentioned this criterion, some said that they prioritise which costs to incur in relation to the expected costs or harm caused by the failure to co-operate.
 - co-operation that can occur while minimising administrative and travel costs.
331. Some respondents that are part of regional networks, such as the ECN, highlighted the fact the ECN allowed them to co-operate while incurring less administrative costs than other enforcement co-operation activities outside the ECN (the potential efficiencies of regional enforcement co-operation networks are also considered in *Section 19. Regional enforcement co-operation* below). These cost-saving factors became a prioritisation criterion for some authorities, i.e. they prioritised ECN cases. This supports the observation made by some respondents that established co-operation relationships are generally more effective and efficient than new co-operation relationships. This can create an incentive to rely on existing co-operation networks, rather than establishing new ones.

15.5. Enforcement co-operation between authorities with no history of enforcement co-operation

332. Respondents were asked whether their answers as to advantages, disadvantages and limitations they had identified in Questions 28 and 29 would be different if they were answering these questions in relation to authorities with which they had no prior history of co-operation (Question 30). As in 2012, the responses indicated that the challenges and limitations would be more significant, particularly as there would be no established trust or experience between authorities, which respondents considered crucial factors for enforcement co-operation. Of those who responded,¹⁵⁴ 49% said there would be differences, and noted the following challenges when seeking to co-operate with a counterpart authority for the first time:
- lack of network of contacts to facilitate initial communication and exchanges
 - difficulties in initiating informal and frank conversations and exchanges
 - unknown and different operating and co-operating cultures
 - lack of awareness of legal system and co-operation opportunities (e.g. confidentiality laws, types of co-operation that are possible, etc.)
 - longer administrative processes and co-ordination that is more complex.
333. Some respondents noted that lack of experience or trust would not prevent them from co-operating, especially if the counterpart authority demonstrated a strong willingness to co-operate and a proactive approach to engagement.
334. In terms of initiating co-operative relationships, respondents noted that international forums, such as those held by the OECD and the ICN, assisted authorities in developing these relationships. Further, some authorities noted that technical

¹⁵⁴ Fifty-six per cent [56%] of Survey participants responded to Question 30.

assistance programmes and staff exchanges also provided good opportunities to enhance relationships and trust.

15.6. Disadvantages of different types of international enforcement co-operation

335. As noted above in *Section 14.8: Advantages of different types of international enforcement co-operation*, in addition to the general limitations of enforcement co-operation, Question 28 of the Survey asked respondents to note disadvantages of enforcement co-operation in relation to the particular types of enforcement co-operation that were considered in Part 3 of the Survey. Similar to their responses in relation to advantages, many respondents provided a description of general disadvantages of enforcement co-operation, which aligned with the limitations and challenges identified above. Far fewer respondents noted disadvantages compared to advantages, and one respondent specifically said that any issues were better characterised as challenges.

336. In relation to disadvantages of specific types of co-operation, respondents noted the following:

- **Notifications:**¹⁵⁵ a few respondents noted that formal notifications (such as through diplomatic channels) added little value and were very resource intensive. One respondent noted that notification “is a relatively formalistic tool for cooperation and that there may be other less formalistic means to obtain the desired level of transparency”.
- **Requests for investigatory assistance:**¹⁵⁶ a number of respondents noted that the legal barriers were the primary issues preventing investigatory assistance. For example, one respondent said:

We have in some instances sought assistance to carry out investigative measures in another jurisdiction (e.g. requests for information from companies in the other country). Although assistance was helpfully offered, the other authority was not in a position to assist as extensively as we had originally envisaged due to having different information-gathering powers. This could potentially limit the information available when coming to a decision in a case.

- Relatedly, another respondent noted that:

While MLATs are a useful tool when evidence is located abroad and/or foreign counterparts are unable to share information under less informal mechanisms, the length of the MLAT process can make it difficult for [our authority] to obtain the information in a timely fashion.

¹⁵⁵ See *Section 16.2: Notifications of competition investigations or proceedings* below for further discussion of this topic.

¹⁵⁶ See *Section 17.2: Investigative assistance* below for further discussion of this topic.

16. Notification, comity and co-ordination

16.1. Overview of section

337. Notification, comity and co-ordination between authorities are some of the most frequent types of enforcement co-operation that occur, primarily because many aspects can be undertaken informally. This section considers how the respondents use and value these types of enforcement co-operation, which was addressed in Part 3.1 of the Survey relating to “Notifications and comity provisions.”¹⁵⁷ Part 3 of the Survey excludes regional co-operation and focuses on international co-operation outside regional networks or organisations.
338. These aspects of co-operation are reflected in the 2014 OECD Recommendation, which recommends that:
- when an authority considers that an investigation or proceeding being conducted by another authority under its competition laws may affect its important interests, it should transmit its views on the matter to, or request consultation with, the other authority (III)
 - when an authority considers that one or more enterprises or individuals situated in one or more other jurisdictions are or have been engaged in anticompetitive practices or mergers with anticompetitive effects that substantially and adversely affect its jurisdiction’s important interests, it may request consultations with such other authority(s) (IV)
 - an authority should ordinarily notify another authority when its investigation or proceeding can be expected to affect the other jurisdiction’s important interests; (V)
 - where two or more jurisdictions 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 (VI)
339. The analysis of the 2012 and 2019 Survey results and related data in this section shows that these types of enforcement co-operation occur more frequently in merger matters than in other enforcement areas. It also shows that enforcement co-operation is always considered on a case-by-case basis (outside of legal arrangements that require certain types of enforcement co-operation), with some respondents having particularly strong relationships with other authorities that support repeated enforcement co-operation.
340. This Section demonstrates that while enforcement co-operation is supported by both formal and informal mechanisms, some authorities see limited utility in formal

¹⁵⁷ Questions 9-13 of Survey.

systems of notification and very few authorities engage in formal acts of comity, while they do in practice consider issues relevant to other jurisdictions. It confirms that consultation and co-ordination are considered valuable for both specific case co-operation, and also as part of maintaining long-term, co-operative relationships between authorities.

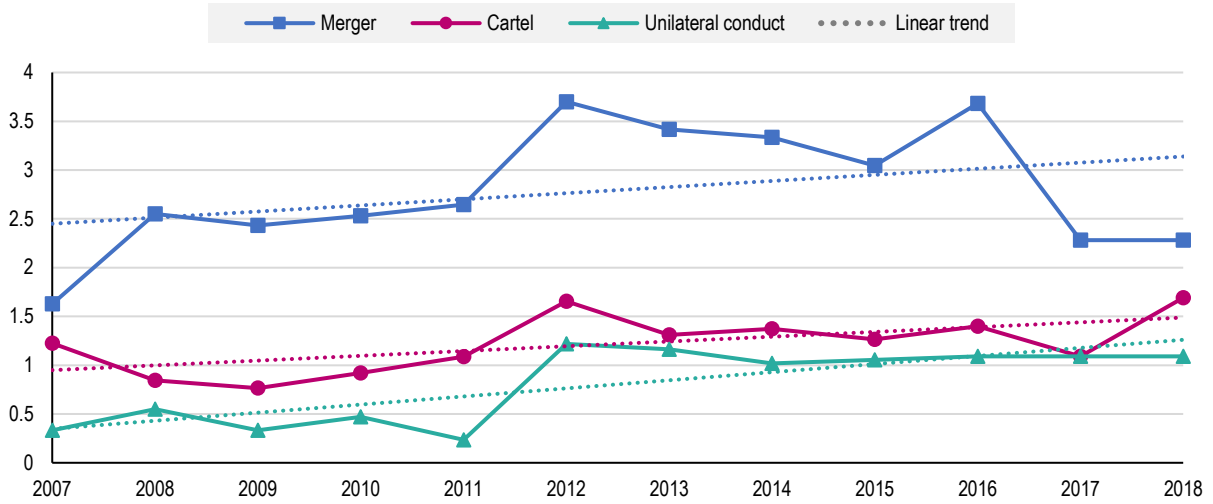
16.2. Notifications of competition investigations or proceedings

341. The Survey included both qualitative and quantitative questions designed to identify how many notifications authorities make and receive beyond their regional networks,¹⁵⁸ along with their views as to the utility of, and any issues with, notifications.¹⁵⁹ It was clear that in some instances, respondents considered notification to be a formal procedure (for example, using diplomatic channels of communication), where others thought it could occur informally (even if officially). Accordingly, some respondents may have recorded lower instances of using notifications, even when they do notify other authorities of matters of potential mutual interest.
342. *Figure 16.1* below sets out the average number of notifications that respondents reported were made between 2007-2018 across enforcement areas, while *Figure 16.2* below sets out the average number of notifications received between 2007-2018 across enforcement areas. Both *Figure 16.1* and *Figure 16.2* demonstrate a slight upwards trend in all enforcement notifications made over the entire period, with merger notifications (both made and received) being more common than cartels or unilateral conduct notifications. For both notifications, made and received, there were some significant variations in some years. The significant spike in 2012 in *Figure 16.2* is the result of one Respondent reporting about 50% of the total number of notifications in that year and the average excluding this Respondent would be 1.4 instead of 2.8 notifications for 2012.

¹⁵⁸ Question 10 and Tables 3.1. and 3.2 of the Survey

¹⁵⁹ Questions 11 and 12 of the Survey

Figure 16.1. Average number of notifications made by authorities, by enforcement areas, 2007 – 2018



Source: OECD/ICN Joint Survey 2019, Question 10 – Table 3.1

Data source type: defined data set

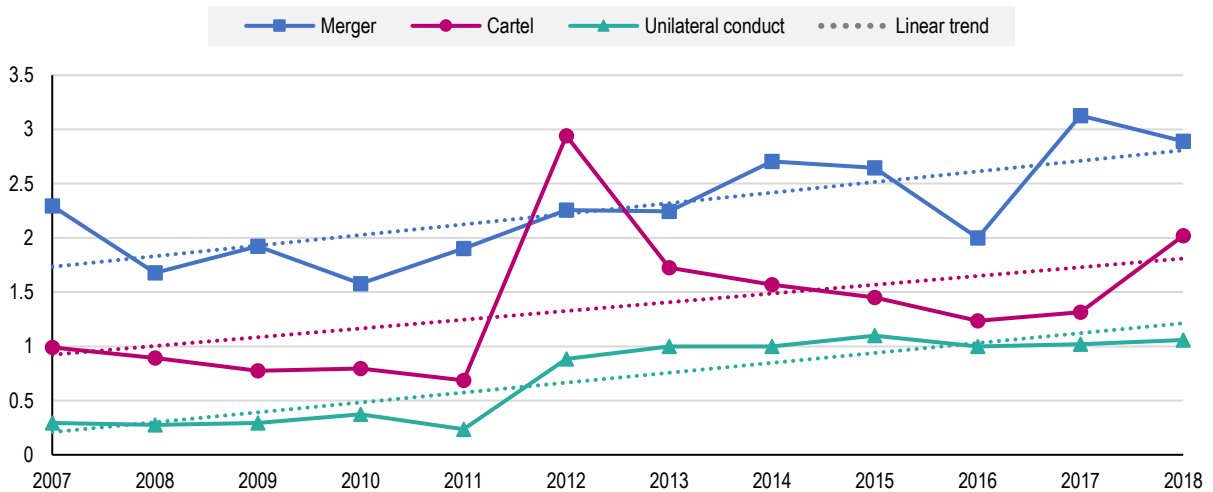
Figure depicts results where a median number has been used if ranges were provided by a respondents. It reflects a trend only and the vertical axis figure should not be regarded as an accurate total, given potential double counting and the use of ranges in the respondents' answers.

This figure is a simple average of the number of notification made by respondents. The figure demonstrates a trend only and not a total number of notifications.

Response rate: 2012:92% and 2019:96%*

*This response rate is calculated over the total number of authorities that declared to have experience in issuing notification but did not fill in table 3.1.

Figure 16.2. Average number of notifications received by authorities by enforcement area, 2007 – 2018



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

Data source type: defined data set

Figure depicts results where a median number has been used if ranges were provided by a respondents. It reflects a trend only and the vertical axis figure should not be regarded as an accurate total, given potential double counting and the use of ranges in the respondents' answers.

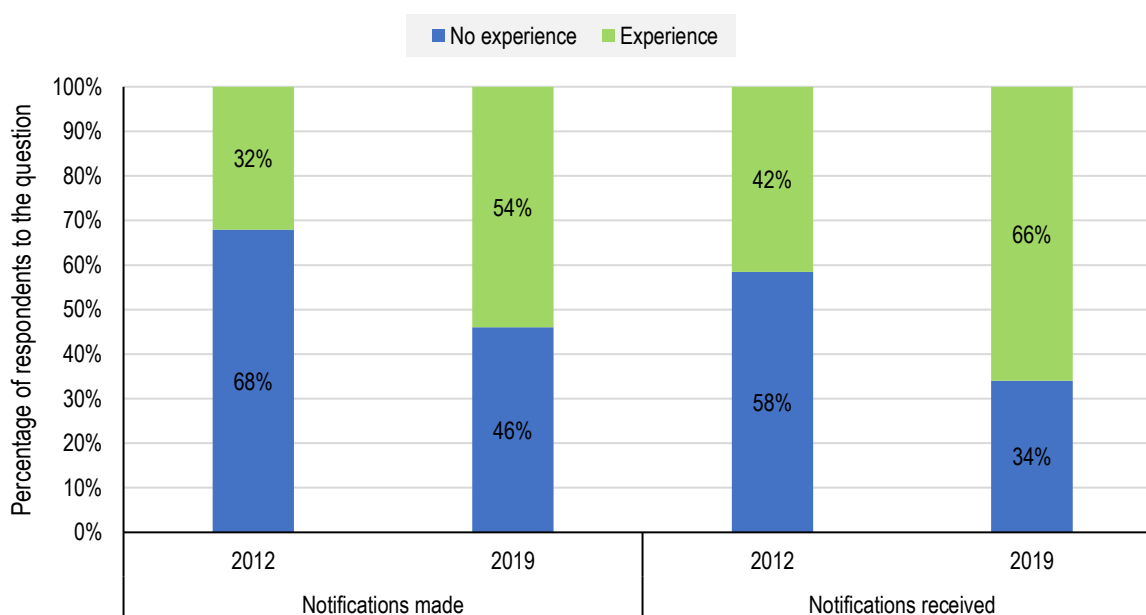
This figure is a simple average of the number of notification received by respondents. The figure demonstrates a trend only and not a total number of notifications.

Response rate: 2012:92% and 2019:84%*

*This response rate is calculated over the total number of authorities that declared to have experience in receiving notification but did not fill in table 3.2.

343. Figure 16.3 compares the 2012 and 2019 Survey results in relation to notifications made and received. It demonstrates that while 92% of respondents to the 2012 Survey answered the question, there were substantially fewer with experience in making or receiving notifications than respondents in 2019 (where 95% responded to the question). Accordingly, the results for the 2012 Survey time period in Figure 16.3 represents 17 authorities with experience, while the 2019 Survey period reflects 31 authorities with experience.

Figure 16.3. Experience making and receiving notifications, by percentage of respondents to the question, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 10 – Table 3.1 and 3.2

Data source type: defined data set

Figure depicts responses as proportions over total number of respondents to the question

Response rate: 2012:92% and 2019:95%

344. Respondents were asked if they thought there were longer-term trends of increasing or decreasing notifications, and the reasons for any trends. Where respondents thought there was an increase, the following reasons were provided:

- adherence to the 2014 OECD Recommendation
- improved bi-lateral relationships

- co-operation and transparency initiatives co-ordinated by ICN, OECD and other organisations (and engagement with these bodies by authorities)
 - improved technological security and protection for information communicated
 - the increase in notifications correlates with the increase in international cases (due to drivers outlined in *Drivers of international enforcement co-operation*)
 - recent changes in national provisions allowing for more enforcement co-operation
 - regarding notifications in cartel matters: a greater push toward co-ordinated leniency policies.
345. The Survey asked if authorities thought notifications would likely increase, decrease or remain stable. Although few responded to this question, one respondent identified that the number of notifications it has been receiving has increased but that the number of notifications it has sent remained stable. The respondent noted:

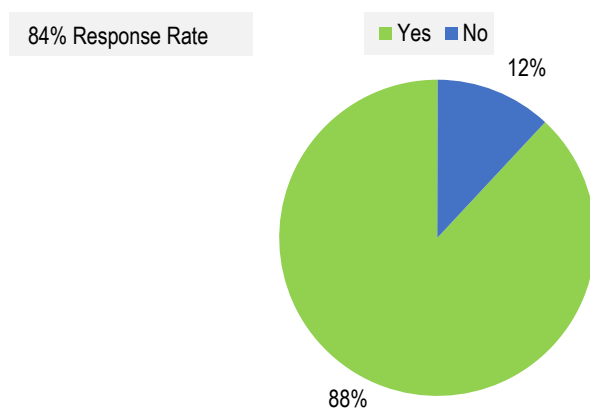
notifications are to a large degree linked to the number of cases generated by an agency. If the number of cases goes up the number of notifications also tends to go up, as the duty to notify is in most cases triggered by proceedings reaching a particular stage and not by a circumstance subject to judgement.

346. Another respondent that noted a decrease in outgoing notifications, but was unclear why, identified that the percentage drop in outgoing notifications may reflect the number of cross-border cases being dealt with on a yearly basis (fewer cases yielding fewer notifications), the level of need to interact with international partners, and other reasons.
347. The Canadian authority noted that while notifications may be made to any authority around the world, they notify some authorities more frequently:

Additionally, while our notifications have been truly global in nature (reaching a wide range of partners), the primary authorities we exchange notifications with are the United States Federal Trade Commission, the United States Department of Justice, and the European Commission Directorate-General for Competition. These have been our main notification partners for quite some time and we do not foresee any major changes in that regard if we project out 10-15 years. This is largely because we have well-established, close partnerships with the US and the EU competition authorities supported by longstanding co-operation treaties. The US being Canada's largest trading partner, plus the integrated nature of the North American economy and our shared border, all explain why we cooperate the most often with the US.

16.2.1. Utility of notifications and associated issues

348. The Survey asked whether notifications were useful, and if so why (Question 11). The responses we categorised into 'yes' or 'no' show that of those who responded, 88% found them useful, see *Figure 16.4*.

Figure 16.4. Usefulness of notifications, by percentage of respondents to the question, 2019

Source: OECD/ICN Joint Survey 2019, Question 11

Data source type: quantitative representation categorised free text

349. The free-text responses to Question 11 confirmed that respondents found formal notifications could be useful, as demonstrated by the following comments:

350. Canada:

Formal notifications with respect to mergers can also be particularly useful in identifying transactions that do not require pre-merger notification ..., but may raise competition issues. Formal notifications have also provided useful background and led to further co-operation or coordination among authorities on merger reviews or abuse of dominance investigations, including remedy discussions, as well as the coordination of evidence-gathering activities in cartel investigations. Notifications have also been beneficial for alerting the [Authority] to legislative changes of our partners impacting our co-operation.

351. Mexico:

In the case of cartels, formal notifications of enforcement actions are useful. However, it should be noted that although formal notifications are important, they represent only one type of co-operation. As co-operation among agencies increases, formal notifications become less important.

In the case of mergers, the mechanism is useful for its informative purposes and for analysis coordination. However, formal notifications have not been not useful, so far.

352. Ecuador:

...in the case of economic concentration operations, for example, the notification of a foreign jurisdiction of an international operation that requires authorization in that jurisdiction and effects [the Authority's] interests, can help the identification of a possible non-notified operation or gun jumping...in these cases, the notification improves the probability of detecting transactions that must be examined by the competition authority.

353. A minority of authorities [13%] did not find much utility in notifications outside of regional networks. The comments from the US helped clarify this perspective,

confirming that this response primarily related to formal notifications through diplomatic channels:

354. US:

Almost fifty years ago, concerns about “extraterritorial” antitrust enforcement created the demand for formal notifications... Today, many agencies are committed to vigorous competition enforcement focused on consumer welfare and economic efficiency, and have developed relationships with other agencies. This change is reflected in agencies’ practices and in the OECD Recommendation adopted in 2014, which allowed for practical and “informal” agency-to-agency communications regarding pending investigations.

355. The free-text responses indicate that authority-to-authority communication regarding investigations/cases of mutual interest is important and that in many instances this can and does occur outside a formal notification regime. This view was also reflected in comments that respondents gave to Question 12, which asked about awareness of parallel investigations outside of notification processes. A number of authorities noted they utilised a number of methods to become aware of possible parallel investigations, including:

- established inter-authority communication networks
- reviewing competition related information services (such as MLEX, PaRR, international business news)
- pro-actively following the activities of particular authorities (such as media releases and announcements)
- communicating with parties to the investigation.

16.3. Comity and consultation

356. As noted above in *Section 9.1.6: Comity – traditional (negative) and positive*, 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, and is either traditional (negative) or positive comity.

357. In practice, it is difficult to find public examples of comity (that is, where a jurisdiction publicly takes the interests of another jurisdiction into account in its decision-making). However, in contrast, there are more 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.¹⁶⁰ In practice, where these

¹⁶⁰ For example, as noted in (OECD, 2019_[10])_Thermo Fisher/Life Technologies (2013) and Continental/Veyance (2014) mergers: in these cases, the Canadian Competition Bureau deferred to other agencies’ remedies, finding them sufficient to protect consumers and eliminate competitive concerns in Canada. *GSK-Novartis merger case* (2015): the Australian Competition and Consumer Commission concluded that merger remedies agreed with other agencies solved its competitive concerns. Therefore, it did not require Australia-specific remedies but only asked the parties’ commitment to the other agreed remedies.

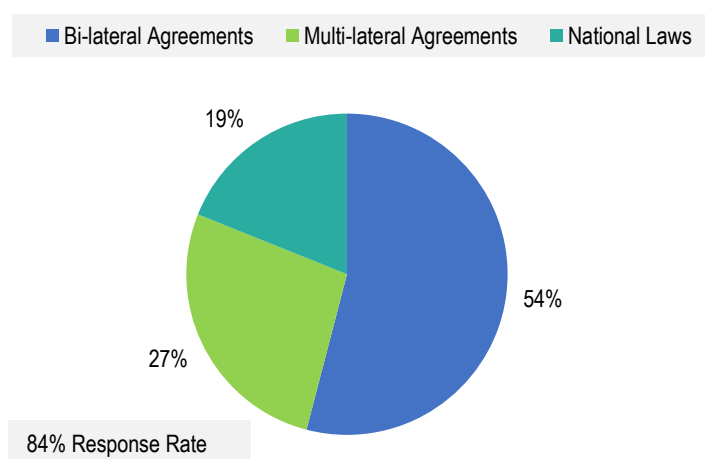
authorities were co-operating and sharing information prior to a decision, it may be that the outcome was influenced by this co-operation, but that should be distinguished from formal comity.

358. The 2019 Survey did not specifically address the issue of consultation other than by reference to a question regarding adherence to the 2014 OECD Recommendation, which refers to consultation in Sections III and IV on ‘Consultation and comity’. The practice of consultation outlined in Sections III and IV of the Recommendation is covered by the issues of engagement between authorities discussed above relating to stages of co-operation, notification and comity.¹⁶¹

16.3.1. Provisions in laws enabling traditional comity

359. The survey asked respondents to describe the provisions in their laws that enabled them to consider the interests of other countries (i.e. ‘traditional comity’) outside of their regional networks (Question 9). As shown in *Figure 16.5*, the majority of respondents reported that the legal basis for engaging in traditional comity came through bi-lateral agreements (54%), followed by multi-lateral agreements (27%) and national laws (19%).

Figure 16.5. Comity provisions applicable to international competition enforcement, by percentage of respondents to the question, 2019



Source: OECD/ICN Joint Survey 2019, Question 9

Data source type: quantitative representation categorized free text

Figure depicts responses as proportions over total number of respondents to the question

360. The prevalence of comity clauses in bi-lateral agreements was also observed in the OECD’s review of the inventory of bi-lateral competition enforcement MoUs, where

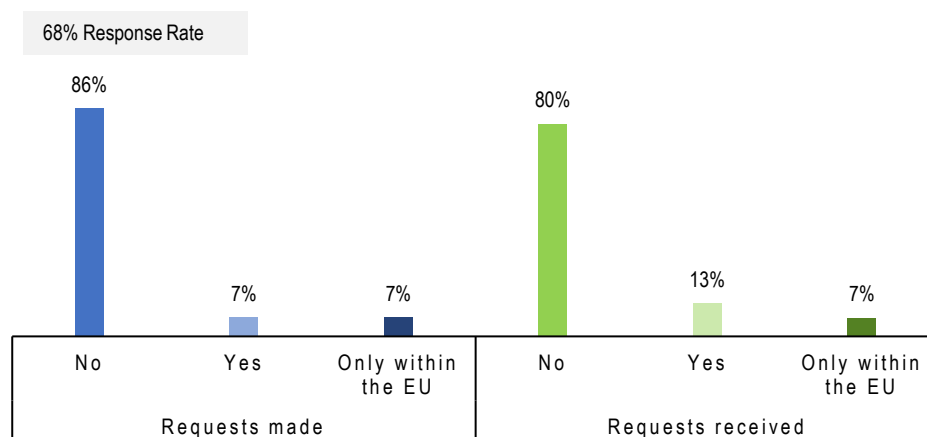
¹⁶¹ Approximately half of the bi-lateral MoUs on enforcement co-operation reviewed by the OECD through the inventory included general provisions on “consultation”. Some MoUs include a general provision that consultations may be requested by either party regarding any matter relating to the agreements, 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.

approximately half of the MoUs reviewed were identified as having a provision on traditional comity. While some MoUs have only high-level general principles of traditional comity (e.g. Chile-US (2011) and Canada-Korea (2006)), a few MoUs have detailed traditional comity provisions (e.g. Brazil-Japan (2014) and Japan-Korea (2014)) (OECD, 2017^[69]).

16.3.2. Use of positive comity provisions by respondents

361. Question 13 of the 2019 Survey asked participants whether they have had experience with positive comity during the 2012 – 2018 period outside of regional networks. The responses were collected and categorized into ‘yes’, ‘no’ and ‘only within the EU’. *Figure 16.6* sets out the results for both requesting and receiving positive comity and they show that 86% have no experience of requesting, and 80% no experience of receiving positive comity outside of regional networks, with only 7% and 13% per cent having any experience (outside of regional networks).
362. Of the three respondents who had made a request, one had done so once in the 1990s, one did not indicate how many times it had been done (but was an EU member), and one noted they had made 17 requests (also an EU member).¹⁶² Of the two respondents who had received a request, one noted they had received seven requests (also an EU member)¹⁶³, while the other authority noted that they had refused due to differences in criminal/administrative legal systems in cartel enforcement, but that nonetheless they had suggested the case may go through the Mutual Legal Assistance Treaty between the two jurisdictions under voluntary action from their respective judicial authorities.

Figure 16.6. Experience in making and requesting positive comities, by percentage of respondents to the question, 2019



Source: OECD/ICN Joint Survey 2019, Question 13

Data source type: quantitative representation categorized free text

Figure depicts responses as proportions over total number of respondents to the question

¹⁶² It may be the EU members incorrectly included regional positive comity requests.

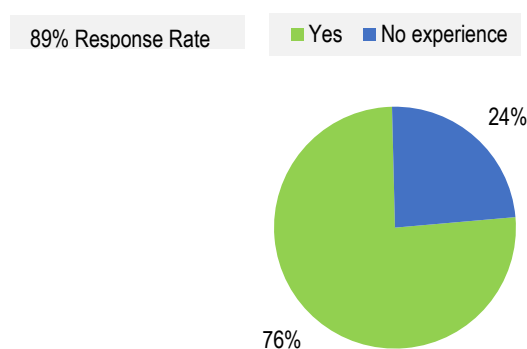
¹⁶³ It may be the EU member incorrectly included regional positive comity requests.

363. The limited experience with positive comity is consistent with the OECD's review of bi-lateral MoUs relating to enforcement co-operation, which identified only a few MoUs having positive comity provisions (e.g., Brazil-Japan (2014) and Japan-Korea (2014)).

16.3.3. Consideration of other authorities' remedies in own work

364. Question 16 of the Survey asked participants whether authorities consider other authorities' remedies when assessing their own cases. *Figure 16.7* shows that 76 percent of respondents to the question have or would have considered other authorities' remedies in their work. Of the 76% of respondents, 16 percent clearly explained that the consideration of remedies only happens in merger cases. On the other hand, of the 24% of respondents who had no experience taking into consideration remedies by other authorities, 33% have had experience within regional networks (particularly within the ECN).

Figure 16.7. Consideration of other authorities' remedies in own work, by percentage of respondents to the question, 2019



Source: OECD/ICN Joint Survey 2019, Question 16

Data source type: quantitative representation categorized free text

Figure depicts responses as proportions over total number of respondents to the question

365. The analysis of qualitative responses to Question 16 of the Survey provides some further information that helps illuminate the results shown in *Figure 16.7*. As mentioned, the vast majority of respondents would consider remedies from other authorities when analysing their own work. Nonetheless, respondents agreed on the following:

- there are no specific legal provisions concerning consideration of remedies applied by other jurisdictions
- considering remedies imposed by other authorities is undertaken as part of the analysis of the case and it results in very fruitful information
- authorities would always seek to apply similar and non-contradictory remedies. Authorities would also consider those remedies applied to similar cases and in similar market conditions by other authorities in order to further avoid divergent approaches to similar issues.

16.4. Co-ordination of competition investigations or proceedings

366. The Survey did not specifically address the issue of co-ordination other than by reference to a question regarding adherence to the 2014 OECD Recommendation, which specifically refers to co-ordination in Section VI (in the part relating to ‘Co-ordination of Competition Investigations or Proceedings’). However, the concept of co-ordination as a type of co-operation has been further developed since the 2012 Survey was originally conducted, and some types of enforcement co-operation outlined by respondents to the Survey are best characterised as co-ordination. Section VI of the 2014 OECD Recommendation outlines possible co-ordination steps insofar as appropriate and practicable, and subject to appropriate safeguards including those relating to confidential information:

- providing notice of applicable time periods and schedules for decision-making
- co-ordinating the timing of procedures
- requesting, in appropriate circumstances, that the parties to the investigation and third parties voluntarily grant waivers of confidentiality to co-operating competition authorities
- co-ordinating and discussing the competition authorities’ respective analyses
- co-ordinating the design and implementation of remedies to address anticompetitive concerns identified by competition authorities in different jurisdictions
- in jurisdictions 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 authorities
- exploring new forms of co-operation.

367. The OECD review of MoUs of bi-lateral enforcement co-operation 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.*¹⁶⁴

368. 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) (OECD, 2017_[70]). An example from the Australia-Japan (2015) MoU¹⁶⁵ is set out in *Box 16.1*.

¹⁶⁴ Section I-2 of Korea-US (2015). Also Colombia-US (2015), China (NDRC and SAIC)-EU (2012). OECD Inventory of International Co-Operation MoUs between Competition Agencies, Provisions on Co-Ordination of Investigations and Proceedings, (OECD, 2017_[70]).

¹⁶⁵ See “Paragraph 5(2)” (Australia - Japan, 2015_[199]) and (OECD, 2017_[70]).

Box 16.1. Cooperation 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.

