Organisation for Economic Co-operation and Development

DAF/COMP/WP3(2022)2

Unclassified

English - Or. English

5 May 2022

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 5 May 2022

Working Party No. 3 on Co-operation and Enforcement

Thinking out of the Competition Box: Enforcement Co-operation in Other Policy Areas

Note by the Secretariat

21 June 2022

This document was prepared by the OECD Secretariat to serve as background for Item 3 of 135th meeting of Working Party 3 on Co-operation and Enforcement on 21 June 2022.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

More documentation related to this discussion can be found at: https://www.oecd.org/daf/competition/thinking-out-of-the-competition-box-enforcement-cooperation-in-other-policy-areas.htm.

Sabine ZIGELSKI
Sabine.Zigelski@oecd.org, +(33-1) 45 24 74 39

JT03494850

This document, as well as any data and map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

Thinking out of the Competition Box: Enforcement Co-operation in Other Policy Areas

Note by the Secretariat[*]

This Note provides background information and suggested ways forward to support the Hearing on Thinking out of the Competition Box: Enforcement Co-operation in Other Policy Areas, to be held by Working Party 3 on 21 June 2022.

Brief, descriptive overviews of legal models and instruments for international co-operation from the fields of enforcement against corruption, cybercrime, police co-operation, financial and tax co-operation, and patent law are provided, and set out in more detail in the Annex to this Note. They are intended to allow readers to form their own opinion on the applicability of the presented options to the needs for more and better enforcement co-operation in the competition sphere.

A short analytical part attempts to match the solutions found in other enforcement areas with competition needs, to identify feasible options for ways forward for the work of Working Party 3. Under "ways forward", we advocate for a qualitative change in approach to international competition enforcement co-operation now, to fill the 2014 Recommendation with life. It is needed to make the required leap towards the removal of legal obstacles and the development of enhanced co-operation models, and it is possible, as precedent from other enforcement fields demonstrates.

[*] This note was prepared by Sabine Zigelski and Takuya Ohno (both OECD Competition Division). The document benefitted from comments by Antonio Capobianco and Ori Schwartz (OECD Competition Division), William Loo and Balázs Garamvölgyi (OECD Anti-corruption Division), Paul Hondius (OECD Centre for Tax Policy and Administration), and Claire Marguerettaz (OECD Legal).

Table of contents

Thinking out of the Competition Box: Enforcement Co-operation in Other Policy Areas 2

Abbreviations and acronyms 5

1. Introduction 6

2. Overview of legal models and instruments reviewed 8

2.1. Anti-corruption 8
2.2. Cybercrime 9
2.3. Judicial co-operation - joint investigation teams 9
2.4. Financial area 10
2.5. Taxation 11
2.5.1. International co-operation based on bilateral tax models 11
2.5.2. International co-operation based on multilateral tax treaties 12
2.6. Patent law 12
2.7. Summary 13

3. Matching legal models and instruments from other enforcement areas to legal obstacles to competition enforcement co-operation 14

3.1. Consultation, comity, co-ordination and notifications 14
3.2. Information exchange 15
3.2.1. Memorandum of Understanding – IOSCO MMoU 15
3.2.2. Model agreement – OECD Model TIEA 16
3.2.3. Multilateral Conventions 16
3.3. Investigative assistance 17
3.3.1. Multilateral conventions 18
3.3.2. (Dual) criminality requirements 19
3.3.3. Supporting legal models and instruments 21
3.4. Enhanced enforcement co-operation 21
3.4.1. Joint investigations 21
3.4.2. Lead agency models 22
3.4.3. Recognition of enforcement outcomes 23
3.4.4. One-stop-shop models 24
3.5. Central co-ordinating bodies 25

4. Ways forward 26

Annex A. Legal models and instruments for international enforcement co-operation from other enforcement areas 29

1. International Co-operation in Corruption and (Foreign) Bribery Cases 29

2. Budapest Convention on Cybercrime 36

3. Eurojust – European Union Agency for Criminal Justice Cooperation – Joint Investigation Teams 41

4. IOSCO - Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU) 47

5. OECD Model Convention with Respect to Taxes on Income and on Capital and OECD Model Tax Information Exchange Agreement 52

6. The Convention on Mutual Administrative Assistance in Tax Matters 57

7. Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting ("MLI") 63

8. WIPO and the International Patent Co-operation Treaty (PCT) 67

9. OECD Decisions 71

Endnotes **76**

References **80**

Tables

Table 2.1. Overview of legal models and instruments reviewed and their main characteristics 13

Boxes

Box 3.1. Examples for approaches to address legal problems to information exchanges 17
Box 3.2. Domestic enabling legislation 18
Box 3.3. MLA enforcement co-operation for hardcore cartels 20

Abbreviations and acronyms

AEOI	Automatic Exchange of Information
AML/CFT	Anti-Money Laundering/Combating the Financing of Terrorism
BEPS	Base Erosion and Profit Shifting
CbC MCAA	Multilateral Competent Authority Agreement (MCAA) on the exchange of Country-by-Country (CbC) reports
MAAC	Convention on Mutual Administrative Assistance in Tax Matters
CoE	Council of Europe
CRS MCAA	Common Reporting Standard Multilateral Competent Authority Agreement
DTT	Double Taxation Treaty
EMMoU	Enhanced Multilateral Memorandum of Understanding
EOIR	Exchange of Information on Request
GLP	OECD Principles of Good Laboratory Practice
IACCC	International Anti-Corruption Coordination Centre
IOSCO	International Organization of Securities Commissions
ISA	International Research Authority
JIT	Joint Investigation Team
MAD	Mutual Acceptance of Data
MLA	Mutual Legal Assistance
MLI	Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting
MMoU	Multilateral Memorandum of Understanding
PCT	Patent Co-operation Treaty
SEOI	Spontaneous Exchange of Information
SIENA	Secure Information Exchange Network Application
TIEA	Tax Information Exchange Agreement
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention against Transnational Organized Crime
WGB	OECD Working Group on Bribery
WIPO	World Intellectual Property Organization

1. Introduction

International co-operation of competition enforcement authorities is a priority topic for the OECD Competition Committee and its Working Party 3 (WP3).[1] In 2014, on the proposal of the Competition Committee, the OECD Council adopted the Recommendation concerning International Co-operation on Competition Investigations and Proceedings (2014 Recommendation) [OECD/LEGAL/0408],[2] which calls for Members and non-Members having adhered to it (Adherents) to foster effective international co-operation and take appropriate steps to minimise direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities. It provides a high-level framework of existing aspects of international co-operation such as exchange of confidential information, investigative assistance, and consultation, notifications and co-ordination of competition investigations or proceedings. The 2014 Recommendation is the latest OECD Recommendation on international enforcement co-operation in competition matters and reflects a development towards more and better enforcement co-operation that started with the first version of the Recommendation, which was adopted in 1967 and has been reviewed over the years and replaced by five subsequent versions.[3]

Over the last decade, globalisation of trade and services have kept increasing. Digitalisation has created business models and global players that are similar all over the world. Notwithstanding the significant benefits for the global economy and consumers, this also increases the geographic scope of competition risks and infractions.[4]

The proliferation of competition law and competition agencies with an increase of more than 600% over the last 30 years and today more than 140 competition laws and agencies in place addresses the problem and at the same time increases challenges that may consist in parallel, duplicative or even contradictory enforcement action (OECD/ICN, 2021, pp. 69-74[1]).[5]

Through the process of reviewing the implementation, dissemination and continued relevance of the 2014 OECD Recommendation the Competition Committee, through its Working Party 3, identified significant benefits of international co-operation in competition enforcement as outlined in the 2022 Report on implementation, dissemination and continued relevance of the 2014 Recommendation (OECD, 2022[2]) (the 2022 Report), also confirmed by recent OECD and ICN joint work (OECD/ICN, 2021[1]). In this process, WP3 held in October 2021 a virtual workshop on legal models for competition enforcement co-operation (the October workshop), where existing models for enforcement co-operation and exchanges of confidential information were discussed.[6] This informed the discussion at the WP3 meeting in November 2021 on the topics and priorities for future work on international enforcement co-operation to address the findings of the 2022 Report on the basis of a short Secretariat Note [DAF/COMP/WP3(2021)4].

The 2022 Report found that international enforcement co-operation plays an important role in the daily work of many competition authorities. At the same time, it highlighted significant, persistent obstacles, summarised as follows (emphases added):

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

potential to significantly improve co-ordination, reduce enforcement cost to both businesses and agencies, and create trust in truly global enforcement solutions.

In February 2022, the OECD Council encouraged Adherents [C(2022)23; C/M(2022)3, Item 42] to explore the most efficient and effective options for addressing the legal barriers to enforcement co-operation, and to explore models for enforcement co-operation existing in other areas of law enforcement (OECD, 2022, p. 7[2]) to inform competition approaches.[7] Working Party 3 had already started to explore these topics in the October Workshop. The Workshop showed that there was significant scope for improved international co-operation and an appetite by delegates to pursue a more ambitious agenda.

In order to explore available options for an ambitious agenda, Working Party 3 is holding a Hearing in June 2022.[8] This note and its Annex support the Hearing and provide detailed information on legal models and instruments from the areas of cybercrime, anti-corruption and foreign bribery, taxation, financial securities, international police co-operation, and international patent law.

The document is structured as follows:

- Section 2. provides an overview of various legal models and instruments from other enforcement areas.
- Section 3. matches elements of the legal models and instruments presented with suggested approaches to improve competition enforcement co-operation.
- Section 4. proposes ways forward for developing solutions for enabling domestic frameworks, multilateral models and instruments for improved international co-operation in competition enforcement.
- The 4. Annex A provides structured and detailed descriptions of the referenced legal models and instruments for international enforcement co-operation from other enforcement areas.

2. Overview of legal models and instruments reviewed

This section provides summary descriptions of various legal models and instruments for international enforcement co-operation from other enforcement areas. It shows that competition enforcers are not alone in their need for more and better international co-operation, and that a wide variety of solutions was found, ranging from models and tools or MoU to binding multilateral agreements that enable a wide variety of forms of international enforcement co-operation. Readers are encouraged not to dismiss solutions as found in inherently criminal enforcement fields right away, as they are often explicitly opened and applicable to administrative or civil enforcement as well.

2.1. Anti-corruption

A number of international treaties, which are binding multilateral legal instruments, exist in the area of fighting corruption and foreign bribery;[9] see more detailed description and references in the Annex, section 1. :

- The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [OECD/LEGAL/0293] (OECD Anti-Bribery Convention)[10]
- The 1999 Council of Europe Criminal Law Convention on Corruption (CoE Corruption Convention)[11]
- The 2003 United Nations Convention Against Corruption (UNCAC)[12]

These Conventions aim to achieve substantive harmonisation of national laws, making corruption and bribery in all their forms a criminal offence and establishing liability for legal persons, such as undertakings engaging in bribery and corruption. They create binding obligations on Parties to ensure that their domestic legal frameworks are fit for purpose and allow for the forms of co-operation as included in the relevant provisions. They all include provisions on international co-operation of competent law enforcement bodies, and such provisions include the widest possible form of legal assistance, including the exchange of all kinds of information, provision of evidence, executing searches, seizures, and freezing, identifying and tracing proceeds of crime, property or instrumentalities, confiscation and recovery of the proceeds, and extradition. UNCAC also foresees the establishment of joint investigative bodies.

With respect to legal assistance and co-operation, UNCAC and the COE Corruption Convention provide a direct legal basis for such co-operation.[13] The OECD Anti-Bribery Convention provides a consultation mechanism to identify the appropriate jurisdiction for the prosecution of an offence in cases where more than one Party has jurisdiction over it. Another interesting feature of the OECD Anti-Bribery Convention is the mandatory monitoring mechanism subject to a thorough process undertaken in the framework of the OECD Working Group on Bribery in International Business Transactions, where a system of peer reviews assesses the domestic legal framework of the Parties, their application and enforcement of the Convention in practice.

The OECD Anti-Bribery Convention is further complemented by several OECD Recommendations, in particular the 2009 OECD Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation) [OECD/LEGAL/0378] seeking to enhance the ability of the Parties to the Anti-Bribery Convention to prevent, detect, and investigate allegations of foreign bribery.[14]

For UNCAC additional tools and models have been devised to support implementation of the Convention: the United Nations Office on Drugs and Crime (UNODC) Model Law on Mutual Assistance in Criminal Matters,[15] which provides a template for implementation in domestic law to facilitate unilaterally the widest range of assistance to be given and received by a State in investigations, prosecutions and judicial proceedings in relation to criminal matters, a UNDOC Model Treaty on Mutual Assistance in Criminal Matters,[16] which provides a framework to assist States interested in negotiating and concluding bilateral agreements aimed at improving co-operation in matters of crime prevention and criminal justice, and a UNDOC Manual on Mutual Legal Assistance and Extradition,[17] which is a practical guide to facilitate the drafting, transmission and execution of requests for extradition and mutual legal assistance.

