



OECD/ICN QUESTIONNAIRE ON INTERNATIONAL CO-OPERATION

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Background

- Survey was launched on 27 July 2012
- Deadline for responses on 14 September 2012
- Preliminary results (covering 38 responses) presented to WP3 on 23 October 2012
- New responses received up to first week of December 2012
- Draft Secretariat report (covering 55 responses) distributed on OLIS on 12 February 2012
- Presentation of key findings on 26 February 2013
- Finalization of Report



The Report on the OECD/ICN Survey

1. Introduction
2. Qualitative assessment of international co-operation
3. Legal basis and formal co-operation
4. Experience with international co-operation
5. Regional and multilateral co-operation
6. Limitations and constraints
7. Exchange of information and confidentiality waivers
8. The role of OECD
9. Areas of potential improvement

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Responses to the Survey: Summary Statistics

- 57 responses from 55 countries
- 55 used in quantitative analysis
- 32 OECD member responses
- 31 OECD member countries
- 14 observer responses
- 13 observer countries
- 11 ICN-only responses

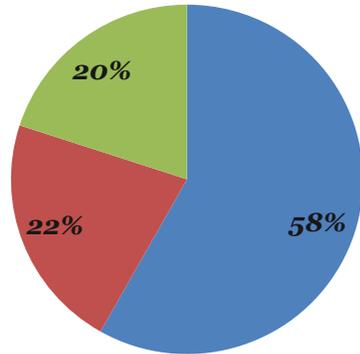
	Response rate	
	#	Response rate
OECD members	31	91%
OECD observers	13	87%
Non-OECD respondents	11	--
<i>Total respondents</i>	57	--

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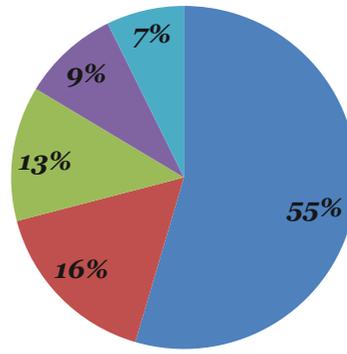
Responses to the Survey: Summary Statistics

Distribution by Membership



■ OECD members ■ OECD observers
■ ICN only responses

Geographical Distribution



■ Europe ■ Americas ■ Asia
■ Pacifica ■ Africa

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Prioritisation and Objectives of Co-operation

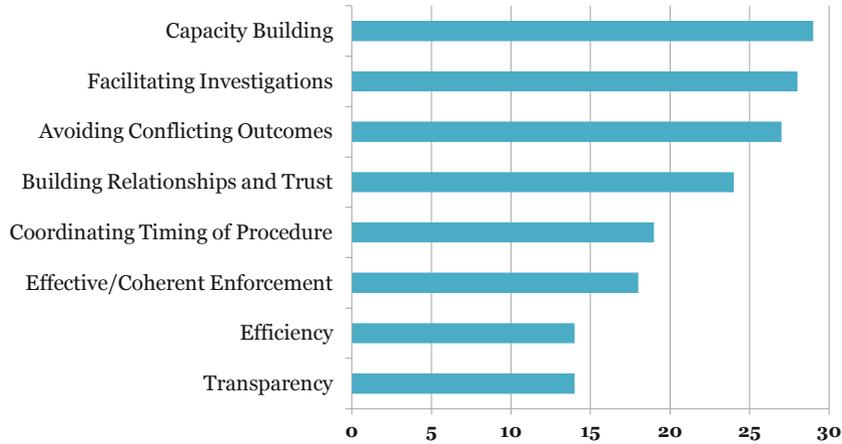
- Co-operation is a policy priority for a vast majority of competition agencies - 46 respondents (84%)
- Those who reported that co-operation is not a policy priority (7 respondents) gave one or more of the following reasons:
 - Young agency, still focused on capacity building
 - Regional co-operation had been sufficient
 - Prioritise only to the extent of relevance to a case

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Prioritisation and Objectives of Co-operation

