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

### Introduction and background

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

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

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

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

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

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

## I. Instructions on completing the questionnaire

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

- **Questions and sub-questions.** The questionnaire contains 48 questions. Many of these questions include a number of sub-questions. Respondents are requested to answer as many questions and sub-questions as possible, in order to provide a richer set of responses.
- **Qualitative information.** The questionnaire includes questions requiring both qualitative information (covering background, experience and ideas) and quantitative data. We would like to stress the importance of gathering qualitative information on how international co-operation works in practice and where its strengths and weaknesses are. Where a qualitative answer is requested, respondents may supplement their responses by annexing additional material (e.g., articles or papers) that may be useful in understanding their position. Whenever possible, and even if not expressly indicated, when answering qualitative questions, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreements) cases/investigations.
- **Quantitative data.** We understand that a number of agencies may not have access to the extensive data required to fully answer the quantitative parts of the questionnaire, and may therefore have difficulty providing some of the figures requested. Please complete all questions to the extent possible, using the information and data available to your agency. However, when hard data is not readily available, respondents are requested to provide *estimates*, if possible, clarifying the conditions under which the estimate was made, or to use the following *ranges* if necessary: [0-5], [5-10], [10-20] and [more than 20].
- **Time periods.** A number of tables within the questionnaire request data for the last five years (2007 – 2011). Additional questions seek to cover developments over a longer period of 10-15 years. We understand that for many agencies it may not be possible to provide data for this entire time period. Respondents are invited to reply starting with information concerning the most recent year for which information is available, and working backwards providing as much information as possible. Tables also request data for 2012. This information should be provided only if readily available and only for the first half of the calendar year.
- **Confidential/business information and sensitive information.** When responding to the questionnaire, care should be taken to comply with confidentiality rules applicable in your jurisdiction. For example, information regarding specific individuals or companies, the disclosure of which is prohibited, should not be included in the answers to the questionnaire.

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

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prior consent of the agency(ies) concerned.

- **Questions on “frequency”.** Across the questionnaire, a number of questions aim at estimating the frequency of certain international co-operation activities. Frequency is measured as Never, Seldom (less than 20% of cases/investigations), Occasionally (between 20% and 60% of cases/investigations), and Frequently (more than 60% of cases/investigations). In order to estimate these percentages, respondents should only consider the subset of cases/investigations where international co-operation is potentially available (e.g., because there is more than one jurisdiction directly or indirectly involved with the case/investigation) or necessary (e.g., because the case/investigation potentially raises cross-border competition issues), and not the total universe of cases subject to the agency’s jurisdiction.
- **Formal and informal co-operation.** The questionnaire seeks information relating to both formal and informal international co-operation. Agencies are likely to have different views of what constitutes “formal” vs. “informal” international co-operation, and where the characterization makes a difference in their international co-operation work they should explain it in the narrative sections of their responses. Note that section 3 of the questionnaire focuses on what is traditionally known as formal cooperation (i.e., directly pursuant to bilateral or multilateral arrangements of some kind).
- **Co-operation within regional networks.** When answering the questionnaire you are requested to distinguish between co-operation occurring within an existing co-operation platform (such as the ECN, Caricom, WAEMU, Nordic Alliance) and that which occurs outside such specialized frameworks, whether bilateral or multilateral. Because co-operation within regional networks relies on special rules and international agreements, the questionnaire separates the two forms of co-operation. Sections 1 and 2 refer to co-operation both within and outside regional networks. Respondents are requested to answer Sections 3 to 7 of this questionnaire with exclusive reference to co-operation outside regional networks. Section 8 of the questionnaire is intended to cover only experiences within regional and multi-lateral co-operation networks.
- **OECD and ICN specific questions.** The last two sections of the questionnaire refer specifically to OECD and ICN work products and work plans. Non-OECD members and observers are welcome to answer the OECD-specific questions (section 9) if they have views or suggestions on where the OECD should focus its efforts.

## II. Definition of terms

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

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

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- **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.