369. It appears that in practice, co-ordination primarily occurs through informal contacts, which are the main means of inter-authority co-ordination. *Box 16.2* gives some examples of successful inter-authority co-ordination in merger cases.¹⁶⁶

Box 16.2. Cases of successful inter-authority co-ordination

Louisiana Pacific Corporation/Ainsworth Lumber Company Limited merger (2014): the Canadian Competition Bureau co-operated with the DoJ through regular calls between case teams and sharing of information. The Bureau and the DoJ compared theories of harm, attended each other's

¹⁶⁶ Extracted from (OECD, 2019_[10]), with additions.

depositions, and co-ordinated the review of the parties' proposed remedies. The authorities' economists also worked together, discussing data and econometric models.¹

Continental AG/Veyance Technologies merger (2014): the Canadian Competition Bureau co-ordinated its review with the DoJ and the Mexican Federal Economic Competition Commission (COFECE), since both Continental and Veyance had manufacturing and final assembly plants located in the US and Mexico. Following the co-operation, the Bureau did not take any action, because the remedies agreed between the parties and the DoJ also resolved Canadian competition concerns.²

GTCR/PR Newswire merger (2016): The UK Competition and Markets Authority (CMA) co-operated with the DoJ on acquisition of PR Newswire by GTCR, in order to align remedies to solve shared competition concerns. Both authorities cleared the transaction requiring the divestment of PR Newswire's subsidiary Agility to Innodata, a global digital services and solutions company.³

Halliburton/Baker Hughes (2016): the merger between Halliburton and Baker Hughes was abandoned in May 2016 since the transaction raised competition concerns in at least 23 markets related to oilfield services provided to oil and gas exploration and production companies in certain jurisdictions. The investigation of the transaction was carried out in close co-operation between several competition authorities across the world, including the DoJ, the European Commission, the Brazilian competition authority CADE and the Australian Competition and Consumer Commission.⁴

Dow/DuPont (2017): this merger was cleared subject to remedies in the EU, the US, Australia, Brazil, Canada, Chile, China, and South Africa.⁵ The authorities of those jurisdictions co-operated in reviewing the transaction and co-ordinated to align remedies. The Mexican competition authority COFECE refrained from taking action as it found that the remedies agreed with the US and the EU addressed all of its competitive concerns adequately.⁶

Abbott Laboratories/Alere (2017): this case was a merger between a global health care company and a professional supplier of diagnostic solutions for infectious diseases. The transaction was approved subject to remedies (the divestment of Alere's Epop and Triage tests, as well as Alere's BNP reagents business) by the U.S. Federal Trade Commission, the EU and the Canadian Competition Bureau. The three authorities co-operated to ensure that the adopted cross-border remedies did not conflict, and to take into account other jurisdictions' interests and policies.⁷

Bayer/Monsanto (2018): the acquisition of Monsanto by Bayer was reviewed by several authorities. It was cleared, although markets with overlaps (seeds, pesticides, digital agriculture) were subject to divestitures. In this case, the EU, the DoJ and the Australian, Brazilian, Canadian, Chinese, Indian and South African competition authorities worked closely together.⁸

Horizon Global Corporation/Brink International BV case (2018): the acquisition of Brink International by Horizon Global (in Europe, the company is active mainly via its subsidiary Westfalia-Automotive GmbH) was abandoned after the German Bunderskartellamt and the UK Competition and Markets Authority expressed competitive concerns. The two authorities maintained close contact during the investigation.⁹

Knauf/USG case (2019): the Australian and New Zealand authorities cleared the acquisition of USG by Knauf when the companies promised to divest the seller's operations in a joint venture (USG Boral Building Products) to a buyer approved by both authorities. During the investigation, the two authorities co-operated closely.¹⁰

Illumina/PacBio (2019): The CMA coordinated its review with the US Federal Trade Commission (FTC) through regular calls and to exchange relevant information (via the use of confidentiality

waivers). Both authorities found that the merger may have raised competition concerns in the supply of specialist DNA sequencing systems. The merger was abandoned in January 2020.¹¹

Sabre/Farelogix (2020): Sabre's acquisition of Farelogix was reviewed by the UK Competition and Markets Authority (CMA) and US Department of Justice. The CMA prohibited the merger as it was likely to result in a substantial lessening of competition in certain IT solutions used by airlines in making reservations. The authorities worked closely together during the investigation. After the CMA's prohibition the merger was abandoned in May 2020.¹²

Sources:

¹ www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03724.html, (Competition Bureau, 2014^[71]).

² www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03862.html, (Competition Bureau, 2014^[72]).

³ www.justice.gov/opa/pr/gtc-agrees-divest-third-largest-media-contact-database-provider-us-order-proceed-acquisition, (US DOJ, 2016^[73]); www.gov.uk/government/news/cma-accepts-media-contact-databases-merger-remedy, (UK Government, 2016^[74]).

⁴ www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal, (US DOJ, 2016^[75]); http://europa.eu/rapid/press-release_STATEMENT-16-1642_en.htm, (European Commission, 2016^[76]); www.accc.gov.au/media-release/halliburton-and-baker-hughes-proposed-merger-terminated, (ACCC, 2016^[77]); <http://en.cade.gov.br/press-releases/general-superintendence-issues-opinion-on-halliburton2019s-takeover-of-baker-hughes>, (CADE, 2015^[78]).

⁵ http://europa.eu/rapid/press-release_IP-17-772_en.htm, (European Commission, 2017^[79]); www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics, (US DOJ, 2017^[80]); <http://en.cade.gov.br/press-releases/merger-between-dow-and-dupont-is-approved-with-restrictions>; (CADE, 2017^[81]).

⁶ [DAF/COMP/WP3/M\(2017\)2/ANN2/FINAL](http://www.oecd.org/DAF/COMP/WP3/M(2017)2/ANN2/FINAL), (OECD, 2017^[82]).

⁷ www.ftc.gov/news-events/press-releases/2017/11/ftc-approves-final-order-preserving-competition-us-markets-two, (US FTC, 2017^[83]); http://europa.eu/rapid/press-release_IP-17-147_en.htm, (European Commission, 2017^[84]); www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04308.html, (Competition Bureau, 2017^[85]).

⁸ http://europa.eu/rapid/press-release_IP-18-2282_en.htm, (European Commission, 2018^[86]); www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened, (US DOJ, 2018^[87]); <http://en.cade.gov.br/press-releases/cade-approves-with-restrictions-bayer2019s-acquisition-of-monsanto>; (CADE, 2018^[88]); www.compcom.co.za/wp-content/uploads/2017/01/Commission-Conditionally-Approves-Bayer-Transaction-Final.pdf, (Competition Commission of South Africa, 2017^[89]).

⁹ www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/18_06_2018_Anhaengerkupplungen.html, (Bundeskartellamt, 2018^[90]); www.gov.uk/government/news/towbars-merger-abandoned, (UK Government, 2018^[91]).

¹⁰ www.accc.gov.au/media-release/knauf%E2%80%99s-acquisitions-of-usg-and-awi-conditionally-approved, (ACCC, 2019^[92]); <https://comcom.govt.nz/news-and-media/media-releases/2019/commerce-commission-grants-clearance-for-knauf-and-usg-to-merge-subject-to-a-divestment>, (Commerce Commission of New Zealand, n.d.^[93]).

¹¹ <https://www.gov.uk/government/news/illumina-pacbio-abandon-merger>; (UK Government, 2020^[94]); <https://www.gov.uk/government/publications/analysis-of-the-investigation-of-the-proposed-acquisition-of-pacbio-by-illumina/looking-forward-to-the-future-investigating-the-proposed-acquisition-of-pacbio-by-illumina>, (UK Government, 2020^[95]).

¹² <https://www.gov.uk/government/news/cma-blocks-airline-booking-merger>, (UK Government, 2020^[96]); <https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-sabre-and-farelogix-decision-abandon>, (US DOJ, 2020^[97]).

17. Investigative assistance and enhanced co-operation

17.1. Overview of section

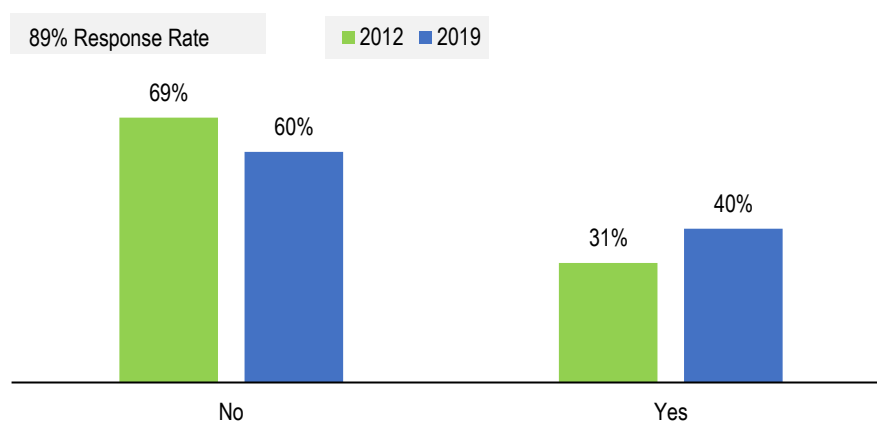
370. This section considers results from Part 3.2 and 3.3 of the 2012 and 2019 Surveys relating to the prevalence and usefulness of investigative assistance (including by type of request and enforcement area) and enhanced co-operation.
371. Part 3 of the Survey excludes regional co-operation and focuses on international co-operation outside regional networks or organisations. The results show that experience and use of investigative assistance outside of these networks and organisations is increasing but limited by legal barriers, and that experience with enhanced co-operation remains very limited.
372. A number of respondents mistakenly responded to this part of the Survey with reference to enforcement co-operation within regional networks or organisations. These answers have been removed from the data reporting on enforcement co-operation outside of regional networks or organisations, however, they provided some useful insights regarding how it can occur in practice and have been included in this section (see *Section 17.2.3: Investigative assistance within regional networks*).

17.2. Investigative assistance

373. The Survey asked multiple sub-questions relating to investigative assistance, including the number of requests made and received, the type of assistance required, average duration of the entire process of requesting investigatory assistance and the legal bases used for providing investigative assistance (Question 14 and tables 4.1-4.4). Respondents completed tables setting out the requests made and received by types and enforcement area. *The results reported should be interpreted carefully considering so few authorities provided details regarding the number of requests made and received (many responded to the question but either had no experience or did not list details). In addition, it was clear that some authorities only included formal requests for investigative assistance, while noting they engaged frequently in informal investigative assistance.*
374. *Figure 17.1* shows the percentage of authorities with experience with investigative assistance as compared between 2012 and 2019. It shows the number of authorities reporting experience has increased since the 2012 Survey, from 31% in 2012, to 40% in 2019. Eleven authorities that had no experience with international investigative assistance in the 2012 Survey answered that they had now had experience. This increase corresponds with the number of requests for investigative assistance that have been made and received comparing 2012 and 2019. The reasons for the increase in experience and requests made and received are not clear from the Survey responses. It could be that experience has increased and/or it could be that there is greater recognition of what investigative assistance can include.

375. *Figure 17.2* shows the average yearly number of requests made and received between all competition authorities comparing the 2012 and 2019 Surveys, which demonstrates that there has been an increase in both requests made and received. The results reported should be interpreted carefully considering so few authorities provided details regarding the number of requests made and received (many responded to the question but either had no experience or did not list details). In addition, it was clear that some authorities only included formal requests for investigative assistance, while noting they engaged frequently in informal investigative assistance.

Figure 17.1. Authorities with experience with investigative assistance, by percentage of respondents to the question, 2012 vs. 2019



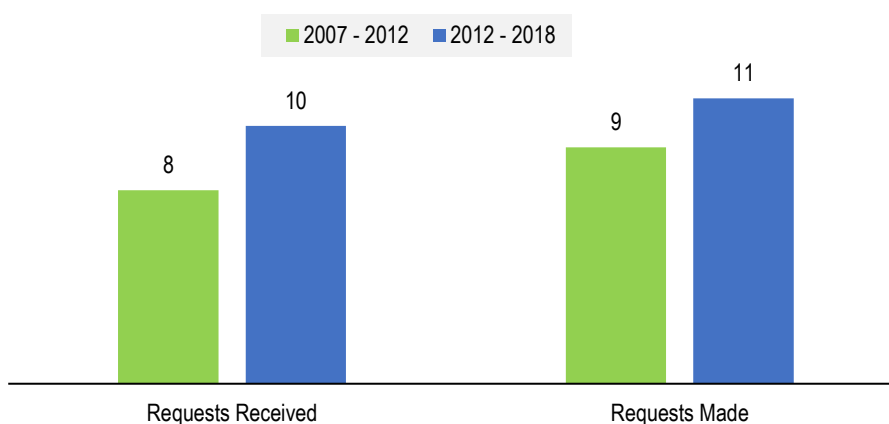
Source: OECD/ICN Joint Survey 2019, Question 14

Data source type: quantitative representation categorized free text

Figure depicts responses as proportions over total number of respondents to the question

Response rate: 2012: 86% and 2019: 89%

Figure 17.2. Average yearly number of total requests received or made between all competition authorities for the survey periods, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 14 – Tables 4.1 and 4.2

Data source type: defined data set

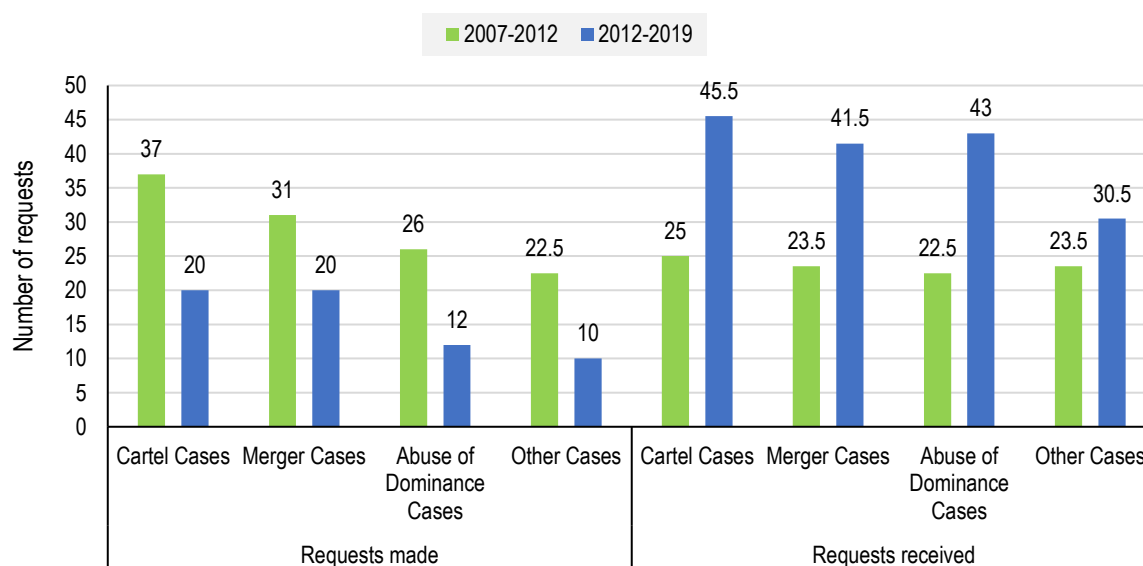
Figure depicts results where a median number has been used if ranges were provided by a respondent

This figure is a simple sum of the total number of requests made and received by respondents. The figure demonstrates a trend only and not a total number of cases.

Response rate: 2012: Table 4.1: 96%, Table 4.2: 93% and 2019: Table 4.1: 93%, Table 4.2: 92%.

376. *Figure 17.3* presents the distribution of the total number of investigatory assistance requests issued and received by the respondent authorities over the period considered (from 2012 to 2018, the 2019 Survey data). The vast majority of the authorities that reported an experience with requests for investigatory assistance indicate a limited number of requests (less than 5). However, a limited percentage of the authorities reports having received or issued between 10 and 20 requests. Finally, only one authority reported more than 20 requests issued in relation to cartel co-operation. Cartel co-operation is reported to occur more frequently than co-operation in other areas of enforcement.

Figure 17.3. Distribution across enforcement areas of the requests made and received, 2019



Source: OECD/ICN Joint Survey 2019, Question 14 – Tables 4.3 and 4.4

Data source type: defined data set

Figure depicts results where a median number has been used if ranges were provided by a respondent.

Other was not defined in the survey, but the example 'e.g. non-cartel agreements' is provided.

Response rate: 2012: 86% and 2019: Table 4.3: 91%, Table 4.4: 86%.

17.2.1. Types of requests for investigative assistance

377. Most of the respondents gave very high-level answers as to the descriptions of the type of investigative assistance provided, such as 'Request for information and assistance'; 'Joint dawn raids and general cartel related investigative assistance'; or "Serving Documents." Most of the detail provided by respondents on the type of investigative assistance they provided was by those who had incorrectly answered the question in relation to regional networks, which is considered in *Section 17.2.3: Investigative assistance within regional networks*.

17.2.2. Legal basis for requests for providing investigative assistance and associated challenges

378. A number of respondents noted that responding to requests for investigative assistance often required a legal instrument, such as a MLAT, national law, or a bilateral or multi-lateral agreement that allowed for this form of enforcement co-

operation. In the absence of these legal bases, authorities are often limited to providing public and/or authority confidential information and limited types of investigative assistance.

379. Only a few respondents elaborated on the challenges they had experienced with investigatory assistance. One respondent noted that in the absence of an enforcement co-operation agreement, they had used a letter rogatory but that it was very burdensome and time consuming. A number of EU respondents noted that the lack of an agreed (and permitted) way to make a request, made the process for working together and transfer information outside of their existing EU network very time-consuming and often impossible.
380. Related to the practical issues outlined above, the OECD June 2019 paper on enforcement co-operation (OECD, 2019_[10]) noted that some authorities made provisions for the allocation of costs. Although no comments were made in the Survey regarding the costs of providing investigative assistance, having arrangements to address issues such as costs are likely to make investigative assistance operate more effectively. Outlined in *Box 17.1* are some examples of provisions on investigative assistance costs.¹⁶⁷

¹⁶⁷ The text in the box was originally included in (OECD, 2019_[10]).

Box 17.1. Provisions on investigative assistance cost**New Zealand Commerce Act****99J Conditions on providing compulsorily acquired information and investigative assistance¹**

(1) If the Commission provides compulsorily acquired information or investigative assistance to a recognised overseas regulator, the Commission may impose conditions on such provision, including conditions relating to:

(...)

(d) the payment of costs incurred by the Commission in providing anything or in otherwise complying with a request for information or investigative assistance.

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 co-operation²

(...)

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:

¹ www.legislation.govt.nz/act/public/1986/0005/89.0/DLM4854120.html, (New Zealand, 1986_[98])

² https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.011.01.0003.01.ENG&toc=OJ:L:2019:011:TOC (European Parliament, 2019_[99]).

17.2.3. Investigative assistance within regional networks

381. As noted above, a number of respondents incorrectly answered Question 14 in relation to investigative assistance occurring within the framework of a regional network or organisation. Those responses have been excluded from the analysis presented above, however, they provided useful insights on the role of investigative assistance in regional enforcement co-operation and potentially beyond these networks and organisations.

382. To the extent that some of the respondents were answering in relation to their engagement with ECN,¹⁶⁸ the ECN framework relates to the sharing and flexible allocation of work relating to anti-competitive agreements and abuses (i.e. not mergers). There is the possibility within the ECN of parallel anti-competitive agreement and abuses cases, where one authority has a leading role, as outlined in

¹⁶⁸ See description of ECN network at *Annex I: EU Regional Integration Arrangements*

"The authorities dealing with a case in parallel action will endeavour to coordinate their action to the extent possible. To that effect, they may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings".¹⁶⁹

383. Many EU members engage in investigative assistance with other ECN member authorities. In describing the type of assistance requested, most of the respondents mentioned formal Requests for Information ("RFI") under Article 22 of Regulation 1/2003, and the request of carrying out dawn raids.¹⁷⁰

384. One of the EU respondents reported that more than half of the requests issued over the period considered were addressed to two countries, indicating that even within the EU framework, some countries are using investigative assistance more frequently than others. No reasons for this were provided, however the reasons may be relevant to considering when and how investigative assistance is most useful when legally possible. This issue could be considered as part of the work on the proposed future areas of focus, such as in relation to case studies or removing legal barriers to co-operation outlined in *Section 21. Proposed future areas of focus to improve international enforcement co-operation.*

385. One respondent reported that within their network:

"[a] typical formal request for investigatory assistance usually takes a couple of months (sometimes more) to process and result [in assistance]. The duration of the period depends on whether the authority concerned has provided the necessary information as well as the extent of the requested assistance".

386. A non-EU authority reported that their approach was:

"very positive to this kind of co-operation" and that they have not registered any shortcomings. Furthermore, they provided details of the procedure followed in providing investigative assistance and specified that a "task force that is set up prior to an investigation deals with all practicalities and has proven a successful model of cooperation".

¹⁶⁹ See also description of case allocation in *Section 14.7.2: Cartel and anti-competitive agreement cases.*

See European Commission (2012_[200]).

¹⁷⁰ See *Annex I: EU Regional Integration Arrangements* for a detailed description of the legal basis for investigative assistance within the EU.

387. An example of investigative assistance within the EU regional network is outlined in *Box 17.2*.

Box 17.2. Example of investigative assistance

In November 2014, the AGCM launched an investigation against the pharmaceutical group Aspen €5.2 million for an alleged infringement of Art. 102(a) of the TFEU, consisting in the imposition of excessive and unfair prices for its off-patent anti-cancer drugs.

The investigation concerned inter alia the following undertakings: i) Aspen Pharma Trading Limited (APTL), with registered office in Dublin, which is a company of the South-African Aspen group, leader in the production and distribution of generic drugs and distributor of trademark drugs; and ii) Aspen Pharma Ireland Limited (APIL), with registered office in Dublin, which is an undertaking under Irish law controlled by Aspen Pharmacare Holdings Limited (APHL), the holding of the multinational pharmaceutical group, with registered office in Durban, South Africa.

The AGCM made a request for investigatory assistance pursuant to article 22 of Regulation No. 1/2003 to the Irish Competition Authority (Competition and Consumer Protection Commission or CCPC). As a result, the CCPC carried out inspections at the premises of the foreign undertakings APTL and APIL. The documentation gathered by the CCPC during its inspections was subsequently sent to the AGCM, pursuant to article 12 of Reg. 1 /2003 and added to the AGCM case file.

Sources:

¹ AGCM. Case n. A480 - INCREMENTO PREZZO FARMACI ASPEN, decision n. 26185 of 29 September 2016, published on the AGCM Bulletin n. 36/2016 (AGCM, 2016_[100]). A non-official English translation of the decision is available at the following link: https://en.agcm.it/dotcmsDOC/pressrelease/A480_eng.pdf. See paragraph n. 5 of the decision about the cooperation with the CCPC (AGCM, 2016_[101]).

17.3. Experience with enhanced co-operation

388. As noted in the description of enhanced co-operation in *Section 9.1.8: Enhanced co-operation*, enhanced co-operation can cover a broad range of activities. It was clear from the Survey responses that respondents differed in what activities they considered constituted “enhanced co-operation”. For example, one respondent considered the coordination, organisation and conduct of joint raids to be enhanced co-operation, while another did not. One respondent with a narrower view of what is meant by enhanced co-operation noted that there were a range of activities on both cartel and merger matters that involved intensive co-operation but which they did not consider to meet the definition of enhanced co-operation.

389. The different interpretations of the definition and meaning of enhanced co-operation impact the usefulness of the collected data. As was noted in relation to investigative assistance, further work on this could be considered as part of work on the proposed future areas of focus, such as in relation to for case studies or removing legal barriers to co-operation outlined in *Section 21. Proposed future areas of focus to improve international enforcement co-operation*.

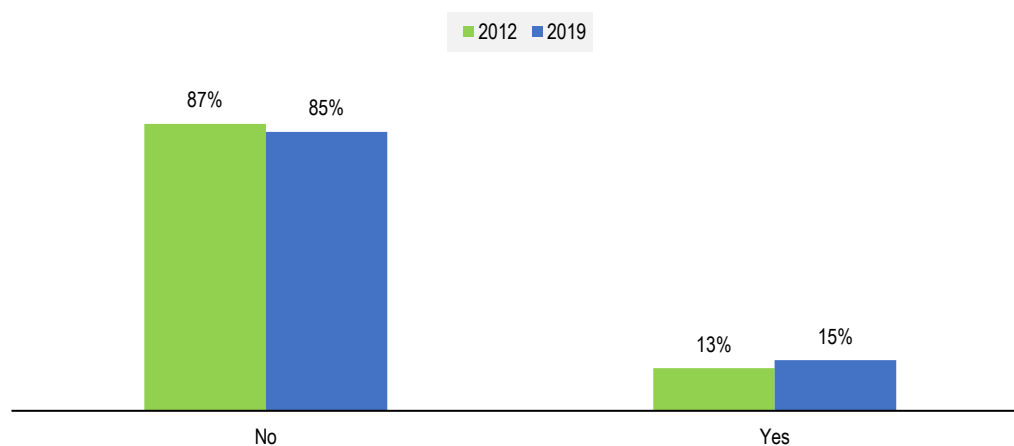
390. Given the small numbers of respondents who have engaged in enhanced co-operation outside of regional networks and the level of detail provided in the responses, it is difficult to assess the value of enhanced co-operation to authorities that use it

beyond their regional networks. However, the activities described by the eight respondents included: joint inspections; design of remedies; joint interviews and joint negotiations.

391. As is discussed in *Section 19. Regional enforcement co-operation* below, some existing regional networks (particularly the EU) provide good examples of how authorities can engage in enforcement co-operation and the types of mechanisms needed to facilitate it. As is set out in *Annex I:EU Regional Integration Arrangements*, EU members engage in enhanced co-operation within the EU in relation to anti-competitive agreements and abuse. Importantly, having the ability to engage in enhanced co-operation can lead to efficiencies for authorities and for business. For example, authorities could agree to have one authority collect a witness statement or create a process for merger review where some elements of a case or an investigation are led by one authority, but with decisions and advisory input retained by the non-lead authorities.

392. The Survey asked authorities about their experience in terms of enhanced co-operation (Question 15). Very few respondents to the question had experience with enhanced co-operation outside regional networks.¹⁷¹ As shown in *Figure 17.4*, the number of respondents with enhanced co-operation experience has increased slightly from 13% to 15% from 2012 to 2019, however, in terms of actual authorities with experience, there were only seven [7] in 2012, as compared to eight [8] in 2019.

Figure 17.4. Experience with enhanced co-operation, by percentage of respondents to the question, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 15

Data source type: quantitative representation categorized free text

Figure depicts responses as proportions over total number of respondents to the question

Response rate: 2012: 96% and 2019: 95%

393. As noted in *Section 15. Limitations and challenges to international enforcement co-operation*, intensive enhanced co-operation is likely to rely on a legal instrument

¹⁷¹ The results from respondents who included regional examples in their Survey responses were removed.

permitting enforcement co-operation. Further, as outlined above in *Section 11.4: 2014 OECD enhanced enforcement co-operation*, the OECD has undertaken work on the enhanced co-operation in the past regarding what it could encompass. However, outside of regional networks, it appears little has developed in the interim period and there is scope for further consideration of this issue.

18. Information sharing and confidentiality waivers

18.1. Overview of section

394. Sharing information is an important component of enforcement co-operation between authorities. As respondents to the Survey noted, it can make a significant difference to the outcome of an investigation. This Section focuses on how authorities share information, and in particular, how they share confidential information (outside of regional networks and organisations), as was addressed in Part 5 of the Survey.¹⁷² It considers:

- the types of information shared by authorities
- the various criteria jurisdictions use to define whether information is confidential
- how jurisdictions protect confidential information
- the circumstances and benefits of authorities sharing ‘public’ and ‘authority confidential information’
- the use of confidentiality waivers to exchange confidential information and the difficulties in obtaining such waivers.

395. The data and analysis considered in this Section show that most jurisdictions have very strict controls regarding the management and handling of confidential information (such as trade secrets, sensitive business information or information relating to leniency applicants). While some authorities are entitled to share confidential information in specific legal circumstances, others are prohibited from sharing it.

396. The willingness and capacity to share confidential information also varies considerably between respondents, especially given that many respondents within the EU find the ECN system sufficient for their information sharing needs. However, other authorities consider that, even while recognizing the importance of safeguarding confidential information, the practical and legal barriers preventing authorities from exchanging information are causing detriment to international competition enforcement, and that this is unlikely to resolve without co-ordinated efforts to improve existing legal frameworks.

397. Respondents noted that the systems protecting confidential information are particularly complex and vary between jurisdictions, which poses a practical challenge for those seeking to exchange confidential information. A number of respondents noted that the variety and differences between confidentiality regimes, despite some commonalities, are part of what increases the resources necessary to engage in confidential information sharing.

¹⁷² Question 20- 26.

398. Further, the Survey shows that restrictions relating to the sharing and treatment of confidential information can be based on jurisdiction-wide laws, as opposed to competition law specific provisions, such that attempts to harmonise confidentiality regimes is very complicated. Waivers provided by parties provide the simplest means of transferring confidential information, but as the results show, there are still challenges for authorities willing to share information on this basis and also a number of authorities cannot use waivers.

18.2. Types of information authorities share

399. The Survey respondents confirmed there were four broad categories of information that are relevant to sharing information with counterpart authorities.¹⁷³ They are:

- **publicly available information:** this term is used to describe information that is in the public domain, including information that may have once been confidential but is no longer (e.g. confidential information from a party that becomes public as part of a jurisdiction’s decision-making process), or that is technically publicly available, even if not easily accessible (for example, government or court documents available in a jurisdiction which are not online).
- **authority confidential information:** the term is used to describe information created or held by an authority that is not in the public domain, where the authority is not statutorily prohibited from disclosing but it is considered confidential or sensitive by the authority. For example: the fact that the authority has opened an investigation; the fact that the authority has requested information from an individual or a firm located outside its jurisdiction; investigative tactics and guidance to staff; staff theories of harm and analysis (including product and geographic market definitions and assessments of competitive effects); use of technical analytical tools; and consideration of potential remedies. Further, analysis and compilation of public information by an authority can transform public information into ‘agency confidential information’, for example through the use of complex data analytics.
- **confidential information:** what each jurisdiction considers to be ‘confidential’ information varies between jurisdictions, and the breadth of the possible definitions is discussed in *Section 18.3: How is “confidential information” defined by authorities?*. Generally, it applies to sensitive information obtained from parties to a case (e.g. the parties seeking merger approval or those who are the subject of an investigation for anti-competitive conduct) or from third parties with a connection to the case (e.g. competitors, suppliers, customers of the parties, other domestic government authorities, international authorities). There are two types of confidential information that enjoy a particularly high level of protection in most jurisdictions: legally privileged information¹⁷⁴ and information obtained by an authority through an amnesty/leniency application.

¹⁷³ Based on categories used in the 2013 Report but which have been further developed based on the 2019 Survey data.

¹⁷⁴ Privileged information from a party or third party (i.e. information shared between a client and their legal advisor for the purpose of providing legal advice) is rarely information that an authority will have in its possession, as it is generally protected from collection by an authority, and if

- **case-related information that does not include confidential information**¹⁷⁵: in practice, authorities use this to refer to what is generally a combination of public information, authority information that is not confidential but not public (e.g. information that may not be made public at that stage but is not legally considered to be confidential or sensitive),¹⁷⁶ and authority confidential information.¹⁷⁷ It is the collated and organised nature of this bundle of different types of information that makes it its own category. In addition, the organisation of all this information may be informed by the confidential information on the case-file.

18.3. How is “confidential information” defined by authorities?

400. In all jurisdictions surveyed, there are rules (e.g. legislation, case law, guidelines, or established practices) that determine if and how confidential information can be shared with a counterpart authority. These rules help describe what confidential information is, how it should be managed and how confidentiality can be “waived” or “lost”.
401. All respondents to the questions in Part 5 of the Survey confirmed that they obtain confidential information from a variety of sources, including: information that is mandatorily provided by a party or third party; information that is obtained without the consent of a party (e.g. materials seized in “dawn raids” or obtained via a “wire tap”); and/or information provided voluntarily, but including business secrets.
402. In the Survey, confidential information is defined as:
- information the disclosure of which is either prohibited or subject to restrictions. For example, information could be defined as confidential if it constitutes business secrets of a company or if its disclosure could prejudice the legitimate commercial interests of a company.*
403. However, as will be demonstrated in this Section, in practice finding an agreed definition of confidential information is one of the challenges to enforcement co-operation. To help address this issue, the Survey advised respondents to include information about how they share information that may be sensitive if disclosed to the public or another authority, but which they do not consider to be “confidential information” (within their jurisdiction), to mark it as being different to “confidential information”.

18.3.1. Criteria used by jurisdictions to define confidentiality

404. The 2013 Report developed a useful framework for outlining the various criteria that respondents use to classify confidential information, which has been adapted for this Report. Survey respondents confirmed that their jurisdictions categorise information as confidential using some or all of the following criteria:

obtained, must generally be returned to the party and not used: see Background note p.14 (OECD, 2019^[37])

¹⁷⁵ “Confidential information” as defined above.

¹⁷⁶ For example, authorities may also have ‘non-confidential’ or redacted versions of documents from parties or third parties that are not (or not yet) public: see Background note (OECD, 2019^[37]),

¹⁷⁷ “Agency confidential information” as defined above.

- By the ***nature of the information***, that is, information is defined as confidential by value or nature of the information itself. For example, in the context of information obtained from parties or third parties, it could be confidential if disclosure would harm the commercial interests of the source that provided it. Other key examples noted by the respondents include:
 - business secrets and other commercially sensitive information (e.g. information related to price, sales, costs, customers and suppliers; commercial know-how, production quantities; market shares and commercial strategies)
 - information which is prejudicial to the commercial position of the subject (e.g. issues related to internal business practice or culture)
 - personal data or information (e.g. such as private telephone numbers and addresses, medical or employment records)
 - information which may cause a party or third party harm (for example, protecting the identity of an information provider, where their identification may create a significant commercial or personal risk to that informant)
 - authority confidential information, which, if released, would be detrimental to the authority's capacity to enforce the competition laws
 - where the information, if released, would likely affect future supply of information; or
 - if the disclosure would be contrary to the public interest.
- By ***the way in which the information is obtained***, for example if it is obtained:
 - by an authority in the course of the performance of its official duties and functions
 - using powers of compulsion
 - during non-public procedures; or
 - from counterpart authorities.

Information can therefore be confidential, even if it does not have any other qualities that would make it appear sensitive or confidential. Where this is the case, respondents noted that they have processes for ensuring that not all information obtained compulsorily is necessarily classified as confidential (e.g. they can de-classify information as confidential if it is in fact public information).

- By ***the purpose for which the information was collected or submitted***, related to the above criteria, which may limit an authority's ability to share that information with another authority (e.g. information submitted for the purpose of a market study may prevent it from being used for an investigation into anti-competitive conduct).
- By ***what stage a proceeding it is at***. In a number of jurisdictions, once the matter is considered by a court or tribunal, or a decision is published by an administrative body (unless other confidentiality protections continue to apply), information that was relied upon for the decision-making is made public.
- By ***the way the providing parties define it***. In some jurisdictions, confidentiality protections apply if requested by a party providing the information. In addition, in

many jurisdictions parties can often choose to waive their legal protections to confidentiality.