2.2. Cybercrime

In the field of cybercrime, the Convention on Cybercrime (Budapest Convention)[18] (see Annex, section 2.) is the first international treaty on crimes committed via the Internet and other computer networks. It was adopted within the framework of the Council of Europe and open to all countries. It aims to harmonise the national criminal laws on cybercrime; improve procedural powers to investigate cybercrime and secure electronic evidence in relation to any crime; and to establish a fast and effective regime of international co-operation for cybercrime investigations. It is binding on all Parties.

Chapter 3 of the Budapest Convention contains the provisions concerning international co-operation. It provides for traditional mutual assistance in situations where no legal basis between Parties exists – in which case the Budapest Convention's provisions apply directly; and where such a basis exists – in which case the existing arrangements also apply to assistance under the Budapest Convention. Parties to the Convention shall afford one another mutual assistance to the widest extent possible for the purpose of investigations or proceedings concerning the crimes covered by it (Art. 23). Each Party is required to adopt the legislative and other measures necessary to carry out such co-operation (Art. 25(2)).

The Budapest Convention is complemented by an Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems.[19] In November 2021, a second Additional Protocol on enhanced co-operation and disclosure of electronic evidence[20] was adopted specifically targeting enhanced enforcement co-operation on a number of issues – direct information requests to private entities across borders on domain name registration and subscriber information; giving effect to orders from another Party for expedited production of subscriber information and traffic data, also in expedited procedures; emergency mutual assistance, including a 24/7 authority network; and co-operation in the absence of a treaty or arrangement providing procedures for video conferencing support and joint investigations and joint investigation teams. This second Additional Protocol also includes a section relating to the protection of sensitive data.

2.3. Judicial co-operation - joint investigation teams

A very practical tool to implement enforcement co-operation on specific cases and to allow for easy exchanges of information and evidence between jurisdictions are Joint investigation teams (JIT). A number of binding multilateral legal instruments provide for the use of JIT[21].

JIT allow for direct co-operation of enforcers in cases where difficult and demanding investigations have links with other jurisdictions, or where several parallel investigations necessitate co-ordinated action by the concerned jurisdictions. The JIT scheme as

developed in the practice of the EU Member States is possibly the most advanced and provides interesting practical insights (see Annex, section 3.).

The EU-style JIT is based on the EU Convention on Mutual Assistance in Criminal Matters between the Members States of the EU and the EU Council Framework Decision on JIT,[22] - further complemented by a model agreement and useful additional guidance materials - which provide the legal basis for the types of co-operation and legal assistance to be undertaken within a JIT, such as

- Access to information and evidence from all parties to the JIT, without the requirement to engage in additional Mutual Legal Assistance procedures (MLA). JIT can undertake investigations in the jurisdictions of all parties to the JIT directly, or ask competent authorities in all parties to carry out investigatory measures
- Joint investigations with seconded JIT members from all parties present during investigative measures on each other's territories
- Co-ordination of the investigations (timing, investigative tactics, synchronisation of steps and almost immediate exchange of the results). This also enables to take into consideration the requirements of the other legal system, to ensure mutual admissibility
- A practical consequence of JIT is the early resolution of conflicts of jurisdiction and ne-bis-in-idem problems, leading to effective case allocation between the parties to a JIT

JITs under the Eurojust framework are set up for a specific case and for a limited duration, and they can include officials from competent authorities, and additionally judges and prosecutors. The designated competent authorities can directly enter into a JIT agreement, and JIT experts developed a JIT model agreement,[23] which can be adjusted to the specific needs of the co-operating parties.[24] Further, there is a practical guide to JIT (Eurojust, 2021[3]). The model agreement is non-binding, however, once used, signed and ratified, the JIT agreement becomes binding on the parties. It is open to participation by jurisdictions from outside the EU.

Eurojust provides overall support for the use of JITs. For example, it:

- Helps identify cases of linked or parallel investigations
- Provides organisational and logistics support for the set-up and operation of JITs and
- Provides financial support for JIT members (e.g. reimbursement of travel and accommodation expenses, as well as costs for interpretation and translation, and the transfer of items)

2.4. Financial area

In the financial area, there exists one interesting example of a tool provided to securities regulators for combating cross-border fraud and misconduct, to protect global markets and to increase investor confidence.

The International Organization of Securities Commissions (IOSCO) (see Annex section 4.) has created a Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO-MMoU).[25] This IOSCO-MMoU represents a commitment of the signing regulators with regard to mutual assistance on the exchange of information for the purpose of enforcing and securing compliance with the

securities laws and regulations of the relevant jurisdictions. It is not legally binding, but signatories, which are the relevant national regulators, declare that they have the legal ability and willingness to gather information key to investigating and prosecuting enforcement matters; provide information to foreign counterparts for the uses described in the IOSCO-MMoU; and protect the confidentiality of information.

Information can be shared for a wide range of purposes, including civil, administrative or criminal proceedings (Art. 10). The information shared can relate to records of transactions, detailed transaction information, or beneficial ownership information. In addition, the IOSCO-MMoU allows for investigative assistance in obtaining the relevant information and take or compel statements under oath. In 2016, IOSCO established the Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (IOSCO eMMoU),[26] which adds key new aspects under the MMoU, such as audit related information exchange, compelling physical attendance for testimony, freeze assets, share internet service provider records, and obtain and share telephone records. Both MMoU are currently into force until all signatories to the MMoU have signed the eMMoU.

An IOSCO MMoU Screening group reviews applications from authorities seeking to become signatories, to ensure all requirements in terms of ability to share information, provide assistance and protect confidentiality are met. Regulators who do not meet the requirements can be listed in the Appendix B member list,[27] and this may help drive the national legislative changes that are required to obtain full membership.

2.5. Taxation

In the field of taxation, different legal instruments and models have been developed to foster assistance and exchange of information between national tax administrations. This note will look in particular at the following ones (detailed information on each in the Annex, sections5. , 6. , 7.):[28]

Bilateral models

- The OECD Model Tax Convention on Income and on Capital (OECD Model Tax Convention) and
- The OECD Model Tax Information Exchange Agreement (OECD Model TIEA)

Multilateral instruments

- The Convention on Mutual Administrative Assistance in Tax Matters (MAAC) [OECD/LEGAL/0235]; and
- Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting (MLI) [OECD/LEGAL/0432].

2.5.1. International co-operation based on bilateral tax models

Bilateral tax treaties (Double Tax Treaties or "DTTs")[29] generally include provisions relating to international co-operation. There are currently more than 3 000 bilateral tax treaties in effect across the globe, the majority of which are based on **the OECD Model Tax Convention**.[30] The OECD Model Tax Convention sets out provisions concerning administrative assistance for the purpose of avoiding double taxation. This includes the exchange of information between the tax authorities of the Contracting States and the assistance by Contracting States in the collection of each other's taxes.[31]

Governments can also conclude Tax Information Exchange Agreements ("TIEAs") based on **the OECD Model TIEA**.[32] The TIEA focuses on the promotion of international co-operation in tax matters through exchange of information and treats this issue more in detail than bilateral tax treaties do. It also allows for investigative assistance in obtaining information for another jurisdiction. A Model Protocol to the TIEA aims to extend the modalities of information exchange by including the automatic exchange of information and spontaneous exchange of information (in addition to the information exchange upon request, included in the original 2002 Model TIEA). As of 16 March 2022, 518 TIEAs have been signed based on the OECD Model TIEA.

While the OECD Model Tax Convention and the OECD Model TIEA are not legally binding, once parties enter into a tax treaty or a TIEA, these become legally binding upon them.

2.5.2. International co-operation based on multilateral tax treaties

The main multilateral instrument for international co-operation in tax matters is the **MAAC,** which was developed jointly by the OECD and the Council of Europe. The MAAC creates a legally binding basis for administrative assistance between the Parties without the need for separate bilateral agreements. As of December 2021, 144 jurisdictions participate in the MAAC.[33] While the MAAC creates binding obligations vis-à-vis all other Parties, jurisdictions can, by way of reservations, restrict their participation to certain types of mutual assistance or to assistance in connection with certain taxes. The MAAC can be applied in criminal tax matters if Parties do not issue a reservation on this aspect.[34]

Another multilateral instrument in tax matters is the MLI. The MLI is an international tax treaty which aims at modifying the application of existing bilateral tax treaties in a fast and effective manner to implement the package of measures developed under the OECD/G20 BEPS ("Base Erosion and Profit Shifting") project.[35] Its focus is on substantive provisions of tax treaties and not on assistance or information exchange. The relevance for the analysis in the competition context lies in the way the MLI operates.

One of the key elements of the MLI is that it modifies tax treaties between two or more Parties to the MLI in a consolidated manner, allowing them to avoid separate individual amendments to their existing bilateral tax treaties. As of 28 February 2022, 99 jurisdictions are covered by the MLI, and, as of 1 February 2022, over 880 tax treaties have already been modified by the MLI. An additional 940 treaties will be modified once the MLI will have been ratified by all Signatories.

2.6. Patent law

In the field of patent law, the International Patent Co-operation Treaty (PCT)[36] (see Annex, section 8.) is a binding international treaty adopted within the framework of the World Intellectual Property Organisation (WIPO), and administered by it.[37]

The PCT enables innovators to seek patent protection for an invention simultaneously in a large number of countries by filing one single "international" patent application. By filing under the PCT, applicants also ensure priority for their invention in all Parties. The PCT filing replaces the filing of several separate national or regional patent applications in the first stage. Following the application, research on novelty is carried out by one dedicated research agency, resulting in a written opinion and a preliminary report; which can inform the national patent offices, which ultimately take independent decisions on the granting of the patent in their respective jurisdictions.

WIPO administers the PCT and maintains databases, provides translations, shares information, and offers assistance to participating jurisdictions and applicants. The platforms provided by WIPO allow for the exchange of documents between national IP offices, and for sharing and storage of case related search and examination documents. This helps to avoid unnecessary duplication of work in the parallel national patent procedures.

2.7. Summary

Enforcement co-operation is needed in many legal contexts outside the competition sphere, and is often significantly more advanced in terms of the legal frameworks governing the co-operation, and the types of enforcement co-operation they enable. Table 2.1 provides an overview of the main characteristics of the models and instruments reviewed in this Note.

Table 2.1. Overview of legal models and instruments reviewed and their main characteristics

Characteristics	Conventions combatting Bribery and Corruption	Budapest Convention on Cybercrime	Eurojust JIT	IOSCO MMoU	OECD Model Tax Convention	OECD Model TIEA	CMAAT	MLI	International Patent System	OECD Decisions[1]
Binding legal instrument	●	●					●	●	●	●
Non binding MoU or legal model			●	●	●	●				
Bilateral			●		●	●				
Multilateral	●	●	●	●		●	●	●	●	
Exchange of confidential information	●	●	●	●	●	●	●		(●)	
Dual criminality requirements/assumptions	●	●	●	●		●				
Common databases/case information systems	●		●						●	●
Joint notification systems/one-stop-shop systems									●	●
Joint investigations/case teams	●	●	●							
Functions relevant for parallel investigations	●		●				●		●	
Acknowledgement/deferral to another jurisdiction's decision										●
Arbitration mechanisms in case of conflicting outcomes	●								●	●
Investigative assistance	●	●	●	●	●	●	●			
Lead agency models									(●)	
Co-ordinating bodies	●	●	●	●		●	●	●	●	●
Provisions on costs	●		●			●	●		●	●
Reservations, opt-in, opt-out, limits of co-operation	●	●			●		●	●	●	

Note: Explanations regarding the concepts covered by the various characteristics can be found in the detailed descriptions of various legal models in the previous section, in section 3, and the Annex.
Note: [1]OECD Decisions fall outside the scope of the analysis of models and instruments from other enforcement spheres, but, noting that they are a very flexible tool that can accommodate any content, they include some interesting aspects that can be informative for competition enforcement co-operation. For this reason, characterisics of the OECD Decisions referenced in part 3. , are included in this table and described in more detail in the Annex, section 9. .

Source: OECD Secretariat Research, see also detailed descriptions in the Annex.