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### III. Questionnaire

#### 1. Qualitative assessment of international co-operation

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

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

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

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

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

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

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

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

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

**2. Legal basis of international co-operation**

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

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

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

**3. Different types of formal international co-operation**

**3.1 *Notifications and comity provisions***

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

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

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

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

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

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

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

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

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

action been rejected by an agency in another jurisdiction and for what reasons? How often?

**3.2 Formal requests for investigatory assistance**

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

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

<b>Table 4.1 – Number of formal requests for investigatory assistance made per year over the last 5 years, by type of assistance requested</b> (if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])		
Type(s) of assistance requested (please specify)	Number of requests made per year in last 5 years	Number of requests with a positive outcome

<b>Table 4.2 – Number of formal requests for investigatory assistance received per year over the last 5 years, by type of assistance</b> (if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])		
Type(s) of assistance requested (please specify)	Number of requests received per year in last 5 years	Number of requests with a positive outcome

<b>Table 4.3 – Number of formal requests for investigatory assistance made over the last 5 years, by enforcement area</b> (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)

<b>Table 4.4 – Number of formal requests for investigatory assistance received over the last 5 years, by enforcement area</b> (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)

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

### 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**

17. In the set of your cases/investigations in which international co-operation would be feasible or likely, how **frequently** has this co-operation taken place?

18. Please provide figures for the **number of international agencies** with which your agency has co-operated on cases/investigations, and the **number of cases/investigations**, over the last 5 years.

<b>Table 5.1 – Number of international agencies with which your agency has co-operated by enforcement area</b> (if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])					
Year	Cartel cases / investigations	Merger cases / investigations	Unilateral conduct/abuse of dominance cases / investigations	Other (e.g., non-cartel agreements)	Legal basis used
2012					
2011					
2010					
2009					
2008					
2007					

<b>Table 5.2 – Number of cases/investigations in which your agency has co-operated by enforcement area</b> (if necessary, use the following ranges: [0-5], [5-10], [10-20] and [more than 20])					
Year	Cartel cases / investigations	Merger cases / investigations	Unilateral conduct/abuse of dominance cases / investigations	Other (e.g., non-cartel agreements)	Legal basis used
2012					
2011					
2010					
2009					
2008					
2007					

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

19. In the set of your investigations where international enforcement co-operation would be feasible or likely (e.g., not the total universe of cases/investigations handled by your agency), please indicate the **types of international co-operation and their frequency** below.

<b>Table 6.1 – Frequency in merger cases/investigations that involve international co-operation</b> (please tick the relevant box)				
	<b>Never</b>	<b>Seldom</b> ( < 20% of cases or investigations)	<b>Occasionally</b> (20% - 60% of cases or investigations)	<b>Frequently</b> ( > 60% of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy co-ordination				
Public communication post-decision (e.g. press release, public statements)				
Other (please specify)				

**Table 6.2 – Frequency in cartel cases/investigations that involve international co-operation**  
(please tick the relevant box)

	<b>Never</b>	<b>Seldom</b> ( < 20% of cases or investigations)	<b>Occasionally</b> (20% - 60% of cases or investigations)	<b>Frequently</b> ( > 60% of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Sharing of leniency information, pursuant to waiver				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating with another agency on dawn raids/searches				
Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy co-ordination				
Public communication post-decision (e.g. press release, public statements)				
Other (please specify)				

**Table 6.3 – Frequency in *unilateral conduct / abuse of dominance* cases/investigations that involve international co-operation**  
(please tick the relevant box)

	<b>Never</b>	<b>Seldom</b> ( < 20% of cases or investigations)	<b>Occasionally</b> (20% - 60% of cases or investigations)	<b>Frequently</b> ( > 60% of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating with another agency on dawn raids/searches				
Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy co-ordination				
Public communication post-decision (e.g. press release, public statements)				
Other (please specify)				

**Table 6.4 – Frequency in *other (e.g. non-cartel agreements)* cases/investigations that involve international co-operation**  
(please tick the relevant box)