- **By *the way a judicial body, or tribunal, or other government party in an authority's jurisdiction defines it.*** A distinction can occur between what an authority considers to be confidential (such as information provided by a counterpart authority) and what another judicial or governmental body determines to be confidential.
405. As the list above demonstrates, there are a number of factors that are likely to affect whether information is defined as being confidential within each jurisdiction. Various elements of these criteria can have very specific meanings within each jurisdiction's legal regime (e.g. the definition of a 'trade secret'). Further, there can be very different legal requirements and cultures regarding transparency of information (e.g. the likelihood as to whether courts will protect the confidentiality of documents provided by counterpart authorities).
406. In practice, even where allowed, the sharing of confidential information is unlikely to occur if the authority seeking to obtain information is not able to provide certainty to a counterpart authority regarding how confidential information is defined and how it is protected. While a small number of respondents noted they have public guidance on the operation of their confidentiality regimes, it is unclear from the Survey data if this is the norm and if this information would be considered sufficiently detailed for a counterpart authority to understand both a) what confidential information the other authority may be able to provide and in what circumstances and b) how any confidential information they provided to a counterpart authority would be protected.

18.4. OECD Recommendation on information sharing

407. The 2014 OECD Recommendation instructs adherents to:

... 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').¹⁷⁸

408. The 2014 OECD Recommendation describes some of the key considerations related to information gateways, generally summarized as:
- **Establishing sufficient safeguards to protect confidential information exchanged**
 - To this end, the Recommendation provides substantial detail on the types of protections to be considered, including that the receiving authority will: (i) maintain the confidentiality of the exchanged information to the extent agreed with the transmitting authority with respect to the information's use and disclosure; (ii) notify the transmitting authority 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 authority and that authority has confirmed that it does not object to the disclosure. The

¹⁷⁸ See *Annex C: 2014 OECD Recommendation*.

Recommendation also addresses the treatment of unauthorized disclosure, and the disposal of information once it has served its purpose.

- **Whether to limit or exclude certain information based on the type of investigations or type of information**
- **Retaining discretion to use an information gateway, and the ability to place limits on how information shared may be used by the receiving authority**
 - Notably, the Recommendation identifies that information should be used solely by the receiving authority for the purpose for which the information was originally sought, unless the transmitting authority has explicitly granted prior approval for further use or disclosure of the information.¹⁷⁹

18.5. Why is protecting confidential information important and how is it done?

409. Authorities rely on confidential information to be able to effectively enforce competition laws. They are not only legally obliged to protect it, they also have an interest in ensuring parties and third parties can trust that information provided to the authority will be kept confidential pursuant to the laws of their jurisdiction, such that the parties' can be comfortable in making full disclosure of any relevant confidential information to the authority. Authorities also have an interest in developing and safeguarding their reputation for protecting confidential information, so that other domestic and international authorities are willing to cooperate with them.

410. The 2020 ICN Guidance on Enhancing Cross-Border Leniency Co-operation provides a good summary of why it is important in cartel matters:

Confidentiality is a critical issue for competition law enforcement and leniency programmes are not an exception. Leniency applicants' concerns about the confidentiality of their application and information provided to competition agencies may undermine the effectiveness of leniency programmes by diminishing the incentives to self-report and co-operate, and may also undermine the integrity and effectiveness of investigations. Cartel members may refrain from applying to a leniency programme when they are not assured about confidentiality of information and evidence they provide since a disclosure may cause, in particular: (i) damages claims under private lawsuits, (ii) commencement of investigations in other jurisdictions where the cartel member did not apply for leniency, exposing the applicant to a greater risk of liability, and (iii) retaliation from other cartel members. (ICN, 2020_[53])

18.6. How do authorities share and protect confidential information

411. The Survey asked respondents to summarise how they protected confidentiality in their jurisdiction (Question 20), and asked a series of questions relating to the conditions under which authorities could share information (Question 22).

412. A significant portion of the respondents provided very high-level summaries of how their confidentiality regimes operate. Below are some key aspects of various confidentiality regimes, which indicate a significant diversity among the jurisdictions:

¹⁷⁹ See *Annex C: 2014 OECD Recommendation*.

Legal norms within the jurisdiction:

- many respondents require counterpart authorities to agree to protect confidential information pursuant to their authority's laws or an agreed set or terms (generally, that the information remain protected and be used only for the terms on which it is provided).
- some respondents noted they that could share confidential information without a waiver if there was a relevant international agreement.
- some respondents noted that (some or all) party or third party information was not automatically considered confidential in their jurisdiction but that confidential treatment could be requested by the parties.
- some respondents noted that for either all party or third party confidential information or some forms of it (such as confidential information relating to a leniency applicant), exchange of information was not possible even with a waiver.
- some respondents noted the information can only be used for the specific use it was given, while others did not have that limitation
- some respondents noted that where the information was provided voluntarily, permission was always needed to share that information.

Additional steps taken by the authority to protect confidential information:

- some respondents noted that they will keep information provided by a counterpart authority confidential unless required by law or a court to provide it to another party, but commit to defend any claims by these parties in relation to the confidentiality of the material it has obtained from its counterparts.
- some respondents noted that have developed authority-level additional guidance and rules relating to the protection of confidential information and to improve public transparency.

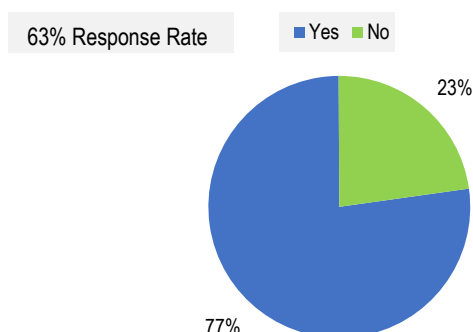
413. Only seven [7] authorities confirmed they were able to share confidential information without a waiver outside of regional networks, which is one more than in the 2012 Survey results.¹⁸⁰ A few respondents noted (either in the 2012 Survey response, who did not answer this question in 2019, and in the 2019 Survey) that they potentially could share this information with a suitable international agreement in place, but it was unclear if they were entitled to make these agreements at the authority level or whether a treaty would be required.

414. *Figure 18.1* shows that 77% of authorities have some form of legal provision¹⁸¹ that allows for the transfer of confidential information. The Respondents noted they did so through a variety of mechanisms that were outlined in *Section 13.2: Description of legal bases for co-operation*, such as the ability to share by waiver and/or national legislation.

¹⁸⁰ See discussion of ability to share confidential information via information gateways, second-generation agreements and MLATs in *Section 13. Legal bases for co-operation*

¹⁸¹ The question used the term 'national law provisions' but it was clear from the responses that authorities understood this to include competition law regimes that allowed for the use of waivers.

Figure 18.1. Existence of national legal provisions allowing transfer of confidential information, by percentage of respondents to the question, 2019



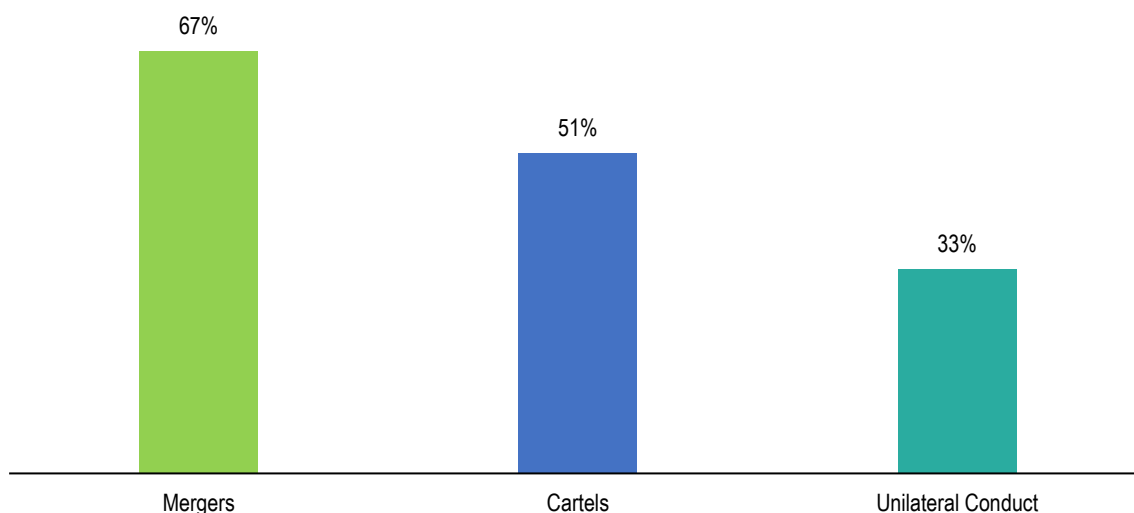
Source: OECD/ICN Joint Survey 2019, Question 22

Data source type: quantitative representation categorised free text

Figure depicts responses as proportions over total number of respondents to the question

415. As noted in Section 12. *Frequency of types of enforcement co-operation by enforcement area*, respondents 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 18.2 below shows that 67% of respondents did so for merger matters, 51% for cartel matters, and 33% for unilateral conduct matters.

Figure 18.2. 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, 2019



Source: OECD/ICN Joint Survey 2019, Question 19 – Table 6.1, 6.2 and 6.3

Data source type: quantitative representation categorised free text

Figure depicts responses as proportions over total number of respondents to the question

Response rate: Table 6.1, 86%; Table 6.2, 82%; Table 6.3, 80%.

416. All respondents to the questions have laws that specifically protect some types of confidential information. For the majority of these respondents, these protections are also included in their competition laws, often supplemented by additional laws, regulations, practice or guidance (both non-competition and competition-specific). For a number of authorities, information is primarily protected by national laws of broader application, such as laws applying to the use of confidential information by public servants, laws protecting privacy and trade secrets, and general commerce laws. It appears that this complex interplay between general national laws, competition laws, practice, procedures and guidance in each jurisdiction is part of what makes the sharing of confidential information challenging in practice.

18.7. Sharing of confidential information by waiver

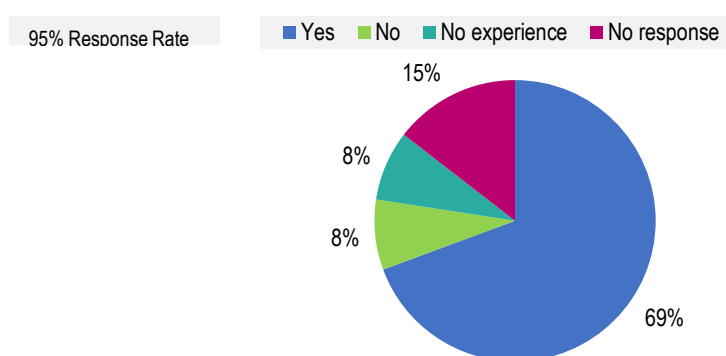
417. Sharing confidential information pursuant to a waiver is the most frequent method of sharing confidential information between authorities. The waiver itself sets out the terms on which the information is shared and confirms the provider of the information gave permission for the information to be shared on those terms.

418. The Survey defines waiver or confidentiality waiver as:

permission granted by a party under investigation or a third party in a case/investigation that enables investigating authorities in different jurisdictions to discuss and/or exchange information, protected by confidentiality rules of the jurisdiction(s) involved, that has been obtained from the party in question.

419. Figure 18.3, Figure 18.4 and Table 18.1 show the number of respondents which are permitted to rely on confidentiality waivers (for at least one enforcement area), whether they actively seek them, and if they use a standard form for them (Question 24). Eight per cent [5] of the respondents cannot use waivers, while of those who can use them, 28% [12] do not seek their use and 40% [17] do not use a standard waiver form.¹⁸²

Figure 18.3. Use of confidentiality waivers, by percentages of Survey respondents, 2019

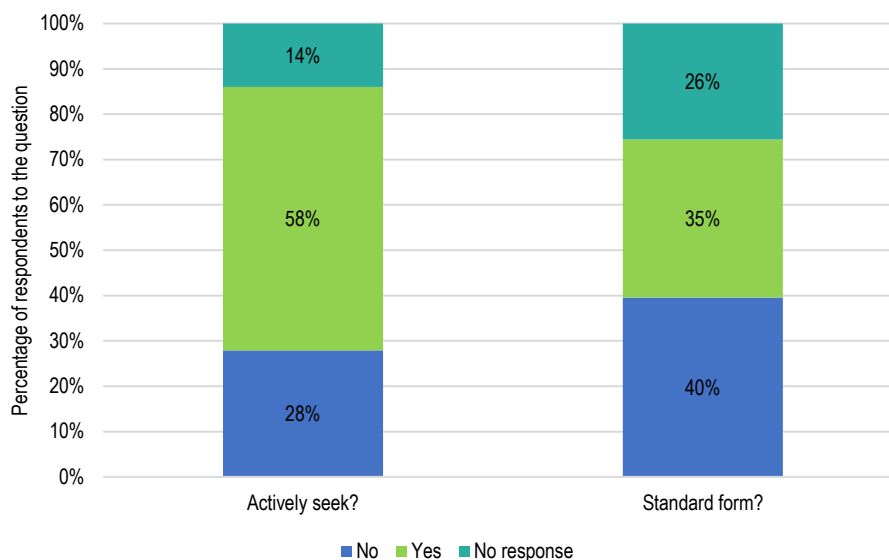


Source: OECD/ICN Joint Survey 2019, Question 24 and 2012 OECD Survey
Data source type: quantitative representation categorised free text

¹⁸² A comparative analysis was not useful given some differences between the respondents in 2012 vs 2019, which produced misleading results.

Figure depicts responses as proportions over total number of Survey respondents

Figure 18.4. Actively seeks confidentiality waiver and use of standard forms by respondents



Source: OECD/ICN Joint Survey 2019, Question 24 and 2012 OECD Survey

Data source type: quantitative representation categorised free text.

Figure depicts responses as proportions over total number of Survey respondents that are allowed to use confidentiality waivers.

Table 18.1. Confidentiality waivers, by number of respondents, 2019

	Permitted? 2019	Actively seek? 2019	Standard form? 2019
Yes	43	25	15
No	5	12	17
No experience	5		
No Response	10	6	11
Response rate	95%	86%*	74%*

Source: OECD/ICN Joint Survey 2019, Question 24

Data source type: quantitative representation categorised free text

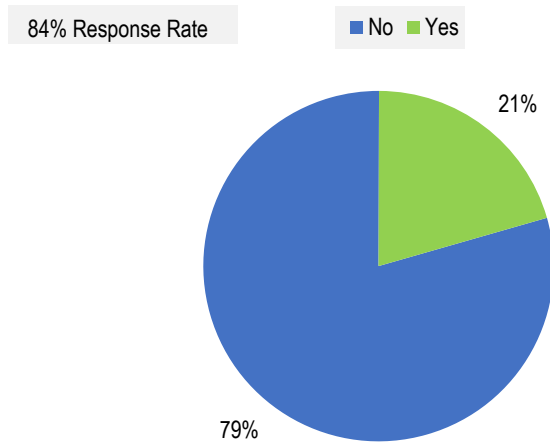
Figure depicts responses as proportions over total number of Survey respondents

* These response rates are calculated over the total number of respondents who are permitted to use confidentiality waivers.

18.7.1. Difficulties obtaining waivers

420. The Survey asked respondents whether they had experienced difficulties when obtaining waivers (Question 25). Responses were categorised in “yes” or “no” in order to create *Figure 18.5*, which shows that the majority of those respondents who use waivers do not experience any difficulty in obtaining them.

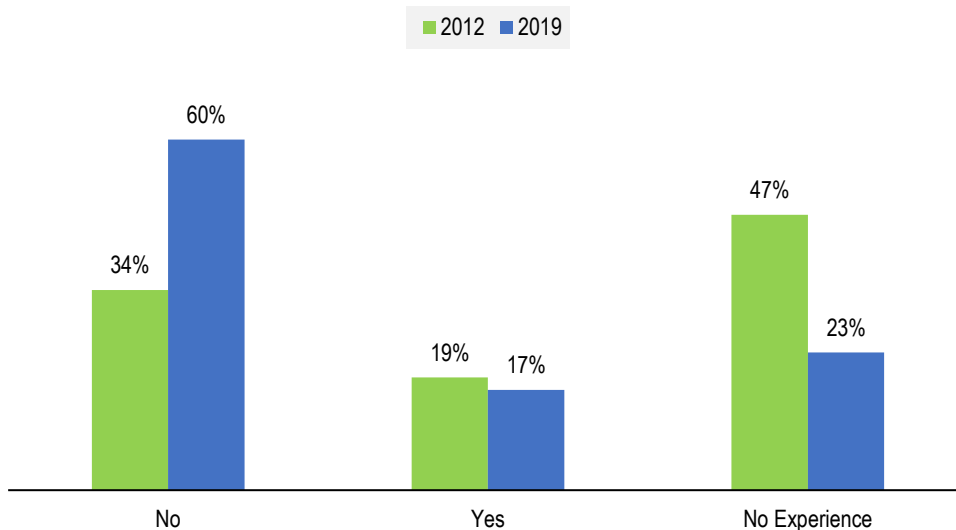
Figure 18.5. Difficulty obtaining waivers, by percentage of respondents to the question, 2019



Source: OECD/ICN Joint Survey 2019, Question 25
 Data source type: quantitative representation categorized free text
 Figure depicts responses as proportions over total number of respondents with experience in obtaining waivers.

421. Figure 18.6 compares the results from 2012 and 2019 Surveys and shows that respondents reported that difficulties obtaining waivers have decreased over time. In addition, and likely relatedly, more respondents have acquired experience using waivers since 2012.

Figure 18.6. Difficulties obtaining waivers, by percentage of respondents to the question, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 25
 Data source type: quantitative representation categorized free text
 Figure depicts responses as proportions over total number of respondents to the question
 Response rate: 2012: 88% and 2019: 84%

422. The qualitative responses showed that where difficulties arise they are related to the following key issues:
- inability to secure a waiver from the target in an investigation for anti-competitive conduct.
 - the parties having concerns with the scope of the waiver and seeking to amend it.
 - Timing and deadlines making negotiation of waivers untenable.
423. The Survey results show that while waivers are effective and work for a number of authorities, there remain challenges, and that efforts to improve confidential information sharing generally may also require focus on the difficulties encountered with waivers.

18.8. Sharing authority confidential information¹⁸³

424. A number of respondents noted that they do not have any legal restrictions on sharing authority confidential information and that sharing this information could be very valuable. Outlined below are a few specific comments from respondents regarding how they share authority confidential information:
- they followed internal guidelines about when to do this
 - some had limitations on with whom they could share this information (e.g. they can only share this information with members of their European regional networks)
 - where this information was very sensitive, there needed to be a high degree of trust in the counterpart authority, along with knowledge of the procedures and processes of the counterpart authority in handling sensitive and confidential information
 - they required a guarantee from the receiving authority that they would use it only for the intended purposes.

18.9. Sharing publicly available information¹⁸⁴

425. No respondents noted any legal restrictions on their ability to share publicly available information. The sharing of public information can be particularly beneficial where it assists the counterpart authority with the identification and organisation of this material. For example, benefits of enforcement co-operation are often realised when authorities share publicly available information that is difficult to access online (such as some court documents), or when jurisdictions can assist one another where there are language differences.

¹⁸³ See definition in *Section 18.8: Sharing authority confidential information*.

¹⁸⁴ See definition in *Section 18.9: Sharing publicly available information*.

19. Regional enforcement co-operation

19.1. Overview of section

426. The Survey confirmed what was also recognised from the findings of the 2012 Survey and from other OECD work¹⁸⁵: authorities frequently experience their most extensive, intensive and successful enforcement co-operation through regional co-operation networks and organisations. The Survey results demonstrate that a significant number of the respondents (74%) are involved in at least one regional competition network or organisation and consider this engagement to be beneficial. In addition to supporting enforcement co-operation, regional networks and organisations can provide frameworks for regional policy and practice harmonisation; and can also assist in building the enforcement capacity of smaller or younger authorities in the region.¹⁸⁶
427. This Section of the Report considers the qualitative and quantitative responses in the Survey dealing with regional enforcement co-operation, including Part 8, where Survey respondents were specifically asked about their experience co-operating within regional networks and organisations. Part 8 of the Survey asked about the frequency of enforcement co-operation within the regional networks, how the regional networks facilitate co-operation, and the advantages and disadvantages of being part of a network.
428. The Survey did not address different types of enforcement co-operation by enforcement area in the context of regional enforcement co-operation, or ask the same detailed questions regarding notification, comity, investigatory assistance or enhanced co-operation, exchange of information and use of confidentiality waiver (Parts 3, 4 and 5 of the Survey). Whether this data would be useful could potentially be part of the initiative focused on regional enforcement co-operation proposed in *Section 21. Proposed future areas of focus to improve international enforcement co-operation*.

19.2. Types of regional networks and organisations

429. The various types of regional co-operation networks and organisations in which the respondents (and broader ICN membership) are involved are defined and outlined in *Annex J: Regional co-operation networks and organisations*, including Regional Integration Arrangements and other types of regional networks and organisations (e.g.

¹⁸⁵ See the OECD Secretariat papers and country submissions for the discussion at the 2018 Global Competition Forum entitled 'Benefits and challenges of regional competition agreements' (OECD, 2018_[13]).

¹⁸⁶ Regional competition agreements - inventory of provisions in regional competition agreements, DAF/COMP/GF(2018)12. This document provides an overview of the different characteristics of regional competition frameworks. (OECD, 2018_[13]).

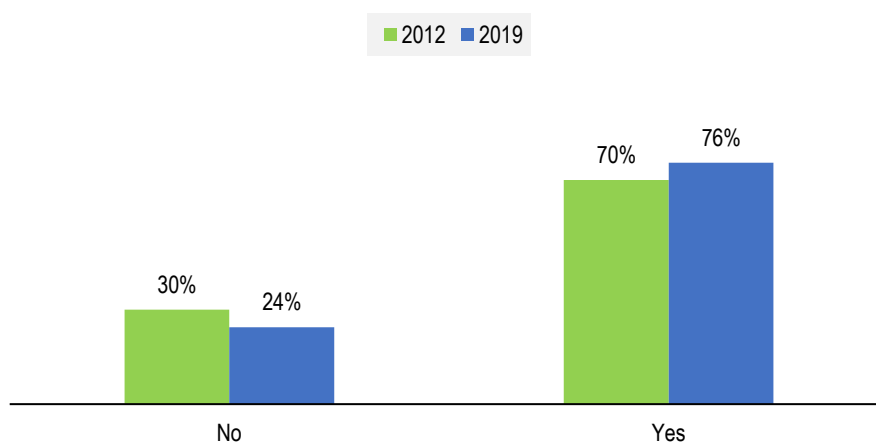
ones based on regional arrangements, multi-lateral agreements or trade agreements). Eighty-eight per cent of the respondents said they were part of a regional competition arrangement.¹⁸⁷ The majority of respondents to questions relating to regional enforcement co-operation were members of the EU or the Nordic Alliance.¹⁸⁸

430. In addition to regional arrangements between jurisdictions, *Annex I: EU Regional Integration Arrangements* also provides an overview of some regional networks that support enforcement co-operation, such as the OECD Regional Centres.

19.3. Regional enforcement co-operation: types and frequency

431. *Figure 19.1* shows the participation rate of respondents in regional enforcement co-operation networks and organisations was similar in the 2012 and 2019 Survey results (70% in 2012 compared to 74% in 2019).

Figure 19.1. Participation in a regional network or organisation, by percentage of respondents to the question, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 37

Data source type: quantitative representation categorized free text

Figure depicts results as a proportion of each group

Response rate: 2012: 84% and 2019: 100%*

*Some countries did not provide an answer to question 37, however, where publicly available, the information was added.

432. The Survey asked respondents to provide a frequency score in relation to different types of enforcement co-operation¹⁸⁹ within their regional network or organisation (Question 38 – Table 8). *Figure 19.2* shows the average frequency score given to each type of enforcement co-operation within a regional network or organisation as compared between the 2012 and 2019 Survey results. *Table 19.1* provides the results for the 2019 Survey. *Figure 19.2* illustrates that in all categories, the frequency of co-

¹⁸⁷ Question 37, Survey.

¹⁸⁸ The Nordic Alliance is addressed in the *Annex J: Regional co-operation networks and organisations*.

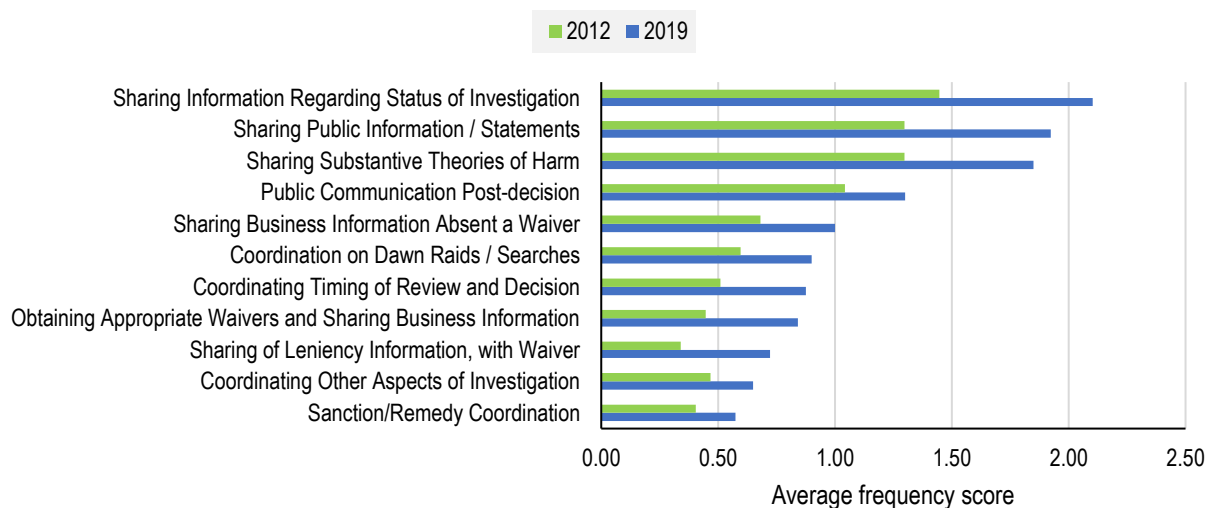
¹⁸⁹ The meaning of these was not defined in the Survey.

operation has increased between the Surveys. The most frequent types of co-operation for both the 2012 and 2019 Survey are:

- sharing information regarding status of investigation
- sharing substantive theories of harm
- sharing publicly available information
- public communication post-decision.¹⁹⁰

433. *Table 19.1* shows these four types are cited significantly more frequently in 2019 than the remaining types. These are types of co-operation which can frequently occur informally (particularly the first, third and fourth category). In relation to the sharing of business information, in some regional organisation (such as the EU, within the ECN framework), this can occur absent a waiver.¹⁹¹

Figure 19.2. Type of co-operation within a regional network or organisation, by average frequency score, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 37 – Table 8

Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts average frequency scores, where options were: [Frequently = 3], [Occasionally = 2], [Seldom = 1], [Never = 0]

Response rate: 2012:84% and 2019: 89%

¹⁹⁰ This term was not defined in the Survey but is likely to be understood to mean co-ordination of public communication of a decision once it has been made.

¹⁹¹ See *Annex I: EU Regional Integration Arrangements in relation to operation of EU*.

Table 19.1. Frequency by type of enforcement co-operation within a regional network or organisation, 2019

Type of co-operation	Frequently (> 60%)	Occasionally (20% - 60%)	Seldom (< 20%)	Never	Total Responses
Sharing Information Regarding Status of Investigation	41%	36%	15%	8%	39
Sharing Substantive Theories of Harm	33%	28%	33%	8%	40
Sharing Public Information / Statements	28%	38%	31%	3%	39
Public Communication Post-decision	23%	15%	33%	30%	40
Co-ordination on Dawn Raids / Searches	8%	18%	33%	43%	40
Sharing of Leniency Information, with Waiver	8%	6%	36%	50%	36
Sharing Business Information Absent a Waiver	8%	25%	28%	40%	30
Obtaining Appropriate Waivers and Sharing Business Information	5%	13%	42%	39%	38
Co-ordinating Timing of Review and Decision	5%	15%	43%	38%	40
Co-ordinating Other Aspects of Investigation	3%	8%	43%	48%	40
Sanction/Remedy Co-ordination	3%	8%	35%	55%	40

Source: OECD/ICN Joint Survey 2019, Question 37 – Table 8

Data source type: defined data set

Response rate: 89% of the respondents that are part of a regional network or organisation

19.4. How regional agreements facilitate enforcement co-operation: advantages and disadvantages of regional enforcement co-operation

434. In addition to the general benefits of enforcement co-operation noted by respondents in *Section 14.6: Benefits of international enforcement co-operation*, respondents observed that their regional arrangements facilitated enforcement co-operation by supporting:

- regional consistency, convergence and deeper co-operation among regional members, which helps enforcing competition law and makes decisions more effective
- strong relationships between members
- the exchange of confidential information pursuant to the arrangements of an RCA
- the sharing of non-confidential information and other relevant documentation within the network
- the conduct and co-ordination of joint investigations
- the sharing of experiences, best practices and capacity building
- the sharing and improving of common tools and resources.¹⁹²

19.4.1. Advantages

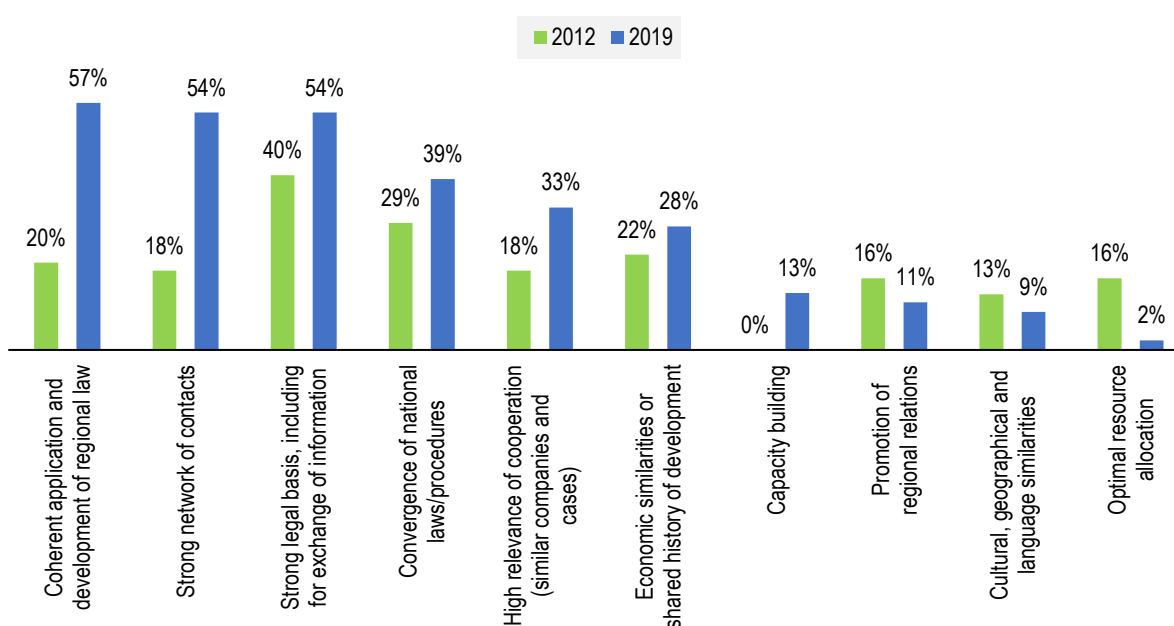
435. Respondents were also asked to identify the advantages and disadvantages of regional co-operation, as well as to identify the way in which those advantages and disadvantages differ from those of international co-operation outside a regional network or organisation (Question 38). Respondents to the Survey noted the following advantages, which mirrored the benefits facilitated by regional co-operation:

¹⁹² Question 37, Survey.

- coherent application and development of regional law (62%)
- strong legal basis, including for exchange of information (60%)
- strong network of contacts (57%)
- convergence of national laws/procedures (43%)
- high relevance of co-operation (similar companies and cases) (36%)
- economic similarities and shared history of development (31%)
- capacity building (7%)
- cultural, geographical and language similarities (5%).

436. *Figure 19.3* shows the above categories of advantages, comparing the 2012 and 2019 Survey results. The qualitative responses to Question 38 were categorised following the same categories used in 2012, with the addition of a new category “capacity building.” It shows some differences between the two Surveys, with “coherent application and development of regional law” and “strong network of contacts” being significantly more important to the 2019 respondents.

Figure 19.3. Advantages of regional co-operation, by percentage of respondents to the question, 2012 vs. 2019



Source: OECD/ICN Joint Survey 2019, Question 38

Data source type: quantitative representation categorized free text

Figure depicts responses where respondents may have provided multiple responses

Response rate: 2012: 91% and 2019: 85%

437. The strong legal basis for enforcement co-operation was emphasised by one respondent who noted:

What distinguishes, the international co-operation that we are able to achieve within a regional network from co-operating internationally with agencies outside the network, is the legal framework of the first one.