The following Section 3. sets out to match these models and instruments with the legal obstacles to competition enforcement co-operation.

3. Matching legal models and instruments from other enforcement areas to legal obstacles to competition enforcement co-operation

Recent OECD and OECD/ICN work has identified different types of obstacles to more and better international enforcement co-operation.[38] They can be summarised as legal limitations, especially relating to confidential information sharing, investigative assistance and enhanced co-operation; resourcing; co-ordination/timing; trust and reciprocity; and practical issues (e.g. language, time differences etc.) (OECD/ICN, 2021, pp. 129 - 140[1]). While resource constraints and matters of trust are undoubtedly very important constraints, the ***legal*** limitations were generally considered as the most serious limitations, and little has happened since the adoption of the 2014 Recommendation to address such legal obstacles, thus limiting progress in international enforcement co-operation.[39] This is not for lack of ideas, as for example a 2014 Hearing on Enhanced Enforcement Co-operation at the OECD,[40] or a recent OECD Workshop on legal models for international enforcement co-operation demonstrate.[41]

The following sections briefly outline different types of competition enforcement co-operation, and how the legal models and instruments from other enforcement areas could inspire solutions to enable such co-operation in the competition context.

3.1. Consultation, comity, co-ordination and notifications

Competition agencies do not face major difficulties when they engage in consultation, co-ordination, negative comity or notifications (OECD/ICN, 2021, pp. 141-151[1]) and (OECD, 2022, pp. 37-55[2])). Most of these actions take place informally, and there are various sources of information that allow agencies to be informed about enforcement action in other jurisdictions that may have a nexus to their own jurisdiction. The OECD contact list,[42] soon to be replaced by the public Competition Enforcement Co-operation Template database,[43] and the ICN contact list and templates[44] provide easy access to contact information and background information on enforcement, and informal consultations are a frequent phenomenon.

Nevertheless, informal and ad-hoc notifications or consultations reach their limit when the initial knowledge about another jurisdiction's interest or engagement in an enforcement action is missing. In particular, enforcement action that is under consideration and not public, as may be the case in abuse of dominance cases or in pre-notification merger investigations, or that is by its very nature secret, such as planned cartel investigations, may require different and more formalised and protected ways of notification. Without knowledge about similar, parallel cases, co-operation cannot take place.

Central databases or "information clearing houses"[45] could help overcome information gaps and facilitate co-operation and co-ordination of enforcement action. They could also serve as a central point for one-stop-shop systems (3.4.4), could trigger and support lead agency co-operation (3.4.2), and JIT (3.4.1).

Of the discussed legal instruments, the PCT (see 2.6) provides an example for a central case notification system, where the administring body, WIPO, also provides dissemination to relevant national bodies, translation, and an initial assessment, and hosts a case related

information system for documents and research results relevant to case assessment by national bodies. The national patent offices take their own, independent decisions but can use results of investigations from parallel national proceedings.

The application to competition co-operation may seem rather limited at first glance, as the information concerned in the patent sphere is information that will eventually be public and will be shared with all affected authorities in any case. The additional information shared by patent offices relates to technical research and is not equivalent to business confidential information. However, once the limitations to the exchange of confidential information as they exist in the competition context are overcome (see 3.2 below), a central case and investigation register, which could include case related information and evidence, could become a more feasible option.

Another application for a central notification system could be a centralised leniency marker system (see also one-stop-shop models, 3.4.4 below) (also suggested by (Pecman and Pham, 2020, pp. 32-35[4])), where the marker grants priority in all participating jurisdictions. This would be similar to the international patent application in the patent system, and could allow for subsequent co-ordination of investigations, decisions on joint investigations, or lead agency models.

Any central notification platform would require dedicated resources and funding to administer such a central database reliably.

3.2. Information exchange

The exchange of information is a cornerstone of any type of international enforcement co-operation. While public and agency confidential information[46] with significant relevance to competition enforcement can generally be exchanged without legal obstacles, this is different for the exchange of confidential information.[47] Confidentiality waivers can help overcome legal difficulties, but they are mostly used in merger investigations, where the parties to the merger have an interest in facilitating agency co-operation. There is also significant use in cartel investigations, mostly prompted by requirements in leniency programmes to grant waivers, but there is hardly any use in abuse of dominance investigations (OECD, 2022, pp. 57-59[2]). Information gateways, which provide a unilateral legal basis to share confidential information with other agencies, remain limited in their number and even more limited in their actual use. Second generation agreements have increased, but they only apply in relation to the parties to the agreements (OECD, 2022, pp. 59-61[2]).

The exchange of information is central to ***any*** type of enforcement co-operation, and consequently, a number of models and instruments exist that address the problem for the respective enforcement spheres. They differ in their binding legal qualities, and in their reach, bilateral or multilateral.

3.2.1. Memorandum of Understanding – IOSCO MMoU

The IOSCO-MMoU (see 2.4) facilitates mutual assistance between signatory regulators regarding the exchange of information for the purpose of enforcing and securing compliance with the securities laws and regulations of the relevant jurisdictions. The information exchange is permissible in all enforcement contexts, administrative, civil or criminal, and includes confidential information and evidence, such as internet or telephone records. The IOSCO-MMoU safeguards the protection of the confidentiality of the exchanged information. While it is not a binding legal instrument, no regulator can become Party to the MMoU (Appendix A participant) unless the national legal requirements to enable the exchanges and to provide the safeguards are proven to be in place. The signature

demonstrates a serious commitment to mutual assistance between regulators. Its practical use is significant, with steadily rising numbers of information exchanges, and 4 319 requests made in 2019 alone.

Compared to the Model TIEA (see below), the IOSCO-MMoU has the advantage that it is a multilateral MoU. Signing regulators commit to exchanging information with all other signatories, and there is no bilateral element.

3.2.2. Model agreement – OECD Model TIEA

The OECD Model TIEA (2.5) is an example of a model agreement for the exchange of information for the purposes as defined in the TIEA. Once the model is,used, signed and ratified, it becomes a binding agreement between the signatories. It is not necessary that the conduct underlying the information request constitutes a crime in the requested Party. The Model TIEA provides that signing jurisdictions commit to enact the legislation necessary to comply with, and give effect to, the terms of the TIEA, which includes the exchange of information and confidentiality protections.

Similarly, the OECD Model Tax Convention includes provisions on the exchange of information and assistance in tax collection to be included in tax treaties between signatories based on the Convention.

3.2.3. Multilateral Conventions

- The MAAC (2.5) includes a comprehensive set of provisions for the exchange of information in tax matters. It allows for exchange of information on request, and automatic and spontaneous exchanges. In addition, it allows the exchange of other sensitive information related to tax administration and compliance improvement, for example, risk analysis techniques or tax avoidance or evasion schemes. It includes protections of rights and safeguards of persons as they apply under applicable national laws, and secrecy of the information obtained.[48] MAAC is applicable in administrative and criminal tax law enforcement contexts.
- The PCT (2.6) provides for extensive access to shared information through a common patent notification system and a case information database.
- Other Conventions, such as the Budapest Convention and the Conventions in the field of Anti-Corruption include extensive provisions on information exchange, as part of the MLA provisions covered by those Conventions. These are outlined below (3.3).

In the competition context, these models and instruments have obvious relevance and demonstrate various ways in which legal limitations to the exchange of confidential information can be overcome, ranging from non-binding, multi-lateral MoU concluded between agencies, to treaties entered into by governments. All of them require Parties to overcome obstacles in national laws that would preclude the information exchanges covered by the models and instruments, and they equally provide for safeguards with regard to the protection of confidentiality and secrecy of the exchanged information. The fact that there is precedent for information exchange from financial securities regulation and tax enforcement, which are not primarily criminal, demonstrates that it is possible to achieve such agreements for administrative enforcement.

Box 3.1. Examples for approaches to address legal problems to information exchanges

The IOSCO-MMoU requires prior to signing the MMoU that the signing regulators ensure that no domestic secrecy or blocking laws or regulations prevent the mutual assistance provided for in the MMoU (e.g. exchange of information, Art. 6(b)).[1] In Articles 10 and 11, provisions are made for the permissible uses of information and for confidentiality of the information exchanged.

The Model TIEA provides that Contracting Parties shall enact any legislation necessary to comply with, and give effect to, the terms of the TIEA (Art. 10).[2] It contains provisions on declining requests (Art. 7), in particular when they relate to business or otherwise confidential information. At the same time, it exempts certain clearly defined types of information from this category (Art. 7 (2) and Art. 5 (4)). Art. 8 includes protections on the confidentiality of the information exchanged.

Notes:
[1] See https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf;
[2] See https://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm;

3.3. Investigative assistance

Investigative assistance relates to providing information, compelling testimony or documents, serving documents or executing searches on behalf of another jurisdiction. This type of co-operation is specific, as it seeks to support enforcement action, which takes place in another jurisdiction, without there necessarily being a local nexus or a parallel national case. As such, it is a more "altruistic" form of co-operation (OECD, 2022, p. 62[2]). Actual instances of investigative assistance outside of regional networks are rare, and legal limitations are at least part of the explanation, next to resource constraints or lack of trust in agency relationships (OECD, 2022, p. 68[2]).

In light of the powers required to engage in investigative assistance, legal instruments that were developed primarily for criminal enforcement seem to be most instructive, in particular on all powers relating to mutual legal assistance (MLA). However, some investigative assistance is also foreseen in the previously introduced more administrative-type of enforcement tools. It should also be noted that in the consumer protection context, an approach favouring domestic enabling legislation is proposed (see Box 3.2).

Box 3.2. Domestic enabling legislation

One approach to reduce legal obstacles to enforcement co-operation is to focus on domestic enabling legislation that allows a competition agency to provide confidential information and assistance to another competition agency. In line with proposals developed by the OECD Committee on Consumer Protection (CCP),

> *domestic enabling legislation would need to include appropriate procedural and substantive safeguards to the exercise of the recommended powers by consumer protection enforcement agencies in cross-border matters based on data protection and privacy, confidentiality, and principles of due process, international law, and mutual legal assistance. However, such safeguards ought not to prevent consumer protection enforcement agencies from the lawful exercise of their powers in appropriate cases (OECD, 2021, p. 9[5]).*

Such domestic enabling legislation could go beyond information exchanges, and could include investigative assistance (OECD, 2021, p. 11[5]), and provisions that allow other jurisdictions to apply their investigatory powers to foreign businesses in other jurisdictions (OECD, 2021, p. 12[5]).[1]

This concept is not new to competition enforcement. Information gateways are enabling domestic legislation.[2] However, evidence of their use is scarce, demonstrating room for improvement.

A model law could support the introduction of aligned domestic legal frameworks, with the UNODC Model Law on Mutual Assistance in Criminal Matters providing valuable inspiration.[3]

Notes:
[1] Such powers are also foreseen in the 2nd additional protocol to the Budapest Convention.
[2] For more detail, see (OECD/ICN, 2021[1]), part 18 and annexes F and H;
[3] https://www.unodc.org/pdf/legal_advisory/Model%20Law%20on%20MLA%202007.pdf.

There is a wide range of treaties that focus on or exclusively target MLA, hosted by a variety of global or regional institutional frameworks. The examples introduced here relate mostly to the anti-corruption sphere, as this is an area that can be considered most closely related to competition offences in terms of the actors involved and the offences committed.

3.3.1. Multilateral conventions

The multilateral conventions relating to corruption and bribery as introduced under 2.1 above share one common element relevant for the discussion: a focus on international co-operation with an obligation to provide the widest possible form of legal assistance, including the exchange of all kinds of information, provision of evidence, executing searches, seizures, and freezing, identifying and tracing proceeds of crime, property or instrumentalities, confiscation and recovery of the proceeds, and extradition. Similar to competition enforcement, they target undertakings and their behaviour, in addition to individuals.

The Budapest Convention (2.2) equally includes provisions on international co-operation and the provision of the widest possible forms of legal assistance, and requires Parties to adopt the legislative and other measures to carry out such co-operation.

All the Conventions discussed provide a direct legal basis for the MLA foreseen, unless other treaties or agreements, which do not contain obligations contrary to the conventions, already provide for it.

3.3.2. (Dual) criminality requirements

It would seem rash to dismiss the precedent these Conventions set just because they are mostly applied in a criminal enforcement context. It is true that many laws make MLA conditional upon the existence of dual criminality in the co-operating jurisdictions, and a strict application of dual criminality can be a significant hurdle in the fulfilment of MLA requests (OECD, 2017, p. 41[6]), and could be a serious hurdle for application in the competition enforcement context. However, while many referenced instruments are designed and applied mostly in criminal enforcement frameworks, they provide for mechanisms that allow or encourage to a certain extent co-operation and legal assistance in civil/administrative contexts.