	<b>Never</b>	<b>Seldom</b> ( $< 20\%$ of cases or investigations)	<b>Occasionally</b> ( $20\% - 60\%$ of cases or investigations)	<b>Frequently</b> ( $> 60\%$ of cases or investigations)
Sharing information regarding the status of your investigation				
Sharing the substantive theories of violation and harm you are investigating				
Obtaining appropriate waivers and sharing business information and documents with another agency				
Sharing business information and documents with another agency, absent a waiver				
Sharing of public information/public statements				
Co-ordinating with another agency on the timing of review and decision				
Co-ordinating with another agency on dawn raids/searches				
Co-ordinating other aspects of investigations (e.g., timing of interviews and document demands)				
Sanction/remedy co-ordination				
Public communication post-decision (e.g. press release, public statements)				
Other (please specify)				

5. **Exchange of confidential information and confidentiality waivers**

20. Please provide a summary of the **terms of the confidentiality** protections that apply to your agency.

21. What **types of information** is your agency authorized to share with other international competition agencies in the context of international co-operation? For example, can you share public information, non-public agency information, legally-protected confidential party or third party information? Does this differ as between cartels, mergers, and unilateral conduct/abuse of dominance cases/investigations? If so, please explain.

22. Under what conditions is the **transmission of confidential information** to an international competition agency possible in your jurisdiction? Is reciprocity a condition for sharing confidential information with other agencies? Does your competition agency allow the exchange of confidential information if equivalent protections are given from the requesting agency (i.e. downstream protection)? Does this differ as between cartels, mergers, and unilateral conduct/abuse of dominance cases/investigations? If so, please explain. Do you have any national law provisions which authorise the transmission of confidential information? Are the authorisations specific to competition law, or are they part of more general legal provisions? How often did you use these national provisions to exchange confidential information with other agencies?

23. What information (e.g., public information, non-public agency information, statutorily-protected confidential party or third party information) do you get most **benefit** from sharing with other agencies (either receiving or providing)? Please provide examples of cases/investigations in which an ability or inability to share (confidential) information benefited or impeded an investigation or affected the agencies' ability to co-ordinate sanctions or remedies.

24. Is your competition agency permitted to rely on **confidentiality waivers** from parties and third parties to use their confidential information in discussions with agency staff from international competition agencies? Do you actively seek confidentiality waivers or do you rely on the parties to come forward with an offer to waive their right to confidentiality? Do you use a standard form for confidentiality waivers?

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25. Have you experienced **difficulties in obtaining confidentiality waivers** for international co-operation? If so what issues have you encountered? What are the different incentives driving targets of investigations to provide waivers? Do you have any ways in which you can share confidential information without a waiver and without the party's consent? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

26. If your agency is in a position to obtain confidential information from another agency because this is permitted under the applicable rules or because the parties granted a confidentiality waiver, is there any **limitation on the uses** of that information (e.g., can it only be used for internal purposes by the agency, or can it also be used as evidence in court)?

6. **Pros and Cons of international co-operation between agencies**

27. What **factors** does your agency consider in evaluating whether to request co-operation from another competition agency? What **factors** does your agency consider when it receives a request for co-operation from another competition agency?

28. Based on your experience, what have been the **advantages and disadvantages** of each type of formal co-operation referred to in Section 3 above (i.e., notifications; request for investigatory assistance; and enhanced co-operation mechanisms)? What are the advantages and disadvantages of different means of co-operation? Are some ways of co-operating more suitable or more effective for particular types of cases/investigations (merger, cartel or unilateral conduct/abuse of dominance), or particular jurisdictions, than others?

29. What are the **limitations** to international co-operation that you have encountered? (Please rank in terms of importance.) Are these limits *legal* or *practical* in nature? Are they specific to competition law or general under the constitution, legislation, case law or practice in your jurisdiction? Do they differ depending on whether your agency is requesting co-operation from another competition agency or if it is the recipient of a co-operation request? What difficulties do such limitations create? Where are the **gaps**, if any, in current international co-operation arrangements? What other arrangements might fill those gaps? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