Objectives Pursued in International Co-operation



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Usefulness of Co-operation

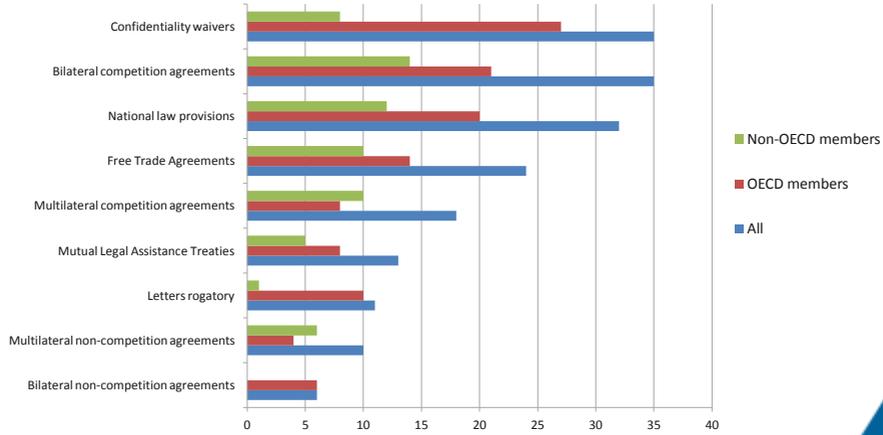
- 44 respondents found international co-operation useful to their enforcement strategy
- 40 respondents highlighted usefulness of *informal* co-operation in particular
- Respondents assessed that benefits from co-operation overall outweigh the costs

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Legal Basis for International Co-operation

Availability of legal bases for international co-operation



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Legal Basis for International Co-operation: Availability

- Most widely available legal bases for co-operation:
 - Bilateral competition agreements (64% of respondents)
 - Confidentiality waivers (64%)
 - National law provisions (58%)
 - Free trade agreements (44%)
 - Multilateral competition agreements (33%)

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Legal Basis for International Co-operation: Frequency of Use and Relevance

- Most ‘frequently used’ legal bases:
 - National law provisions
 - Confidentiality waivers
 - Letters rogatory
- Most ‘relevant’ legal bases:
 - National law provisions
 - Confidentiality waivers
 - Multilateral competition agreements

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Formal instruments for co-operation

- 32 respondents (58%) reported provisions for international comity in national law, bilateral agreements or multilateral agreements
- Use of cooperation mechanisms has been limited:
 - *Formal notifications*: less useful than in the past, due to informal communication/more publicly available information (15 respondents had made notifications, 19 respondents had received)
 - *Investigatory assistance*: experience concentrated in a few agencies; for others, lack of legal basis/length and complexity of request procedures (11 had made requests, 10 had received)

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Experience with International Co-operation

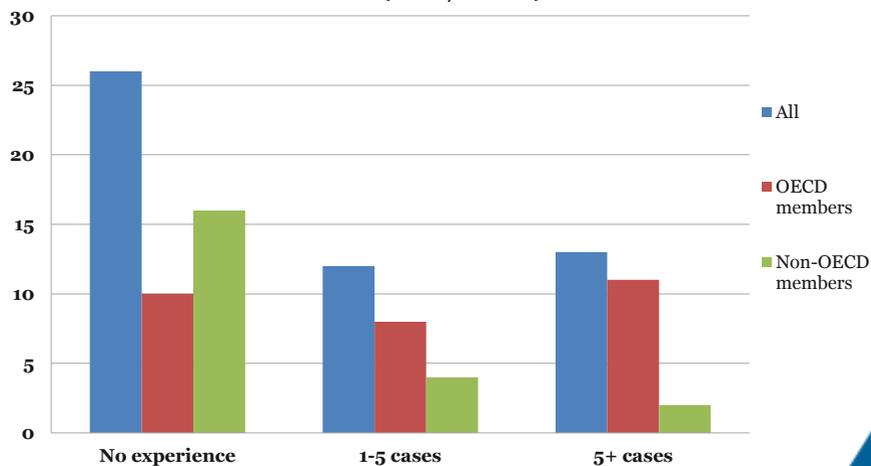
- About one-half of respondents (29 agencies) reported some experience with international enforcement co-operation, excluding regional experience
- 26 respondents reported no experience
- Of the agencies reporting experience in enforcement outside regional networks:
 - 22 agencies reported occasional experience
 - 7 agencies (all OECD member countries) reported frequent or regular co-operation