The OECD Anti-Bribery Convention explicitly applies to acts committed by legal persons that are not criminal in the law of all Parties, as long as the offence as such is covered by the scope of the Convention. It stipulates in Art. 9.2 that dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of the Convention (OECD, 2017, p. 41[6]). Part A of the supporting OECD Anti-Bribery Recommendation explicitly calls on Adherents to provide mutual legal assistance in non-criminal investigations and proceedings within the scope of the OECD Anti-Bribery Convention involving a legal person, including when the non-criminal investigations and proceedings are not directly related to criminal proceedings involving a natural person.[49]

UNCAC (Art. 43.2) provides for a dual criminality assumption:

> *In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.*

This still requires that the conduct in question is a criminal offence in both parties. To address the problem, Art. 46.9(c) suggests that the dual criminality principle should be applied sparingly in corruption cases (if at all) (OECD, 2017, p. 41[6]):

> *Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.*

The European Convention on Mutual Assistance in Criminal Matters,[50] through its Second Additional Protocol,[51] sets a wider scope for mutual assistance (Art. 1), going beyond criminal investigations:

> *Mutual assistance may also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting or the requested Party by virtue of being infringements of the rules of law, where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.*
>
> *Mutual assistance shall not be refused solely on the grounds that it relates to acts for which a legal person may be held liable in the requesting Party.*

The 2000 EU Mutual Legal Assistance Convention,[52] which clearly inspired the wording of the provision in the Second Additional Protocol quoted above, goes even further in terms of the binding nature of the MLA in administrative proceedings, in saying in its Art. 3 (emphasis added) that

> *Proceedings in connection with which mutual assistance is also to be afforded*
>
> *1. Mutual assistance **shall** also be afforded in proceedings brought by the administrative authorities in respect of acts which are punishable under the national law of the requesting **or** the requested Member State, or both, by virtue of being infringements of the rules of law, and where the decision may give rise to proceedings before a court having jurisdiction in particular in criminal matters.*

In particular for enforcement against hard core cartels, which are not criminal in all jurisdictions (OECD, 2020, pp. 13-17[7]), (wide) interpretations of dual criminality requirements can be instructive and could allow MLA at least in this competition enforcement context (see also Box 3.3).

Box 3.3. MLA enforcement co-operation for hardcore cartels

The OECD looked at the use of MLA provisions for enforcement co-operation in hardcore cartel cases already in 2012 (OECD, 2012[8]). This work was recently referenced in ICN work (ICN, 2020, pp. 13-14[9]), and it sees limited relevance for the use of MLA because of criminality/dual criminality requirements, different legal standards and investigative methods and potentially lengthy and resource intensive procedures.

However, it may be worth taking a closer look again. For example, the European Convention on Mutual Assistance in Criminal Matters,[1] through its Second Additional Protocol,[2] could be applicable to a wide range of cartel cases and jurisdictions, where cartel enforcement is criminal or at least partly criminal (such as in bid rigging cases) or, as for example in Germany, is treated as a misdemeanour proceeding.[3] This could allow for EU-style JIT in cartel matters, as it is precisely this Convention that is their legal basis. JIT type co-operation would effectively overcome many of the alleged obstacles to MLA in hardcore cartel enforcement. For EU Member countries, the 2000 EU Mutual Legal Assistance Convention would seem to provide a legal basis for JIT type co-operation already.

Notes:
[1] See https://rm.coe.int/16800656ce
[2] See https://rm.coe.int/168008155e
[3] See also http://www.worldlii.org/int/other/treaties/COETSER/2001/5.html, explanatory note to the second protocol. Expressly intended to include "Ordnungswidrigkeiten" (best translated as misdemeanour procedures), which would make for example German cartel enforcement suitable for co-operation. The proviso re the courts means that the relevant courts should at least also deal with criminal cases.

More in general, the absence of dual criminality requirements or the explicit encouragement to apply effective MLA in administrative/civil enforcement contexts, as shown in the referenced Conventions, shows that there is legal precedent for MLA outside the criminal enforcement context, which could inform competition specific MLA agreements. This is also demonstrated by the IOSCO-MMoU, which provides that dual criminality requirements are not valid reasons to refuse to provide assistance (Art. 7(c)).[53]

3.3.3. Supporting legal models and instruments

The OECD Anti-Bribery Recommendation supports the OECD Anti-Bribery Convention and provides up to date and detailed recommendations to Adherents on the implementation of its various provisions. A detailed part XIX on international co-operation could inform similar provisions in the competition context. The UNODC Model Law on Mutual Assistance in Criminal Matters,[54] which provides for the unilateral implementation of national provisions to allow for MLA, the UNDOC Model Treaty on Mutual Assistance in Criminal Matters,[55] and a UNDOC Manual on Mutual Legal Assistance and Extradition could serve as further inspiration for future work on legal assistance in the competition context.

3.4. Enhanced enforcement co-operation

Enhanced enforcement co-operation[56] is a rare phenomenon outside regional arrangements, and actual case examples of joint investigations, or the application of lead agency models are missing. One-stop-shop models and the mutual recognition of decisions are equally rare outside arrangements provided in the regional context such as in the European Union. At the same time, all competition enforcement areas could benefit from enhanced co-operation in cases with similar impact on a larger number of jurisdictions. Intelligent work sharing and co-ordination could help save resources, make best use of specialised knowledge and competence in some jurisdictions, allow for harmonised and aligned enforcement outcomes, and create benefits in terms of efficiency and legal certainty for affected undertakings. Younger and under-resourced jurisdictions could benefit to a certain extent from positive externalities created by the enforcement actions of better equipped and experienced jurisdictions (see also (Gal, 2008, p. 16[10]), (Martyniszyn, 2021, p. 698[11])). Consequently, the OECD Council has encouraged the Competition Committee to address enhanced enforcement co-operation as one of the areas for future activity to improve the implementation of the 2014 Recommendation.[57]

3.4.1. Joint investigations

Joint investigations can take on a variety of forms. (Pecman and Pham, 2020, pp. 24-29[4]) provide a detailed description of JIT and discuss their applicability in the competition context, national law requirements, and the role of international organisations in their formation and support.

Of the presented legal instruments, the Budapest Convention encourages the use of joint investigation teams (JIT) in its newly adopted Second Additional Protocol, to facilitate criminal investigations or proceedings.[58] JITs should be established by mutual agreement by the competent authorities of two or more Parties, which determine conditions governing the operation of joint investigation teams, such as their purposes, composition, functions, duration, location, organisation, terms of gathering, transmitting and using information or evidence, terms of confidentiality, and participation in another Party's investigative actions. UNCAC provides that *"… in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies."*[59] These should ideally be based on existing bilateral or multilateral agreements, or be established on a case-by-case basis. The OECD Anti-Bribery Recommendation equally calls on Adherents to consider setting up joint or parallel investigative teams.[60]

A relatively recent anti-corruption initiative to bundle and co-ordinate enforcement action across borders is the International Anti-Corruption Coordination Centre (IACCC).[61] IACCC targets grand corruption schemes and aims to inform who can offer investigative

assistance, support with practical actions and advice, collect and bundle grand corruption scheme related information, co-ordinate an effective global law enforcement response, and support collaboration by national enforcement agencies.

As described in 2.3 above, the EU-style JIT is probably the best developed JIT model and provides for a model agreement, a practical guide, and financial and logistics support to JIT provided by Eurojust. Entering into a JIT allows for very close case co-operation, and investigative assistance and exchange of information and evidence without the need to engage in additional MLA procedures. A JIT also facilitates the quick resolution of jurisdictional conflicts due to the close co-operation of the enforcers involved.

JITs in competition enforcement could enable very close case co-ordination and synchronised investigations, as well as direct sharing of confidential information and case related evidence. National experts in such JITs are selected based on their specialisation and experience in a certain enforcement matter. JITs would also help in finding best placed jurisdictions to take enforcement action and decisions, and they have the potential to align enforcement outcomes. An added benefit is the close personal interaction of JIT team members, which can trigger more future co-operation. However, to be fully applicable in the competition context, legal obstacles to investigative assistance and information exchange would need to be overcome in the first place, as they are essential for a viable legal basis for JITs in the competition enforcement context.

3.4.2. Lead agency models

Lead agency models can take a variety of forms but they have in common that one agency takes the lead in investigating a case and co-ordinating or even determining its outcome, with a view to the resolution of competition concerns in all affected jurisdictions.[62] Voluntary models leave decision-making competences with the participating jurisdictions; mandatory models defer decision making to the lead agency. Other variants can include a supranational body or organisation to allocate lead jurisdiction competencies or adjudicate conflicts between jurisdictions (see for all (Budzinski, 2014[12])). Lead agency co-operation can be combined with JIT co-operation, where the participating jurisdictions second team members to the lead agency for the investigation, with all necessary investigative and information sharing powers necessary for a multijurisdictional investigation (see also (Pecman and Pham, 2020, p. 26[4])).

Precedent for lead agency enforcement co-operation outside of regional competition networks is scarce. Within the EU context, the EU Merger Regulation (EUMR) and its case allocation principles could be seen as a form of lead agency model,[63] likewise the case allocation to a well placed agency within the European Competition Network (ECN).[64] However, even there it is one agency taking exclusive jurisdiction, and not one agency taking the lead in a case for several jurisdictions. The OECD Anti-Bribery Convention provides that when more than one jurisdiction would have jurisdiction over an alleged offence covered by the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.[65]

The PCT (see 2.6) could be seen as limited precedent, as it allocates the thorough first examination of an international patent application to one dedicated research authority. The results can then serve as a valuable basis for the ensuing national patent proceedings.

Another enforcement area where the idea of lead agencies is considered is consumer protection. The Implementation Toolkit on Legislative Actions for Consumer Protection Enforcement Co-operation (OECD, 2021[5]) suggests that when enforcement agencies work in parallel they should, when appropriate, aim to secure outcomes that are consistent overall, taking into consideration differences in agency structure, powers, and applicable

law. This could involve several consumer protection authorities agreeing on a common position as to what outcomes they can achieve under their own law, and using this as the basis for their approach to businesses under investigation. Depending on the compatibility of legal regimes, the participating authorities could also appoint a lead authority to co-ordinate the co-operation (OECD, 2021, p. 20[5]). The lead agency as understood here is a bit behind the discussions in the competition area, where lead agencies could have functions going beyond agreeing on a common investigation approach or harmonised outcomes, namely carrying out joint investigations and/or deferring to the decision of the agreed lead agency.

If lead agency models were to be considered in the competition context, questions of case allocation, case related investigative support and information exchange, extraterritorial jurisdiction and proportionality of national decisions exercising such jurisdiction, and reliance on or recognition of another jurisdiction's decision (see 3.4.3 below) would need to be solved.

3.4.3. Recognition of enforcement outcomes

The recognition of enforcement outcomes in one jurisdiction, such as decisions, judgments or settlements by other jurisdictions, has been discussed primarily in the hard core cartel context. The existence of an international cartel could be established in one jurisdiction, and other jurisdictions could use such a decision as prima facie evidence for their cartel findings, providing a basis also for third-party follow on action (Martyniszyn, 2021, pp. 702-704[11]). Plaintiffs would only need to prove the local elements of a cartel for national action, and that foreign decisions meet specified standards (Gal, 2008[10]). The advantages of such an approach are obvious, as smaller or less resourced jurisdictions can rely on the investigations and findings of larger jurisdictions and would only need to complement them with the required national elements. International cartels could be fined and sued for damages in most jurisdictions where they caused harm, which increases deterrence and the efficiency of cartel prosecution. An added advantage is that such recognition mechanisms could be adopted unilaterally by jurisdictions. While the discussion in the literature limits itself to cartels, such a mechanism could also be applied to suitable international mergers or abuse of dominance investigations. Since an infringement in one jurisdiction does not necessarily establish an infringement in another jurisdiction, such recognition would work on a case-by-case basis.

Precedent for such a recognition mechanism outside regional enforcement arrangements is limited.[66] OECD Decisions on MAD and the OECD Tractor Codes (see Annex, section 9.) can be considered as a sort of recognition mechanism. MAD enables the mutual recognition of laboratory testing results for chemicals, thus avoiding duplicative testing. The Adherents to the OECD Tractor Codes agree on common testing standards and accept test results from other jurisdictions, provided they were carried out following the Codes. However, both examples relate to scientific standards, which will produce unequivocal results when following an agreed procedure. This is clearly unlike competition cases where decisions are taken with wider discretion and following procedures that are not completely harmonised.

