Intergovernmental Group of Experts on Competition Law and Policy
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Roundtable on: Modalities and Procedures for International Cooperation in Competition Cases involving more than one Country

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UNCTAD 13th IGE: International co-operation in competition enforcement

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1. Background

In 2012, the OECD's Competition Committee identified 'International Co-operation in Competition Enforcement' as one of its two strategic priorities (the other being evaluating the impact of competition interventions).

The proposed objective of this work stream was to study and share experiences and insights on international co-operation among competition agencies with a view to improving it. The work would include thorough explorations of the reasons for international co-operation, the relative merits of various forms of co-operation, lessons from co-operation efforts in other policy fields, constraints on greater co-operation, experience with the 1995 Recommendation on International Co-operation, areas where improvements are needed, and potential solutions/enhancements.

As an early action in this project, the OECD decided to conduct a survey of practice in this area, and co-ordinated with the ICN on a single questionnaire that would support the needs of both the OECD Competition Committee's long-term project on International Co-operation and the ICN Steering Group project on International Enforcement Co-operation.

2. What are the main findings of the joint OECD/ICN study?

The survey covered a wide range of issues, such as the objectives of IC, the legal basis for it, the types of cooperation, specifics of existing use of co-operation mechanisms and possible future work to improve co-operation, focusing on the OECD and ICN.

The survey was addressed to all member agencies of the ICN (which includes all members of OECD). We received 57 responses, 55 of which were used in compiling figures for the report on the survey[1]. These included 32 from OECD member countries.

The survey contains a mass of useful information, and I urge interested readers to download a copy, from http://www.oecd.org/competition/oecd-icn-international-cooperation-survey.htm. The following represent my own impressions of the more important findings.

First, we attempted to quantify international co-operation: how many agencies do it? How many cases have there been? Most agencies do not record this information systematically, so the responses represented estimates.

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

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* The views expressed here are those of John Davies of the OECD Secretariat and do not necessarily represent those of the OECD Competition Committee, or any of its participants.

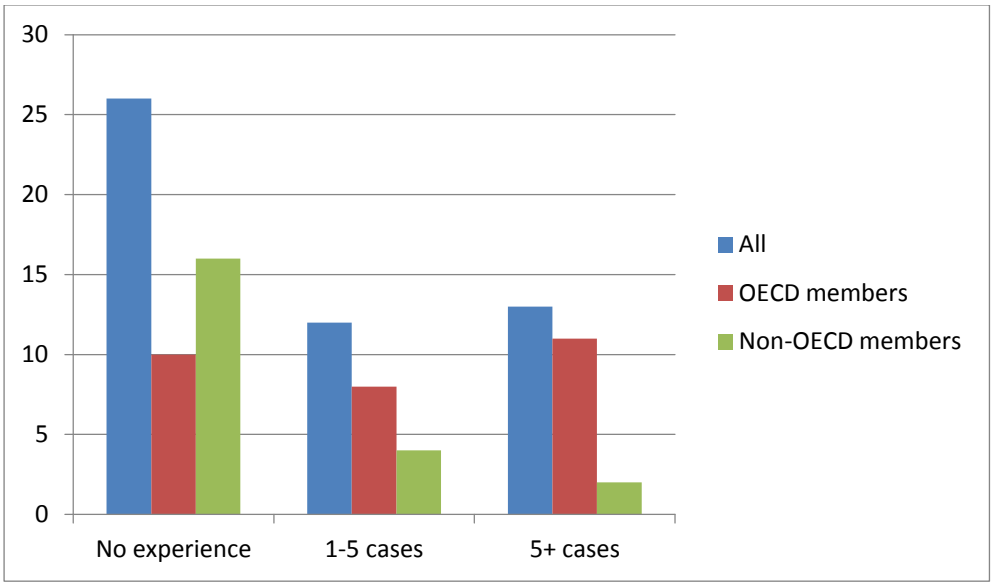
1 Of the other two, one was too late to include and the other was from a member of the judiciary, from a jurisdiction for which the competition agency had already responded.

- Agencies have increased international co-operation over time, and that they expect further increases due to the rising number of multi-jurisdictional cases.

- The estimated data provided in response to the Survey indicate approximate increases of 15% in cartel cases, 35% in merger review cases and 30% in unilateral conduct cases.