... we think [this lesson] would be worth expanding to international co-operation with agencies outside the network are that this kind of legal co-operation framework (law or soft law or bi-lateral/multi-lateral agreements) increases co-operation due to legal certainty.

438. Respondents noted that, in addition to the legal frameworks that supported their enforcement co-operation, there were very strong relationships of trust and understanding. These were built over time and supported by regional meetings, regular exchanges and interactions. As explained by one member of the Nordic Alliance:

Personal contacts and knowledge of the other Nordic Authorities, i.e. through regular meetings at different levels, is helpful. This contributes to a mutual trust between the authorities and have for example, in a Nordic context, proven invaluable in the exchanging of important, confidential and sensitive information which has been beneficial to each of the authorities.

439. Some respondents identified that regional networks enable sharing insights, experiences, and techniques from similar economies. For example, one Central American authority noted:

An important advantage of participating in the RECAC [the Central American National Competition Authorities Network] is that its member competition authorities operate in similar contexts. Thus, they are not strange to the peculiarities of the markets in Central America and the exchange of experiences and knowledge with similar counterparts enhance the technical capacities of the agencies.”

440. Similarly, another respondent noted:

Co-operations as such are more often for geographically closer countries mainly because market conditions are more similar. In smaller economies, businesses are more prone to expand to other markets, usually in neighbouring countries.

441. Another Nordic country noted that in addition to economic ties, there were also language, cultural and historical ties that helped support the regional network:

The Nordic countries have many features in common such as a relatively small number of inhabitants, low density of population in many areas, developed economies, many highly concentrated markets, as well as a common history and traditions. To co-operate with neighbouring countries which to a large extent share traditions and history and have market economies with several common characteristics has been very beneficial.

19.4.2. Disadvantages

442. Few respondents noted any disadvantages with participating in regional enforcement co-operation (only 34% of respondents to the survey answered the question). As with the 2012 results, those who did respond identified resource constraints as their primary disadvantage, including the issues arising from the obligation to co-operate with regional partners.

20. Future vision and respondents' views on future work for OECD and ICN

20.1. Overview of section

443. The Survey asked respondents about their vision for the future of enforcement co-operation,¹⁹³ their views on the OECD 2014 OECD Recommendation, the usefulness of the ICN's work to date¹⁹⁴ and the future areas of focus they would like to see undertaken by each organisation.¹⁹⁵ Their responses are outlined in this Section and indicate that authorities want to continue to improve enforcement co-operation and would like the OECD and ICN to both continue the types of work they have done to date to support this and consider new ways to address existing barriers to enforcement-cooperation.

20.2. Future vision for improving enforcement co-operation

444. Many respondents to the Survey listed variations of the benefits outlined above as their vision for the future of international enforcement co-operation. A substantial number of respondents noted that the drivers of co-operation would make enforcement co-operation more necessary in the future and noted that improved co-operation was needed to ensure efficient and effective global enforcement of competition laws. The improvement respondents are seeking, fall into the following key categories:

- earlier/more timely enforcement co-operation and co-ordination, including better pre-investigation co-operation
- more effectively foster and utilise informal enforcement co-operation and build trusting relationships
- improve access to, and promotion of, successful tools and models for enforcement co-operation, including digital co-operation tools and tools that build capacity to co-operate effectively
- greater transparency about what information authorities may share and how
- greater harmonisation and convergence in laws and practices

¹⁹³ Part 1, Question 6 of Survey.

¹⁹⁴ Parts 9 and 10, Questions 39 – 48 of Survey.

¹⁹⁵ Part 7, Questions 34 -36 of Survey.

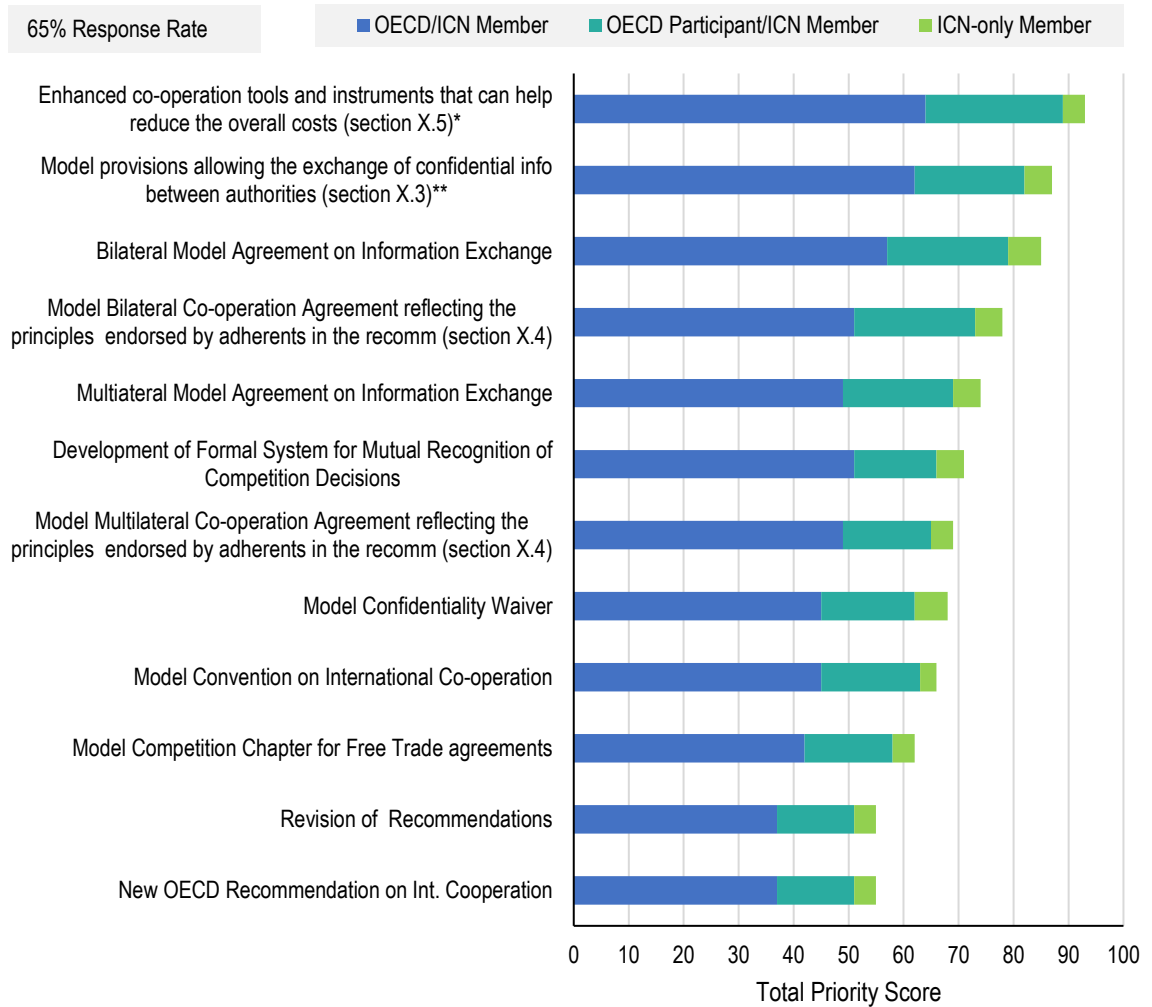
- more enhanced and co-ordinated enforcement co-operation on matters of mutual concern (i.e. where enforcement co-operation on specific cases intersects with broader policy or enforcement issues, such as some of the challenges arising from some elements of the digital economy).
 - more and improved bi-lateral, regional and multi-lateral formal instruments and frameworks to improve enforcement co-operation and remove legal barriers to deeper co-operation
445. As with the responses to many other qualitative assessment questions in the Survey, it is unclear if all of these elements are valued by all authorities and with equal weight. However, they do align with other responses to the Survey regarding current challenges with, and limitations of, international enforcement co-operation, as well as the responses to the Survey questions regarding what could be improved.¹⁹⁶

20.3. Future work for OECD and views on 2014 OECD Recommendation

446. Respondents were provided with a range of options for future work for the OECD and their responses are set out in *Figure 20.1* and *Table 20.1*. These results, together with the responses to the open-ended queries and consideration of the overall Survey results, provide a useful indication for potential future focus OECD work. The top four responses from the defined list of options are:
- 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 enforcement actions (as set out in Section X.5 of the 2014 OECD Recommendation).
 - model provisions allowing the exchange of confidential information between competition authorities subject to safeguards, without the need to obtain the prior consent from the source of the information (as set out in Section X.3 of the 2014 OECD Recommendation).
 - bi-lateral model agreement on information exchange.
 - model bi-lateral co-operation agreement reflecting the principles endorsed in the 2014 OECD Recommendation (Section X.4).

¹⁹⁶ Part 7, Questions 34 -36 of Survey.

Figure 20.1. Future work for the OECD, by priority score, by type of respondent, 2019



Source: OECD/ICN Joint Survey 2019, Question 44 – Table 10

Notes: Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts summed ordinal scores, where options were: [High = 3], [Medium = 2] and [Low = 1]

* Enhanced co-operation tools and instruments that can help reduce the overall costs associated with investigations or proceedings by multiple comp authorities, and the same time avoid inconsistencies among enforcement actions (section X.5)

** Model provisions allowing the exchange of confidential info between authorities without the need to obtain the prior consent from the source of the info and subject to the safeguards as provided in this Recomm (section X.3)

Table 20.1. Future work for the OECD, by priority score, 2019

Type of co-operation	High priority	Medium priority	Low priority	Total Responses
Enhanced co-operation tools and instruments that can help reduce the overall costs associated with investigations or proceedings by multiple comp authorities, and the same time avoid inconsistencies among enforcement actions (section X.5)	51%	36%	13%	39
Bi-lateral Model Agreement on Information Exchange	46%	26%	28%	39
Model provisions allowing the exchange of confidential info between authorities without the need to obtain the prior consent from the source of the info and subject to the safeguards as provided in this Rec. (section X.3)	38%	43%	20%	40
Multi-lateral Model Agreement on Information Exchange	29%	37%	34%	38
Model Bi-lateral Co-operation Agreement reflecting the principles endorsed by adherents in the Rec. (section X.4)	28%	40%	33%	40
Development of Formal System for Mutual Recognition of Competition Decisions	24%	39%	37%	38
Model Confidentiality Waiver	22%	41%	38%	37
Model Multi-lateral Co-operation Agreement reflecting the principles endorsed by adherents in the Rec. (section X.4)	15%	43%	43%	40
Model Convention on International Co-operation	17%	50%	33%	36
Model Competition Chapter for Free Trade agreements	11%	50%	39%	36
Revision of Recommendations	0%	41%	59%	39
New OECD Recommendation on Int. Co-operation	0%	41%	59%	39

Source: OECD/ICN Joint Survey 2019, Question 44 – Table 10

Data source type: defined data set

Response rate: 65% of total respondents

Figure depicts summed ordinal scores, where options were: [High = 3], [Medium = 2] and [Low = 1]

447. In addition to the above figures, respondents noted that they would like future OECD work to focus on:

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

448. In relation to the use and dissemination of the 2014 OECD Recommendation,¹⁹⁷ some respondents observed that while they did not often directly rely on it in enforcement co-operation cases, it was used regularly to develop internal co-operation policy documents, bilateral and multi-lateral agreements, and to train staff and inform other stakeholders on key elements of international enforcement co-operation. Eighty-three per cent of those who responded to the Survey question considered the OECD 2014 OECD Recommendation relevant, with the remainder having had no experience with it.¹⁹⁸

20.4. Respondents' views on ICN work to date and future focus

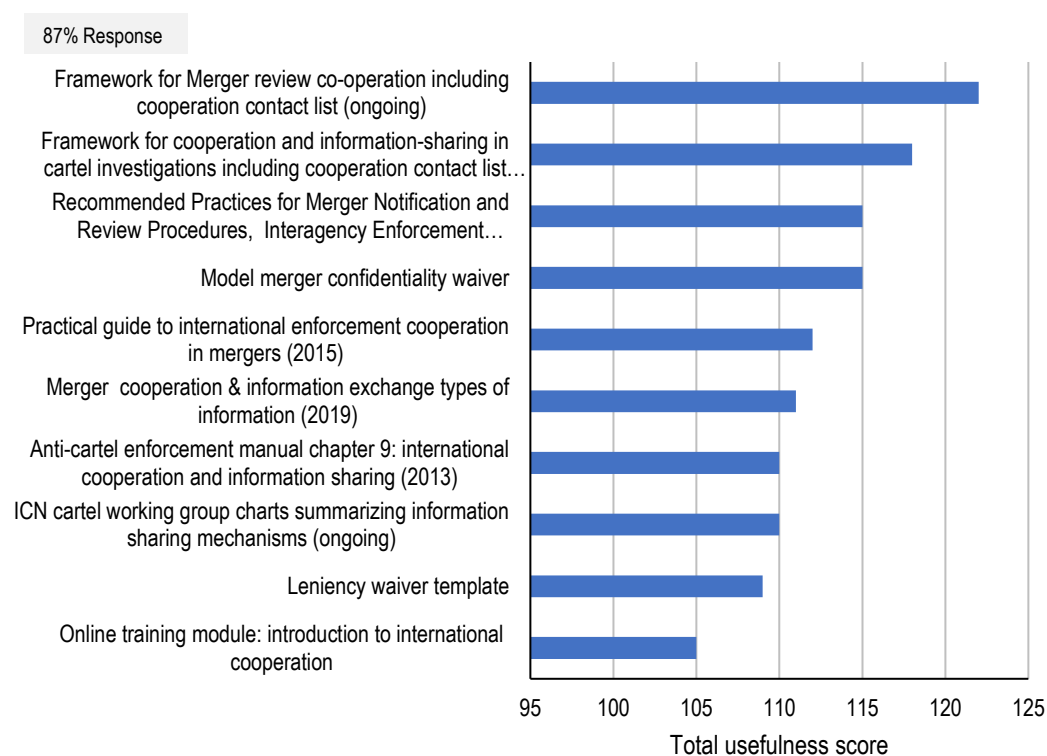
20.4.1. Respondents' views on ICN work to date

449. The qualitative and quantitative responses to the Survey show that ICN members value and use the ICN's work relating to international enforcement co-operation. As shown in *Figure 20.2* below, the top four most useful outputs are the Frameworks for Mergers and Cartels, the Recommended Practices for Merger Notification and Review Procedures, and the Model Merger Confidentiality Waiver. The reason why some were ranked lower than others was not clear from the qualitative responses and may be worthy of further consideration by the ICN, as authorities might not be sufficiently aware of these tools and resources rather than finding them not useful. As is noted in the proposals for future ICN work, the ICN might wish to evaluate whether the current tools and resources remain relevant, whether members are aware of these tools and resources, and whether there needs to be greater promotion of these tools and resources

¹⁹⁷ Questions 39-42 of Survey.

¹⁹⁸ Sixty-five per cent [65%] Survey participants responded to Question 43

Figure 20.2. Respondents' views on ICN work to international enforcement co-operation, by usefulness score, 2019



Source: OECD/ICN Joint Survey 2019, Question 45 – Table 11

Data source type: defined data set

Figure depicts responses where respondents may have provided multiple responses

Figure depicts summed ordinal scores, where options were: [High = 3], [Medium = 2] and [Low = 1]

20.4.2. Respondents' views as to future work for ICN

450. Respondents were asked about the areas in which they would like to see the ICN carry out work in the future, which work-products were most useful and what the ICN can do to help foster both enforcement co-operation and broader general co-operation.¹⁹⁹

451. The respondents' views regarding future work for the ICN primarily focused on the ICN continuing and expanding the work it has undertaken to date to strengthen enforcement co-operation. Many respondents noted the important role the ICN plays in bringing together authorities in general co-operation activities, creating harmonisation in competition enforcement and being a venue for addressing new policy and practice challenges in competition enforcement. As one respondent noted:

The ICN should continue to be a vector of convergence between authorities, not only for substantial law and procedural law, but

¹⁹⁹ Question 45-48, 2019 Survey.

also for the application of competition law to new challenges, such as the digital economy.

452. Respondents commented that the ICN should focus on key areas of shared interest between authorities and ways to improve enforcement co-operation and practice in these key areas. Respondents' suggestions for future ICN work related to enforcement co-operation (and more broadly) can be categorised into the following activities:

- evaluate, update and then further promote the ICN's existing work on enforcement co-operation including via webinars, workshops, events (potentially including a regional focus)
- further develop co-operation-related case studies, best-practice tools, guidelines, templates and models
- focus on specific sectors, markets or technical issues where enforcement co-operation can be challenging and consider where new enforcement investigation and analysis techniques may be useful (e.g. such as enforcement co-operation issues in the digital economy context)²⁰⁰
- promote mechanisms that can be used to overcome legal barriers to enforcement co-operation, such as wider adoption of information gateways
- undertake outreach to younger authorities to raise awareness of the benefits and methods of international enforcement co operation
- explore opt-in frameworks, like the ICN Framework for Competition Authorities Procedures,²⁰¹ for addressing enforcement co-operation-related issues (e.g. regarding transparency and treatment of confidential information)
- improve the network of contacts by providing an accessible and up-to-date list of authorities' contacts
- co-ordinate and collaborate with other international organisations, including the OECD, EU and UNCTAD.

²⁰⁰ One respondent provided the following examples: algorithms as a tool to create and track cartels; liability of the programmers of deep machine learning in the framework of antitrust investigations; relevant market definition in multiple side markets.

²⁰¹ See (ICN, 2019_[3])

Part IV. Proposed future areas of focus

21. Proposed future areas of focus to improve international enforcement co-operation

21.1. Overview of section

453. The respondents to the Survey valued the work that competition authorities, the ICN and OECD have undertaken to date to improve enforcement co-operation. This Section outlines possible future areas of focus that authorities, the OECD and ICN could consider in order to improve enforcement co-operation further. It also outlines the factors to consider when progressing any proposed future areas of focus/
454. The proposed future areas of focus are based on the findings of the Report, that is:
- an analysis of the overall Survey results
 - specific suggestions made by Respondents (as set out in the *Section 20. Future vision and respondents' views on future work for OECD and ICN*)
 - consideration of the work done by the OECD and ICN to date
 - consideration of the drivers of international enforcement co-operation.
455. The proposed future areas of focus intend to direct the discussion to activities that are of particularly high value for improving enforcement co-operation, respond to the requests of authorities and generate greater value from existing and new resources, networks and tools.
456. The proposed future areas of focus outlined in *Table 21.1* fall within the following four key categories:
- further develop enforcement co-operation work-products and networks (Focus Area 1.1.-1.5)
 - provide policy and practical support for further developing effective regional enforcement co-operation (Focus Area 2)
 - improve transparency and trust (Focus Area 3)
 - remove substantive and legal barriers to co-operation. (Focus Area 4).
457. *Table 21.1* sets out the main categories (as outlined above); provides a description of the future area of focus; its rationale and notes on the current status of that focus area; and proposed next steps, including comments on sequencing and timing in relation to other areas of focus.

21.2. Factors to consider when progressing any proposed future areas of focus for OECD and ICN

458. Outlined below are some of the key factors that the OECD and ICN may wish to consider in determining what, how and when to progress the proposed future areas of focus.

21.2.1. Determining the best placed organisation

459. There is significant overlap in membership between the OECD Competition Committee and the ICN members, however, each organisation has different strengths and resources, which may make one more suited to undertake or lead certain initiatives to improve international enforcement co-operation.
460. For the OECD, work is primarily undertaken by the OECD Secretariat (with the support of other directorates, such as OECD Legal), with direction from the OECD Competition Committee and sometimes from OECD Council (particularly in relation to OECD recommendations). Important contributions and responses to the work of the OECD Secretariat are made by members, associates and participants of the Competition Committee. Other documents such as a monitoring report to the OECD Council on an OECD recommendation are formally approved Competition Committee work products.
461. For the ICN, the majority of work is undertaken by the specialist subject matter working groups, which include authority experts and non-government advisors (NGAs). Some specific projects are also undertaken by the ICN Steering Group (ICN SG) or a group established by ICN SG (such as the ICN drafting team for this Project).
462. It is beyond the scope of this Report to suggest in most instances which organisation is best placed to do what. Any initiative will benefit from communication in planning future areas of work. This will assist in identifying the best-placed organisation and in managing the limited resources of each and of the authorities that contribute to their work.

21.2.2. Sequencing

463. The proposed areas of focus intentionally do not include timelines and are not sequenced, however, they do include comments on how they are potentially interrelated. The sequencing will depend on what decisions are made about pursuing certain initiatives and the scope, scale and process of particular initiatives.
- For example: if either the OECD or ICN agreed to collect and collate detailed information from authorities regarding their specific ability to co-operate on enforcement in order to improve transparency and trust (see Focus Area 5), this would be a useful set of information for determining which potential model(s) for overcoming legal limitations to enforcement co-operation may be more useful (Focus Area 8). Nevertheless, Focus Area 8 could still be progressed in its absence.

21.2.3. Scale, scope and time horizons

464. All the future areas of focus outlined in *Table 21.1* could include work of varying scale, scope and with short-, medium-, or long-term horizons. Some tasks can be done more quickly and sooner (e.g. working out the best way to ensure authorities can easily access the best information from both organisations on international enforcement co-operation), while other initiatives would likely require multiple years to achieve (e.g. determining and implementing best ways to remove legal limitations on the capacity to co-operate). These matters will need to be considered by each organisation in the context of their existing work programmes and resources.

21.3. Table outlining proposed future areas of focus for OECD and ICN

Table 21.1. Proposed future areas of focus for consideration by OECD and ICN

Category and No.	Description of proposed future area of focus	Rationale and notes on current status	Proposed next steps and comments on sequencing and timing in relation to other initiatives
<p>Focus Area 1.1</p> <p>Further develop enforcement co-operation work-products and networks</p>	<p>The OECD and ICN respectively and together consider options to improve communication, co-ordination and cross-promotion of their existing and planned respective work related to international enforcement co-operation.</p>	<p>Avoid duplication (not only of work by the organisations but also for authorities).</p> <p>Promote the respective work-products of each organisation, including considering opportunities to improve the accessibility and dissemination of their respective work-products.</p> <p>While there is a good line of formal communication between the organisations that is supported by the OECD/ICN Liaison, this role does not focus on planning and discussion focused on international enforcement co-operation.</p>	<p>The OECD and ICN to discuss possible plans for improving communication and co-ordination between the organisations, such as:</p> <ul style="list-style-type: none"> • regular information exchange focused on enforcement co-operation; • communication in early planning stages and before the launch of initiatives/work streams; and • further cross-referencing and cross promoting the tools/work-products of each organisation to make them available to authorities. <p>These discussions could commence once the Report is finalised and involve ongoing communication.</p>

<p>Focus Area 1.2</p> <p>Develop further enforcement co-operation work-products and networks</p>	<p>Audit existing enforcement co-operation work-products and tools and consider which ones need to be reviewed, retired and what new ones may be required.</p>	<p>Respondents valued the work of both the OECD and ICN to date and want existing work programmes supporting international enforcement co-operation to continue and be improved upon, while ensuring that existing work-products (if still valuable) are revised and kept up-to-date.</p> <p>Note: case studies are addressed in a separate initiative. Further, tools/work-products to address substantive legal barriers should probably be developed once (and if) the proposed work relating to possible solutions to address existing legal barriers is completed.</p>	<p>The OECD and ICN to consider their existing work-products and identify potential new work-products and tools needed (not captured in other initiatives).</p> <p>In relation to the ICN, the ICN could consider doing this in a holistic review, considering work-products across the enforcement areas and Working Groups.</p>
<p>Focus Area 1.3</p> <p>Develop further enforcement co-operation work-products and networks</p>	<p>Develop detailed case studies that model specific types of enforcement co-operation in different enforcement areas, which capture not only the legal basis for the co-operation but also how it occurred in practice.</p>	<p>Authorities have requested detailed examples of actual enforcement co-operation.</p> <p>For example, it could include detailed real or hypothetical examples of:</p> <ul style="list-style-type: none"> • some of the types of enforcement co-operation considered in the Survey (such as Question 19 – see <i>Section 12.5: Frequency of types of enforcement co-operation by enforcement area</i>) • enforcement co-operation between authorities with different types of relationships and legal capacity to co-operate • enforcement co-operation on new or developing policy or practice issues • examples of enforcement co-operation relating to confidential information sharing, providing investigative assistance or enhanced co-operation. 	<p>The OECD and ICN to develop a series of case studies and discuss which organisation should take the lead in the drafting or how it could be divided. This type of work would likely be well-suited to the ICN Working Groups, however, the OECD (especially from its work in the regional centres) may have resources in this regard also.</p> <p>The ICN to consider how these may be incorporated in its online training on demand.</p>

Focus Area 1.4

Develop further enforcement co-operation work-products and networks

Promote better understanding of the potential value of different types of enforcement co-operation at the case-handler level.

Involving more case-handlers in understanding the basics of international enforcement co-operation will likely help authorities to promote the benefits of enforcement co-operation internally, and help them establish stronger relationships of trust between authorities, to scale-up their enforcement co-operation.

The OECD to consider: stronger focus on training for case-handlers on international enforcement co-operation through the OECD regional competition centres and other forums.

The ICN to consider: how best to further promote and expand the work already being undertaken by Working Groups, that is relevant to case-handlers, including considering further training of case-handlers via ICN workshops and other forums.

The OECD and ICN to consider ways to get more case handler-level staff directly involved in enforcement co-operation work and to promote direct interaction and relationship building between authorities.

<p>Focus Area 1.5</p> <p>Develop further enforcement co-operation work-products and networks</p>	<p>The OECD and ICN to consider ways to encourage and/or systemise better data recording on enforcement co-operation by member authorities.</p>	<p>Improve the ability to measure international enforcement co-operation on a regular basis, including informal co-operation.</p> <p>Responding to the Survey was a resource intensive task, especially in relation to collecting and gathering data over the past 5 years. It appears that many authorities do not have a systemised way of recording instances of international enforcement co-operation data.</p> <p>Measuring the frequency and use of enforcement co-operation would likely provide further support for authorities for these activities and/or help them identify where they may want to consider improving enforcement co-operation practices.</p> <p>Having just reviewed the Survey data in detail, the OECD and ICN drafters of the Report are in a good position to note what questions and data is likely to be most useful to collect on an ongoing basis.</p> <p>Creating a simplified and prioritised way of regularly collecting key data should be less onerous and produce a significantly better quality of information for the OECD, ICN and authorities than running a survey every 5 years.</p>	<p>The OECD and ICN to discuss the possibility of creating a plan to encourage and/or systemise better data recording of enforcement co-operation by member authorities.</p> <p>One option could be to incorporate into the OECD's existing data collection from authorities, the Survey to which is due to be sent next to member in first quarter 2021. Potentially this could include ICN members who are not members or participants of the OECD Competition Committee.</p>
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Focus Area 2

Provide policy and practical support for further developing effective regional enforcement co-operation

The OECD and ICN to respectively consider how regional co-operation can be supported and improved in a manner that is complementary to building broader international enforcement co-operation.

The Survey revealed that regional co-operation was highly valued by authorities of varying sizes and across jurisdictions. There has been limited work done to date to by the OECD and ICN to consider the variety of ways regional networks may operate and how they can be supported to develop as part of improving global international enforcement co-operation.

The OECD to consider work-streams that will promote dialog and understanding to facilitate regional enforcement co-operation and improve wider international enforcement co-operation. In particular, the OECD could consider building on the work undertaken in 2018 in relation to regional co-operation and using the RCCs to further promote improved models for regional co-operation.

The ICN to consider if this work is a priority and/or could be better integrated into the work already being undertaken in working groups or as it pertains to younger and developing authorities.

<p>Focus Area 3</p> <p>Improve transparency and trust</p>	<p>Consider mechanisms that create improved transparency and trust around the ability of jurisdictions to co-operate, in particular in relation to issues such as:</p> <ul style="list-style-type: none"> • ability to share confidential information and how confidential information from a counterpart would be handled in a co-operating jurisdiction: e.g. protections; possible mechanisms for access by third parties; and ability to agree to terms of provision. • whether leniency or merger parties must notify if they have engaged with another authority on the same matter. • ability to provide investigative assistance • ability to engage in enhanced co-operation • ability to enter into second-generation style agreements with other authorities. 	<p>While many authorities may have good understanding of how they can co-operate with other authorities with which they frequently engage, a number of authorities noted that a lack of transparency and trust around the ability of other authorities (and the rules and protections that existed in relation to this co-operation) limited and slowed potential co-operation. In some instances, these concerns in relation to trust and transparency (or the ability to resolve them in a timely way) prevented potential co-operation.</p> <p>Some of this information was captured in the Survey, however, better quality information could likely be obtained with clear and focused instructions.</p>	<p>The OECD and ICN to consider work streams that provide such information, develop best practices and consider potential frameworks to support publication of this information.</p> <p>It may be that a simple template could be developed that authorities could complete and make public.</p> <p>Having this information would likely be very useful for further considering legal barriers to enforcement co-operation and how to resolve them (see Focus Area 4)</p>
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<p>Focus Area 4</p> <p>Remove substantive and legal barriers to co-operation</p>	<p>Considering possible models to resolve key legal obstacles to improve the ability to co-operate on certain types of enforcement co-operation activities, such as sharing confidential information, enhanced co-operation and investigative assistance.</p> <p>See examples in <i>Annex D: Overview of other legal models for enforcement co-operation</i>.</p> <p>The work should consider options raised by the respondents and others and analyse their pros and cons in depth, such as: model bi-lateral agreements, model multi-lateral agreements and treaty options (e.g. ISOCO, OECD treaty and counterpart-matching multi-lateral agreement model), and OECD Recommendation and Decision processes.</p>	<p>Respondents listed legal barriers as one of the key challenges to enforcement co-operation</p> <p>For the avoidance of doubt, the purpose of this work would not be to consider options for ensuring enforcement co-operation between all authorities but rather to consider the most efficient ways for authorities to be able to co-operate effectively with counterpart authorities when it is in their interest to do so.</p>	<p>The OECD and ICN to consider work streams that provide such information and allow for conclusions on best practices and on ways to implement them. The OECD is likely to be best placed, with the support of the OECD Legal Division, to lead this work.</p>
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21.4. Proposed future areas of focus for authorities

465. The future areas of focus in *Table 21.1* suggest potential OECD and ICN activities, however, competition authorities play the central role in improving enforcement co-operation by reflecting themselves on how they can co-operate more effectively. Authorities and their staff have a better prospect of progressing international enforcement co-operation in line with their priorities and strategies when its value in both specific enforcement cases and more broadly is understood by its staff and stakeholders. To this purpose, they can:

- review their own international enforcement co-operation activities and consider if they are as effective and efficient as possible
- review the resources they dedicate to international enforcement co-operation and if they are in line with their stated priorities
- review the OECD and ICN work and tools on enforcement co-operation and consider if they can be better communicated and implemented within their own organisations
- continue to contribute to the work of the OECD and ICN in improving enforcement co-operation, including supporting the development of the proposed future areas of focus outlined above.

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Annex A. Methodology

Overview of Annex

This Annex provides a detailed description of how the data from the Survey was analysed, treated and presented in the Report. The Survey data has been presented in figures and tables throughout the Report. The Report focused on presenting data and results that add meaningful information to the discussion regarding the status of international enforcement co-operation. In addition to the methodology, this Section outlines:

- key differences between 2012 and 2019 Survey
- commentary on the depth and quality of the responses.

Methodology

Distinctions between respondents by membership and geography

The structure of the OECD and the OECD Competition Committee (along with details of who are OECD Members, Participants and Associates) is outlined in *Section 8.1: The Organisation for Economic Co-operation and Development (OECD)*. The membership categories have been treated in this Report as outlined below:

- the European Commission is a Survey respondent and it has been counted as an OECD Member for the purposes of this Report, as was done with the 2012 Survey
- OECD Competition Committee Associates have been grouped with OECD Participants
- Colombia recently completed the ascension process and became an OECD member (as of 28 April 2020) has been counted as an OECD Member
- Costa Rica has yet to complete the ascension process and has not been counted as a member
- ICN-Only refers to jurisdictions that are members of the ICN but that are not OECD Members, Participants or Associates.

In the OECD 2013 Report on the 2012 Survey, many results were presented as a split between OECD Members and Non-OECD Members (which included OECD Participants). However, in reviewing the data from the 2019 Survey (and noting the change in OECD membership since 2012), it was observed that in many instances, the OECD Participant responses were more similar to the OECD Member responses than the ICN-Only responses. Accordingly, combining OECD Participant and ICN-Only responses masked certain trends and/or potentially gave a misleading result for both the OECD Participant and ICN-Only groups. Consequently, in most instances the results for all respondents are presented together unless interesting or noteworthy differences between groups of respondents were observed.

Out of the OECD Members and the Participants, 27 of these are also members of the European Union and part of the European Economic Network (ECN) (OECD, 2015_[102]). Given the centralised structure of the European Commission and the ECN (discussed in further detail in *Annex I: EU Regional Integration Arrangements*), in some instances it was useful to separate European responses from non-European responses.

Comparison of 2012 Survey vs. Survey data.

As noted in Section 8.6: *Overview of the responses to the Survey*, there were more responses to the 2019 Survey than in the 2012 Survey (62 vs. 57), although for some questions, there were more responses in the 2012 Survey. Comparisons between the 2012 and 2019 Survey results account for this difference as much as possible by comparing the percentage of the number of respondents or the average of the responses given to that question. Where data was categorised from free text questions in 2019, where possible, the same categories from the 2013 Report have been used.