This should not imply the mutual recognition of decisions would not be an enforcement mechanism worth considering for competition enforcement co-operation, in particular since it would be completely within the powers of individual jurisdictions to establish such a recognition mechanism, depending on national legal requirements. The broader its adoption, the higher the value could be for international enforcement co-operation and the mechanism could greatly facilitate lead agency models.

The mutual recognition and enforcement of judgments concept is reflected in the 2016 OECD Recommendation on Consumer Protection in E-commerce [OECD/LEGAL/0422]:[67]

> *Part 3, v) Co-operate and work toward developing agreements or other arrangements for the mutual recognition and enforcement of judgments resulting from disputes between consumers and businesses, and judgments resulting from law enforcement actions taken to combat fraudulent, misleading or unfair commercial conduct;*

3.4.4. One-stop-shop models

One-stop-shop models are discussed in the context of notification systems – merger notifications and applications for leniency with setting markers (OECD, 2014, pp. 4-5[13]), (Taladay, 2012[14]), (International Chamber of Commerce, 2016[15]). In the merger context, multiple filings can be burdensome and difficult for merging parties, and one central notification that is shared with all relevant jurisdictions could reduce this burden. For cartels, a common marker system for leniency applications would have the characteristics of a one-stop-shop system. A marker could be set with one body or designated jurisdiction, which would notify all affected jurisdictions, and the marker would establish priority in all jurisdictions, with subsequent co-operation obligations in all. This increases legal certainty and predictability for applicants, and may be one way to counter the declining trend in leniency across the world (OECD, 2022, p. 43[16]). For all one-stop-shop models, it is commonly assumed that jurisdiction for the ultimate decision is still with the individual jurisdictions (Pecman and Pham, 2020, pp. 33-34[4]), (OECD, 2014, pp. 4-5[13]).

Next to procedural facilitation, one-stop-shop solutions would also address the issue of notification of all agencies affected by a merger or cartel (see 3.1). A central filing and information system could thus help align investigations and favour co-operation of all notified agencies from the earliest stages on. This could in turn facilitate joint investigations (see 3.4.1) and the functioning of lead agency models (see 3.4.2).

Of the presented models, the PCT (see 2.6) is the only one that provides for such a solution. In the PCT system, one single international application replaces a (potential) multitude of national applications and secures priority for the patent application in all participating jurisdictions. A PCT application can be sent to any of the participating patent offices in the language of the applicant in a standardised form that is the same for all jurisdictions. Fees are only paid once. An initial examination is undertaken centrally. Only in the later stages, when an applicant decides to continue the patenting process, individual national applications will be necessary, and independent national decisions on the granting of the patent will be taken. The system benefits from a central administration by WIPO, which includes applications in all databases, provides translations, distributes and shares files and information. In addition, WIPO offers assistance and capacity building to participating jurisdictions and to applicants.

Prima facie, the application of such a system in the merger and cartel context would seem feasible. Applicants voluntarily submit applications to a central body and in doing so agree to the sharing of the information they submit. Agencies remain free to decide if they proceed individually or if they enter into collaboration with one or more other agencies. They are only bound by the date of the initial submission that will start the clock in a merger procedure or establish priority in the race for leniency.

A limiting factor today would be the lack of a central co-ordinating body.

3.5. Central co-ordinating bodies

As shown in the sections above, a number of enhanced forms of co-operation would benefit from a central body (see also (Pecman and Pham, 2020, p. 24[4])) that, for example, co-ordinates and disseminates notifications of enforcement action, acts as a central contact point in one-stop-shop merger notification or cartel marker systems, facilitates joint investigations, supports lead agency models, or offers mediation and conflict resolution services to participating jurisdictions. An additional central function that may benefit enhanced forms of co-operation could be a certification function, which establishes that required enabling legislation is in place at national levels, that national procedures guarantee agreed minimum standards, and that helps jurisdictions aspiring to join a model or instrument to design and implement necessary changes in domestic enforcement frameworks.

Some examples illustrate where experience in exercising central functions already exists:

In the anti-corruption sphere (see 2.1), the OECD's main instrument is the Anti-Bribery Convention with its supporting Recommendation. The OECD plays an important role in the monitoring of the implementation of the Convention, which is undertaken by the OECD Working Group on Bribery (WGB) constituting the Conference of the Parties of the Convention. The WGB has an elaborate monitoring system, which assesses the legal framework, the application and enforcement by Parties in practice with a system of mandatory peer reviews,[68] which is considered to be the "gold standard" of monitoring by Transparency International. In this way, the WGB has a co-ordinating function with regard to the implementation and execution of the Convention. A similar monitoring is undertaken ex-ante for the IOSCO-MMoU by IOSCO, to review applications from authorities seeking to become MMoU signatories and for ensuring all requirements are met before joining the MMoU.

In the taxation area, OECD hosts the co-ordinating body of the MAAC (see 2.5). The implementation and development of the Convention is monitored by this co-ordinating body composed of representatives of the competent authorities of the Parties under the aegis of the OECD. The co-ordinating body is responsible for, inter alia, acting as a forum to increase international cooperation in tax matters, recommending revisions or amendments to the Convention and furnishing opinions on the interpretation of provisions of the Convention.[69]

Existing OECD Decisions provide for co-ordinating functions in a number of different ways (see Annex, section 9.).

- Within the MAD framework (OECD Decision concerning Mutual Acceptance of Data in the Assessment of Chemicals [OECD/LEGAL/0194] and the Decision-Recommendation on Compliance with Principles of Good Laboratory Practice [OECD/LEGAL/0252]), the OECD evaluates a government's national GLP compliance monitoring programme before they can fully participate in the MAD. In order for a government to be considered as a candidate for MAD, they must have a GLP Compliance Monitoring Programme of test facilities within their territories, by means of inspections and study audits, carried out by a dedicated national GLP Monitoring Authority.
- Under the OECD Tractor Codes (Decision revising the OECD Standard Codes for the Official Testing of Agricultural and Forestry Tractors [OECD/LEGAL/0334]), the OECD controls the implementation of the Codes and approves test results. In each participating jurisdiction, the national stations in charge of tractor testing follow the OECD Codes when performing their tests, and then submit results to

OECD for approval. The results of approved tests are then published and used by tractor manufacturers, sellers and users, and are accessible through an online database.[70]

- The OECD Control System for Waste Recovery (Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations [OECD/LEGAL/0266]) helps control transboundary movements of wastes destined for recovery operations between Members and non-Members of the OECD having adhered to the Decision. It is supervised and controlled under a specific intra-OECD Control System, which entails different types of control procedures, dedicated competent national authorities, pre-approved recycling facilities, standardised notification and approval procedures, and regularly updated databases of competent authorities and recovery facilities.
- The OECD Decision on Conflicting Requirements being imposed on Multinational Enterprises **[**OECD/LEGAL/0261**]** foresees a consultation mechanism for problems that arise when multinational enterprises are made subject to conflicting requirements. In this case, Adherents can call for consultations in the Investment Committee or through other mutually acceptable arrangements.

4. Ways forward

The obstacles to more and better competition enforcement co-operation were clearly identified in recent work (OECD, 2022[2]), (OECD/ICN, 2021[1]). Legal limitations to exchange of confidential information absent waivers and to providing investigative assistance to another competition authority are core limiting factors. Both are essential preconditions for parallel, co-ordinated investigations, for support of another agency's investigations in cross-border cases, and any form of enhanced enforcement co-operation, such as joint investigations, lead agency models, or one-stop-shop models.

This is not a new finding:

> *The lack of appropriate tools (e.g. to exchange confidential information), procedures, institutions and resources are problems whose solutions go beyond the remit of competition authorities. … Until solutions can be found to overcome these barriers, effective international co-operation will not be achieved. (OECD, 2012, p. 14[17])*

and

> *Respondents also identified information exchange as a key area for improvements. Many suggested that agencies should agree on a clearer and common legal framework for the exchange of confidential information, i.e. the type of case-specific information that agencies find most useful. … Because limitations on the exchange of confidential information are often structural, solutions suggested are structural and include the adoption of national legislation or of international instruments which would allow exchanges of confidential information under clear conditions and with adequate safeguards. (OECD, 2013, p. 115[18])*

Such findings led to the inclusion of detailed and operational provisions on information exchange in the 2014 Recommendation, Section VII. Investigative assistance was also included prominently (Section VIII.), but remained more at the stage of a declaration of intent. However, up until 2022, no significant progress on either one was made outside of a few regional competition agreements.

In order to stop turning in cycles, a change in approach and more serious commitment to implement the 2014 Recommendation by competition authorities and their governments is required. Without change, cross-border competition infringements will create increasing harm in a rapidly globalising and digitised borderless economy, where enforcers bide their time struggling to overcome long known legal limitations to their effective co-operation.

Other enforcement areas like taxation, financial securities, or anti-corruption show impressive precedent demonstrating that when there is a political will, legal limitations to effective cross-border enforcement co-operation can be overcome. Precedent ranges from bilateral or multilateral model agreements or MoUs to binding multilateral Conventions. They cover most of the needs of enhanced competition enforcement co-operation – notification systems, databases, an ability to exchange confidential information and to provide investigative assistance, and ways to engage in joint investigations or determine lead agencies, as well as precedent for one-stop-shop solutions and central bodies with co-ordinating functions. Most of the instruments and models are open to global participation.

The current political climate, with increased concerns about high market concentration levels, and questions raised regarding the ability of national competition enforcers to address anti-competitive actions of multinational companies in online and offline markets effectively, should provide the necessary impetus for change.

Such change could, at the end of a consensual process, result in a **binding international legal instrument on Co-operation on Competition Investigations and Proceedings**, which incorporates all elements deemed essential for effective co-operation. As demonstrated by the precedent, such a legal instrument can establish direct legal bases for the exchange of confidential information and for investigative assistance, which in turn enable most if not all other discussed forms of enhanced enforcement co-operation.

A useful starting point, as the basic consensus already exists here, would be the strengthening and further dissemination of the 2014 Recommendation, in particular with regard to the existing provisions on information exchange and investigative assistance. This could, for example, be done by **turning the 2014 Recommendation into a "Decision-Recommendation"**. OECD Decision-Recommendations include both non-binding provisions and legally binding provisions. They create an obligation on Adherents to implement binding provisions included in the Decision part, and could, in the 2014 Recommendation case, introduce a binding obligation to create information gateways and introduce MLA provisions in domestic law.

A co-ordinated approach to national legal bases for effective competition enforcement co-operation could in turn provide a sound basis for **creating templates for MoUs or agreements**, and to promote them from mere declarations of intent to instrumental co-operation tools, or for a co-ordinated approach to **adjusting existing bilateral or multilateral MoUs or binding co-operation agreements**. A **multilateral MoU with a requirement to create the enabling domestic conditions** that allow for effective enforcement co-operation, inspired by the IOSCO-MMoU, would be another option.

While the focus of future work should be on enabling and facilitating the exchange of confidential information and investigative assistance, in parallel work could be envisaged to develop workable solutions for **enhanced types of enforcement co-operation**, such as joint investigation teams, lead agency models, one-stop-shop models or recognition of other jurisdictions' decisions. They would enable the qualitative leap to more systematic and efficient international enforcement co-operation, going beyond occasional and mostly bilateral case-by-case co-operation. The ability to exchange information and to provide acts of legal assistance are necessary conditions for the functioning of most of them, but they are not sufficient. Enhanced co-operation models will require defined framework

conditions and specific implementation commitments by participating jurisdictions, and rules governing their execution. They may require a central, co-ordinating body. Again, precedent from other enforcement areas can at least partly inform this work.

In summary, there are various options to bring about the necessary qualitative change to international competition enforcement co-operation, and the OECD with its 2014 Recommendation provides an ideal platform. The options shown are not mutually exclusive and can be undertaken in a staged approach in order to help build consensus, including beyond OECD membership, to potentially result in an international convention at the end of the process. The only consideration that is not optional is that work on this qualitative change needs to start now, to ensure that national competition agencies continue to be relevant actors in achieving better living conditions for consumers in a global economy.