- Merger review is the enforcement area in which respondents have co-operated mostly over the period 2007-2011; this is the enforcement area in which there has been the highest number of cases involving international co-operation in each year.

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



Second, the Survey confirmed that the quality of IC is affected by existing limitations:

- *Legal limitations*, (see table below) due to differences in legal systems and to restrictions in domestic legislation, appear to be one of the more important limitations on international co-operation.

- *Practical limitations* (resources, timing, language) appear to be relatively less important but more frequently encountered in the enforcement practice of responding agencies.

- With regard to the frequency, on average, respondents ranked their experience with limitations as ranging between 'never' and 'seldom'.

- Respondents also felt that practical difficulties with co-operation can usually be overcome, while limitations of a legal nature tend to bring co-operation to a halt.

- Limitations and constraints often appear to be relatively less important for OECD agencies than for non-OECD agencies. Non-OECD countries generally find these constraints more difficult to overcome.

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

Third, the ability to exchange (confidential and non-confidential) information was identified as a core feature of international co-operation:

- The exchange of *non-confidential information* is generally allowed and occurs frequently. Agencies engage in case discussions on analytical methods for a particular case (e.g. product and geographic market definition) or assessment of the competitive effects of the case, and potential remedies which could be accepted.

- More difficult is the exchange of *confidential information*. National and international legal frameworks, however, often do not allow agencies to exchange confidential information. This may impact on the effectiveness of international co-operation.

- Legal protection on the disclosure of information often is a constituent part of the authority of agencies to compel information in competition investigations. As such, confidentiality rules are fundamental components of an agency's ability to obtain information and ultimately are key underpinnings that facilitate international co-operation.

- While the exchange of confidential information relies on formal mechanisms for co-operation, the exchange of non-confidential information and internal agency information often occurs on an informal basis. However, practical limitations (such as language, lack of resource, or different timing of the investigations) can limit the effectiveness of these types of exchanges.

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

Finally, moving to the next steps in the work on international co-operation, the Survey provides many ideas and suggestions on <u>future work</u>. In general, suggestions fell into three main categories:

(i) suggestions on how to maximise the benefits of co-operation within the existing legal and practical constraints; (Eg, more transparency of workload/pipeline cases; establish clear, transparent and practical procedures for requesting and executing co-operative activities; more

sharing of non-confidential information; expansion and promotion of convergence in the use of waivers).

(ii) suggestions on how to improve the existing system of co-operation by addressing the effects of legal and practical constraints on co-operation; (Eg, Building/expanding a comprehensive and consistent legal framework (legal provisions for the exchange of confidential information; building a network of bilateral and multilateral co-operation agreements); Advocating reforms and convergence of national legislation and procedures); and

(iii) a number of suggestions focussed on ways to improve interaction between enforcers, establish contacts, and develop procedures and best practices for more effective relationships (Eg, Interaction and building relationships between agencies; and sharing experience and insight).

If I had to pick *two suggestions* which received strong support, I would say that

- Many suggested that agencies should agree on a *clearer legal framework for the exchange of confidential information*. An effective legal framework for the exchange of confidential information should address the following questions: (i) what type of information can be exchanged, and what type of information cannot be exchanged; (ii) the conditions for the transmission of confidential information to another enforcement agency, and (iii) what use the receiving agency can make of the confidential information received.

- Reforms in the area of *confidentiality waivers* are viewed as a way to foster more valuable co-operation through a more effective exchange of confidential information between enforcers.

The Survey also gave an indication on the *dividing line between OECD and ICN* as for work allocation:

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

2. Discuss the main cooperation challenges that face competition authorities in dealing with cross border cases both within the EU and outside?

Exchanges of information to enforce European Competition Law, between National Competition Authorities of EU member states, and between those authorities and the European Commission, are facilitated by the European Competition Network. I would not want to set out details of the ECN's operations here, as EU delegates to the IGE are surely better placed to do so than is the OECD Secretariat!