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Experience with International Co-operation

Number of Cases in Which Agencies had Co-operated (2007-2012)



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Experience with International Co-operation

Number of Cases in which Agencies had Co-operated, by Enforcement Area (2007-2011)

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

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Experience with International Co-operation

- The number of cases involving international co-operation has increased over time

	Increase in Cases Involving Co-operation (2007-2011)
Cartel	15%
Merger	35%
Abuse of Dominance	30%

- Respondents expect the frequency of international co-operation to continue to increase, due to growth in the number of multi-jurisdictional cases

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Regional Co-operation

- 38 respondents (69%) indicated membership in a regional network
- Some networks provide a framework for co-operation in competition enforcement:
 - ECN/ECA/EU Merger Working Group (26)
 - COMESA (3)
 - Nordic Alliance (3)
 - ICAP (2)
 - CARICOM (2)

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Regional Co-operation

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

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Limitations to Effective Co-operation

- *Limitations of a legal nature* (for example due to restrictions in domestic legislation or differences in legal systems) were ranked as important and among the most frequently encountered limitations on co-operation
- *Practical limitations* (for example lack of resources, language and timing issues) were in general ranked as less important, and considered more easy to overcome



Limitations on Effective Co-operation

Ranking of Limitations and Constraints		
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



Exchange of Information

- Exchange of *non-confidential information* (such as analytical methods, non-public agency information) is generally permitted and can provide significant benefits
- The exchange of *confidential information* is more difficult and relies on formal mechanisms for co-operation
 - Protection of confidential information is fundamental to the ability of agencies to successfully complete investigations;
 - National legislation or international agreements (outside regional co-operation platforms) generally do not allow for the transmission of confidential information to other enforcers.

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Exchange of Confidential Information

- 30 respondents can exchange confidential information on the basis of a confidentiality waiver
- 16 respondents indicated that equivalent down-stream protection of confidential information is an important condition for its exchange
- 12 respondents said that they can exchange confidential information subject to the existence of enabling provisions in bilateral or multilateral co-operation agreements
- 9 respondents said that they can exchange confidential information subject to the imposition of conditions on the use of confidential information:
 - Receiving agency must ensure equivalent downstream protection
 - Information can be used only for purposes for which it was obtained
 - Information can only be used for internal agency purposes

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Exchange of Information: Confidentiality Waivers

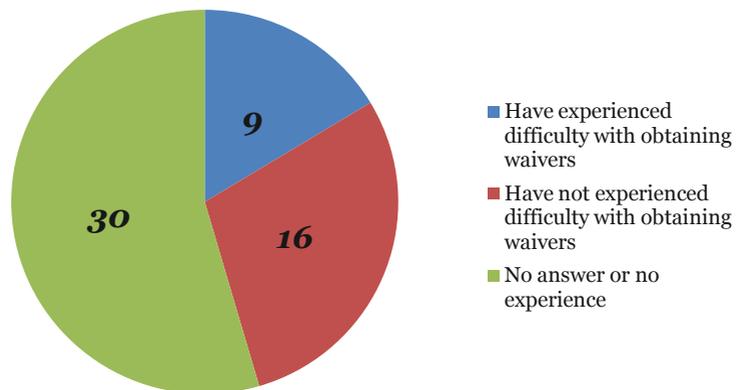
- More than two-thirds of respondents are allowed to use waivers in their enforcement activity
- Standard forms exist, as well as *ad hoc* negotiations of terms and conditions
- Use of waivers has limits:
 - Different incentives in merger and cartel cases
 - They are voluntary and remain at the discretion of the parties
 - Different scopes and language used
- Use of waivers is not as broad as it might be

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Exchange of Information: Confidentiality Waivers

Experience of Respondents with Confidentiality Waivers



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Impact of OECD Co-operation Instruments

- 16 respondents reported experience with applying the instruments developed in the 1995 Recommendation on International Co-operation
- 12 respondents reported experience with the 2005 Best Practices
- Respondents indicated that the OECD documents had been useful as general guidance for enforcement co-operation, building relationships, and legislative advocacy

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Impact of OECD Co-operation Instruments

Experience of Respondents with the 1995 Recommendation on International Co-operation