Annex A. Legal models and instruments for international enforcement co-operation from other enforcement areas

1. International Co-operation in Corruption and (Foreign) Bribery Cases[1]

Characteristics	International Co-operation in Corruption and (Foreign) Bribery Cases
General description and main functions	There is a significant body of legal instruments related to enforcement against corruption and foreign bribery and related offences. Both the OECD and the United Nations, as well as the Council of Europe, have Conventions in place to address corruption and bribery effectively, and all include provisions and related models and guidance to align substantive and liability standards and to facilitate in particular international law enforcement co-operation. The Conventions create binding obligations on signatories to ensure that their domestic legal frameworks are fit for purpose and allow for the forms of co-operation as included in the relevant provisions. They provide comprehensive frameworks for fighting corruption, targeting both substantive alignment as well as international co-operation. The **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions** (1997)[2] includes provisions on • Making foreign bribery a **criminal offence** in all signatories (Art. 1); • Establishing **liability of legal persons** for the bribery of a foreign public official (Art. 2); • Establishing punishable effective, proportionate and dissuasive criminal **penalties** (Art. 3); • Establishing **jurisdiction** over foreign bribery when offence is committed on own territory, and jurisdiction over own nationals when the offence is committed abroad (Art. 4); • **Consultation** - when more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution (Art. 4.3);

[1] Instruments and models covered were developed by the OECD, United Nations and Council of Europe. They have a similar purpose and scope in general.

[2] https://www.oecd.org/corruption/oecdantibriberyconvention.htm.

Characteristics	International Co-operation in Corruption and (Foreign) Bribery Cases
	• **Legal Assistance** - each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person (Art. 9.1); • **Dual criminality** - where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention (Art. 9.2). The 1997 Convention is supported by the **OECD Recommendation on Further Combating Bribery of Foreign Public Officials** in International Business Transactions (2021)[3]. The Recommendation has a dedicated part (XIX) on international co-operation: • In part A, on **mutual legal assistance procedures**, it calls on Adherents to ○ Make full use of existing agreements/enter into agreements where necessary; ○ Ensure clear and easily accessible channels for assistance; ○ Ensure that national laws afford an adequate basis for mutual legal assistance, including provision of evidence, executing searches, seizures, and freezing, identifying and tracing proceeds of crime, property or instrumentalities, and confiscation and recovery of the proceeds; ○ Provide mutual legal assistance in non-criminal investigations and proceedings within the scope of the OECD Anti-Bribery Convention involving a legal person, including when the non-criminal investigations and proceedings are not directly related to criminal proceedings involving a natural person; ○ Facilitate mutual legal assistances with non-signatories to the Convention. • In part B, on **enhancing international co-operation**, it calls on Adherents to ○ Take effective measures for direct co-operation including: bilateral agreements, participation in regional or international networks, promoting exchange of personnel and experts and establishing liaison officers; ○ Spontaneous supply of information to other member countries when it could help their investigations or proceedings; ○ Complementary forms of information exchange including by Financial Intelligence Units, tax information, financial regulators, and co-operation with regional and international networks. • In part C, on **multijurisdictional cases**, it calls on Adherents to ○ Encourage direct coordination in concurrent or parallel investigations and prosecutions, including through sharing of information and evidence; ○ Consider consultations during the investigation, prosecution, and conclusion of a case, as early as possible, and using regional/international organisations to assist; ○ Consider setting up joint or parallel investigative teams.

[3] https://www.oecd.org/daf/anti-bribery/2021-oecd-anti-bribery-recommendation.htm.

Characteristics	International Co-operation in Corruption and (Foreign) Bribery Cases
	In a dedicated part on **data protection** (XXVI), the Recommendation advises to • Ensure that compliance with data protection rules and laws that prohibit transmission of economic or commercial information does not unduly impede effective international co-operation in investigations and prosecutions of foreign bribery and related offences, in accordance with Articles 9 and 10 (mutual legal assistance, extradition) of the OECD Anti Bribery Convention. In XXVII, Adherents are instructed to continue the programme of **rigorous and systematic monitoring** of member countries' implementation of the OECD Anti-Bribery Convention and this Recommendation (see the monitoring programme here). Similarly, the **United Nations Convention Against Corruption** (UNCAC, 2003)[4], and the **Council of Europe Criminal Law Convention on Corruption** (CoE Corruption Convention, 1999)[5], provide that state parties shall "afford one another the widest measure of MLA in investigations, prosecutions and judicial proceedings in relation to the offences covered by [the] Convention" (article 46.1 UNCAC); or "afford one another the widest measure of mutual assistance by promptly processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute criminal offences established in accordance with the Convention." (Art. 26 COE Corruption Convention). UNCAC, in Art. 43.2, also provides for a dual criminality assumption. A full chapter of the Convention is dedicated to international co-operation, and it includes detailed provisions on legal assistance (Art. 46), law enforcement co-operation (Art. 48), joint investigations (Art. 49), and special investigative techniques (Art. 50). In the absence of a specific treaty on mutual legal assistance, the provisions on legal assistance and law enforcement co-operation provide a direct legal basis for such co-operation (Art. 46.7 and 48.2). The same applies to the provisions on international co-operation in the COE Corruption Convention (Art. 25).[6]
Legal nature	The Conventions are legally binding international treaties. The OECD Convention is binding and supported by non-binding OECD Recommendations (on foreign bribery, export credits, development actors, tax measures).[7]
National implementation requirements	The OECD Recommendation on Further Combating Bribery of Foreign Public Officials in part XIX, A, expressly calls on Adherents to ensure that national laws afford an adequate basis for mutual legal assistance, including provision of evidence, executing searches, seizures, and freezing, identifying and tracing proceeds of crime, property or instrumentalities, and confiscation and recovery of the proceeds. UNCAC, Art. 46 9) (c) on legal assistance asks that "each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality." Both UNCAC and CoE Corruption Convention can take direct effect in the absence of other legal bases for enforcement co-operation and legal assistance.

[4] https://www.unodc.org/unodc/de/treaties/CAC/.

[5] https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=173.

[6] See also https://www.oecd.org/corruption/acn/OECD-International-Cooperation-in-Corruption-Cases-2017.pdf, p 14.

[7] See https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378#relatedInstruments; related instruments.

Characteristics	International Co-operation in Corruption and (Foreign) Bribery Cases
Years of existence and steps in development	The precursor to the 2021 OECD Recommendation is a 2009 Recommendation[8], and the review of the 1997 Convention and the 2009 Recommendation[9] led to a significantly enlarged and more detailed section on international co-operation and its facilitation. In particular, • Practice had shown that national legislation was often required to ensure that a broad range of MLA could be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system did not allow criminal liability of legal persons; • Enforcement challenges made the use of MLA and international co-operation difficult. UNCAC entered into force in 2003, the CoE Corruption Convention in 1999.
Adherents/Parties	For the 1997 OECD Convention and the 2021 Recommendation: OECD Members and six non Members.[10] For UNCAC, 189 state parties.[11] For CoE Corruption Convention, 46 signatories.[12]
Use statistics and examples	OECD Convention: from the entry into force of the OECD Anti-Bribery Convention on 15 February 1999 through 31 December 2020 - 25 Parties convicted or sanctioned, collectively, at least 684 natural and 245 legal persons for foreign bribery through criminal proceedings; 7 Parties sanctioned, collectively, at least 87 natural and 119 legal persons for foreign bribery through administrative or civil proceedings.[13] 13% of foreign bribery cases are brought to the attention of law enforcement authorities through the use of formal and informal mutual legal assistance between countries for related criminal investigations accounts. (OECD Foreign Bribery Report, 2014)[14] However, the OECD Working Group on Bribery in International Business Transactions (WGB) and others have found that in particular the legal assistance process still suffers from implementation obstacles.[15]
Process for negotiation	

[8] https://www.oecd.org/daf/anti-bribery/oecdantibriberyrecommendation2009.htm.

[9] https://www.oecd.org/corruption/anti-bribery/Public-Consultation-Review-OECD-Anti-Bribery-Recommendation.pdf.

[10] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0293#adherents.

[11] https://www.unodc.org/unodc/en/corruption/ratification-status.html.

[12] https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=173.

[13] https://www.oecd.org/daf/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2021.pdf.

[14] https://www.oecd.org/daf/anti-bribery/international-co-operation-in-combating-foreign-bribery.htm.

[15] https://www.oecd.org/corruption/International-Cooperation-Corruption-Beijing-2016.pdf

Characteristics	International Co-operation in Corruption and (Foreign) Bribery Cases
Exchange of confidential information	In general, the Conventions allow for the exchange of all types of information, provided adequate legal bases exist/requirements for legal and investigative assistance are met. This also includes the transmission of spontaneous information – information that was not requested but where a transmitting jurisdiction knows that it could be of relevance to a receiving jurisdiction.
Dual criminality requirements / assumptions	Information would mostly be transmitted in the framework of mutual legal assistance (MLA). A facilitating factor included in the Conventions is a dual criminality assumption. In the context of MLA, dual criminality refers to the principle that the criminal offence underlying the request for assistance must be a crime in both the requesting as well as the recipient state. Many countries nowadays take a "conduct-based" approach to dual criminality, that is, if the underlying conduct would be a crime in both countries, the requirement of dual criminality is met.[16] However, there is room for many jurisdictions to also provide assistance if the dual criminality requirement is not met, for example because central authorities have wide discretion, or dual criminality only applies when coercive measures are required, or when there is no dual criminality requirement under national law.[17] The 2021 OECD Recommendation calls on Adherents to provide mutual legal assistance in non-criminal investigations and proceedings within the scope of the OECD Anti-Bribery Convention involving a legal person (XIX A (iv)).
Common databases/case information systems	There exists a list of Country Contact Points for parties to the OECD Antibribery Convention.[18] For UNCAC, an online directory for National Contact Points is available.[19] In addition, a database on anti-corruption legislation in 178 states is available.[20]
Joint notification systems/one-stop-shop systems	No one-stop-solutions, but provision on consultation to identify the most appropriate jurisdiction in the OECD Convention: **Consultation** - when more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution (Art. 4.3). Legal assistance could facilitate solutions where jurisdictions agree on who is best placed to prosecute an offence, but where evidence/perpetrators are located outside the competent jurisdiction.
Joint investigations/case teams	UNCAC (Art. 49) – provides that "… in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may **establish joint investigative bodies**." This should ideally be based on existing bilateral or multilateral agreements, or on a case-by-case basis. The 2021 OECD Recommendation in part C provides that Adherents should consider setting up joint or parallel investigative teams in cases that may necessitate co-ordinated and concerted action with one or several other member countries.
Functions relevant for parallel investigations	See information exchange, investigative assistance.

[16] https://www.oecd.org/corruption/typologyonmutuallegalassistanceinforeignbriberycases.htm, pp 20-21.

[17] https://www.oecd.org/corruption/typologyonmutuallegalassistanceinforeignbriberycases.htm, p 22.

[18] https://www.oecd.org/daf/anti-bribery/oecd-wgb-country-contact-points-international-cooperation.pdf.

[19] https://www.unodc.org/compauth_uncac/en/index.html.

[20] https://www.unodc.org/centralasia/en/press/uncac-legal-library-launched_-new-database-of-anti-corruption-legislation-from-178-states.html.

Acknowledgement/deferral to another jurisdiction's decision	-
Arbitration mechanisms in case of conflicting outcomes	UNCAC, Art. 66, provides for settlement of disputes through negotiation, arbitration, and in last instance the International Court of Justice.
Investigative assistance • compelling evidence – statements/documents • servicing documents • enforcing rulings/fines	Comprehensive body of provisions on investigative assistance, including provision of evidence, executing searches, extradition, seizures, and freezing, identifying and tracing proceeds of crime, property or instrumentalities, and confiscation and recovery of the proceeds (2021 OECD Recommendation part A). The OECD Convention calls for prompt and effective assistance to the fullest extent possible (Art. 9), including extradition (Art. 10), for which the OECD Convention can be considered a direct legal basis. UNCAC likewise provides (Art. 46) that parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. This is further specified with a detailed list in Art. 46, and UNCAC includes provisions on the way legal assistance requests should be dealt with by the requesting and receiving agency. To facilitate legal assistance, UNCAC foresees that parties install a central authority to receive and execute or forward mutual legal assistance requests. For most types of legal assistance, the Convention can be deemed to provide the necessary legal basis, absent other agreements. Within the UN framework, there is a large body of resources on mutual legal assistance. The United Nations Office on Drugs and Crime (UNODC) provides a number of valuable resources for mutual legal assistance: • A **Model Law on Mutual Assistance in Criminal Matters** (2007)[21], which can serve as a template for a law to facilitate unilaterally the widest range of assistance to be given and received by a State in investigations, prosecutions and judicial proceedings in relation to criminal matters. • A **Model Treaty on Mutual Assistance in Criminal Matters** (1990)[22], • **A Manual on Mutual Legal Assistance and Extradition** (2012)[23], which includes detailed explanations and also checklists to use for drafting legal assistance requests.
Lead agency models	See one-stop-shop systems
Co-ordinating bodies	No direct enforcement co-ordination functions, apart from consultation mechanism in the OECD Convention. The OECD Working Group on Bribery monitors the implementation of the 1999 OECD Convention by assessing the legal framework, the application and enforcement in practice with a system of mandatory peer reviews, which is considered to be the "gold standard" of monitoring by Transparency International.[24] In this way, the OECD has a co-ordinating function with regard to the implementation and execution of the Convention.
Provisions on costs	UNCAC - UNODC – Model law – costs usually borne by the assisting state; UNCAC (Art. 46) costs normally borne by requested Party.
Reservations, opt-in/opt-out clause, limits of co-operation.	None for the 1999 OECD Recommendation. For UNCAC, only with regard to Art. 66, settlement of disputes.