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

<b>Table 7 – Limitations to effective international co-operation, importance and frequency</b> (please tick the relevant box)					
	<b>Ranking by importance</b> (high / medium / low)	<b>Never</b>	<b>Seldom</b> (< 20% of cases or investigations)	<b>Occasionally</b> (20% - 60% of cases or investigations)	<b>Frequently</b> (< 60% of cases or investigations)
Lack of knowledge of another agency(ies) involvement					
Existence of a legal limit(s)					
Absence of waiver(s)					
Different legal standard(s) applied					
Other differences / inconsistencies between legal systems					
Dual criminality requirement (for cartels)					
Low willingness to co-operate					
Lack of trust in the other agency					
Different stages in the procedures					
Lack of resources/time					
Language/cultural differences					
Different time zones					
Other (please specify)					

30. Would the answers to the previous two questions be different for cases/investigations which involved international co-operation with an agency with which you have no history of international co-operation? What particular challenges do you face in such cases?

31. Are there **benefits** that would flow from removing these limitations? Are there **costs** that would flow from the removal of these limitations? If so, what are they? What in your jurisdiction is currently carried out less efficiently than might be possible if international co-operation were more effective? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

32. In what ways can **absence of international co-operation hinder an investigation**? Can you provide any examples of cases in which an absence of international co-operation has hindered an investigation? What were the circumstances? If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel and unilateral conduct/abuse of dominance cases/investigations.

33. Can you provide any **examples** of cases in which international co-operation would have been useful but could not or would not have been possible so you did not make the request? What factors influenced your decision not to make a request? Describe the type of assistance that would have been useful and the impact of its unavailability on your enforcement efforts. If possible, please provide case examples to illustrate your answers and distinguish between international co-operation experiences in merger, cartel, unilateral conduct/abuse of dominance and other (e.g., non-cartel agreements) cases/investigations.

7. **How to improve the quality and intensity of international co-operation between agencies**

34. Do you think that the current framework for international co-operation provides sufficient **incentives** to competition agencies and to businesses to co-operate effectively with enforcers from other jurisdictions? How can such incentives be created or strengthened? Would your answer be different with regards to international co-operation with an agency with which you have no history of international co-operation? What particular challenges do you face in such cases?

35. In what ways can international co-operation between competition enforcers be **improved**?

36. Under what conditions do you think the **exchange of confidential information** between agencies should be allowed during co-operation? What **safeguards** would you require to disclose confidential information in your possession to another agency? What safeguards would you be prepared to provide to receive confidential information held by another agency? Do you have any views on how to improve ways in which you obtain (i) confidential information from other agencies and (ii) confidentiality waivers from the parties?

8. **Regional and multilateral co-operation**

37. Are you a member of a **regional organisation** which provides a platform for international co-operation in competition enforcement cases/investigations (e.g., ECN, Caricom, WAEMU, Nordic Alliance)? In what ways does membership in this organisation facilitate international co-operation? What types of international co-operation take place? What information are you able to share? Can the information you receive from other regional members be used in your own investigations?

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

<b>Table 8 – Overall frequency of international co-operation in regional organisations (types and ways)</b> (please tick the relevant box)				
	<b>Never</b>	<b>Seldom</b> ( < 20% of cases or investigations)	<b>Occasionally</b> (20% - 60% of cases or investigations)	<b>Frequently</b> ( > 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 co-ordination				
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 international co-operation you are able to achieve within a regional network from co-operating internationally with agencies outside the network? Are there useful lessons from this regional co-operation that you think would be worth expanding to international co-operation with agencies outside the network?

**9. OECD specific questions**

39. Please describe your experience with the **implementation of the 1995 OECD Recommendation** concerning international co-operation between member countries on anticompetitive practices affecting international trade (the “1995 Recommendation”). Is any specific action taken to make the 1995 Recommendation known to staff within your agency? Do you refer to the 1995 Recommendation when you co-operate with other agencies? In particular, discuss if you have made any use of the following international co-operation mechanisms provided for under the Recommendation.

Table 9 – Implementation of OECD 1995 Recommendation		
International co-operation mechanisms in the 2005 Recommendation	Used (Yes / No)	If yes, when, in which circumstances and was the mechanism useful?
Notification of existing investigations (Rec. I.A.1)		
Co-ordination of actions (Rec. I.A.2)		
Exchange of information (Rec. I.A.3)		
Consultation procedure (Rec. I.B.4 and 5)		
Conciliation procedure (Rec. I.B.8)		

40. In light of any problems or gaps in international co-operation that you have identified in your experience, how could the 1995 Recommendation be **improved**?