For other cases (such as enforcement of domestic competition law, and merger control), EU member states deal with one another as they would with other jurisdictions. The challenges that they or any other competition authority will face, when seeking to deal with cross-border cases, will depend on the circumstances of the case. However, discussions at OECD often mention the following:

- The need to obtain information, to carry out an investigation of anti-competitive effects in one jurisdiction, when the conduct or documents relating to it, reside in another jurisdiction;

- Enforcement of remedies on firms with little presence in the enforcing country;

Once authorities do seek to co-operate, the biggest legal challenges are:

- The treatment of confidential information, and especially provisions in the law protecting information gained in the course of an investigation from onward transmission to other bodies (within or across borders).

- Different substantive provisions of the law, especially for co-operation between jurisdictions where criminal charges can be brought for breaches of competition law and jurisdictions where they cannot.

However, having listened to several discussions at OECD on this topic, it seems clear that the most effective response to all of the challenges is to develop a truly effective, co-operative relationship. Most competition agencies are willing in principle to co-operate, but the practicalities can be off-putting, especially for staff under tight pressure of deadlines in complex investigations. Agencies need to see that co-operation is producing effective contributions to their day-to-day work, or they will not develop the level and frequency of contact that is essential to build trust for effective collaboration

3. Taking into account the latest OECD note (DAF/COMP/ WP3 (2013) on exchange of information on competition cases, what are your recommendations to young competition authorities in dealing with such cases?

This question refers to a discussion at the OECD's Competition Committee's working party on enforcement in June 2012. 'Information gateways' are national legal provisions or international agreements that explicitly empower the enforcement agency to exchange confidential information with other competition authorities in other jurisdictions, under certain conditions. These provisions allow the transmission of the confidential information even if the interested parties have not consented to the transmission.

Only four OECD jurisdictions (UK, Australia, Canada and Germany) have provisions in their domestic legislation enabling them to exchange confidential information with other competition agencies without having to require the consent of the interested parties, or the need to enter into specific co-operation agreement with the other agency. Competition agencies from other OECD jurisdictions have entered (or are about to enter) into international co-operation agreements which include information gateways (the United States with Australia; New Zealand and Australia; and the European Union with Switzerland). Provisions allowing the exchange of confidential information without the parties consent also exist in multilateral co-operation platforms, such as the European Competition Network (ECN).

Most OECD members therefore do not have information gateways in domestic legislation. We would not necessarily recommend that younger competition authorities seek to introduce such measures, particularly if to do so might lessen business confidence in the treatment of confidential information. For a young competition agency, it might be more important to ensure that laws and procedures properly protect confidential information acquired during an investigation. Even if effective laws and procedures are in place, it will usually be important to establish a track record of protecting confidential information (domestically and internationally), as if business harbours serious doubts about this, investigations will be significantly hampered. As an information gateway represents a (strictly limited) mechanism to allow information exchange without the agreement of the businesses (or other owners of the information) concerned, it could well send the wrong signals about the agency's commitment.

Young competition authorities might end up dealing with established competition agencies that have such gateway legislation and benefit from the support of these "mature" jurisdictions. The OECD discussion showed that in order for that to happen, young agencies need to

- Build trust and confidence in their enforcement capabilities (need solid enforcement track and reputation of sound enforcer). The existence of legal provisions (such as the gateways) may not be sufficient to trigger co-operation if there is no trust.

- Ensure in their jurisdictions a high level of legal protection for the confidential information received and of due process. This is an essential condition for the gateways to operate.

- Ensure some form of reciprocity, or willingness to share the cost of co-operation with the transmitting agency. Co-operation can be highly resource-intensive, and the costs must not fall only on one side.

- Ensure that request for co-operation under the gateways are not perceived as "fishing expeditions", but that young agencies make precise requests for actual cases where the support of the foreign agency is a necessary element (e.g. evidence located in that jurisdictions)

That said, new agencies can and should engage in international co-operation in competition enforcement through other means, just as do many long-established agencies in jurisdictions that do not operate such gateways. As the OECD-ICN survey demonstrated, agencies exchange non-confidential information (for example, their own analyses of market definition), and discuss cases in general terms when simultaneously investigating. They can also exchange information obtained from businesses, with a waiver from the business concerned consenting to that exchange.

In many discussions of co-operation, at OECD, Committee participants have stressed the importance of informal co-operation and frequent contact to build trust and good relations. This suggests that real and effective contacts at staff level (case officers, economists and so on) might be a higher priority than more formal mechanisms such as Memoranda of Understanding, at an early stage in an agency's development.