Number of responses to each question

As the number of responses to each question and sub-question in the Survey varied, the number of respondents per question has been provided in relation to each figure. In figures relating only to 2019 Survey results, this is indicated in the top left of the figures in the Report. Where it is a comparison between 2012 and 2019 Survey figures this is noted in the notes under that figure. The figures do not depict non-responses unless this is specifically indicated.

In some of the cases where a main question is followed by sub-questions (i.e. Question 24 – *Figure 18.4* and *Table 18.1*), figures reported do not represent the proportion of total respondents to the question. They instead represent the proportion over the total number of respondents that answered “yes” to the main question. Where this is the case, this methodology is reported in the notes to the figure.

Six of the 62 respondents responded to a shorter version of the Survey, which only included a sub-set of questions.²⁰² In order to avoid underestimation of the response rates, they have been calculated over the total number of respondents that received a given question. That is, the six countries that received the short version of the Survey have been considered for the purpose of the calculation of the response rates only for those questions included in the short version of the Survey or where data regarding their jurisdictions was obtained from other public sources. Where the latter occurred, record of these instances and sources has been recorded in the primary data set.

Note on presentation of data in figures

Each of the figures includes notes on what type of data the figure is based on and how the figure has been created. Outlined below are explanations of what was done with various types of data and how this is noted in the figures in the Report.

- **Quantitative data:** where the Survey 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

²⁰² The short version of the survey only included Question 6, Questions 34 to 36, and Questions 39 to 48.

international co-operation by importance and frequency), these have been marked as “*Data source type: defined data set.*”

- **Qualitative/free-text data:** where the Survey questions requested qualitative responses and these have been categorised into 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.*”
- **Comparison of 2012 vs. 2019 Survey results:** In those cases where comparison between 2012 and 2019 Survey results was done using the number of respondents (for instance, number of respondents who said “x” in a particular question), data has been illustrated as a percentage of respondents who responded “x” over total respondents to the question. These figures are marked: “*Figure depicts responses as proportions over total number of respondents to the question.*”
- **Treatment of responses where a limited range of answers was provided to respondents:**
 - In some circumstances, where there were multiple available responses (such as ‘High’, ‘Medium’, and ‘Low’ or ‘Frequently’, ‘Occasionally’, ‘Never/Seldom’), an ordinal score was assigned to the chosen option (e.g. High = 3, Medium = 2, Low = 1). The results have then been aggregated according to two different methods:
 - Method 1: the scores were summed across the sample of respondents to the question (Question 29 – *Figure 15.1*, Question 44 – *Figure 5.1* and *Figure 20.1*, and Question 45 – *Figure 5.2* and *Figure 20.2*);
 - Method 2: the scores were averaged across the sample of respondents to the question (Question 8 – *Figure 4.2* and *Figure 13.1*, Question 29 – *Table 4.1*, *Table 15.1*, *Figure 15.2*, and *Figure 15.3*, Question 7 – *Figure 12.1*, Question 19 – *Figure 12.6*, *Figure 12.7*, and *Figure 12.8*, and Question 37 – *Figure 19.2*)

The final scores obtained were then used as a basis for comparison. These figures are marked: “Figure depicts summed ordinal scores, where options were: [High = 3, Medium = 2 and Low = 1]” or [Frequently (>60% of cases)=3, Occasionally (20-60% of cases)=2, Seldom (<20%)=1 and Never=0.”].

In some instances, respondents provided different sets of answers for different enforcement areas. In these occasions, the highest option has been used for the calculations (e.g. if a respondent selected ‘Frequently’ for merger cases and ‘Occasionally’ for cartel cases, the answer ‘Frequently’ has been considered).

- Respondents provided a mixture of individual number responses and ranges provided (e.g. Respondent A answered they had 10 cases, where Respondent B answered they had 5-10 cases). Where these responses were to be summed, a median was taken within any ranges provided. Where the final option was provided as ‘more than 20’, the conservative figure of 25 was used as a median number. These figures are marked: “Figure depicts results where a median number has been used if ranges were provided by a respondent”.

- **Multiple responses to the same question:** where the question allowed for multiple answers this has been marked as: *“Figure depicts responses where respondents may have provided multiple responses”*
- **Results presented as a proportion of respondents of a particular membership group:** in some instances, comparing absolute totals for certain groups of respondents (e.g. OECD/ICN Members, OECD Participants/ICN Members, ICN-Only respondents, EU members or Non-EU members) can create a potentially misleading figure (i.e. there were many more OECD/ICN Member responses than ICN-Only responses). In some instances, the figures were presented as a proportion of the number of responses from that group. These figures are marked: *“Figure depicts results as a proportion of each group”*.
- **Results presented as a proportion of responses to a question on an enforcement area:** in some responses to quantitative questions (i.e. number of requests made for investigative assistance by enforcement area), results have been illustrated as a proportion over the total sum for each enforcement area in order to show the split between enforcement areas. These figures are marked: *“Figure depicts results as a proportion over the total sum”*.
- **Data on trends:** Some data is used to depict trends, and should not be relied upon to depict an actual figure of how many times a type of enforcement has occurred, because it may include double or triple counting. For example, where authorities provided a total number of instances of engaging in a certain type of co-operation, those instances have been summed for each year to show a trend over the period of both Surveys. However, this summed total may include double or triple counting of the same instance of co-operation by another authority(ies) (e.g. instances of contact with another authority by enforcement area – Question 19, Table 5.1 of the Survey). Where this has been done, the figure includes the following note: *This figure is a simple sum of the total number of [X]. [Y] more respondents answered this question in 2019 than 2012. The figure demonstrates a trend only and not a total number of [X].*

Data in tables

Some tables have been created to provide a more detailed view of the data illustrated by a preceding figure, particularly in cases where the responses were given in specific descriptors to choose from (e.g. “high”, “medium” or “low”). The table illustrates the proportion of respondents who assigned one of those descriptors to a specific option within the question. The proportions shown are calculated over the total number of respondents corresponding to each option or category, as some respondents did not fully respond to a question.

Treatment of “non-responses” to questions within the Survey

Some respondents did not respond to all questions. Where there was ‘no response’ to a particular question, this was only marked as such in case other answers of that respondent indicated that this was the case.

Use of enforcement category “other” data

Some questions of the Survey asked for specific responses for each enforcement area (merger cases, cartel cases and abuse of dominance or unilateral conduct cases). These

questions included an additional category called “Other (e.g. non-cartel agreements)”. Most figures illustrating data coming from this type of question have excluded the representation of the category “Other” as they both got far fewer responses and it is difficult to identify what respondents precisely understood as “other”. Qualitative responses rarely addressed this category.

Treatment of responses with ranges

Some questions of the Survey suggested the respondents to answer using ranges when exact figures were not available. When ranges have been used, the analysis considered the mid-point of the range provided (e.g. for the range [0-5] the value 2.5 was considered). For the last range, [more than 20], the value 25 was considered.

This approach means that in some instances, where mid-point values were added over years (e.g. 2.5 summed over a 5 year period) these estimate may be significantly higher or lower than the actual number. For example if a range of 0-5 was selected for 5 years, this could be a total of 5 times in five years, but would be calculated as 12.5 instances using this approach. All figures using this approach has been marked.

Key differences between 2012 and 2019 Survey

The 2012 Survey was updated in the 2019 Survey in the following key ways:

- Question 3 of the 2012 Survey asked what types of international co-operation activities they found the most/least beneficial. In the 2019 Survey, Question 3 further asked whether their answer depended on what they consider as “formal” or “informal” co-operation.
- Question 6 of the 2012 Survey asked about their vision for the future of international co-operation. In 2019 Survey, Question 6 further asked whether, how and why their view has changed since the last Survey.
- Question 10 of the 2012 Survey asked about the number of notifications made/received. In 2019 Survey, Question 10 further asked whether the Recommendation changed their procedures for sending or receiving notifications, and what has changed.
- The 2019 Survey included three new questions on the implementation of the Recommendation (Questions 40 to 42).
- Question 40 asked about challenges they faced when implementing the Recommendation.
- Question 41 asked for suggestions on how to improve the implementation of the Recommendation by relevant public actors in their jurisdiction.
- Question 42 asked for suggestions on how to boost the dissemination of the Recommendation among relevant public and non-public actors in their jurisdiction.
- Question 40 of the 2012 Survey asked about how to improve the former recommendation. Question 43 of the 2019 Survey corresponds to this one and further asked whether they consider the Recommendation still relevant.

- Question 47 of the 2012 Survey asked whether there are other aspects of co-operation in the broader sense that have proven valuable in their enforcement work. This question was not explicitly replicated in the 2019 Survey.

Commentary on the depth and quality of the responses.

The complexity and detail of the Survey made completing it a significant resource undertaking for many authorities. Outlined below are some observations on the depth and quality of the data.

- **Terms and definitions not used consistently:** respondents did not all use terms or definitions related to co-operation activities or types consistently, which made comparisons and conclusions difficult in some instances.
- **Quality of quantitative data unclear:** The 2019 Survey noted that many authorities may not have access to the extensive data required to fully answer the quantitative parts of the questionnaire, and may therefore have difficulty providing some of the figures requested. Respondents were asked to complete all questions to the extent possible, using the information and data available to their authority. However, when hard data was not readily available, respondents were requested to provide estimates, if possible, clarifying the conditions under which the estimate was made, or to use the ranges if necessary. The Survey advised:

In order to estimate these percentages, respondents should only consider the subset of cases/investigations where international co-operation is potentially available (e.g., because there is more than one jurisdiction directly or indirectly involved with the case/investigation) or necessary (e.g., because the case/investigation potentially raises cross border competition issues), and not the total universe of cases subject to the agency's jurisdiction.

- **Many respondents used ranges and few indicated if they were estimates,** but it is unclear whether the quantitative data provided is an estimate. It is unclear whether authorities systematically store this kind of data. This is discussed in *Section 21. Proposed future areas of focus to improve international enforcement co-operation* relating to potential initiatives.
- **Many sub-questions of qualitative responses not answered:** In cases of questions containing multiple sub-questions, most authorities only responded to some sub-questions. In addition, when authorities answered questions containing plural sub-questions, it was sometimes unclear to which sub-questions they responded. For instance, with respect to Question 27 (which inquired about factors to be considered when requesting or receiving international co-operation) several authorities enumerated factors and it was not clear to which option the answers applied.
- **Some questions in tables left blank and meaning sometimes unclear:** Some authorities left quantitative questions or tables unanswered without explaining the meaning of the non-response, so that its meaning was unclear. For example, approximately 8 authorities left blank at least a part of Table 2 in Question 8 (relating to the availability of each legal basis and the number of cases) without explaining the reason for doing so. The questions may have been left unanswered for various reasons that could include:

- they have no experience with this scenario;
 - the questions are not applicable to their authority (i.e. they do not have a certain competence);
 - they do not collect the relevant data and are unable to do so now for either technical or resource reasons;
 - they chose not to answer the question for unstated reasons.
- **Case examples:** Only a limited number of authorities provided case examples to explain their answers. For example, Question 4 requested the authorities to provide case examples to illustrate how useful co-operation was; however, only about a half of the authorities provided case examples.
 - **Contradictory answers:** A few respondents gave responses that were contradictory. For example, in Table 2 in Question 8, while some authorities denied the availability of a legal basis to co-operate, they simultaneously enumerated more than one case where a legal basis had been used. Similarly, in Question 10 (regarding the number of notifications made or received) while some authorities answered “none (outside of a regional co-operation)”; the same authorities subsequently did not mention the number of notifications in the section dedicated to regional co-operation. Where the contradictions were identified and a correct response could be ascertained through context or research, it has been corrected.
 - **Accuracy:** Some responses raise potential concerns regarding accuracy. Significant issues with accuracy that are relevant to the analysis have also been addressed with competition authorities directly.
 - **Confusion between ‘only non-regional international co-operation’, ‘only regional co-operation’ and ‘both international and regional co-operation’:** Some authorities appeared to answer questions that related to ‘only non-regional international co-operation’, ‘only regional co-operation’ and ‘both international and regional co-operation’ incorrectly. For example, answering questions relating to international co-operation outside of a regional network with reference to a regional network. Significant issues with accuracy that are relevant to the analysis have also been addressed with competition authorities directly.
 - **Confusion between exact number of occurrences in a year versus the number of occurrences per year over a multi-year period:** In some tables (such as 4.1-4.4.) respondents were asked to show the number of instances something had occurred “per year between 01-01-2012 and 31-12-2018.” Given the way the question was drafted, it was unclear from the table in most cases (if not listed year-by-year) whether the number or range provided was a total for the entire time period or for each year within that time period. Generally, the context provided by open-ended questions allowed a determination to be made. For those that answered for each year – i.e. providing 7 different figures or ranges, one per each year, these were converted into a single figure by summing them in order to obtain the total instances over the whole period. For those that answered providing an estimate of the number of yearly occurrences in the period considered – i.e. providing one figure or range representing the yearly number of occurrences, these were converted into a single number by multiplying the number provided by the authority (or the mid-point of the range provided) by the number of the years covered by the period.

Annex B. 2019 Survey

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

Introduction and background

This questionnaire was prepared to support the OECD Competition Committee's and the International Competition Network (ICN)'s long-term work on international co-operation. The purpose of the questionnaire is to survey current practices on international co-operation between agencies in enforcement cases/investigations, identify examples of effective international co-operation and areas for improvement, and support the monitoring of the implementation of the 2014 OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings [OECD/LEGAL/0408] (the "Recommendation"). The results of the survey will be used to report to the OECD Council on the implementation of the Recommendation, as well as to inform decisions on future work that the OECD and the ICN may undertake to foster effective and efficient international co-operation between enforcement agencies.

The questionnaire is almost identical to the one used by the OECD and the ICN in 2012²⁰³. The results of the survey will be made available to both the OECD and ICN memberships.

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

Responses to this questionnaire should be sent **by Friday, 20 September 2019** to:

Despina Pachnou (Despina.pachnou@oecd.org) and **Rebecca Lambert** (Rebecca.Lambert@oecd.org) for the OECD; and icn.oecd.liaison@concorrenca.pt for the ICN.

I. Instructions on completing the questionnaire

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

- **Questions and sub-questions.** The questionnaire contains 48 questions. Many of these questions include a number of sub-questions. Respondents are requested to answer as many questions and sub-questions as possible, in order to provide a richer set of responses.
- **Qualitative information.** The questionnaire includes questions requiring both qualitative information (covering background, experience and ideas) and quantitative data. We would like to stress the importance of gathering qualitative information on how international co-operation works in practice and where its strengths and weaknesses are. Where a qualitative answer is requested,

²⁰³ www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf

respondents may supplement their responses by annexing additional material (e.g., articles or papers) that may be useful in understanding their position. Whenever possible, and even if not expressly indicated, when answering qualitative questions, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreements) cases/investigations.

- **Quantitative data.** We understand that a number of agencies may not have access to the extensive data required to fully answer the quantitative parts of the questionnaire, and may therefore have difficulty providing some of the figures requested. Please complete all questions to the extent possible, using the information and data available to your agency. However, when hard data is not readily available, respondents are requested to provide estimates, if possible, clarifying the conditions under which the estimate was made, or to use the following ranges if necessary: [0-5], [5-10], [10-20] and [more than 20].
- **Time periods.** A number of tables within the questionnaire request data for the last seven complete years (01-01-2012 to 31-12-2018).
- **Confidential/business information and sensitive information.** When responding to the questionnaire, care should be taken to comply with confidentiality rules applicable in your jurisdiction. For example, information regarding specific individuals or companies, the disclosure of which is prohibited, should not be included in the answers to the questionnaire.
- As for non-confidential information, the disclosure (to the public or to other agencies) of which may nevertheless be sensitive, we urge respondents to include this information in their replies but clearly mark it as sensitive. This is to ensure as complete, open and fair a survey as possible of the issues covered by the questionnaire. The results of the Survey will be prepared in an aggregated and anonymous way. Any disclosure of individual replies (or parts thereof) within any report will only be made with the prior consent of the agency(-ies) concerned.
- **Questions on “frequency”.** Across the questionnaire, a number of questions aim at estimating the frequency of certain international co-operation activities. Frequency is measured as Never, Seldom (less than 20% of cases/investigations), Occasionally (between 20% and 60% of cases/investigations), and Frequently (more than 60% of cases/investigations). In order to estimate these percentages, respondents should only consider the subset of cases/investigations where international co-operation is potentially available (e.g., because there is more than one jurisdiction directly or indirectly involved with the case/investigation) or necessary (e.g., because the case/investigation potentially raises cross border competition issues), and not the total universe of cases subject to the agency’s jurisdiction.
- **Formal and informal co-operation.** The questionnaire seeks information relating to both formal and informal international co-operation. Agencies are likely to have different views of what constitutes “formal” vs. “informal” international co-operation, and, where the characterization makes a difference in their international co-operation work, they should explain it in the narrative sections of their responses. Note that section 3 of the questionnaire focuses on what some agencies may consider to be formal co-operation (i.e., directly pursuant to bilateral or multilateral arrangements of some kind).
- **Co-operation within regional networks or organisations.** When answering the questionnaire you are requested to distinguish between co-operation occurring within an existing co-operation platform (such as the ECN, Caricom, WAEMU, Nordic Alliance, etc.) and that which occurs outside such specialized frameworks, whether bilateral or multilateral. Because cooperation within regional networks relies on special rules and international agreements, the questionnaire separates

the two forms of co-operation. Sections 1 and 2 refer to co-operation both within and outside regional networks. **Respondents are requested to answer Sections 3 to 7 of this questionnaire with exclusive reference to co-operation outside regional networks.** Section 8 of the questionnaire is intended to cover only experiences within regional and multi-lateral co-operation networks or organisations.

- **OECD and ICN specific questions.** The last two sections of the questionnaire refer specifically to OECD and ICN work products and work plans.

II. Definition of terms

For the purpose of this questionnaire, the following definitions apply. For additional definitions not covered below, please refer to the Recommendation, section I.

- **Comity** (or traditional comity) involves a country's consideration of how it may prevent its law enforcement actions from harming another country's important interests. It generally implies notifying another country when enforcement proceedings carried out by a competition agency may affect other jurisdictions' important interests or requesting another country to modify or cease its enforcement action to protect the requesting jurisdiction's own important interests.
- **Confidential information** refers to information the disclosure of which is either prohibited or subject to restrictions. For example, information could be defined as confidential if it constitutes business secrets of a company or if its disclosure could prejudice the legitimate commercial interests of a company.
- **International co-operation** is limited to co-operation between international enforcement agencies in specific enforcement cases, i.e. merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreement) cases. This questionnaire does not concern general co-operation on matters of policy, capacity-building, etc.; only international co-operation in the detection, investigation, prosecution or sanctioning of a specific anti-competitive behaviour or the investigation or review of mergers is covered. The extent of international co-operation may vary from case to case, ranging from less extensive co-operation (for example, keeping each other informed on the stages of the investigation or having general discussions on substantive issues) to more extensive co-operation, such as parallel investigations, **investigatory assistance** (see below) and more **enhanced co-operation** (see below). International co-operation may involve different types of activities (see Table 6.1 for a list).
- **Enhanced co-operation** can entail identifying a lead enforcement agency, setting up joint investigative teams, or entering into work sharing arrangements. Enhanced co-operation does not involve a withdrawal of jurisdiction over a case; parallel enforcement action can be taken by more than one agency if one agency is not in a position to safeguard the interests of the other jurisdiction(s) affected.
- **Regional co-operation** is a subset of international co-operation activities that take place within a regional framework or organisation.
- **Investigatory assistance** involves co-operation with another jurisdiction's investigation. It entails a variety of co-operative activities such as assisting with the gathering of evidence or taking witness statements to providing information relevant to the investigation. In contrast to positive comity, investigatory assistance does not involve a request to another agency for a particular remedial action.
- **Mutual recognition of decisions** involves the recognition of decisions by enforcers or courts of another jurisdiction. The outside decision is recognised or even, in some cases, enforced by other countries, as if it was a decision taken by the agency of these latter countries.

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

III. Questionnaire

1. Qualitative assessment of international co-operation and co-operation within regional networks or organisations

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

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

3. What types of international co-operation activities (see Table 6.1 for a list) has your agency found **most beneficial** and why? What types have been the **least beneficial** and why? Does this depend on what your agency considers as "formal" or "informal" cooperation? If so, identify how your agency defines these terms. For example, does it make a distinction by the type of co-operation activity, or by the instrument pursuant to which co-operation takes place, e.g., bilateral agreement or multilateral arrangement such the OECD Recommendation or the ICN Framework? What have been your best and worst experiences of international co-operation? If possible, please provide **case examples** to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

4. On the basis of your experiences so far, how **useful** has international co-operation been to your enforcement strategy? How has international co-operation, or lack of it, affected enforcement by your agency? What impact or difference has your agency's experience with international co-operation made on your ability to investigate and prosecute cases generally? If possible, please

provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

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

6. What is your **vision for the future** of international co-operation? How would you like international co-operation to look in 5, or 10, or 15 years' time? If you responded to this survey in 2012, has your view changed since then? If it has, how and why has it changed?

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

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

Table 1 – Stage of case/investigation at which international co-operation and co-operation within regional networks or organisations takes place

(please tick the relevant box)

	Never	Seldom (< 20% of cases or investigations)	Occasionally (20% - 60% of cases or investigations)	Frequently (> 60% of cases or investigations)
Pre notification/before opening investigation				

During investigation				
Post investigation				
Other (please specify)				

2. Legal basis of international co-operation or co-operation within regional networks or organisations?

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

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

Table 2 – Legal basis for international co-operation or co-operation within regional networks or organisations*

* For purposes of responding to Table 2, agreements should be understood to include binding and non-binding agreements and arrangements.

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

3. Different types of international co-operation

For responses in this section, include only experiences related to international co-operation. Do not include responses or data related to co-operation within regional networks or organisations. These should only be provided in section 8.

3.1 Notifications and comity provisions

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

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10. Over the period between 01-01-2012 and 31-12-2018 have you made **notifications** of enforcement actions to other jurisdictions? Have you received notifications from other jurisdictions related to their enforcement actions? What type of cases/investigations did they relate to (merger, cartel, unilateral conduct/abuse of dominance, other (e.g., non-cartel agreements)? If possible, please provide a broad estimate of how many notifications your agency makes per year and how many it receives. Is there a specific **legal basis** for your notifications?

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

Table 3.1 – Number of notifications made, by enforcement area
(if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])

Year	Cartel cases / investigations	Merger cases / investigations	Unilateral conduct/abuse of dominance cases / investigations	Other (e.g., non-cartel agreements)
2012				
2013				
2014				
2015				
2016				
2017				
2018				

Table 3.2 – Number of notifications received, by enforcement area
(if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])

Year	Cartel cases / investigations	Merger cases / investigations	Unilateral conduct/abuse of dominance cases / investigations	Other (e.g., non-cartel agreements)
2012				
2013				
2014				
2015				
2016				
2017				
2018				

Please discuss if your answer would be significantly different if the time frame considered was 10-15 years or longer. Are there any reasons for any increase or decrease in international co-operation during this timeframe? Are these increases or decreases anticipated to continue? For what reasons? If you are an Adherent to the 2014 OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings did the Recommendation change your procedures for sending or receiving notifications? If so, what has changed?

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

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

13. Have you issued or responded to a request asking you to take enforcement action on behalf of another jurisdiction (so-called „**positive comity**“)? Approximately how many times over the period between 01-01-2012 and 31-12-2018? Have you responded negatively to a request to take an enforcement action on behalf of another jurisdiction? If so, for what reasons? How often? Have your requests for enforcement action been rejected by an agency in another jurisdiction and for what reasons? How often?

3.2 Requests for investigatory assistance

14. Have you issued or responded to a request for **investigatory assistance**? Approximately how many times per year, over the period between 01-01-2012 and 31-12-2018? What have been the types of assistance requested, e.g. gathering information, interviewing witnesses? How many times have you responded negatively to a request for investigatory assistance? How many times have your requests for investigatory assistance been rejected? What reasons were given for refusing a request? How long does a typical request for investigatory assistance take to process and result in assistance? What have you found to be the shortcomings of these types of requests? Please identify any specific **legal bases** for investigatory assistance requests.

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

Table 4.1 – Number of requests for investigatory assistance made per year between 01-01-2012 and 31-12-2018, by type of assistance requested

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

Type(s) of assistance requested (please specify)	Number of requests made per year between 01-01-2012 and 31-12-2018	Number of requests with a positive outcome

Table 4.2 – Number of requests for investigatory assistance received per year between 01-01-2012 and 31-12-2018, by type of assistance

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

Type(s) of assistance requested (please specify)	Number of requests made per year between 01-01-2012 and 31-12-2018	Number of requests with a positive outcome

Table 4.3 – Number of requests for investigatory assistance made between 01-01-2012 and 31-12-2018, by enforcement area

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

Cartel cases/ investigations	Merger cases/ investigations	Unilateral conduct / abuse of dominance cases/investigations	Other (e.g., non-cartel agreements)

Table 4.4 – Number of requests for investigatory assistance received between 01-01-2012 and 31-12-2018, by enforcement area

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

Cartel cases/ investigations	Merger cases/ investigations	Unilateral conduct / abuse of dominance cases/investigations	Other (e.g., non-cartel agreements)

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

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3.3 Enhanced international co-operation provisions

15. Do you have any experience with joint investigations, work sharing arrangements, or any other form of **enhanced co-operation**? If yes, please describe your experience, the challenges/successes and the limitations that you have encountered.

16. To what extent do you take other agencies' **remedies** into account when deciding on your own remedies? What are the conditions under which you are able, or willing, to do this? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreements) cases/investigations.

4. Frequency of international co-operation between competition agencies (outside regional networks or organisations)

17. In the set of your cases/investigations in which international co-operation would be feasible or likely, how **frequently** (see Instructions) has this co-operation taken place?

18. Please provide figures for the **number of international agencies** with which your agency has co-operated on cases/investigations, and **the number of cases/investigations**, from 01-01-2012 to 31-12-2018.

Table 5.1 – Number of international agencies with which your agency has co-operated by enforcement area

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

Year	Cartel cases / investigations	Merger cases / investigations	Unilateral conduct/abuse of dominance cases /investigations	Other (e.g., non-cartel agreements)	Legal basis used
2018					
2017					
2016					
2015					
2014					
2013					
2012					

Table 5.2 – Number of cases/investigations in which your agency has co-operated by enforcement area

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

Year	Cartel cases / investigations	Merger cases / investigations	Unilateral conduct/abuse of dominance cases /investigations	Other (e.g., non-cartel agreements)	Legal basis used
2018					
2017					
2016					
2015					
2014					
2013					
2012					

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

19. In the set of your investigations where international enforcement cooperation would be feasible or likely (e.g., not the total universe of cases/investigations handled by your agency), please indicate the **types of international co-operation and their frequency** below.

Table 6.1 – Frequency in merger cases/investigations that involve international co-operation

(please tick the relevant box)

	Never	Seldom (< 20% of cases or investigations)	Occasionally (20% - 60% of cases or investigations)	Frequently (> 60% of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Co-ordinating with another agency on the timing of review and decision				

Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy coordination				
Public communication post decision (e.g. press release, public statements)				
Other (please specify)				

Table 6.2 – Frequency in *cartel* cases/investigations that involve international co-operation
(please tick the relevant box)

	Never	Seldom (< 20% of cases or investigations)	Occasionally (20% - 60% of cases or investigations)	Frequently (> 60% of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy coordination				
Public communication post decision (e.g. press release, public statements)				
Other (please specify)				

Table 6.3 – Frequency in *unilateral conduct / abuse of dominance* cases/investigations that involve international co-operation

(please tick the relevant box)

	Never	Seldom ($< 20\%$ of cases or investigations)	Occasionally ($20\% - 60\%$ of cases or investigations)	Frequently ($> 60\%$ of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy coordination				
Public communication post decision (e.g. press release, public statements)				
Other (please specify)				

Table 6.4 – Frequency in *other (e.g. non-cartel agreements)* cases/investigations that involve international co-operation

(please tick the relevant box)

	Never	Seldom ($< 20\%$ of cases or investigations)	Occasionally ($20\% - 60\%$ of cases or investigations)	Frequently ($> 60\%$ of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				

Sharing of public information/public statements				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy coordination				
Public communication post decision (e.g. press release, public statements)				
Other (please specify)				

5. Exchange of confidential information and confidentiality waivers (outside regional networks or organisations)

20. Please provide a summary of the **terms of the confidentiality** protections that apply to your agency.

21. What **types of information** is your agency authorized to share with other international competition agencies in the context of international cooperation? For example, can you share public information, non-public agency information, legally-protected confidential party or third party information? Does this differ as between cartels, mergers, and unilateral conduct/abuse of dominance cases/investigations? If so, please explain.

22. Under what conditions is the **transmission of confidential information** to an international competition agency possible in your jurisdiction? Is reciprocity a condition for sharing confidential information with other agencies? Does your competition agency allow the exchange of confidential information if equivalent protections are given from the requesting agency (i.e. downstream protection)? Does this differ as between cartels, mergers, and unilateral conduct/abuse of dominance cases/investigations? If so, please explain. Do you have any national law provisions which authorise the transmission of confidential information? Are the authorisations specific to competition law, or are they part of more general legal provisions? How often did you use these national provisions to exchange confidential information with other agencies?

23. What information (e.g., public information, non-public agency information, statutorily-protected confidential party or third party information) do you get most **benefit** from sharing with other agencies (either receiving or providing)? Please provide examples of cases/investigations in which an ability or inability to share confidential information benefited or impeded an investigation or affected the agencies' ability to co-ordinate sanctions or remedies.

24. Is your competition agency permitted to rely on **confidentiality waivers** from parties and third parties to use their confidential information in discussions with agency staff from international competition agencies? Do you actively seek confidentiality waivers or do you rely on the parties to come forward with an offer to waive their right to confidentiality? Do you use a standard form for confidentiality waivers?

25. Have you experienced **difficulties in obtaining confidentiality waivers** for international co-operation? If so, what issues have you encountered? What are the different incentives driving targets of investigations to provide waivers? Do you have any ways in which you can share confidential information without a waiver and without the party's consent? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

26. If your agency is in a position to obtain confidential information from another agency because this is permitted under the applicable rules or because the parties granted a confidentiality waiver, is there any **limitation on the uses** of that information (e.g., can it only be used for internal purposes by the agency, or can it also be used as evidence in court)?

6. Pros and cons of international co-operation between agencies outside regional networks or organisations

27. What **factors** does your agency consider in evaluating whether to request co-operation from another competition agency? What **factors** does your agency consider when it receives a request for co-operation from another competition agency?

28. Based on your experience, what have been the **advantages and disadvantages** of each type of co-operation referred to in Section 3 above (i.e., notifications; request for investigatory assistance; and enhanced co-operation mechanisms)? What are the advantages and disadvantages of different means of co-operation? Are some ways of cooperating more suitable or more effective for particular types of cases/investigations (merger, cartel or unilateral conduct/abuse of dominance), or particular jurisdictions, than others?

29. What are the **limitations** to international co-operation that you have encountered? (Please rank in terms of importance.) Are these limits *legal* or *practical* in nature? Are they specific to competition law or general under the constitution, legislation, case law or practice in your jurisdiction? Do they differ depending on

whether your agency is requesting co-operation from another competition agency or if it is the recipient of a co-operation request? What difficulties do such limitations create? Where are the **gaps**, if any, in current international co-operation arrangements? What other arrangements might fill those gaps? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

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

Table 7 – Limitations to effective international co-operation, importance and frequency
(please tick the relevant box)

	Ranking by importance (high / medium /low)	Never / Seldom (< 20% of cases or investigations)	Occasionally (20% - 60% of cases or investigations)	Frequently (< 60% of cases or investigations)
Lack of knowledge of another agency(ies) involvement				
Existence of a legal limit(s)				
Absence of waiver(s)				
Different legal standard(s) applied				
Other differences / inconsistencies between legal systems				
Dual criminality requirement (for cartels)				
Low willingness to co-operate				
Lack of trust in the other agency				
Different stages in the procedures				
Lack of resources/time				
Language/cultural differences				
Different time zones				
Other (please specify)				

30. Would the answers to the previous two questions be different for cases/investigations which involved international co-operation with an agency with which you have no history of international co-operation? What particular challenges do you face in such cases?

31. Are there **benefits** that would flow from removing these limitations? Are there **costs** that would flow from the removal of these limitations? If so, what are they? What in your jurisdiction is currently carried out less efficiently than might be possible if international co-operation were more effective? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation

experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

32. In what ways can **absence of international co-operation hinder an investigation**? Can you provide any examples of cases in which an absence of international co-operation has hindered an investigation? What were the circumstances? If possible, please provide case examples to illustrate your answers and distinguish between international cooperation experiences in merger, cartel and unilateral conduct/abuse of dominance cases/investigations.