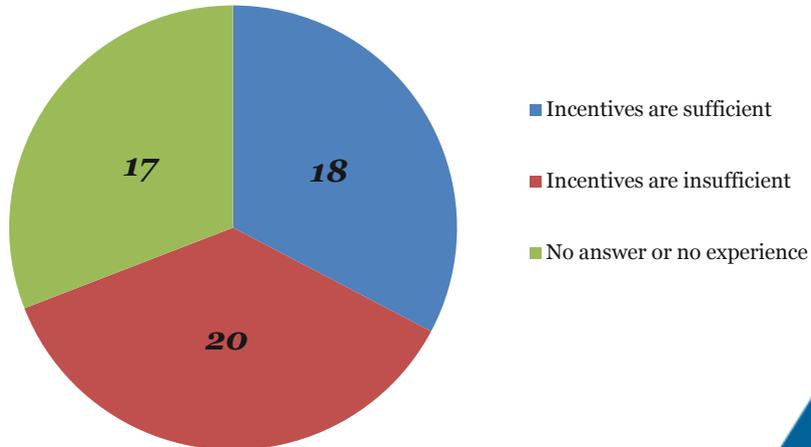
Instruments under the Recommendation	Respondents with experience
Notification of existing investigations (Rec. I.A.1)	14
Co-ordination of actions (Rec. I.A.2)	9
Exchange of information (Rec. I.A.3)	11
Consultation procedure (Rec. I.B.4 and 5)	4
Conciliation procedure (Rec. I.B.8)	1

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Incentives for International Co-operation

Opinions on the Sufficiency of Incentives for Co-operation in the Current Framework



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Incentives for International Co-operation

- Those who believe that the current system provides insufficient incentives provided some suggestions for improvements:
 - Development of more practical regulations/procedures/definitions (7)
 - Clarification of the benefits of co-operation for agencies and businesses (5)
 - Facilitation of sharing information (5)
 - Strengthening of legal provisions for co-operation and protections for information exchanged (4)

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How to improve international co-operation

- Suggestions fell into three main categories:
 - Suggestions on how to maximise the benefits of co-operation within the existing legal and practical constraints
 - Suggestion on how to improve the existing system of co-operation by addressing the effects of legal and practical constraints on co-operation
 - Suggestions on how to improve interaction between enforcers, establish contacts, and develop procedures and best practices for more effective relationships.

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How to improve the ability of agencies to exchange confidential information

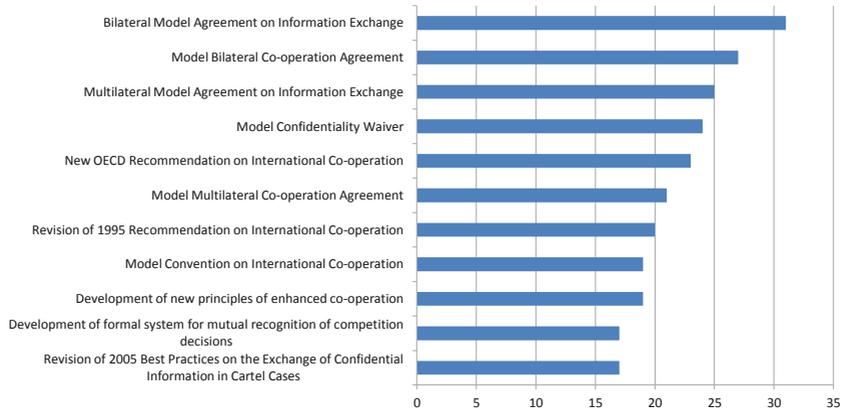
- Solutions suggested include the adoption of national legislation or of international instruments which would allow exchanges of confidential information under clear conditions and with adequate safeguards.
- There was a general consensus that any improvement in the way confidential information can be exchanged between enforcers should always be accompanied by appropriate safeguards to protect legitimate interests and the rights to confidentiality.
- An effective legal framework for the exchange of confidential information should address the following questions:
 - what type of information can be exchanged, and what type of information cannot be exchanged;
 - the conditions for the transmission of confidential information to another enforcement agency, and
 - what use the receiving agency can make of the confidential information received.

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Priority of Future Work for the OECD

Future Work for the OECD, by 'Priority' based on OECD Responses



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