41. Please describe your experience with the **implementation of the 2005 OECD Best Practices** for the formal exchange of information between competition agencies in hard core cartel investigations.

42. Based on your experience and answers, in what areas would you like to see **future discussion or work** being carried out by the OECD in the next 12 – 24 months? How would you like to see any output (including formal instruments) develop?

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

<b>Table 10 – Future work for the OECD</b> (please tick the relevant box)			
<b>Outputs</b>	<b>Low priority</b>	<b>Medium priority</b>	<b>High priority</b>
Revision of 1995 Recommendation on International Co-operation			
New OECD Recommendation on International Co-operation			
Revision of 2005 Best Practices on the Exchange of Confidential Information in Cartel Cases			
Model Bilateral Co-operation Agreement			
Model Multilateral Co-operation Agreement			
Model Confidentiality Waiver			
Bilateral Model Agreement on Information Exchange			
Multilateral Model Agreement on Information Exchange			
Model Convention on International Co-operation			
Development of new principles of enhanced comity (e.g., lead agency/ies in an investigation, work sharing arrangements, joint investigatory teams)			
Development of a formal system for the mutual recognition of competition decisions			
Other (please specify)			

**10. ICN specific questions**

43. How helpful has the following **ICN work** been to international co-operation?

<b>Table 11 – Usefulness of ICN work to international co-operation</b> (please tick the relevant box)			
<b>Outputs</b>	<b>Low</b>	<b>Medium</b>	<b>High</b>
ICN Recommended Practices for Merger Notification and Review Procedures, Recommended Practice X, Interagency Co-ordination (2004)			
ICN Guiding Principles for Merger Notification and Review, Guiding Principle 6, Co-ordination (2002)			
ICN Merger Working Group Model Confidentiality Waiver (2005)			
ICN Cartel Working Group paper, Co-operation Between Competition Agencies in Cartel Investigations (2007)			
ICN Cartel Working Group Charts Summarizing Information Sharing Mechanisms (ongoing)			
Framework for Merger Review Cooperation (ongoing)			

44. Based on your experience and answers, in what areas would you like to see **future discussion or work** being carried out by the ICN in the next 12 – 24 months? How would you like to see any output (including formal instruments) develop?

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

<b>Table 12 – Future work for the ICN</b> (please tick the relevant box)			
<b>Outputs</b>	<b>Low priority</b>	<b>Medium</b>	<b>High priority</b>
Revision of co-operation-related provisions of ICN Recommended Practices on Merger Notification and Procedure			
New ICN Guidance with respect to Co-operation on Cartel, Merger and/or Unilateral Conduct/Abuse of Dominance Enforcement Matters			
New ICN Recommended Practices with respect to Co-operation on Cartel, Merger and/or Unilateral Conduct Enforcement Matters			
New or Revised ICN Working Group Reports on Co-operation on Cartel, Merger and/or Unilateral Conduct Enforcement Matters, comparing cooperation practices, rules and experiences			
Broaden/replicate ICN Cartel Working Group Charts Summarizing Information Sharing Mechanisms for other enforcement areas			
Model Bilateral Co-operation Agreement			
New or Revised Model Confidentiality Waivers for Cartel, Merger and/or Unilateral Conduct Enforcement Matters			
Broaden/replicate Framework for Merger Review Cooperation for other enforcement areas			
Other (please specify)			

45. What aspects of ICN networking, work product (please identify), and events have been the most helpful in fostering international co-operation, whether case specific or in the broader sense – i.e., not limited to case cooperation?

46. In what enforcement areas (mergers, cartels, unilateral conduct, other) should the ICN focus its efforts to foster international co-operation?

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47. Are there other aspects of cooperation in the broader sense – i.e., not limited to case cooperation – that have proven valuable in your enforcement work?

48. What can ICN do to help foster cooperation in the broader sense – i.e., not limited to case cooperation?