33. Can you provide any **examples** of cases in which international cooperation would have been useful but could not or would not have been possible, so you did not make the request? What factors influenced your decision not to make a request? Describe the type of co-operation that would have been useful and the impact of its unavailability on your enforcement efforts. If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

7. How to improve the quality and intensity of international cooperation between agencies (outside regional networks or organisations)

34. Do you think that the current framework for international co-operation provides sufficient **incentives** to competition agencies and to businesses to co-operate effectively with enforcers from other jurisdictions? How can such incentives be created or strengthened? Would your answer be different with regards to international co-operation with an agency with which you have no history of international co-operation? What particular challenges do you face in such cases?

35. In what ways can international co-operation between competition enforcers be **improved**?

36. Under what conditions do you think the **exchange of confidential information** between agencies should be allowed during co-operation? What **safeguards** would you require to disclose confidential information in your possession to another agency? What safeguards would you be prepared to provide to receive confidential information held by another agency? Do you have any views on how to improve ways in which you obtain (i) confidential information from other agencies and (ii) confidentiality waivers from the parties?

8. Regional co-operation

37. Are you a member of a **regional network or organisation** that provides a platform for regional co-operation in competition enforcement cases/investigations (e.g., ECN, Caricom, WAEMU, Nordic Alliance)? In what ways does membership in this organisation facilitate co-operation? What types of co-operation take place? What information are you able to share? Can the information you receive from other regional members be used in your own investigations?

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

Table 8 – Overall frequency of co-operation within regional networks or organisations (types and ways)

(please tick the relevant box)

	Never	Seldom (< 20% of cases or investigations)	Occasionally (20% - 60% of cases or investigations)	Frequently (> 60% of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Sharing of leniency information, pursuant to a waiver				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating with another agency on dawn raids/searches				
Co-ordinating other aspects of investigations (e.g. timing of interviews and document demands; joint interviews)				
Sanction/remedy coordination				

Public communication post decision (e.g. press release, public statement)				
Other (please specify)				

38. What are the **advantages** and **disadvantages** of regional co-operation? What distinguishes the co-operation you are able to achieve within a regional network from co-operating internationally with agencies outside the network? Are there useful lessons from this regional cooperation that you think would be worth expanding to international cooperation with agencies outside the network?

9. OECD specific questions (for all OECD Members and 4 Recommendation Adherents, Brazil, Colombia, Romania and the Russian Federation)*

** Competition Committee Participants and observers and other non-OECD Members are welcome to answer the questions in this section 9 if they have suggestions on where the OECD should focus its efforts.*

39. Please describe your experience with the **implementation of the 2014 OECD Recommendation** concerning International Co-operation on Competition Investigations and Proceedings (the “Recommendation”). Were there specific actions taken to **make the Recommendation known** to staff within your agency or to other public sector bodies? Do you refer to the Recommendation when you co-operate with other agencies?

Please use table 9 to reply **how you implemented** clauses II to VIII of the Recommendation.

Table 9 – Implementation of Recommendation

Clauses of the Recommendation	Used (Yes /No)	If yes, when, in which circumstances and was it useful?
Commitment to Effective International Co-operation (Rec. II)		
Consultation and Comity (Rec. III and IV)		
Notification of Competition Investigations or Proceedings (Rec. V)		
Co-ordination of Competition Investigations or Proceedings (Rec.VI)		
Exchange of information in Competition Investigations or Proceedings (Rec. VII)		
Investigative assistance to another competition authority (Rec. VIII)		

40. What **challenges** did your agency face in the implementation of the Recommendation?

41. Do you have any suggestion on how to **improve the implementation** of Recommendation by relevant public actors in your jurisdiction?

42. Do you have any suggestion on how to **boost the dissemination** of Recommendation among relevant public and non-public actors in your jurisdiction?

43. Do you consider the Recommendation still **relevant**? In light of any problems or gaps in international co-operation that you have identified in your experience, how could the Recommendation be **revised or improved**?

44. Based on your experience and answers, in what areas should the OECD **focus in the next 12 – 24 months**? How would you like to see any output (including co-operation instruments) develop?

In addition to providing a narrative answer, please also fill out the table below. **The fields marked in bold are instructions to the Competition Committee in the Recommendation (section X), which have not been implemented so far**.²⁰⁴

Table 10 – Future work for the OECD

(please tick the relevant box)

Outputs	Low priority	Medium Priority	High priority
Revision of the Recommendation			
New OECD Recommendation on International Co-operation			
Model provisions 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 (section X.3)			

²⁰⁴ See Note by the Secretariat - DAF/COMP/WP3(2019)3

Model bilateral co-operation agreement reflecting the principles endorsed by Adherents in the Recommendation (section X.4)			
Model multilateral co-operation agreement reflecting the principles endorsed by Adherents in the Recommendation (section X.4)			
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 enforcement actions (section X.5)			
Bilateral Model Agreement on Information Exchange			
Multilateral Model Agreement on Information Exchange			
Model Convention on International Co-operation			
Model Confidentiality Waiver			
Development of a formal system for the mutual recognition of competition decisions			
Model Competition Chapter for Free Trade Agreements			
Other (please specify)			

10. ICN specific questions

45. How helpful has the following ICN work been to international cooperation?

Table 11 – Usefulness of ICN work to international co-operation

(Please tick the relevant box)

Outputs	Low	Medium	High
Framework for Merger Review Co-operation including cooperation contact list (ongoing)			
Recommended Practices for Merger Notification and Review Procedures, Interagency Enforcement Cooperation (2018)			
Practical Guide to International Enforcement Cooperation in Mergers (2015)			

Merger Cooperation & Information Exchange Types of Information (2019)			
Model Merger Confidentiality Waiver			
Framework for Cooperation and Information-Sharing in Cartel Investigations including cooperation contact list (ongoing)			
Anti-Cartel Enforcement Manual Chapter 9: International Cooperation and Information Sharing (2013)			
ICN Cartel Working Group Charts Summarizing Information Sharing Mechanisms (ongoing)			
Leniency Waiver Template			
Online Training Module: Introduction to International Cooperation			

46. Based on your experience and answers, in what areas would you like to see **future discussion or work on international enforcement cooperation** being carried out by the ICN Working Groups in the next 12 – 24 months? How would you like to see any output (including co-operation instruments) develop?

47. What aspects of ICN networking, work product (please identify), and events have been the most helpful in fostering co-operation, whether case specific or in the broader sense?

48. What else can ICN do to help foster co-operation in the broader sense – i.e., not limited to case co-operation?

Annex C. 2014 OECD Recommendation

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

Adopted on 16/09/2014

<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408>

The Recommendation provides guidance as to how governments can ensure policy and enforcement responses by competition authorities around the world are consistent with each other, even in times of global crisis. For further information on this Recommendation and its relevance to COVID-19 response and recovery, see the background information below.

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.

Annex D. Overview of other legal models for enforcement co-operation

Overview of Annex

This Annex provides a high-level overview of some possible models that could be further considered as part of any work to address legal barriers to enforcement co-operation. It is not intended to be an exhaustive list and does not address the detail, pros or cons of the models. It outlines the following examples and models:

- the co-operation arrangement used by International Organization of Securities Commissions (IOSCO)
- updating the 2014 OECD Recommendation
- OECD Decision
- OECD model bi-lateral/multi-lateral agreement
- OECD facilitated international treaty, with the possibility of (bi-lateral or multi-lateral) competent authority agreements on specific topics within a sub-set of parties.

IOSCO model

IOSCO developed a Multi-lateral Memorandum of Understanding (MMOU) concerning consultation, co-operation and exchange of information. The IOSCO MMOU allows a high level of co-operation between securities or financial regulators, enabling them to effectively provide mutual assistance. In particular,

Under the terms of the MMOU, the securities regulators can provide information and assistance, including records:

- *To enable reconstruction of all securities and derivatives transactions, including records of all funds and assets transferred into and out of bank and brokerage accounts relating to these transactions;*
- *That identify the beneficial owner and controller of an account;*
- *For transactions, including the amount purchased or sold; the time of the transaction; the price of the transaction; and the individual and the bank or broker and brokerage house that handled the transaction; and*

Providing information identifying persons who beneficially own or control companies;

Taking or compelling a person's statement or, where permissible, testimony under oath, regarding the potential offence²⁰⁵

Currently, the IOSCO MMOU has 115 signatories, and a number of information requests, which have been constantly increasing since 2003, reaching 3330 requests in 2016.

²⁰⁵ IOSCO (2020_[220]), <https://www.iosco.org/about/?subsection=mmou>.

Updating the 2014 OECD Recommendation

The Monitoring Report of the 2014 OECD Recommendation (anticipated 2021) could be an opportunity to identify gaps in the legal framework set out in the 2014 OECD Recommendation and/or modify the legal nature of some/all of the provisions to turn the 2014 OECD Recommendation into a legally-binding OECD Decision (see below). An OECD Decision would have the same legal effect as a multi-lateral treaty.

OECD Decision

Member countries are bound under international law by the provisions of Decisions by virtue of their membership as provided for in Article 5 a) of the OECD Convention. Members are obliged to implement OECD Decisions and must take the measures necessary for such implementation.²⁰⁶

Non-Members can participate in the discussions and adhere to a Decision at the time of its adoption by the Council or at any time thereafter through an exchange of letters. In this case, the Decision would become legally binding on those non-Member adherents.

OECD model bi-lateral/multi-lateral agreement

A model bi-lateral/multi-lateral agreement is not legally binding but its systematic use can create a harmonised approach to the general practice. The provisions of the model agreements become binding through the entry into force of the bi-lateral or multi-lateral treaties and/or agreements using it as a model. It would be possible to develop commentaries, which could become the accepted guide to interpreting and applying the provisions of the bi-lateral and multi-lateral treaties or agreements using it as a model.

A model agreement can be drafted by an OECD committee (or one of its subsidiary bodies) with the participation of interested non-Members or through an ad hoc group. It is possible to elevate the model agreement to a legal instrument, for example, the OECD Council can adopt a Recommendation that Adherents (both Members and non-Members having adhered to it at the time of adoption or thereafter) use the model in their bi-lateral competition treaties. For an example of OECD model agreement, see *Box 21.1*.

Box 21.1. Example OECD Model Agreement: Model Tax Convention on Income and on Capital

[Model Tax Convention on Income and on Capital](#) (2017) (MTC) which serves to the basis for thousands of bi-lateral tax treaties (and which actually has similar provisions as the Convention on Mutual Administrative Assistance in Tax Matters (MAAC)). It is coupled to the MTC with an [OECD Recommendation](#), which recommends the use of the MTC.

²⁰⁶ The existing 87 OECD Decisions can be found here: <https://legalinstruments.oecd.org/en/instruments?mode=advanced&typeIds=1&dateType=adoption>

OECD facilitated international treaty (implemented through bi-lateral/multi-lateral competent authority agreements)

There are two levels of law applying to treaties that need to be distinguished:

- first, the instrument would be subject to the law regulating international treaties, in particular the [1969 Vienna Convention on the Law of Treaties](#) (VCLT). It would be legally binding on the Parties that have to perform it in good faith. Also, unless stated otherwise, its interpretation and amendment would be based upon the rules set out in the VCLT.
- second, each country has domestic rules that apply in relation to how a treaty is ratified²⁰⁷ and comes in to force. In particular, in order to proceed to ratification many countries have to complete domestic processes in order to secure parliamentary approval for ratification.

See for example Convention on Mutual Administrative Assistance in Tax Matters (MAAC), Box 21.2.

Box 21.2. Example OECD treaty, with additional implementation possible through bi-lateral/multi-lateral competent authority agreements: Convention on Mutual Administrative Assistance in Tax Matters (MAAC)

The [MAAC](#) is an international treaty. It has binding provisions on all Parties vis-à-vis all the other Parties (not taking into account specific bi-lateral relations). The MAAC, by virtue of its Article 6, offers the possibility for Parties to agree mutually to exchange information automatically with other parties they have selected.

In addition to the treaty, the OECD developed a model bi-lateral agreement and two multi-lateral competent authority agreements ([MCAA CRS](#) and [MCAA CBC](#)), which allow parties to the MAAC to sign a declaration on joining the MCAA with the option to tailor the implementation (each signatory sets up a list of jurisdictions with which to exchange information and to create a “relationship” jurisdictions need to include each other in the list).

The MAAC has a co-ordinating body (Article 24 (3) and (4)) responsible for monitoring the treaty (e.g. recommending revisions or amendments; furnishing opinions on the interpretation of the provisions; coordinating the implementation of the MAAC).

This treaty and related agreements provide a model that enables certain types of co-operation (in this case automatic information exchange) to be agreed using one international agreement, but one that provides adhering parties with the option to agree to some forms of co-operation with only selected parties.

²⁰⁷ That is, the international act whereby a State establishes on the international plane its consent to be bound by a treaty (Article 2 (1) (b) of the VCLT)

Annex E. Other international co-operation networks and international organisations working on international enforcement co-operation

Overview of Annex

In addition to the OECD, ICN and regional networks and organisations discussed in Section 19. *Regional enforcement co-operation* and outlined in detail in *Annex J: Regional co-operation networks and organisations*, there are other important organisations, networks and alliances that support international enforcement co-operation.

Instead of regional proximity, some networks are based on other connecting factors, such as trade, economics, development, maturity, political and historical connections, language and international relations. Examples include:

- the more formalised BRICS network (Brazil, the Russian Federation, India, China and South Africa) (see below);
- UNCTAD (see below)
- the informal and formal arrangements between Australia, Canada, UK, US and New Zealand, including the newly executed 2020 Multi-lateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC). (ACCC et al., 2020_[103]) The MMAC is outlined in further detail in *Annex E: Examples of second-generation agreements*

BRICS

In 2016, Brazil, the Russian Federation, India, China and South Africa signed an MoU, in order to create a framework for multi-lateral co-operation and to set up an institutional partnership, aimed at:

...promoting and strengthening the co-operation in competition law and policy of the Parties through exchanges of information and best practices, as well as through capacity-building activities. (BRICS, 2016_[60])

In addition, the MoU provides for the establishment of Working Groups to conduct joint research on matters of common interest, with a comprehensive approach. A BRICS Coordinating Committee on Antimonopoly Policy was also established. Its objectives, among others, are to identify areas of joint activity and promote joint initiatives, identify similar urgent problems of competition development in socially significant markets and form agendas and sum up the work of the BRICS Working Groups.²⁰⁸

²⁰⁸ See <http://en.fas.gov.ru/international-cooperation/brics/brics-coordination-committee-on-antimonopoly-policy.html>.

UNCTAD - an international organisation working to improve competition co-operation

The OECD's Competition Committee and ICN both have liaison roles established with UNCTAD in order to help communication and co-ordination on issues of mutual interest. In considering the potential initiatives outlined in *Section 21. Proposed future areas of focus to improve international enforcement co-operation*, and in order to avoid duplication, it is worth understanding the role and work of UNCTAD in relation to fostering international co-operation between competition authorities, particularly its role in supporting developing countries. Further regional international co-operation efforts are considered in *Section 19. Regional enforcement co-operation* in relating to regional co-operation networks and organisations.

In recent years, UNCTAD has also undertaken initiatives to support international co-operation. Following the recommendations of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy at its sixteenth session in July 2017, the UNCTAD Secretariat 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 (hereafter "UN Set on Competition"), adopted by the United Nations General Assembly in 1980 (UNCTAD, 2000_[104]). Every five years a so-called United Nations Review Conference is held to review the UN Set on Competition. Section F of the UN Set on Competition is dedicated to international measures to eliminate restrictive practices which may adversely affect international trade, particularly that of developing countries, and the economic development of these countries.

In 2018-2019, the DGIC took stock of the work done by UNCTAD as well as other international organisations such as the ICN and the OECD in promoting international co-operation and co-ordinated the drafting of a set of guidelines aimed at facilitating the implementation of the recommendations under Section F of the UN Set on Competition by UNCTAD member countries.

The 18th session of the UNCTAD IGE on Competition Law and Policy (October 19-23, 2019) approved the document Guiding Policies and Procedures under Section F of the UN Set on Competition ("Guidelines") (UNCTAD, 2018_[105]). These Guidelines are particularly targeted to 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 the Annex to the Guidelines, to avoid duplication, enhance complementarity between the different organisations and, at the same time, ensure consistency with the existing ICN and OECD recommendations. In addition, the Guidelines do not contemplate additional formal co-operation mechanisms or toolkits, in an effort to limit potential co-operation costs especially for younger agencies. The Guidelines are divided in three sections: 1) guiding principles; 2) toolkit for co-operation in competition cases; and 3) the role of UNCTAD in facilitating co-operation under Section F of the UN Set on Competition.

- The first section on **guiding principles** outlines key aspects of co-operation such as the benefits and costs of co-operation; the circumstances under which co-operation can be beneficial; the importance of mutual trust; the different levels of co-operation that might be appropriate for each case; and the importance of safeguarding confidential information.

- The second section illustrates **co-operation mechanisms** such as the exchange of non-confidential information, or the use of confidentiality waivers provided by parties.
- The third section highlights the possible areas in which the **UNCTAD Secretariat** may provide **support and assistance** to competition authorities: for instance: 1) by facilitating consultations among competition authorities; providing guidance - especially for authorities from developing countries and countries with economies in transition - with regard to confidentiality assurances and any use of information shared in the course of such consultation; and 2) maintaining a list of contact persons who may facilitate international co-operation at each Member Country's authority.

The Guidelines will be discussed at the UN Eighth Review Conference to be held in 2020, with the aim that they will be adopted and promulgated by the UN.

Annex F. Examples of second-generation agreements

Overview of Annex

This Annex provides greater detail on the existing second-generation agreements and arrangements that allow for the exchange of confidential information, enhanced co-operation, and investigative assistance,²⁰⁹ often referred to as “second-generation agreements”. It provides context to the Survey discussion of legal bases of co-operation and second-generation agreements. This Annex does not contain information about MLATs, or about regional agreements or networks that facilitate investigative assistance, which are discussed in *Annex J: Regional co-operation networks and organisations* (with the exception of the Nordic Alliance and the Australian/New Zealand arrangements, which are in both, as they are both regional and second-generation style regional agreements).

While there are many benefits to second-generation agreements, there are few examples of such agreements (exactly how many is a question of definition, but it is up to seven), although some additional agreements are currently being negotiated. The language used and what is covered by these second-generation agreements differs, based on the legislative contexts and requirements of the negotiating parties. *Annex H: National laws that enable deeper enforcement co-operation* provides additional detail on the national laws authorising second-generation agreements. Most second-generation agreements, however, address a core set of common elements. These include: identification of the scope of assistance; the treatment of confidential information; treatment of privileged information; the manner in which evidence is to be collected; how information may be used; procedures for making and responding to requests; and limitations or exclusions for certain types of information and discretion afforded the responding authority.

The following section outlines these elements and cites to relevant provisions in existing agreements as examples. The concluding section of this Annex identifies the key areas addressed in each of the existing second-generation agreements, and provides links to the agreements for those desiring more information.

Common elements of second-generation agreements and arrangements

Second-generation agreements can take several forms. Some are binding agreements entered into by governments, and others are authority arrangements. For the sake of simplicity in this Annex, all second-generation documents are referred to as either “second-generation agreements” or “agreements”

Second-generation agreements commonly address:

- **Scope of assistance.** The scope of assistance permitted differs by agreement. Some jurisdictions permit solely the provision of information in the transmitting

²⁰⁹ Investigative assistance is described in *Section 9.1.7: Investigative assistance*.

authority's files, whereas others provide for more extensive investigative assistance, through the use of: compulsory requests for documents; search warrants; and/or oral examinations or depositions, depending on the legal tools employed in the jurisdiction. In some cases, the agreement's focus is on the type or category of information sought, and in others it is on the nature of the assistance requested.

- For examples, see: Australia-Japan, Paragraph 4; Canada-Japan, Paragraph 4; Canada-New Zealand, Paragraphs 9 and 10; New Zealand-Australia, Paragraph 11; EU-Switzerland, Article 7; US-Australia, Article II; Nordic Alliance, Articles 4 and 5
- **Protections for confidential information shared.** All agreements provide that information shared will be afforded confidential treatment, subject to exceptions such as when the information is used in the enforcement proceeding for which it was requested.
 - For examples, see: Australia-Japan, Paragraph 10; Canada-Japan, Paragraph 7; Canada-New Zealand, Paragraphs 14-16; New Zealand-Australia, Paragraphs 15-16; EU-Switzerland, Article 9; US-Australia, Article VI; Nordic Alliance, Art. 3
- **Handling privileged information.** These provisions may address the treatment of privileged information, e.g., attorney-client or legal professional privilege, particularly in situations where the scope of the privilege differs among signatories.
 - For examples, see: Canada-New Zealand, Paragraphs 12 and 15; New Zealand-Australia, Paragraphs 16; EU-Switzerland, Article 7; US-Australia, Article III
- **How information may be used by the receiving authority.** All second-generation agreements permit the information transmitted to be used for the requested purpose. Additionally, some address whether and how the information may be used in the enforcement of competition law provisions other than those that were the subject of the request and laws other than competition laws. Certain agreements also address whether the information may be used for criminal enforcement purposes.
 - For examples, see: Australia-Japan, Paragraph 10; Canada-Japan, Paragraphs 6 and 7; Canada-New Zealand, Paragraphs 11, 14-16; New Zealand-Australia, Paragraphs 12, 15, and 16; EU-Switzerland, Articles 8 and 10; US-Australia, Article VII; Nordic Alliance, Article 3
- **Procedures for requesting information from the other authority.** Certain second-generation agreements identify the level of detail required for a request and describe the entity or person to which the request should be directed.
 - For examples, see: Canada-Japan, Paragraphs 3 and 5; Canada-New Zealand, Paragraphs 7 and 8; New Zealand-Australia, Paragraphs 9 and 10; EU-Switzerland, Articles 7 and 12; US-Australia, Article III
- **Procedures for fulfilling the request.** Some second-generation agreements address whether the request will be executed under the law of the requested or the requesting party, whether officials of the requesting party may be present for the execution of the request, and/or have provisions related to reimbursement of costs incurred when providing certain types of investigative assistance.
 - For examples, see: New Zealand-Australia, Paragraph 12; US-Australia, Articles V and XII; Nordic Alliance, Article 5

- **Limitations or exclusions related to certain categories of information and discretion afforded the responding authority.** Due to differences in legal regimes, second-generation agreements will often identify limitations on the type of information that may be provided. They may exclude from provision categories of information such as: leniency applications, certain settlement-related information, information protected by grand jury secrecy, and merger notification documents. In many second-generation agreements, whether to provide the investigative assistance or the confidential information requested remains in the discretion of the authority receiving the request.
 - For examples, see: Canada-Japan, Paragraphs 4 and 6; Canada-New Zealand, Paragraphs 14-16; New Zealand-Australia, Paragraph 13; EU-Switzerland Article 7; US-Australia, Articles I, II III and IV

Examples of bi-lateral second-generation agreements and arrangements

- **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)** (Competition Bureau, Canada, Fair Trade Commission, Japan, 2017_[106])
 - Arrangement covers: Purpose; Definitions; Communications under this Arrangement; Communication of Information in Enforcement Activities; Requests for Information; Communication of Information; Protection and Use of Information; Interpretation and Application; Legal Effect; Final Matters
- **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)** (Competition Bureau, Canada, Commerce Commission, New Zealand, 2016_[107])
 - Arrangement covers: Purpose of this arrangement; Definitions; Requests for information and/or assistance; Responding to requests; Protection and use of information [including privilege]; Commencement, amendment and termination.
- **Co-operation Arrangement between the Australian Competition and Consumer Commission and the Fair Trade Commission of Japan (2015)** (ACCC, Australia, JFTC, Japan, 2015_[108])
 - Arrangement covers: Purpose; Definitions; Notification; Co-operation and Information Exchange in Enforcement Activities; Co-ordination of Enforcement Activities; Co-operation Regarding Anticompetitive Activities in the Country of a Competition Authority that Adversely Affect the Interests of the Other Competition Authority; Avoidance of Conflicts over Enforcement Activities; Transparency; Consultations; Confidentiality of Information; Miscellaneous; Commencement, Review, Modification and Termination
- **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)²¹⁰

- Arrangement covers: Purpose of this Arrangement; Definitions; Requests for information and/or assistance; Responding to requests; Protection and use of information; Commencement, amendment and termination
- **Agreement between the European Union and the Swiss Confederation concerning co-operation on the application of their competition laws (2013)**²¹¹
 - Agreement covers: Purpose; Definitions; Notifications; Co-ordination of enforcement activities; Conflict avoidance (negative comity); Positive comity; Exchange of information; Use of information; Protection and confidentiality of information; Information of the competition authorities of the Member States and the EFTA Surveillance Authority; Consultations; Communications; Existing law; Entry into force, amendment and termination
- **United States-Australia (1999), The Australia - United States Mutual Antitrust Enforcement Assistance Agreement** (Australia - USA, 1999_[61])
 - Agreement covers: Definitions; Object and Scope of Assistance; Requests for Assistance; Limitations on Assistance; Execution of Requests; Confidentiality; Limitations on Use; Changes in Applicable Law; Taking of Testimony and Production of Documents; Search and Seizure; Return of Antitrust Evidence; Costs; Entry into Force and Termination

Examples of a multi-lateral second-generation agreements

Some regional and multi-lateral networks and agreements also allow for the exchange of confidential information, enhanced co-operation and investigative assistance. Those networks and agreements are discussed in detail in *Annex J Regional co-operation networks and organisations*.

One example of a multi-lateral agreement that functions as a second-generation agreement is the Nordic Alliance's Agreement on Cooperation in Competition Cases between the Nordic Countries (2017) (Denmark, Finland, Iceland, Norway and Sweden, 2017_[109]). Member governments are: Denmark, Iceland, Finland, Norway, and Sweden (see also *Annex J: Regional co-operation networks and organisations*).

- Agreement covers: Definitions; Notifications of competition investigations, proceedings and mergers; Exchange of information; Requests for information; Inspections; Formal requirements; Entry into force; Revision and termination; Depositary

²¹⁰ This is part a broader series of agreements between the two nations that support greater harmonization and understanding. See *Annex J: Regional co-operation networks and organisations* for further information on ANZCERTA (ACCC, Australia, Commerce Commission, New Zealand, 2013_[223]).

²¹¹ Consistent with the Swiss authorising legislation, provided in *Annex H: National laws that enable deeper enforcement co-operation*, this agreement is limited to the exchange of information in the parties' files (EU – Switzerland, 2013_[62])

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

Structure of the MMAC

The MMAC²¹² is structured as an ‘in-principle’ non-binding multi-lateral memorandum of understanding (the Framework MOU), which attaches a model bi-lateral/multi-lateral agreement as an annexure (the Model Agreement).

The second-generation component of the MMAC is contained in the Model Agreement annexed to the Framework MOU.²¹³ As these are yet to be executed (as at December 2020), the MMAC has been considered separately to the executed agreements in the previous section.

All parties have agreed in the MMAC to implement the Model Agreement between themselves bi-laterally (or multi-laterally) in as close as possible a form. As noted by the FTC:

*The Framework aims to strengthen cooperation among the signatories and provides the basis for a contemplated series of agreements that would permit sharing confidential information and using compulsory process to aid each other’s antitrust investigations.*²¹⁴

This structure was developed to allow for the differences between the competencies and legal powers of each authority (for example, only some agencies can issue a warrant on behalf of a counterpart authority), while retaining a ‘standard form’ agreement in order to set a public benchmark and promote conformity. As the preamble notes, the:

“[The] respective jurisdictions all have some form of information sharing legislation that allows for sharing of confidential information in certain circumstances and similar competition law enforcement regimes, including criminal cartel provisions”.

²¹² See MMAC (ACCC et al., 2020_[103])

²¹³ CMA press release available at <https://www.gov.uk/government/news/cma-to-increase-competition-cooperation-with-international-partners> (UK CMA, 2020_[224])

ACCC press release available at <https://www.accc.gov.au/media-release/competition-agencies-to-coordinate-on-cross-border-investigations-0> (ACCC, 2020_[225])

FTC press release available at <https://www.ftc.gov/news-events/press-releases/2020/09/ftc-chairman-simons-signs-antitrust-cooperation-framework> (US FTC, 2020_[211])

DOJ press release available at <https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-signs-antitrust-cooperation-framework-australia> (US DoJ, 2020_[226])

Consumer Commission press release available at <https://comcom.govt.nz/news-and-media/media-releases/2020/commerce-commission-signs-multi-lateral-framework-enhancing-international-cooperation-on-competition-enforcement> (New Zealand Commerce Commission, 2020_[227])

Competition Bureau press release available at <https://www.canada.ca/en/competition-bureau/news/2020/09/competition-bureau-strengthens-relationship-with-five-foreign-counterparts-to-enhance-cross-border-enforcement.html> (Competition Bureau, Canada, 2020_[228])

²¹⁴ See, FTC Press Release, September 2, 2020, (US FTC, 2020_[211]).

The potential benefits of this multi-lateral arrangement between the MMAC members mirrors many of those respondents noted can arise from regional relational networks and organisation (see *Section 19.4: How regional agreements facilitate enforcement co-operation: advantages and disadvantages of regional enforcement co-operation*) and demonstrates that these benefits can potentially be obtained outside of regional arrangements.

The Framework MOU sets out the types of informal co-operation and assistance that the parties have agreed to provide to each other. This includes:

- exchanging information on the development of competition issues, laws, and policies
- exchanging experience on competition advocacy and outreach
- developing authority capacity and effectiveness
- sharing best practices by exchanging information and experiences
- collaborating on projects of mutual interest
- exchanging investigative information already permitted to be disclosed by law.

In practice, this kind of co-operation makes up the majority of day-to-day cooperation between authorities and can technically occur without an agreement. However, the agreement provides structure to the relationship and further comfort around confidentiality.

The MMAC only relates to co-operation related to competition matters, but does allow for parties to make agreements beyond competition matters – clause 4.4 of the Framework 2 permits parties to include additional matters when negotiating agreements based on the Model Agreement.

Model Agreement

The Model Agreement 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.

The types of investigative assistance contemplated by the Model Agreement 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.

Benefits of the MMAC according to the parties

The six parties to the MMAC share similar systems and have strong informal co-operation relationships. The MMAC will help to create consistent, next generation co-operation

agreements between the authorities. This will facilitate the sharing of confidential antitrust evidence, evidence collection and informal co-operation.

Where authorities already have pre-existing formal arrangements (such as between the ACCC and the NZCC), the benefits of the MMAC are primarily twofold. Firstly, it is an opportunity to fill any gaps not already satisfied by existing treaty arrangements. Secondly, the MMAC is an impetus to reflect on and improve current informal co-operation relationships. For example, the Framework MOU promotes and supports the exchange of information like case theories, theories of harm and investigative techniques.

Annex G. Key OECD and ICN international enforcement co-operation documents and resources

This Annex is a list of the key OECD and ICN international enforcement co-operation documents and resources as at December 2020.

Table A G.1. Key OECD international enforcement co-operation documents and resources

Year	Title	Link to page or document
General enforcement co-operation		
2020	OECD inventory of international co-operation agreements between competition authorities (MoUs)	http://www.oecd.org/daf/competition/inventory-competition-agency-mous.htm
2015	OECD inventory of international co-operation agreements on competition	http://www.oecd.org/competition/inventory-competition-agreements.htm
2014	Challenges of International Co-operation in Competition Law Enforcement	https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf
2014	Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings	https://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf
Cartels		
2019	Recommendation of the Council concerning Effective Action against Hard Core Cartels	https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452
2005	Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations	https://legalinstruments.oecd.org/en/
Mergers		
2013	Report on Country Experiences with the 2005 OECD Recommendation on Merger Review	https://www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf
2005	Recommendation of the Council on Merger Review	https://www.oecd.org/daf/competition/mergers/40537528.pdf

Table A G.2. Key ICN international enforcement co-operation documents and resources

Year	Title	Link to page or document
General enforcement co-operation		
2019	Lessons to Be Learnt from the Experience of Young Competition Agencies	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf
2018	Training on Demand, module "Introduction to International Co-operation"	https://www.internationalcompetitionnetwork.org/training/intro-cooperation/
Cartels		
2020	Guidance on Enhancing Cross-Border Leniency Cooperation	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf
2016	Proposal for Establishing the ICN Framework for Promotion of Sharing Non-Confidential Information for Cartel Enforcement	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_nonConfidentialInfoFramework.pdf
2013	Anti-Cartel Enforcement Manual, Chapter on International Cooperation and Information Sharing	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMInternationalCooperationInfoSharing.pdf

Year	Title	Link to page or document
2012	Charts Summarizing Information Sharing Mechanisms	https://www.internationalcompetitionnetwork.org/working-groups/cartel/information-sharing/
2007	Cooperation between Competition Agencies in Cartel Investigations	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_Cooperation.pdf
2005	Template for Waivers of Confidentiality in Cartel Investigations	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_ModelWaiver.pdf
Mergers		
2017	ICN Recommended Practices for Merger Notification and Review Process	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf
2015	Practical Guide to International Enforcement Cooperation in Mergers	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf
2012	International Competition Network's Framework for Merger Review Cooperation	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_FrameworkforMergerReviewCooperation.pdf
2005	Template for Waivers of Confidentiality in Merger Investigations	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_ModelWaiver.pdf
2002	Guiding Principles For Merger Notification and Review	https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidingPrinciples.pdf

Annex H. National laws that enable deeper enforcement co-operation

Overview of Annex

This Annex is intended to provide examples of national laws that create a legal bases of co-operation, specifically to identify the key provisions of national laws that:

- establish information sharing gateways that enable competition authorities to exchange confidential information under certain circumstances without the requirement to seek prior consent from the source of the information;
- enable authorities to provide investigative or legal assistance (for example, national laws required to allow for a jurisdiction to meet its obligations under an MLAT)
- enable jurisdictions to enter into second-generation-style agreements that enable deeper co-operation, such as information sharing, investigative assistance or other forms of enhanced co-operation (see *Annex F: Examples of second-generation agreements*).