[21] https://www.unodc.org/pdf/legal_advisory/Model%20Law%20on%20MLA%202007.pdf.

[22] https://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

[23] https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf.

[24] https://www.oecd.org/corruption/countrymonitoringoftheoecdanti-briberyconvention.htm.

If there are limits, is there a minimum degree of co-operation required?	CoE Corruption Convention – Art. 37 governs reservations and foresees limits to the number and quality of reservations.
Features relevant to competition enforcement co-operation	● Mutual legal assistance with a wide range of options for assistance, including obtaining information on behalf of another Party, and providing confidential information, also servicing of documents and possibly executing sanctions. ● Facilitation of parallel investigations, but also identification of the appropriate jurisdiction in parallel cases, and joint investigations. ● A dual criminality assumption that could include civil proceedings if the underlying offence and/or the extent of applicable fines is of a similar quality as in a criminal regime, for example applicable to hard core cartels. ● Binding conventions that in themselves can provide the legal basis for significant legal assistance, without the need to enter into bilateral or multilateral agreements, while at the same time not taking precedent over existing bilateral/multilateral agreements on the matter. ● A Recommendation with very detailed provisions on the specific forms of international co-operation. ● Model texts for laws that enable state parties to unilaterally allow for wide ranging assistance. ● Model texts for agreements. ● Manual for mutual legal assistance.
Features that may make it difficult to apply to competition enforcement co-operation	● The Conventions and Recommendation are designed for bribery and corruption offences mostly for **criminal offences** in all parties to the Conventions. A lot of co-operation in the competition enforcement context relates to (potential) infringements that will not even be considered quasi-criminal, such as merger cases and antitrust investigations.

2. Budapest Convention on Cybercrime[25]

Characteristics	Budapest Convention on Cybercrime
General description and main functions	The Convention on Cybercrime ("Budapest Convention") is an international treaty on cybercrime drafted by the Council of Europe and open to all countries. It aims principally at: • harmonising the national criminal laws on cybercrime; • improve procedural powers to investigate cybercrime and secure electronic evidence in relation to any crime; and • establishing a fast and effective regime of international co-operation on investigations.[26] Chapter III of the Budapest Convention contains the provisions concerning international co-operation on the investigations of the crimes covered by it. It provides for traditional mutual assistance in two situations: • where no legal basis (treaty, reciprocal legislation, etc.) exists between parties – in which case its provisions apply; and • where such a basis exists – in which case the existing arrangements also apply to assistance under the Budapest Convention. With regard to international co-operation, the Budapest Convention provides that the Parties shall afford one another mutual assistance to the widest extent possible for the purpose of investigations or proceedings concerning the crimes covered by it (art. 23). Each Party is required to adopt the legislative and other measures necessary to carry out such co-operation (art. 25(2)). The extent of the co-operation provided for in the Budapest Convention will be enhanced by the second additional protocol to it, which was adopted on 17 November 2021 and will be opened for signature on 12 May 2022.[27] In particular, considering the proliferation of cybercrime and the increasing complexity of obtaining electronic evidence that may be stored in foreign, multiple, shifting or unknown jurisdictions, the Protocol provides a legal basis for competent authorities to obtain certain information directly from entities established in the territory of another Party (art. 6 and 7) or through the authority where such entities are established (art. 8).[28] It also aims to enhance the Parties' ability to expeditiously obtain certain data owned by an entity in another country in emergency situations, by concretising expedited disclosure of stored computer data though the 24/7 Network (art. 10).[29]

[25] https://www.coe.int/en/web/cybercrime/the-budapest-convention

[26] Explanatory Report to the Convention on Cybercrime, https://rm.coe.int/16800cce5b.

[27] On 5 April 2022, the European Council has authorised all EU Member States to sign the 2nd additional protocol, https://www.consilium.europa.eu/en/press/press-releases/2022/04/05/access-to-e-evidence-council-authorises-member-states-to-sign-international-agreement/.

[28] More concretely, such a legal basis will be incorporated in the legislative and other measures of the parties signing the Protocol.

[29] The 24/7 Network is established by Article 35 of the Budapest Convention. It is staffed with points of contact who, in practice, communicate rapidly and without the need for written translations and are in a position to effectuate requests received from other Parties, whether by going directly to

Characteristics	Budapest Convention on Cybercrime
Legal nature	The Budapest Convention is a binding international convention. The Parties to the Convention can nevertheless express declarations (art. 40) and reservations (art. 43) in relation to the limited number of articles. The list of declarations and reservations can be found here.
National implementation requirements	Several provisions of the Budapest Convention require the Parties to adopt "legislative and other measures as may be necessary" to guarantee the effectiveness thereof. For instance, article 6 of the second additional convention reads as follows: "*Each Party shall adopt such legislative and other measures as may be necessary to empower its competent authorities, for the purposes of specific criminal investigations or proceedings, to issue a request to an entity providing domain name registration services in the territory of another Party for information in the entity's possession or control, for identifying or contacting the registrant of a domain name*."
Years of existence and steps in development	The Budapest Convention was adopted on 23 November 2001 and entered in force on 1 July 2004. The first additional protocol was adopted on 28 January 2003 and entered in force on 1 March 2006. The second additional protocol was adopted on 17 November 2021 and will be opened for signature on 12 May 2022. The Convention was negotiated by members of the Council of Europe as well as Canada, Japan, South Africa and USA. It is open for accession by any State (art. 37).
Adherents/Parties	By June 2021, 66 States were Parties to the Convention (European countries as well as Argentina, Australia, Cabo Verde, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ghana, Israel, Japan, Mauritius, Morocco, Panama, Paraguay, Peru, Philippines, Sri Lanka, Senegal, Tonga and the USA), an additional 2 countries had signed it (Ireland and South Africa), and 9 countries had been invited to accede (Benin, Brazil, Burkina Faso, Guatemala, Mexico, New Zealand, Niger, Nigeria and Tunisia).
Use statistics and examples	A report of the Counsel of Europe on the benefits and impact of the Budapest Convention provides a number of examples of mutual assistance based on the Convention.[30] For instance, **France** makes extensive use of the Budapest Convention's 24/7 network not only for computer-related crime but for all matters in which electronic evidence is necessary. France for example used the network at the time of the Charlie Hebdo attacks to obtain information on foreign forums about possible new terrorist attacks. In 2019, it was reported that the French point of contact handled 268 Budapest Convention-related requests, all for the preservation of data. These included 130 incoming requests (from 24 countries) and 138 outgoing requests. In several terrorism matters, this practice permitted the urgent preservation of essential data.
Process for negotiation	

providers in their territory, soliciting assistance from other competent authorities or going to judicial authorities, should that be required under the Party's domestic law. Explanatory Report to the Second Additional Protocol, p. 28, available at: https://rm.coe.int/1680a49c9d

[30] Available at: http://rm.coe.int/t-cy-2020-16-bc-benefits-rep-provisional/16809ef6ac.

Characteristics	Budapest Convention on Cybercrime
Exchange of confidential information	In addition to the exchange of information that could take place under the general principles of the Convention for mutual assistance (art. 25), the Budapest Convention provides for **spontaneous information exchange** (art. 26). Pursuant to this provision, a Party, within the limits of its domestic law and without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences. The Party providing the information can make the supply of information on the condition that it is: • kept confidential; and • not used for investigations or proceedings other than those stated in the request (art. 28(2)). The additional second protocol, noting that the measures provided for in the protocol often involve the transfer of personal data, seeks to provide sufficient data protection safeguards to the information to be exchanged (art. 14). For instance, it provides limitation regarding the purpose and use for which parties may process personal data (art. 14(2)), retention periods (art. 14(5)) and onward sharing within a Party (i.e. sharing of data from an authority to another authority of the same country) (art. 14(9)) or with other international organisations (art. 14(10)).
Dual criminality requirements / assumptions	Where the assistance is made conditional upon the existence of dual criminality, that condition shall be deemed fulfilled, irrespective of how the national law qualifies the criminal offence in question, if the conduct underlying the offence for which assistance is sought is a criminal offence under that national law (art. 25(5)).
Common databases/case information systems	
Joint notification systems/one-stop-shop systems	
Joint investigations/case teams	The second additional protocol the Budapest Convention specifically provides for a possibility to establish a joint investigation team (JIT) to facilitate criminal investigations or proceedings (art. 12(1))). The JIT is established by a mutual agreement by the competent authorities of two or more Parties, which determines conditions governing the operation of joint investigation teams, such as their specific purposes; composition; functions; duration and any extension periods; location; organisation; terms of gathering, transmitting and using information or evidence; terms of confidentiality; and terms for the involvement of the participating authorities of a Party in investigative activities taking place in another Party's territory (art. 12(2)).
Functions relevant for parallel investigations	
Acknowledgement/deferral to another jurisdiction's decision	
Arbitration mechanisms in case of conflicting outcomes	
Investigative assistance • compelling evidence – statements/documents • servicing documents	• The second additional protocol to the Budapest Convention provides for a possibility to take testimony and statements from a witness or expert who is in the territory of another Party by way of video conference (art. 11).

Characteristics	Budapest Convention on Cybercrime
• enforcing rulings/fines	• It also provides a legal basis for competent authorities to obtain certain information directly from entities established in the territory of another Party (art. 6 and 7) or through the authority where such entities are established (art. 8). More concretely, such a legal basis will be incorporated in the legislative and other measures of the parties signing the Protocol. The second additional protocol to the Budapest Convention provides a legal basis for enhanced international co-operation. With respect to the investigative assistance, it provides a legal basis for: • **Direct co-operation with service providers** (art. 6 and 7). The protocol aims to empower competent authorities to obtain certain information directly from entities established in the territory of another Party. The requested information (e.g. domain name registration or subscriber information) will be submitted directly to the requesting authority. • **Giving effect to order from another Party** (art. 8). The protocol aims to empower competent authorities to issue an order to be submitted to another Party for the purpose of compelling a service provider in the requested Party's territory to produce certain information. The requested Party shall give effect to such an order submitted by a requesting Party. • **Disclosure of computer data in emergency situations** (art. 9). The protocol aims to establish a procedure whereby a Party can seek immediate assistance in obtaining the expedited disclosure of certain computer data. • **Mutual legal assistance in emergency situations** (art. 10). The protocol provides for procedures pertaining to emergency mutual assistance. An "emergency" for the purposes of the protocol means "*a situation in which there is a significant and imminent risk to the life or safety of any natural person*". • **Co-operation by video conferenc**e (art. 11). The protocol provides for a possibility to take testimony and statements from a witness or expert who is in the territory of another Party by way of video conference. • **Joint investigation teams and joint investigations** (art. 12). See "Joint investigations/case team" above.
Lead agency models	
Co-ordinating bodies	The Budapest Convention as well as additional protocols are developed within the Council of Europe. It also provides related materials such as explanatory notes, guidance notes and leaflet and serves as an administrative office in relation to the ratification of (or the accession to) the Convention. The Council of Europe also supports the functioning of the 24/7 Network established according to Article 35 of the Budapest Convention, inter alia, by maintaining a Directory of contact points which is updated and shared regularly with the members of the Network.[31]
Provisions on costs	
Reservations, opt-in/opt-out clause, limits of co-operation. If there are limits, is there a minimum degree of co-operation required?	The Parties to the Convention can express declarations (art. 40) and reservations (art. 43) in relation to the limited number of articles. The list of declarations and reservations can be found here.