The legislative excerpts are provided as an example of the types of national laws that exist. To understand their full context and how they operate is beyond the scope of this Report but likely worthy of further consideration if the Proposed New Focus Area 4 (relating to overcoming legal limitation on co-operation) is pursued by the OECD and/or ICN (see *Section 21.3: Table outlining proposed future areas of focus for OECD and ICN*).

National law provisions by country - alphabetical

Australia

The Australian information gateway is contained in Section 155AAA of the Competition and Consumer Act 2010.²¹⁵

Competition and Consumer Act 2010

Section 1: Protection of certain information

A Commission official must not disclose any protected information to any person except:

- (a) when the Commission official is performing duties or functions as a Commission official; or*
- (b) when the Commission official or the Commission is required or permitted by:*
 - (i) this Act or any other law of the Commonwealth; or*
 - (ii) a prescribed law of a State or internal Territory;*

²¹⁵

to disclose the information.

[...]

Section 12-14: Disclosure to certain agencies, bodies and persons

(12) If the Chairperson is satisfied that particular protected information will enable or assist any of the following agencies, bodies or persons:

[...]

(n) a foreign government body;

to perform or exercise any of the functions or powers of the agency, body or person, an authorised Commission official may disclose that protected information to the agency, body or person concerned.

(13) The Chairperson may, by writing, impose conditions to be complied with in relation to protected information disclosed under subsection (12).

Furthermore, the Mutual Assistance in Business Regulation Act 1992 (MABRA) (Australia, 2019_[110]) permits regulators, including the ACCC, to provide foreign counterparts with investigative assistance. It presents conditions, directions and limits regulators must comply to in rendering assistance.

Mutual Assistance in Business Regulation Act 1992

5 Object of Act

(1) The object of this Act is to enable Commonwealth regulators to render assistance to foreign regulators in their administration or enforcement of foreign business laws by obtaining from persons relevant information, documents and evidence and transmitting such information and evidence and copies of such documents to foreign regulators.

[...]

The ACCC has the ability to enter into second-generation agreements if they reflect the remit of its powers under the CCA and any other relevant Australian legislation.

Canada

Canada's information gateway is established in Section 29 of the Competition Act, (Canada Justice Laws, 1985_[111]) and relates to the disclosure of confidential information. The exception to the prohibition of disclosure "for the purposes of the administration or enforcement of this Act" allows information that is considered confidential under the Act to be communicated to a foreign counter part where the purpose is for the administration or enforcement of the Act (e.g., where the communication of the information would advance a specific Bureau investigation).

Competition Act

Section 29: Confidentiality

29 (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

- (a) *the identity of any person from whom information was obtained pursuant to this Act;*
- (b) *any information obtained pursuant to section 11, 15, 16 or 114;*
- (b.1) *any information obtained under any of sections 53.71 to 53.81 of the Canada Transportation Act;*
- (c) *whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;*
- (d) *any information obtained from a person requesting a certificate under section 102; or*
- (e) *any information provided voluntarily pursuant to this Act.*

Section 30

[...]

Agreements respecting mutual legal assistance:

- a) *the laws of the foreign state that address conduct that is similar to conduct prohibited or reviewable under this Act are, in his or her opinion, substantially similar to the relevant provisions of this Act, regardless of whether the conduct is dealt with criminally or otherwise;*
- b) *any record or thing provided by Canada under the agreement will be protected by laws respecting confidentiality that are, in his or her opinion, substantially similar to Canadian laws;*
- c) *the agreement contains provisions in respect of*
 - (i) *the circumstances in which Canada may refuse, in whole or in part, to approve a request, and*
 - (ii) *the confidentiality protections that will be afforded to any record or thing provided by Canada;*
- (c.1) *the agreement contains one of the following undertakings by the foreign state:*
 - (i) *that any record or thing provided by Canada will be used only for the purpose for which it was requested, or*
 - (ii) *that any record or thing provided by Canada will be used only for the purpose for which it was requested or for the purpose of making a request under any Act of Parliament or under any treaty, convention or other international agreement to which Canada and the foreign state are parties that provides for mutual legal assistance in civil or criminal matters;*
- d) *the agreement also contains the following undertakings by the foreign state, namely,*
 - (i) *that it will provide assistance to Canada comparable in scope to that provided by Canada,*
 - (ii) *[Repealed, 2020, c. 1, s. 22]*
 - (iii) *that any record or thing provided by Canada will be used subject to any terms and conditions on which it was provided, including conditions respecting applicable rights or privileges under Canadian law,*

(iv) *that, at the conclusion of the investigation or proceedings in respect of which any record or thing was provided by Canada, the foreign state will return the record or thing and any copies to Canada or, with the consent of Canada, return the record or thing to Canada and destroy any copies,*

(v) *subject to paragraph (c.1), that it will, to the greatest extent possible consistent with its laws, keep confidential any record or thing obtained by it pursuant to its request, and oppose any application by a third party for disclosure of the record or thing, and*

(vi) *that it will promptly notify the Minister of Justice in the event that the confidentiality protections contained in the agreement have been breached; and*

e) the agreement contains a provision in respect of the manner in which it may be terminated.

Separately, the Bureau published an Information Bulletin on the Communication of Confidential Information Under the Competition Act in which it provides that:

[...] [i]n all cases where confidential information is communicated to a foreign authority, the Bureau seeks to maintain the confidentiality of the information through either formal international instruments or assurances from the foreign authority. The Bureau also requires that use of the confidential information by the foreign authority be limited to the specific purposes for which it is provided. (Competition Bureau, 2013_[112])

Denmark

Two provisions of Denmark's Competition Act (Denmark, 2018_[113]) serve as information gateways. Section 17 (1) and (2) govern information sharing with EFTA member states, while Section 18a relates to countries outside of the EU.

Competition Act

Section 17(1)-(2) – EFTA

(1) The Competition and Consumer Authority may demand all the information, including accounts, accounting records, transcripts of books, other business documents and electronic data, which it deems necessary to carry out its tasks under this Act or to decide whether the provisions of this Act shall apply to a certain situation.

(2) With a view to applying Articles 101 and 102 TFEU or Articles 53 or 54 of the EEA Agreement, the information referred to in subsection (1) may also be demanded for use in the Competition and Consumer Authority's assistance to the European Commission and other competition authorities of the European Union or the EEA area.

Section 18(10)

The Competition and Consumer Authority may conduct inspections to grant assistance to the competition authorities in Sweden, Norway, Iceland, Finland, Greenland and the Faroe Islands in respect of the application of national competition rules by these authorities. Sections (1)-(8) above apply to such inspections.

Section 18a

(1) The Competition and Consumer Authority may, subject to reciprocity, disclose information covered by the Competition and Consumer Authority's duty of confidentiality to other competition authorities, if such information is necessary to assist the enforcement of the competition rules by these authorities, and if the Authority thereby fulfils Denmark's bi-lateral or multi-lateral obligations.

(2) The Minister for Industry, Business and Financial Affairs may lay down specific rules on the Competition Authority's disclosure to foreign authorities of information covered by the Competition Authority's duty of secrecy.

EU and EU Member States

The European Commission and member state national competition authorities can share confidential information within the EU in accordance with EU Regulation No 1/2003 (European Union, 2003_[114]) of 16 December 2002, articles 11 and 12. The Regulation is directly applicable in all member states and takes precedence over national legislation if there are inconsistencies. Articles 103 and 352 also provides the authority to enter into second-generation agreements.

The ECN+ Directive (EU, 2018_[115]), which will have to be transposed into national law by the member states by 2 April 2021, also will regulate co-operation between national authorities within the EU.

EU Regulation No 1/2003 of 16 December 2002***Article 11: Cooperation between the Commission and the competition authorities of the Member States***

1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.

[...]

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 or Article 82 of the Treaty.

[...]

Article 12: Exchange of Information

1. For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.

2. Information exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority. However, where national competition law is applied in the same case and in parallel to Community competition law and does not lead to a different outcome, information exchanged under this Article may also be used for the application of national competition law.

3. Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where:

— the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of Article 81 or Article 82 of the Treaty or, in the absence thereof,

— the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions.

Article 103(ex Article 83 TEC)

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article

Article 352 (ex Article 308 TEC)

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent

of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

Furthermore, the Council decision on the conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (European Commission, 2012_[116]) establishes the power to enter into second-generation agreements.

Finland

Competition Act

Section 40 (Finland, 2013_[117])

*Submitting a confidential document to the competition authority of another state[:]
The submitting of a confidential document in the possession of The Finnish Competition and Consumer Authority to a foreign competition authority is laid down in Section 30 of the Act on the Openness of Government Activities.*

Finnish Act on the Openness of Government Activities

Section 30 [unofficial translation] (Finland, 1999_[118])

*Provision of confidential information to a foreign authority and an international institution[:]
In addition to what is specifically provided by law, an authority may provide information on a confidential document to a foreign authority or international institution if the co-operation between the foreign and Finnish authorities is provided for in an international agreement binding on Finland or in a legal act binding on Finland.*

Germany

The German Act against Restraints of Competition (Bundesministerium der Justiz und für Verbraucherschutz, 2018_[119]) contains provisions that function as information gateways for both EU and non-EU member state competition agencies. The Act specifies that waivers of confidentiality are required exclusively with respect to merger proceedings.

Act against Restraints of Competition

Article § 50a(1) – Cooperation within the Network of European Competition Authorities

Article 12(1) of Regulation (EC) No 1/2003 authorises the competition authority to inform, for the purpose of applying Articles 101 and 102 of the Treaty on the Functioning of the European Union, the European Commission and the competition authorities of the other Member States of the European Union

- 1. of any matter of fact or of law, including confidential information and in particular operating and business secrets, and to transmit to them appropriate documents and data, and*
- 2. to request these competition authorities to transmit information pursuant to no. 1 above, and to receive and use in evidence such information.*
- 3. § 50(2) shall apply mutatis mutandis.*

Article § 50b – Other Co-operation with Foreign Competition Authorities

(1) The Bundeskartellamt shall have the powers pursuant to § 50a(1) also in other cases in which it cooperates with the European Commission or with the competition authorities of other states for the purpose of applying provisions of competition law.

(2) The Bundeskartellamt may only forward information pursuant to § 50a(1) with the proviso that the receiving competition authority

- 1. uses the information in evidence only for the purpose of applying provisions of competition law and in respect of the subject-matter of the investigation for which it was collected by the Bundeskartellamt, and*
- 2. maintains the confidentiality of the information and transmits such information to third parties only if the Bundeskartellamt agrees to such transmission; this shall also apply to the disclosure of confidential information in court and administrative proceedings.*

Confidential information, including operating and business secrets, disclosed in merger control proceedings may only be transmitted by the Bundeskartellamt with the consent of the undertaking which has provided that information.

(3) Provisions concerning legal assistance in criminal matters as well as agreements on administrative and legal assistance shall remain unaffected.

Iceland

Competition Law No 44/2005

Article 3 (Iceland, 2005_[120])

The Competition Authority shall provide assistance in implementing the competition provisions of other states and international organizations in accordance with mutual obligations provided for in international conventions to which Iceland is a party.

Article 35 (Iceland, 2005_[120])

The Competition Authority is authorised to deliver to competition authorities of other states information and data as necessary for the enforcement of Icelandic or foreign competition law in accordance with Iceland's obligations under international agreements.

On delivery of information and data to authorities referred to in Paragraph 1 the Competition Authority shall set as conditions that:

- a. the recipients will treat the information and data as confidential;*
- b. The information and data may only be used for the purposes provided for in the international agreement in question; and*
- c. the information and data may only be delivered to other parties with the consent of the Competition Authority and only for the purpose stated in the consent.*

The Minister for Commerce may establish further rules concerning the surrender by the Competition Authority of data and information to authorities and organisations according to Paragraph 1.

Ireland

Competition and Consumer Protection Act 2014

Section 23 (Irish Statute Book, 2014_[121])

Relationship of Commission with foreign competition or consumer bodies[:]

(1) The Commission may, with the consent of the Minister, enter into arrangements with a foreign competition or consumer body whereby each party to the arrangements may—

- a. furnish to the other party information in its possession if the information is required by that other party for the purpose of performance by it of any of its functions, and*
- b. provide such other assistance to the other party as will facilitate the performance by that other party of any of its functions.*

(2) The Commission shall not furnish any information to a foreign competition or consumer body pursuant to such arrangements unless it requires of, and obtains from, that body an undertaking in writing by it that it will comply with terms specified in that requirement, being terms that correspond to the provisions of any enactment concerning the disclosure of that information by the Commission.

(3) The Commission may give an undertaking to a foreign competition or consumer body that it will comply with terms specified in a requirement made of the Commission by the body to give such an undertaking where—

- a. those terms correspond to the provisions of any law in force in the state in which the body is established, being provisions which concern the disclosure by the body of the information referred to in paragraph (b), and*
- b. compliance with the requirement is a condition imposed by the body for furnishing information in its possession to the Commission pursuant to the arrangements referred to in subsection (1).*

Japan

Article 43-2 of the Antimonopoly Act (Japan, 1947_[122]) sets out the information gateway applicable to the JFTC.

Antimonopoly Act

Article 43-2

(1) The Fair Trade Commission may provide any foreign authority responsible for enforcement of any foreign laws and regulations equivalent to those of this Act (hereinafter referred to in this Article as a "Foreign Competition Authority") with information that is deemed helpful and necessary for the execution performance of the Foreign Competition Authority's duties (limited to duties equivalent to those of the Fair Trade Commission as provided in this Act; the same applies in the following paragraph); provided, however, that this does not apply if the provision of the relevant information is found likely to interfere with the proper execution of this Act or to infringe on the interests of Japan in any other way.

(2) Whenever the Fair Trade Commission provides information to a Foreign Competition Authority pursuant to the provisions of the preceding paragraph, the Fair Trade Commission must confirm the matters listed in the following items:

(i) that the relevant Foreign Competition Authority is capable of providing information equivalent to the information provided pursuant to the provisions of the preceding paragraph

(ii) that the secrecy of information provided as secret pursuant to the provisions of the preceding paragraph will be protected under the laws and regulations of the relevant foreign country to a degree that is equivalent to the degree to which the secrecy of such information is protected in Japan

(iii) that the information provided pursuant to the provisions of the preceding paragraph will not be used by the relevant Foreign Competition Authority for purposes other than those contributing to the performance of its duties

(3) Appropriate measures must be taken so that the information provided pursuant to the provisions of paragraph (1) is not used for criminal proceedings undertaken by a court or a judge in a foreign country.

New Caledonia

Article Lp 462-9 of the commercial code (New Caledonia, 2006^[123]) provides a succinct provision that enables sharing confidential information with select foreign governmental entities, subject to conditions.

I. - The Competition Authority of New Caledonia may, with regard to matters within its jurisdiction, send information or documents it holds, or which it gathers at their request, to the national French Competition Authority, to the European Commission or to the authorities of other States in the exercise of similar powers, subject to reciprocity, and provided that the competent foreign authority is subject to duties of professional confidentiality as rigorous as those required in New Caledonia.

New Zealand

Commerce Act 1986

99F Regulator-to-regulator co-operation arrangements

(1) *The Commission may, with the prior written approval of the Minister, enter into a co-operation arrangement with an overseas regulator.*

99 G (1): *Every cooperation agreement must [...]*

(c) *set out how any compulsorily acquired information that is provided may be used by the overseas regulator, and how it is to be kept secure.*

99I Providing compulsorily acquired information and investigative assistance

(1) *Following a request by a recognised overseas regulator made in accordance with a co-operation arrangement, the Commission may do either or both of the following:*

(a) *provide compulsorily acquired information to the recognised overseas regulator:*

(b) *provide investigative assistance to the recognised overseas regulator.”*

99K Notice to persons affected by provision of information [...]

(2) *However, the Commission need not notify a person as required by subsection (1) if—*

(a) *giving notice might compromise any investigation conducted, or to be conducted, by the Commission or any overseas regulator; or*

(b) *giving notice would prejudice the maintenance of the law (including the prevention, investigation, and detection of offences, and the right to a fair trial) in New Zealand or elsewhere; or*

(c) *it is not practicable in the circumstances to give notice to the person.*

Other authority comes from the Fair Trading Act 1986, Sections 48B to 48O (New Zealand, 1986_[124]). These sections are identical or near-identical provisions to the sections of the Commerce Act quoted above. 2012 Amendments to these Acts (and to the Credit Contracts and Consumer Finance Act and the Telecommunications Act) gave the NZCC the authority to provide compulsorily-acquired information and investigative assistance to overseas regulators with whom a co-operation agreement is in place.

Norway

The Norwegian Competition Act provides a general provision outlining its information gateway and recognizes that further, more detailed, regulations on the transfer of information may be issued (Norway, 2004_[125]).

Competition Act

Section 7: Transfer of confidential information to foreign competition authorities and international organizations

In order to fulfil Norway's international law agreements with a foreign state or international organization, the Norwegian Competition Authority may, without prejudice to the statutory duty of confidentiality, provide competition authorities in foreign states and international organizations with information necessary to promote Norwegian or the relevant state or organization's competition rules.

When disclosing information pursuant to the first paragraph, the Norwegian Competition Authority shall stipulate as a condition that the information may only be disseminated with the consent of the Norwegian Competition Authority and only for the purpose covered by the consent.

The second paragraph does not apply to the disclosure of information that takes place on the basis of an agreement between the Nordic countries on co-operation in competition matters.

The King may issue regulations on the transfer of information pursuant to the first to third paragraphs.

South Korea

Monopoly Regulation and Fair Trade Act

Article 36-2 (International Cooperation of the Fair Trade Commission) (South Korea, 2016_[126])

(1) The Government of the Republic of Korea may conclude a treaty to enforce this Act with any foreign government to the extent that it does not violate Korean Acts and does not infringe on interests of the Republic of Korea.

(2) The Fair Trade Commission may render assistance to a foreign government in enforcing its law according to the treaty concluded with the foreign government under paragraph (1).

(3) The Fair Trade Commission may render assistance to a foreign country at the request of the foreign country to enforce its law, although no treaty has been concluded with such foreign country under paragraph (1), only where the requesting country guarantees that it will comply with the Republic of Korea's request for assistance in the same or similar matters.

Sweden

Competition Act (Sweden, 2008_[127])

Legal assistance to an authority in another state

Chapter 5 Section 19

The Swedish Competition Authority may issue an obligation pursuant to Section 1, if it is so requested by an authority in a state with which Sweden has entered into an agreement on the provision of legal assistance in competition cases. If such an obligation is made the provisions in Sections 11-13 apply.

Chapter 5 Section 20

Upon a request from an authority in a state with which Sweden has entered into an agreement on the provision of legal assistance in competition cases, the Patent and Market Court may, upon application by the Swedish Competition Authority, decide

that the Swedish Competition Authority may perform an inspection of a company or some other person to assist the other state in its investigation of whether its rules on competition have been infringement, if

1. the conditions in Section 5, paragraphs 1-3, are satisfied, and
2. the practice which is being investigated is of such a nature that under the application of this Act or the competition rules of the European Union, the practice would have constituted an infringement of Chapter 2, Section 1 or 7 or Article 101 or Article 102 in the EC Treaty, if any of these regulatory frameworks had been applied to the practice.

In cases pursuant to first paragraph, the provisions in Sections 6-13 apply

Examination requested by the European Commission or an authority in another Member State

Chapter 5 Section 14

The provisions in Section 1 and Sections 11-13 concerning obtaining information also apply when the Swedish Competition Authority takes action at the request of a competition authority of another Member State in the European Union. Chapter 5 Section 15 The provisions in Sections 3-13 about inspections also apply to an application which the Swedish Competition Authority makes at the request of a competition authority of another Member State in the European Union.

Chapter 5 Section 16

The provisions in Section 6 and Sections 9-13 also apply when the Swedish Competition Authority at the request of the Commission of the European Community carries out an inspection as laid down in Section 22 (2) in the Council Regulation (EC) No 1/2003. However, the provision of Section 9, 28 Swedish Competition Act second paragraph, first sentence, does not apply if it may be feared that the relevance of the inspection would be impaired, if it was not commenced immediately. The first paragraph also applies when the Swedish Competition Authority, at the request of the Commission, undertakes an inspection pursuant to Article 12 (1) of the Council Regulation (EC) No 139/2004.

Note on Section 7: Secrecy pursuant to the Public Access to Information and Secrecy Act (2009:400):

The Ordinance with instructions to the Swedish Competition Authority, Section 7: Secrecy pursuant to the Public Access to Information and Secrecy Act (2009:400) does not prevent the Competition Authority, on its own initiative or upon request, from providing information to the competition authorities in Denmark, Finland, Iceland or Norway, when necessary to fulfil agreements between these countries and Sweden regarding cooperation in competition issues.

Information provided in accordance with the first paragraph may be associated with conditions for their use, if so required with reference to individuals' rights or from a public perspective.

Switzerland

Swiss Federal Act on Cartels and Other Restraints of Competition

Article 42b: Disclosure of data to foreign competition authorities

1. Data may only be disclosed to a foreign competition authority based on an act, an international agreement or with the consent of the undertaking concerned.
2. Without the consent of the undertaking concerned, the competition authorities may disclose confidential data, in particular business secrets, to a foreign competition authority on the basis of an international agreement only if:
 - a. the behaviour under investigation in the recipient state is also unlawful under Swiss law;
 - b. both competition authorities are investigating the same or related behaviour or transactions;
 - c. foreign competition authority uses the data only for the purpose of applying provisions of competition law or as evidence in relation to the subject matter of the investigation for which the competition authority requested the information;
 - d. the data is not used in criminal or civil proceedings;
 - e. the foreign procedural law safeguards party rights and official secrecy; and
 - f. the confidential data is not disclosed to the foreign competition authority in the context of an amicable settlement (Art. 29) or when assisting in the discovery and elimination of the restraint of competition (Art. 49a para. 2).
3. The competition authorities shall notify the undertaking concerned and invite it to state its views before transmitting the data to the foreign competition authority.

United Kingdom

Part 9 of the Enterprise Act 2002 (EA02) (Legislation UK, 2002_[128]), Section 243, creates an information gateway. It contains elements the CMA must consider before sharing confidential information with a foreign authority. An extract from the relevant Sections of the EA02 is reported below.

Enterprise Act 2002 (EA02)

Section 240: EU obligations

This Part does not prohibit the disclosure of information held by a public authority to another person if the disclosure is required for the purpose of an EU obligation.

Section 243: Overseas disclosures

(1) A public authority which holds information to which section 237 applies (the discloser) may disclose that information to an overseas public authority for the purpose mentioned in subsection (2).

(2) The purpose is facilitating the exercise by the overseas public authority of any function which it has relating to—

- (a) carrying out investigations in connection with the enforcement of any relevant legislation by means of civil proceedings;
- (b) bringing civil proceedings for the enforcement of such legislation or the conduct of such proceedings;
- (c) the investigation of crime;
- (d) bringing criminal proceedings or the conduct of such proceedings;
- (e) deciding whether to start or bring to an end such investigations or proceedings.

[...]

(10) Information disclosed under this section—

- (a) may be disclosed subject to the condition that it must not be further disclosed without the agreement of the discloser, and
- (b) must not otherwise be used by the overseas public authority to which it is disclosed for any purpose other than that for which it is first disclosed.

(11) An overseas public authority is a person or body in any country or territory outside the United Kingdom which appears to the discloser to exercise functions of a public nature in relation to any of the matters mentioned in paragraphs (a) to (e) of subsection (2).

[...]

Section 244: Specified Information: considerations relevant to disclosure

(1) A public authority must have regard to the following considerations before disclosing any specified information (within the meaning of section 238(1)).

(2) The first consideration is the need to exclude from disclosure (so far as practicable) any information whose disclosure the authority thinks is contrary to the public interest.

(3) The second consideration is the need to exclude from disclosure (so far as practicable)—

- (a) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates, or
- (b) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests.

(4) The third consideration is the extent to which the disclosure of the information mentioned in subsection (3)(a) or (b) is necessary for the purpose for which the authority is permitted to make the disclosure.

United States

International Antitrust Enforcement Assistance Act, 15 U.S.C. §§ 6201-6212

§6201. Disclosure to foreign antitrust authority of antitrust evidence (US, 1994_[129])

In accordance with an antitrust mutual assistance agreement in effect under this chapter, subject to section 6207 of this title, and except as provided in section 6204

of this title, the Attorney General of the United States and the Federal Trade Commission may provide to a foreign antitrust authority with respect to which such agreement is in effect under this chapter, antitrust evidence to assist the foreign antitrust authority—

(1) in determining whether a person has violated or is about to violate any of the foreign antitrust laws administered or enforced by the foreign antitrust authority, or

(2) in enforcing any of such foreign antitrust laws.

§6207. Conditions on use of antitrust mutual assistance agreements (US, 1994_[129])

(a) Determinations[:] Neither the Attorney General nor the Commission may conduct an investigation under section 6202 of this title, apply for an order under section 6203 of this title, or provide antitrust evidence to a foreign antitrust authority under an antitrust mutual assistance agreement, unless the Attorney General or the Commission, as the case may be, determines in the particular instance in which the investigation, application, or antitrust evidence is requested that—

(1) the foreign antitrust authority—

(A) will satisfy the assurances, terms, and conditions described in subparagraphs (A), (B), and (E) of section 6211(2) of this title, and

(B) is capable of complying with and will comply with the confidentiality requirements applicable under such agreement to the requested antitrust evidence[...]

§6211. Definitions (US, 1994_[129])

For purposes of this chapter:

[...]

(2) The term "antitrust mutual assistance agreement" means a written agreement, or written memorandum of understanding, that is entered into by the United States and a foreign state or regional economic integration organization (with respect to the foreign antitrust authorities of such foreign state or such organization, and such other governmental entities of such foreign state or such organization as the Attorney General and the Commission jointly determine may be necessary in order to provide the assistance described in subparagraph (A)), or jointly by the Attorney General and the Commission and a foreign antitrust authority, for the purpose of conducting investigations under section 6202 of this title, applying for orders under section 6203 of this title, or providing antitrust evidence, on a reciprocal basis and that includes the following:

(A) An assurance that the foreign antitrust authority will provide to the Attorney General and the Commission assistance that is comparable in scope to the assistance the Attorney General and the Commission provide under such agreement or such memorandum.

(B) An assurance that the foreign antitrust authority is subject to laws and procedures that are adequate to maintain securely the confidentiality of antitrust evidence that may be received under section 6201, 6202, or 6203 of this title and will give protection to antitrust evidence received under such section that is not less

than the protection provided under the laws of the United States to such antitrust evidence.

[...]

(E) Terms and conditions that specifically require using, disclosing, or permitting the use or disclosure of, antitrust evidence received under such agreement or such memorandum only—

(i) for the purpose of administering or enforcing the foreign antitrust laws involved, or

(ii) with respect to a specified disclosure or use requested by a foreign antitrust authority and essential to a significant law enforcement objective, in accordance with the prior written consent that the Attorney General or the Commission, as the case may be, gives after—

(I) determining that such antitrust evidence is not otherwise readily available with respect to such objective,

(II) making the determinations described in paragraphs (2) and (3) of section 6207(a) of this title, with respect to such disclosure or use, and

(III) making the determinations applicable to a foreign antitrust authority under section 6207(a)(1) of this title (other than the determination regarding the assurance described in subparagraph (A) of this paragraph), with respect to each additional governmental entity, if any, to be provided such antitrust evidence in the course of such disclosure or use, after having received adequate written assurances applicable to each such governmental entity.

Annex I. EU Regional Integration Arrangements

Overview of Annex

The EU/ECN is considered one of the most successful Regional Integration Arrangements. As a significant proportion of the respondents to the Survey are members of the EU/ECN, this Annex sets out its operation in further most detail.

EU and the European Competition Network

The EU provides the most comprehensive model for regional enforcement co-operation. Twenty-seven members of the OECD are also members of the EU.

Members and legal framework

The ECN consists of the national competition authorities of the EU Member States and the European Commission. Its members apply the same competition rules, namely those in Article 101 and 102 of the Treaty for the Functioning of the European Union (TFEU), utilizing detailed legal provisions for co-operation. These rules have been in force since 1 May 2004, when the EU's current antitrust procedural regulation (Regulation 1/2003) entered into force. The [ECN + Directive](#), adopted on 11 December 2018, provides further tools to NCAs to ensure the application of Treaty competition law. The Directive is to be transposed into national legislation of Member States by 4 February 2021.

The ECN is designed to serve as a platform for close co-operation between the European Commission and the EU Member States' competition agencies and is the basis for the creation and maintenance of a common competition culture in Europe. The functioning of the ECN is set out in a European Commission Notice on co-operation within the Network of Competition Authorities (so called [Network Notice](#)).

The European Commission and competition authorities from EU member states co-operate with each other through the ECN by:

- informing each other of new cases and envisaged enforcement decisions
- co-ordinating investigations, where necessary
- helping each other with investigations
- exchanging evidence and other information
- discussing various issues of common interest.

Competences and work-sharing

The ECN is based upon a system of parallel competences and flexible work sharing rules built around the principle that a “well placed” authority should take action in a case. A national competition authority is typically considered well placed if it has the capabilities

to terminate and adequately sanction the infringements that have their main effect in the territory of the EU Member State to which it belongs.

In relation to new cases, NCAs are obliged to inform the Commission and the Network at the outset of proceedings where Articles 101 and 102 of the Treaty are applied. If the NCA intends to investigate a new case (i.e. to carry out any formal investigative measures), the NCA concerned has to inform the Network. The notification of a new case opens a two month case allocation period by the end of which each ECN member should have formed a view on whether it wants to intervene in the case. During that period, the Network member that first notified the case to the Network remains fully in charge of the case and continues its investigation. In most cases, the case allocation period will not lead to a re-allocation of the case.

If the European Commission formally initiates proceedings, the national authority dealing with the same case is released of its competence. By having a flexible system of work allocation, effective enforcement of the EU antitrust rules should not be hindered by a lack of resources available to a particular authority. Likewise, the European Commission is not prevented from dealing with a case that involves important issues for the development of EU competition policy.

Article 13 of Regulation 1/2003 allows Network members to suspend or close their proceedings on the ground that an(other) NCA is dealing with the case. That provision can also be used in cases where an NCA wants to allow a lead authority to proceed with the case, before it continues with its own proceedings.

Functions and tools

In order to foster the coherent application of EU antitrust rules, Regulation 1/2003 provides for a range of formal tools:

- EU Member States' courts and competition authorities are obliged to apply EU competition law when there is **an effect on trade between EU Member States**, in a manner that ensures convergence between national and EU competition law.
- The competition authorities are under an obligation to inform each other of all cases that they investigate under EU competition law.
- EU Member States' competition authorities are obliged to **inform the European Commission about an envisaged enforcement decision at least 30 days before taking it**. In the case that a serious risk of inconsistency exists, the European Commission can take over the case or discuss with the national competition authorities a proposed course of action if appropriate.
- The ECN is also equipped with a number of other formal mechanisms to facilitate close co-operation in the application of EU antitrust rules.

Regulation 1/2003 allows ECN members to exchange information, including confidential information, without the consent of the parties and, if legal requirements are met, to use this information as evidence. Information exchange can take place at all stages of the handling of a case; it is particularly important following inspections. Member States' competition authorities regularly assist the European Commission when it carries out inspections within their territory. Moreover, Member States' competition authorities can carry out inspections or fact-finding measures on behalf of each other or for the European Commission. These tools have been used actively in appropriate cases, such as in the context of inspections.

The **ECN + Directive (2019/1)** of 11 December 2018 empowers the national competition authorities to be more effective enforcers and ensures the proper functioning of the internal market. It covers the application of Articles 101 and 102 on a stand-alone basis, the parallel application of national competition law to the same case as well as the application of national competition law on a stand-alone basis, in order to protect leniency statements and settlement submissions.²¹⁶

The ECN+ Directive ensures that all authorities are granted a core set of investigative and decision-making tools they need to tackle infringements. As regards effective powers to impose deterrent fines, the ECN+ Directive gives Member States the option of allowing their administrative competition authorities to impose fines directly themselves or to go to a non-criminal court to ask for them to be imposed.

The ECN+ Directive fully harmonises, for secret cartels, the conditions for granting immunity and reduction of fines, the form in which NCAs should be able to accept leniency statements and the system of protection of employees of immunity applicants from administrative sanctions. The ECN+ Directive also rolls out a binding system of summary applications across Europe. This means that when a company files a full leniency application with the Commission that covers more than three Member States, it will only have to file short summary applications with the relevant NCAs..

The ECN+ Directive recognises the need for close co-operation and effective multi-lateral and bi-lateral communication in the ECN, including the development of soft measures to facilitate and support the implementation of the Directive. To this end, the new Directive strengthens the investigatory assistance measures provided pursuant to Article 22 of Regulation 1/2003: Art. 24 of the ECN+ Directive ensures that NCAs shall be empowered in their own territory to exercise the powers to carry out an inspection or interview on behalf of and for the account of other national competition authorities, and the officials of the requesting NCAs shall be permitted to attend and actively assist the requested national competition authority in these activities.

In addition, the ECN+ Directive provides for co-operation and solves the main issues related to the cross-border notification of certain NCA decisions: Articles 25-27 lay out the general principles allowing co-operation when one NCA intends to notify its decision or preliminary objections against an undertaking located in another Member State and when it adopts a decision imposing fines or periodic penalty payments against an undertaking that does not have sufficient assets in its territory to enable their recovery, thus requesting the enforcement of its final decision in another Member State.

The ECN+ Directive provisions strengthening the investigative and decision-making powers of the NCAs are the result of a joint advocacy effort of the NCAs as a network towards the policymakers: indeed, the ECN has also developed as a platform to share experiences and discuss more general policy issues that go beyond Regulation 1/2003 (see below).

In the mergers area, [Regulation \(EC\) No 139/2004](#) (also called the EU Merger Regulation) lays down the rules for the European Commission to assess mergers with an EU dimension based on a system of turnover thresholds. Smaller mergers which do not have an EU dimension may fall instead under the remit of Member States' competition authorities.

²¹⁶ See the 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, OJ L 11, 14.1.2019, p. 3–33. (European Union, 2018_[231])

There is a referral mechanism in place which allows the Member States and the Commission to transfer the case between themselves, both at the request of the companies involved and of the Member States. This case referral system is laid down in Article 4(4) and (5), Article 9 and Article 22 of the EU Merger Regulation.

Frequency of formal co-operation within the ECN

In the ECN network, with specific regard to enforcement, co-operation usually takes place at the stage of opening an investigation in order to (i) share information (e.g., complaints) and preliminary views and (ii) to allow for an efficient case allocation (by selecting a well-placed authority) as well as a co-ordination of investigative measures (e.g., parallel inspections). For instance, in 2019 the ECN was informed of 138 investigations of Art. 101 and 102 of TFEU, of which 119 started from NCAs, of which 83 reached the envisaged decision stage under Article 11(4) of Regulation 1/2003.²¹⁷

A co-operation tool that has been activated more frequently in the period 2012-2019 compared to the previous five years, is investigatory assistance pursuant to Art. 22 of Regulation 1/2003, which is useful when the evidence is located in a different Member State than the investigating NCA. In the period 2012-2017, the number of requests for investigatory assistance made or received by the NCAs was in the range of 140-150, most of which (90-100) related to requests to acquire information from the party, followed by the request to carry out unannounced inspections (25-30). For example, the Irish NCA carried out inspections on behalf of the Italian NCA investigating an abuse of dominance in the pharmaceutical sector ([Aspen case, 2016](#)).

During the period 2012-2019, the ECN registered a number of parallel investigations on the same case conducted by NCAs, with the supervision of the European Commission. For instance, as already described in *Section 14.7.2: Cartel and anti-competitive agreement cases*, in April 2015, the NCAs of France, Italy and Sweden closed their parallel case on parity clauses in the agreements between online hotel booking platforms and accommodation providers, accepting a common commitment package valid for the entire EU.

In the merger area, in the period 2012-2018, the referral mechanism has continued to work efficiently in order to allocate the review of mergers effectively.²¹⁸ For instance, the referral system has been used to ensure that transactions in digital markets that might not have an EU dimension based on turnover thresholds but still an impact on competition in the entire European Single Market are reviewed by the European Commission. For instance, at the end of 2017 the NCA of Austria decided to request the referral of the Apple/Shazam merger to the European Commission, which was notified in Austria due to the low turnover thresholds but would otherwise have qualified for the threshold based on transaction value. Several other NCAs joined this request which was eventually accepted by the Commission.²¹⁹ Moreover, in 2018 the parties of the Microsoft/Github-transaction decided to request the referral of the merger to the European Commission based on Art. 4(5) EUMR.

²¹⁷ Yearly statistics and breakdowns are available at the ECN webpage, at: <https://ec.europa.eu/competition/ecn/statistics.html> (European Commission^[215])

²¹⁸ Yearly statistics on the referral requests are available at the ECN webpage, at: <https://ec.europa.eu/competition/mergers/statistics.pdf> (European Commission^[236])

²¹⁹ The “referral decision” of the European Commission is available at: https://ec.europa.eu/competition/mergers/cases/decisions/m8788_1219_3.pdf (European Commission, 2018^[216])

This merger was notifiable in four EEA Member States, including Germany where it met the transaction value based threshold. The request was accepted by the Commission.²²⁰

Informal co-operation that goes beyond Regulation 1/2003

Co-operation within the ECN is not limited to discussions about and assistance in individual cases. The ECN is an active forum for the discussion of general policy issues. Horizontal working groups and sector-specific subgroups have been set up, where case-handlers of the different authorities exchange views and learn from each other's experiences with particular issues or with particular sectors. For example, joint working groups deal with horizontal topics (e.g. leniency), as well as with key sectors of the economy (e.g. energy, financial services). These discussions promote the coherent application of EU antitrust rules and allow competition authorities to pool their experience and identify best practices.

For instance, discussions within the cartel working group of the ECN led to the development of a common model for leniency applications in the EU, as it became necessary to foster convergence and overcome the obstacles posed by the differences in national leniency programs. This type of soft law harmonisation has been incorporated in the ECN+ Directive. Similarly, the recommendations made by the ECN vis-à-vis policymakers in December 2013, on key investigative and decision-making powers that NCAs should have in their competition toolbox, constituted the basis for the preparatory work of the legislative initiative related to the ECN+ Directive.

A more recent example of co-operation on policy matters with relevant impact on enforcement is related to the emergency of the Covid-19 pandemic. In response to it, in April 2020 the ECN issued a joint statement on the application of the antitrust rules during the current coronavirus crisis, explaining how competition authorities can help companies deal with these unprecedented times.²²¹

In the merger area, the ECN identified over the years several areas of possible improvements regarding issues arising in relation to mergers with cross-border impact, and to explore possible solutions, focusing on what is feasible within the existing legal frameworks, drawing from authority practice and experience. Besides the issuing of best practices in co-operation in 2011 (ECN, 2011_[130]), the ECN Merger Working Group has recently promoted further convergence in terms of information requirements for merger notifications (ECN, 2016_[131]) and issued a report outlining common and different approaches with respect to public interest considerations in merger review (ECN, 2016_[132]).

²²⁰ The “referral decision” of the European Commission is available at: https://ec.europa.eu/competition/mergers/cases/decisions/m8994_257_3.pdf (European Commission, 2004_[218])

²²¹ See the ECN joint statement, available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf (ECN, 2020_[219])

Annex J. Regional co-operation networks and organisations

Overview of Annex

This Annex provides an overview of the existing regional co-operation networks and arrangements in order to provide further context for the discussion on regional and multi-lateral enforcement co-operation contained in this Report. This Annex includes:

- an overview of regional agreements that created supra-national bodies with competition-focused advisory, investigative, and/or decision-making powers
- an overview of other regional competition arrangements (i.e. those without competition-focused advisory, investigative, and/or decision-making powers)
- an overview of regional competition arrangements with less formal competition co-operation mechanisms
- an overview of the OECD regional centres and their role in improving enforcement co-operation.

Other non-regional, multi-lateral co-operation networks (such as the BRICS alliance, UNCTAD) are outlined in *Annex E: Other international co-operation networks and international organisations working on international enforcement co-operation*.

Regional Integrational Arrangements with super-national bodies

Regional agreements that have components relating to competition enforcement and which create supra-national bodies with the power to advise, investigate and/or make binding decisions are often regarded as the ‘gold standard’ of regional co-operation. When they function effectively, they have the potential to facilitate effective and efficient enforcement co-operation, foster economic integration and increase intra-regional trade. These regional agreements have been referred to as Regional Competition Agreements (RCAs) in previous OECD work, however, this term has not been adopted for this Report given these arrangements are not competition specific agreements, but are generally part of broader trade and economic agreements that establish economic and legal integration between the jurisdictions in some way. For the purposes of this report these are called Regional Integration Arrangements with competition competencies and supra-national decision making bodies (RIA+Supra).

The role of regional co-operation, specifically RIA+SUPRAs, was considered at the OECD Global Forum on Competition in December 2018. The materials provide an analysis of the operation of a number of RIA+SUPRAs and consider the benefits and challenges of these

models.²²² In addition, some regional arrangements that were not RIA+SUPRAs (such as the Nordic Alliance and Australia-New Zealand arrangements) were also discussed, but they are considered separately below. Four key RIA+SUPRAs are detailed further in *Annex I: EU Regional Integration Arrangements*: the European Union (EU) and European Competition Network (ECN); Caribbean Community (CARICOM); Common Market for Eastern and Southern Africa (COMESA); and Eurasia Economic Union (EAEU).

The OECD Secretariat created an inventory of provisions in RIA+SUPRAs between three or more jurisdictions (i.e. excluding bi-lateral agreements) that are located in the same geographic region, have adopted regional competition provisions, and established a supra-national authority with the ability to advise, investigate and/or make binding decisions (OECD, 2017_[134]). The RIA+SUPRAs considered and their characteristics are outlined in *Table 21.2* below.

²²² See the OECD Secretariat papers and country submissions for the discussion at the 2018 Global Competition Forum entitled 'Benefits and challenges of regional competition agreements' (OECD, 2018_[13]).

Table 21.2. RIA+SUPRAS

Acronym and hyperlink to website	Name	Member states	Population (2019)	Level of integration ¹	Supra-national Bodies
CAN	Andean Community (Comunidad Andina)	Bolivia, Colombia, Ecuador, and Peru	111,736,658	Customs Union	Andean Community Court of Justice Andean Community General Secretariat (SG CAN) Andean Committee for Defence of Competition (advisory group formed by representatives of all the competition authorities of the member states)
CARICOM ²	Caribbean Community	Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago	18,669,107	Common Market	Caribbean Court of Justice CARICOM Competition Commission (CCC) Council for Trade and Economic Development (COTED)
CEMAC	Central African Economic and Monetary Community	Cameroon, the Central African Republic, Chad, Equatorial Guinea, Gabon, the Republic of the Congo	55,477,514	Customs (and Monetary) Union	CEMAC Community Court of Justice CEMAC Competition Commission CEMAC Regional Council of Competition
COMESA	Common Market for Eastern and Southern Africa	Burundi, the Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Tunisia, Somalia, Uganda, Zambia, Zimbabwe	579,622,213	Customs Union	Board of Commissioners COMESA Competition Commission (CCC)
EAC (CAE)	East African Community	Burundi, Kenya, Rwanda, South Sudan, United Republic of Tanzania, Uganda	190,068,673	Common Market	East African Court of Justice EAC Competition Authority (EACCA)
EAEU	Eurasian Economic Union	Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia	181,768,952	Common Market	Supreme Eurasian Economic Council Eurasian Intergovernmental Council Eurasian Economic Commission (EEC) (Council of the Commission and Board of the Commission) (Department of Antitrust Regulation, Department of Competition and Public Procurement Policy) Court of the Eurasian Economic Union
ECOWAS (CEDEAO)	Economic Union of West African States	Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo	386,908,402	Customs (and Monetary) Union	ECOWAS Community Court of Justice ECOWAS Regional Competition Authority (ERIA+SUPRA) Consultative Competition Committee (consisting of two competition experts per member state) (advisory function)
EFTA	European Free Trade Association	Iceland, Liechtenstein, Norway, Switzerland ³ (Switzerland is an EFTA member but it is not part of the EEA)	14,322,060	Free Trade Agreement	EFTA Court of Justice EFTA Surveillance Authority (ESA) (Acting only in Iceland, Liechtenstein and Norway)
EU	European Union	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden.	447,512,041	Economic Union	European Court of Justice General Court of Justice Directorate-General for Competition (DG COMP) Advisory Committee on Restrictive Practices and Dominant Positions (advisory function)
MERCOSUR (MERCOSUL)	Southern Common Market (MeRIA+Suprado Común del Sur)	Argentina, Brazil, Paraguay, Uruguay, Venezuela ³	295,010,438	Customs Union	Committee for the Defence of Competition Trade Commission of the MERCOSUR
WAEMU (UEMOA)	West African Economic and Monetary Union	Benin, Burkina Faso, Ivory Coast, Guinea Bissau, Mali, Niger, Senegal, Togo	127,107,471	Customs (and Monetary) Union	WAEMU Court of Justice WAEMU Competition Commission (Directorate of competition within the Department of the Regional Market, Trade, Competition and Co-operation) Committee on Competition (advisory function)

Sources: OECD (2018^[135]), World Bank (2019^[136]).

Notes:

1. This column ('Level of Integration') defines four levels of regional economic integration: (a) Free Trade Agreements (i.e. FTA – elimination of customs to intraregional trade, (b) Customs Unions (FTA + common external tariffs), (c) Common Market (customs union + free movement of factors of production) and (d) Economic Union (common market + common currency and tax harmonisation. These terms are based on the work of Both, G. D. (2018^[137]).

The "Level of integration" is determined by the legal framework that establish the RIA+SUPRA. An inventory of said legal frameworks can be found in (OECD, 2018^[135]).

2. The CARICOM Competition Commission does not have jurisdiction over the entire CARICOM. Instead, it has jurisdiction over markets of the CARICOM Single Market and Economy (CSME), which excludes the Bahamas.

3. Venezuela, although being a full member, has been suspended since 1 December 2016.

RIA+SUPRAs can take different forms depending on their level of co-operation and convergence. In 2018, the OECD Secretariat grouped the 11 RIA+SUPRAs into four “regional models”:

- the regional referee model where the national authorities, in principle, conduct the investigation and the regional authority takes the decision (CAN, MERCOSUR)
- the two-tier model where the national authorities do the national cases and the regional authorities do the regional cases, including the investigations (CARICOM, CEMAC, EAC, EAEU, ECOWAS)
- the joint enforcement model where national authorities can, or must, apply regional provisions, while the investigation can be more of a joint effort (EU, EFTA, COMESA)
- the one-tier model where the regional authority decides even on national cases, basically leaving the national authorities without any decision power (WAEMU).

Benefits of RIA+SUPRAs

As outlined in the 2018 OECD Secretariat background paper and confirmed by the Survey responses, RIA+SUPRAs can lead to the following benefits:

- **Addressing enforcement resource constraints:** RIA+SUPRAs can significantly reduce the problem of resource constraints, both financial and technical, by merging resources between authorities and achieving economies of scale in their enforcement activities.
- **Strengthening competition culture:** an RIA+SUPRA may spur the adoption of competition laws in the region, contributing to a competition culture, as well as creating economies of scale in educational and advocacy activities.
- **Reducing enforcement capability constraints:** Individual countries are often constrained in their capability to enforce their national competition laws in practice with regard to cross-borders cases, even in the absence of resource constraints. There exist five main obstacles to enforcement (Gal and Wassmer, 2012^[138]):
 - Difficulties collecting evidence in cross-border competition cases. An RIA+SUPRA can create the opportunity to better collect and exchange information
 - Lack of a credible threat. An RIA+SUPRA can create leverage for smaller economies, and makes more powerful and effective enforcement possible. It can also create critical mass and thereby create a critical threat for the competition provisions
 - Deterrence may require cumulative sanctions that can be more easily applied and enforced through an RIA+SUPRA
 - Difficulty to impose a penalty. An RIA+SUPRA may alleviate the problem that NCAs have when they want to sanction a company that is located elsewhere
 - Overcome limitations of existing national authorities. An RIA+SUPRA may be the effective way to overcome deep-rooted limitations of existing authorities, including corruption, inefficiency, bureaucratic obstacles or distrust towards the current authorities.

- **Keep national governments in check:** RIA+SUPRAs can help moderate national governments regarding state-imposed barriers, or serve as a better counterbalance against strong pressure groups trying to exert influence on policy makers.

Factors for successful RIA+SUPRAs

From the work undertaken in 2018, it is possible to identify a few key factors for successful RIA+SUPRAs, which are useful when considering what elements in existing RIA+SUPRAs may need to improve or if the creation of new RIA+SUPRAs is likely to be successful. These factors include:

- the existence of, and political and institutional support for, deep economic integration
- geographical proximity
- historical, cultural, linguistic connections
- compatible national legal systems
- the existence of effective national competition regimes and authorities
- systems which allow for national engagement in the supra-national process (e.g. advisory bodies or consultation processes)
- trust in the skills, efficacy and capacity of any supra-national bodies.

Deep economic integration is one of the most important factors for the well-functioning of the RIA+SUPRA,²²³ since its absence can create conflicts between the national economic interests of the member states. As discussed during the 2018 Global Forum on Competition, adopting and enforcing regional competition law regimes in the absence of a “common market”, can be perceived by RIA+SUPRA members as a loss of control over national markets and lead to conflicting outcomes.²²⁴

Successful RIA+SUPRAs need to ensure that their member states have a complete and mature competition law regime, meaning that national competition authorities have effective investigative and decision-making powers, with the power to impose effective and proportionate fines and well-designed leniency programmes. Furthermore, national competition law regime guarantees, such as in the case of exchange of confidential information, are significant when promoting the intensity of co-operation and enhancing reciprocity.²²⁵

Regional competition arrangements (with second-generation style commitments) that do not establish a supra-national authority

There are examples of very successful regional arrangements that allow for deep enforcement co-operation that do not create supra-national bodies. They provide an alternative model for how enforcement co-operation can occur without some of the

²²³ See Summary of Discussion, Benefits and challenges of regional competition agreements (OECD, 2018_[13])

²²⁴ Ibid.

²²⁵ See Summary of Contributions, Benefits and challenges of regional competition agreements (OECD, 2018_[13])

potential complexities (such as costs) of creating a supra-national body. Two key examples are outlined in *Table 21.3* and below, relating to the Nordic Alliance and the Australia New-Zealand arrangements.

Table 21.3. Regional arrangements (with second-generation style commitments) that do not establish a supra-national authority

Name	Type of arrangement	Members	How does it facilitate co-operation? What types of co-operation? What information can be shared? Can information received be used in investigations?	Legal agreements and arrangements
Nordic Alliance	Network of competition authorities	5 member countries (Denmark, including Faroe Islands and Greenland, Finland, Iceland, Norway and Sweden)	This network allows the authorities to co-operate on enforcement matters including: - discussion of cases and issues of mutual interest - sharing confidential information - investigative assistance - enhanced co-operation. Members can use the information received from other members in their own investigations.	2017 Agreement on Cooperation in Competition Cases ¹
Australia New Zealand	Cross-organisational co-operation arrangements (formal and informal) supported by a trade agreement	Australia and New Zealand	This network allows the authorities to co-operate on enforcement matters including: - discussion of cases and issues of mutual interest - sharing confidential information - investigative assistance - enhanced co-operation.	Various arrangements including the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA or the CER Agreement) ²

1. Agreement on Cooperation in Competition Cases, <https://www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf> (Denmark, Finland, Iceland, Norway and Sweden, 2017_[109])

2. Australia New Zealand Closer Economic Relations Trade Agreement, 1983, <http://www.austlii.edu.au/au/other/dfat/treaties/1983/2.html> (Australia - New Zealand, 1983_[139])

Nordic Alliance

The Nordic Alliance formally started in 2001, when Denmark, Norway and Iceland signed the co-operation agreement, although it is based on an alliance that is over 60 years old. Sweden joined the agreement in 2004. The Nordic Alliance agreement was extended in 2017, via a revised agreement that expanded its competencies and improved the enforcement co-operation tools available to members. For instance, in addition to clarifying the conditions for exchanging confidential information, the Nordic competition authorities are also able to assist each other in fact-finding measures and in inspections.²²⁶

The Nordic countries have many legal, cultural and other similarities. They all have relatively small numbers of inhabitants, a low density of population in many areas, developed economies, many highly concentrated markets, as well as a common history and traditions. The competition legislations are similar to EU-legislation and have many similarities. Respondents within the Nordic alliance note that Nordic business communities also have many similarities, and in many markets the competition authorities face the same competition challenges. In addition to the structural issues, there are also aspects of the alliance framework that benefit shared advocacy initiatives.

A number of the respondents in the Nordic Alliance noted that strong relationships of trust and understanding were key to its successful operation. Staff at different levels within in each authority have personal contacts in the counterpart authorities and knowledge of the

²²⁶ See Summary of Contributions (OECD, 2018_[13])

other Nordic authorities. This trust allows the authorities to exchange important confidential and sensitive information.

Australia/NZ model

Australian and New Zealand arrangements are supported and formalised by the Australian New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), which deals with competition and consumer policy issues. In addition, ANZCERTA is supported by a range of other legal instruments.²²⁷ The arrangement was explained in a joint Australia and New Zealand submission to the OECD:

“In 2004 the governments of Australia and New Zealand requested the Australian Productivity Commission to examine the potential for greater co-operation, coordination and integration of their respective competition and consumer protection regimes. While the review considered that full integration would be too costly, the report recommended further measures that could be taken to deepen the already high level of convergence and co-operation. These measures were largely adopted in the competition chapter of the Single Economic Market Outcomes Framework agreed between the two countries in 2009. Three specific outcomes were proposed: firms operating in each jurisdiction should face the same consequences for the same anti-competitive conduct; competition agencies in the two jurisdictions should be able to share confidential information for enforcement purposes; and that Associate Members should be cross-appointed between the ACCC and the NZCC.

While there are some remaining differences between the two countries’ competition laws, they are substantially similar; the laws provide for the exchange of confidential information and the provision of investigatory assistance between the agencies; and there have been cross-appointments since 2010. Also relevant for competition law enforcement is the 2008 Agreement on trans-Tasman Court and Regulatory Proceedings, implemented in each jurisdiction through their respective Trans-Tasman Proceedings Acts.”²²⁸

In addition to these high-level arrangements, as with the Nordic Alliance, the two authorities have various regular cross-authority meetings at the staff level, and there is a high degree of trust and understanding of each other’s respective competition regimes.

Regional competition arrangements with less formal competition co-operation mechanisms

In addition to the networks and organisations outlined above, there are a range of other regional networks and organisations that directly support enforcement co-operation or help

²²⁷ For example, the Mutual Assistance in Business Regulation and Mutual Assistance in Criminal Matters legislation in Australia and New Zealand; the Memorandum of Understanding Between the Government of Australia and the Government of New Zealand on Co-ordination of Business Law; the 2007 Co-operation Agreement between the ACCC and the NZCC; and the 2006 Co-operation Protocol for Merger Review between the ACCC and the NZCC. (ACCC - NZCC, 2007^[230])

²²⁸ See Contributions from Australia with New Zealand, Benefits and challenges of regional competition agreements (OECD, 2018^[13]).

support it through more general regional co-operation activities. These are listed below and fall within the following categories:

- regional competition arrangements (with first-generation style commitments) that do not establish a supra-national authority (*Table 21.4*)
- regional competition arrangements or networks that do not facilitate specific case-related enforcement co-operation and do not establish a supra-national authority (*Table 21.5*)
- trade and economic agreements with competition components that do not establish a supra-national decision-making authority (*Table 21.6*).

These existing networks and organisations could be further reviewed and utilised to develop regional enforcement co-operation. They may not have the same level of enforcement co-operation as the RIAs or second generation style regional arrangements but they potentially offer other means to enhance enforcement co-operation. For example, the network or co-operation established through ASEAN (Arai and Siadari, 2018^[133]). Considering these opportunities in relation to regional co-operation further is part of the proposed future areas of focus outlined in *Section 21. Proposed future areas of focus to improve international enforcement co-operation*.

Table 21.4. Regional competition arrangements (with first-generation commitments that can facilitate specific case-related enforcement) that do not establish a supra-national authority

Name	Type of arrangement	Members	How does it facilitate co-operation? What types of co-operation? What information can be shared? Can information received be used in investigations?
African Competition Forum (ACF)	Agreement that creates a network of competition authorities	31 African national competition authorities (as of 2020) (Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Congo Brazzaville, Cote d'Ivoire, Egypt, Ethiopia, Eswatini, Gambia, Gabon, Guinea, Kenya, Malawi, Mali, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Rwanda, Senegal, Seychelles, South Africa, Tanzania, Togo, Tunisia, Zambia and Zimbabwe)	ACF enables member states to have a centralised view of a transaction. ACF collates and disseminates information regarding cross-border transactions.
ASEAN Competition Enforcers' Network (ACEN)	Network of competition authorities	10 national competition authorities or equivalent authorities (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam)	ACEN facilitates co-operation on competition cases in the region serves as a platform to handle cross-border cases. ACEN also looks into facilitating co-operation on mergers and acquisitions with a cross-border dimension ACEN encourages information sharing between ASEAN competition authorities.

Table 21.5. Regional competition arrangements or networks that do not facilitate specific case-related enforcement co-operation and do not establish a supra-national authority

Name	Type of arrangement	Members	How does it facilitate co-operation? What types of co-operation? What information can be shared? Can information received be used in investigations?
ASEAN Expert Group on Competition (AEGC)	Network of competition authorities	Representatives from 10 national competition authorities or equivalent authorities (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam)	AEGC facilitates numerous workshops, trainings and seminars to strengthen the capacities of competition-related authorities in the areas of institution building, law enforcement and advocacy. AEGC also ensures a level playing field and fosters a culture of fair business competition, for enhanced regional economic performance in the long run. AEGC is a regional forum to discuss and co-operate on competition policy and law.
Sofia Competition Forum	Network of competition authorities	8 member countries (Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Georgia, Kosovo, Montenegro, North Macedonia, and Serbia)	This forum is an informal platform for technical assistance, exchange of experience and consultations in the field of competition policy and enforcement. This forum aims to assist countries in the Balkan region in adopting and enforcing competition law and to maximize the benefits for these countries of well-functioning markets. The forum is designed to provide capacity building assistance and policy advice through seminars and workshops on competition law and policy.
East Asian Top Level Officials' Meeting on Competition Policy (EATOP)	Conference of competition authorities	18 top level officials from national competition authorities or equivalent authorities (Australia, Brunei, Cambodia, China, Hong Kong, China, Indonesia, Japan, Korea, Laos, Malaysia, Mongolia, Myanmar, New Zealand, Philippines, Singapore, Chinese Taipei, Thailand, and Vietnam)	Co-hosted by JFTC, host authorities and Asian Development Bank Institute Aimed at strengthening the cooperative relationship among the member authorities and development of competition policy and law in the East Asia region, by enabling the top-level officials from the member authorities to get together annually and exchange their views and information candidly with each other.

Table 21.6. Trade and economic agreements with competition components that do not establish a supra-national decision-making authority

Name	Type of arrangement	Members	How does it facilitate co-operation? What types of co-operation? What information can be shared? Can information received be used in investigations?
African Continental Free Trade Area (AfCFTA)	Trade agreement, which creates an autonomous body responsible for co-ordinating the agreement implementation (it is a decision-making body)	54 member countries (Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Cabo Verde, Chad, Cote d'Ivoire, Comoros, Republic of the Congo, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eswatini, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Mozambique, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia and Zimbabwe) ¹	AfCFTA promotes co-operation among its members on investment, intellectual property rights and competition policy (entering into Phase II negotiations in these areas). It promotes harmonisation of policies among members. Additionally, Article 12 tackles anti-competitive business practices, Article 19 market access, and Article 27 Technical Assistance, Capacity building and Co-operation.
ASEAN-Australia-New Zealand Free Trade Area Competition Committee	Trade agreement, which creates a supra-national committee (no decision making power on cases)	Senior officials of Australia, New Zealand, and 10 ASEAN countries (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam)	This committee performs specific undertakings, including planning and implementing its respective Economic Co-operation Work Program.
Asia-Pacific Economic Co-operation (APEC)	Inter-governmental conference, establishes a secretariat with organisational and policy functions.	21 member countries and regions (Australia, Brunei, Canada, Chile, China, Hong Kong, China, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand, the United States, and Vietnam)	Competition Policy and Law Group of APEC promotes understanding of regional competition laws and policies, examines their impact on trade and investment flows, and identifies areas for technical co-operation and capacity building among member economies. The group's activities include: - Exchanging information through a regional database - Sharing new developments in terms of the law, the comparative aspects of competition law, the role of the courts, the degree of autonomy granted to competition authorities, better methods to improve the success of monitoring and the enforcement of the law, and appropriate remedies; and - Sharing experiences and expertise on activities relevant to the implementation of competition policies, using international instruments, to develop good practice.
Association of Southeast Asian Nations (ASEAN)	Inter-governmental organization	10 member countries (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam)	ASEAN promotes active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields, and provides assistance to each other in the form of training and research facilities in the educational, professional, technical and administrative spheres. Specialised sub-groups of ASEAN listed in tables above.
Organisation of Eastern Caribbean States (OECS)	Inter-governmental organization	11 member countries and regions (Antigua & Barbuda, Dominica, Grenada, Montserrat, St. Kitts & Nevis, Saint Lucia, St. Vincent & the Grenadines, British Virgin Islands, Anguilla, Martinique, and Guadeloupe)	Inter-governmental organisation to work together for common interests like peace, stability and wealth.
Southern African Development Community (SADC)	Inter-governmental organization	16 member countries (Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe)	Regional economic community committed to regional integration and poverty eradication within Southern Africa through economic development and ensuring peace and security.

Note:

I. As of 2019, there are 28 ratifying countries and 54 signatories. Source: https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT_ESTABLISHING_THE_AFRICAN_CONTINENTAL_FREE_TRADE_AREA_%282%29.pdf. (African Union, 2019^[140])

OECD Regional Centres

The OECD has established three Regional Centres for Competition. They focus on capacity building activities, including offering workshops and training on enforcement such as cartel prosecution, bid rigging and public procurement, merger analysis, and unilateral conduct, and generally help disseminate the work of the OECD, best practices and OECD standards. Additional activities address heads of authorities and judges from the regions. They provide a forum in which regional authorities can meet, share ideas and develop relationships. They engage with various levels of authority staff, from senior leaders to case-handler level.

The three OECD Regional Centre for competition are:

- **The OECD-GVH Regional Centre for Competition in Budapest:**²²⁹ The OECD and the Hungarian Competition Authority started a joint venture in February 2005 to expand OECD's work on competition in the Central, East and South-East European regions. The beneficiary countries are Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Georgia, Kazakhstan, Kosovo, Kyrgyzstan, Moldova, Montenegro, North Macedonia, Romania, the Russian Federation, Serbia and Ukraine. The Eurasian Economic Commission is a regular participant since 2018.
- **The OECD/Korea Policy Centre, Competition Programme:**²³⁰ this is a joint venture between the Korean government and the OECD. It started in May 2004, and it works with competition authorities in the Asia-Pacific region, including: Australia, Bangladesh, Bhutan, Brunei, Cambodia, Fiji, Hong Kong (China), India, Indonesia, Japan, Lao PDR, Malaysia, Mongolia, Myanmar, Nepal, New Zealand, Pakistan, Papua New Guinea, People's Republic of China, Philippines, Singapore, South Korea, Sri Lanka, Chinese Taipei, Thailand and Vietnam.
- **The OECD Regional Centre for Competition in Latin America in Lima:**²³¹ Established in November 2019, this is a joint venture between the Peruvian Competition Authority (INDECOPI) and the OECD. Beneficiary competition authorities include: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Jamaica, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, Venezuela, Andean Community, and CARICOM.

²²⁹ See: OECD-GVH Regional Centre for Competition in Budapest, <http://www.oecd.org/daf/competition/oecd-gvhregionalcentreforcompetitioninbudapest.htm>. (OECD, 2020^[212])

²³⁰ See: OECD/Korea Policy Centre, Competition Programme, <http://www.oecd.org/daf/competition/oedckoreapolicycentrecompetitionprogramme.htm>. (OECD, 2020^[213])

²³¹ See: OECD Regional Centre for Competition Latin America in Lima, <http://www.oecd.org/daf/competition/oecd-regional-centre-for-competition-in-latin-america.htm>. (OECD, 2020^[214])

Respondents highlighted their engagement with the Centres and the fact that the OECD Centres help in strengthening relations among the region as well as enhance competition law enforcement in the specific region. One respondent participating in the OECD-GVH Regional Centre for competition said:

This platform has proven itself as an extremely useful tool for co-operation among competition agencies of Eastern Europe. The RCC holds 5-7 workshops per year in Hungary and in Member States and covers expenditures of 2 participants from each of the Member States. Moreover, it has a Quarterly Newsletter which covers the Member States' most interesting developments in the sphere of competition. The other big advantage of this organization is that Member States deal with similar problems and challenges, their legislation, economies and markets usually have numerous similarities.

There is also an RCC's instrument called "Request for Information" provides its members with the possibility to direct a request for information to all the members at the same time instantly and we have successfully used it dozens of times since its launch in 2017. The use of the OECD RCC RFI is much more convenient than bi-lateral information exchange.

Colombia noted in relation to the Lima Centre:

The SIC welcomes the OECD initiative to create a competition studies centre based in Lima and with the support of the Peruvian competition authority, INDECOPI. Undoubtedly, this initiative will strengthen relations between the competition authorities in the region, as well as the tasks that these authorities perform in the field of competition.

All RCC, through capacity building, create and foster strong relationships of trust between the participants from all levels of the participating authorities. At the same time, they allow for close interaction between beneficiary authority officials and expert speakers from more experienced OECD members. All this benefits informal co-operation between regional authorities on the one hand, and the regions and their OECD counterparts on the other hand.