[31] https://www.coe.int/en/web/cybercrime/24/7-network-new-

Characteristics	Budapest Convention on Cybercrime
Features relevant to competition enforcement co-operation	• Chapter 3 of the Convention focusing on international co-operation as well as the second additional protocol enhancing the extent of co-operation. The rational for adoption of the second protocol (the increasing complexity of obtaining electronic evidence that may be stored in foreign, multiple, shifting or unknown jurisdictions) would be equally applicable to the competition enforcement. • Each Party is required to adopt the legislative and other measures necessary to carry out such co-operation (art. 25(2)). That should facilitate the conflict with the national laws of competition agencies. • The 24/7 Network supported by the Council of Europe. • Legal basis for an agency to obtain information directly from entities established in another country. • The extent of data protection safeguards provided in the second additional protocol (over 15 paragraphs).
Features that may make it difficult to apply to competition enforcement co-operation	• The precise conditions governing the operation of co-operation are left in the hands of the co-operating States/Agencies (e.g. conditions re functioning of joint investigation teams, video conferences, exchange of information). This may lead to a lack of immediate applicability. • Similar to other instruments facilitating legal assistance, this applies to a criminal enforcement framework, where the dual criminality assumption can usually be met.

3. Eurojust – European Union Agency for Criminal Justice Cooperation – Joint Investigation Teams

Characteristics	Eurojust – Joint Investigation Teams
General description and main functions	A joint investigation team (JIT) is an international, judicial co-operation scheme in criminal matters supported by Eurojust which is an agency of the European Union.[32] A JIT is based on an agreement between competent authorities including judicial (e.g. judges, prosecutors, etc.) and law enforcement authorities of at least two countries and established for a limited duration and for a specific case. Joint investigation teams are an alternative to MLA, focused on obtaining admissible evidence, and the JIT leaders (99 % prosecutors) are those in charge of MLA cooperation during the investigation. The use of JITs is not limited to EU Member States. A non-EU Member State can also participate in a JIT. Once a JIT has been set up, it enables: • exchange of information: JITs enable the direct gathering and exchange of information and evidence without the need to use traditional channels of mutual legal assistance. Information and evidence collected in accordance with the legislation of the state in which the team operates can be shared on the (sole) basis of the JIT agreement; • joint investigations: JITs also allow for practitioners to actively participate in investigative measures on each other's territories, if the host country's law permits, and to therefore share their technical expertise and human resources more efficiently.[33] Eurojust provides overall support for the use of JITs. For example, it: • provides supporting tools and documents that help national authorities plan, set up and operate JITs (e.g., model agreement and practical guide); • provides organisational and logistics support for the set-up and operation of JITs (e.g. arrangement of coordination meetings between the partners and support in the drafting of JIT agreements); and • provides financial support for the JIT members (e.g. reimbursement of travel and accommodation expenses, as well as costs for interpretation and translation, and the transfer of items).
Legal nature	The JIT model agreement,[34] which has been developed by practitioners of the JIT Experts´ Network, represents a common non-binding baseline that practitioners can tailor to the specific needs of their case. However, once signed, the JIT model agreement constitutes a binding agreement for the signing authorities.
National implementation requirements	
Years of existence and steps in development	The instrument of the JIT has been elaborated by two legal documents adopted respectively in 2000 and 2002 (i.e. the 2000 EU Convention on Mutual Assistance in Criminal Matters and the 2002 Council framework decision on JITs).

[32] The European Union legal framework for setting up JITs between EU Member States can be found in Article 13 of the 2000 EU Convention on Mutual Assistance in Criminal Matters and the 2002 Council framework decision on JITs. To date, all EU Member States have implemented one or both of these legal bases. (source: Joint Investigation Teams: Practical Guide, p. 10).

[33] Joint Investigation Teams: Practical Guide, p. 8, available at: https://www.eurojust.europa.eu/jits-practical-guide.

[34] https://www.eurojust.europa.eu/de/model-agreement-setting-joint-investigation-team.

Characteristics	Eurojust – Joint Investigation Teams
	The idea of JITs existed even before 2002. It was the attacks of 11 September 2001 that led to the adoption of the 2002 Council framework decision on JITs.[35]
Adherents/Parties	While the instrument of the JIT is part of the EU legal framework, countries outside the EU can be involved as parties in a JIT with EU Member States when a legal basis for the creation of such JITs exists (e.g. see below a JIT established between Italy and Albania). Such legal basis is, for instance, provided by the CoE 1959 Strasbourg MLA Convention 2nd additional protocol,[36] UNTOC,[37] UNCAC[38].
Use statistics and examples	In 2019, Eurojust provided legal, financial and/or operational support to 262 JITs.[39] As shown in the figure below, the number of JITs supported by Eurojust has been increasing.[40]

[35] Extraordinary Council meeting of 20 September 2001, welcoming a draft of Council framework decision on JITs, noting that "the seriousness of recent events has led the Union to speed up the process of creating an area of freedom, security and justice and to step up cooperation with its partners, […]", available at: https://ec.europa.eu/commission/presscorner/detail/ga/PRES_01_327.

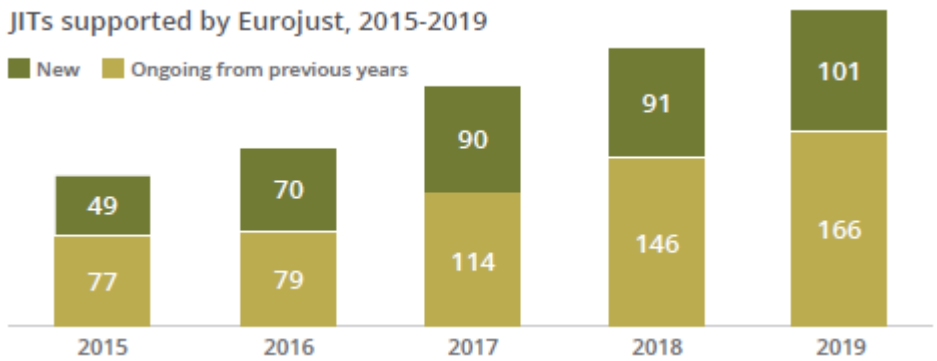
[36] See https://rm.coe.int/168008155e.

[37] See https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.

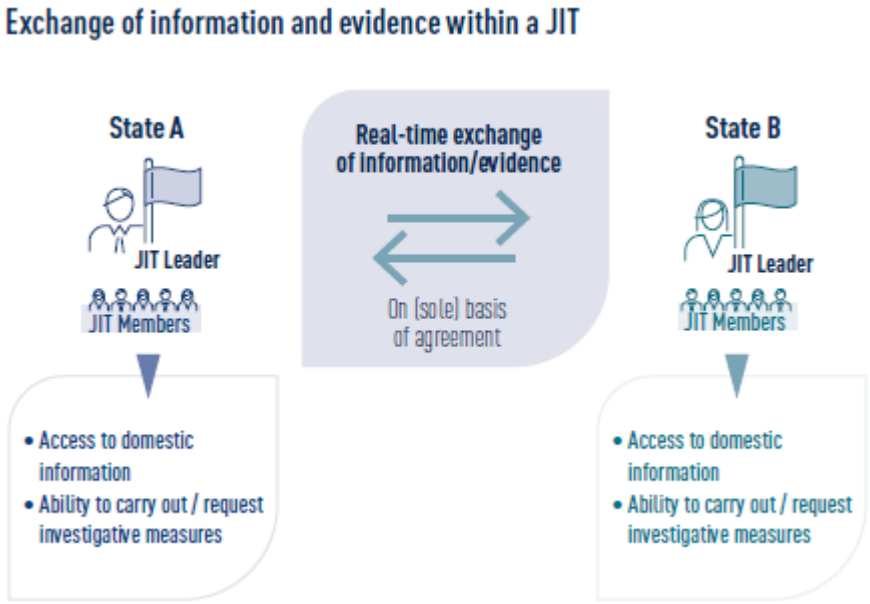
[38] See https://www.unodc.org/unodc/de/treaties/CAC/.

[39] Eurojust Annual Report 2020, p. 9, available at: https://www.eurojust.europa.eu/ar2020.

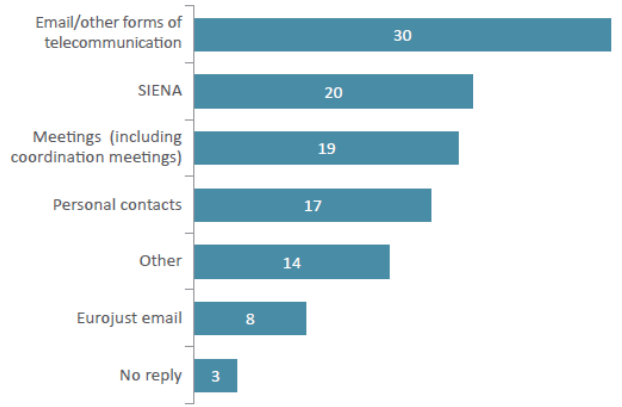
[40] Eurojust, JITs factsheet, p. 5, available at: https://www.eurojust.europa.eu/publication/supporting-judicial-authorities-use-joint-investigation-teams-factsheet.

Characteristics	Eurojust – Joint Investigation Teams
	 JIT between Italian and Albanian authorities (2017)[41] To fight against organised crime groups involved in drug trafficking, a JIT was established between Italian and Albanian authorities in 2017. This facilitated a quick and direct exchange of information and evidence among the authorities involved, who set to work as one team. It enabled in-depth investigations into the criminal activity, mapping out its operations and network, both in Albania and in Italy. The co-operation resulted in a simultaneous arrest of 37 suspected members of an organised criminal group responsible for international trafficking of large quantities of drugs. In addition to its financial and operational support to the JIT, Eurojust also assisted the national authorities with the organisation of four coordination meetings, where team members exchanged crucial information about the case and were supported by Eurojust in establishing a common investigative strategy where seizure of the criminal assets was one of the key elements of the strategy.
Process for negotiation	

[41] Eurojust Press Release, "Major Albanian-Italian drug trafficking network dismantled", 30 June 2020, available at: https://www.eurojust.europa.eu/major-albanian-italian-drug-trafficking-network-dismantled.

Characteristics	Eurojust – Joint Investigation Teams
Exchange of confidential information	The JIT agreement specifies the processes and procedures to be followed regarding the sharing between them of information and evidence obtained pursuant to the JIT in each Member State. In principle, information and evidence collected in accordance with the legislation of the state in which the team operates can be shared on the (sole) basis of the JIT agreement (see figure below). This means that no further bureaucracy, requests, translations, etc. is needed. The JIT agreement is in essence an MLA-framework contract for the included cases. The JIT has access to domestic information from all parties to the JIT, and can carry out investigative measures or require them to be carried out by the competent authorities.  According to an ex-post analysis of the 74 JITs evaluated between April 2014 and October 2017, the means used by JIT members to exchange information and evidence were shown in the figure below.[42] SIENA refers to the Secure Information Exchange Network Application designed by Europol (the European Union Agency for Law Enforcement Cooperation) which is a platform enabling exchange of operational strategic crime-related information.

[42] Second JIT evaluation report, p. 36, available at: https://www.eurojust.europa.eu/sites/default/files/assets/eurojust_second_jit_evaluation_report_en.pdf.

Characteristics	Eurojust – Joint Investigation Teams
	Figure 14 - Information and evidence exchange within the JIT 
Dual criminality requirements / assumptions	
Common databases/case information systems	The JIT partners can agree to establish a common platform/database for the exchange of information and documents. The JIT 3rd evaluation report emphasized the need for the creation of such database in complex JITs with many activities.[43]
Joint notification systems/one-stop-shop systems	
Joint investigations/case teams	The JIT agreement specifies the processes and procedures to be followed regarding the co-ordination of joint investigations, while case teams continue working in their own jurisdictions, applying and exercising investigatory powers in accordance with their domestic law. While JITs allow for practitioners to be present during investigative measures on each other's territories, and to therefore share their technical expertise and human resources more efficiently, the essence of a JIT is the co-ordination of the investigations (timing, investigative tactics, synchronisation of steps and almost immediate exchange of the results). This also enables to take into consideration the requirements of the other legal system, to ensure mutual admissibility.
Functions relevant for parallel investigations	The JIT partners can determine functions relevant for parallel investigations in their JIT agreement. Decisions concerning the investigation are taken by consent of the JIT leaders. Legal remedies are provided as in the domestic laws.
Acknowledgement/deferral to another jurisdiction's decision	

[43] Third JIT evaluation report, p. 11, available at: https://www.eurojust.europa.eu/sites/default/files/Partners/JITs/2020-03_3rd-JITs-Evaluation-Report_EN.pdf

Characteristics	Eurojust – Joint Investigation Teams
Arbitration mechanisms in case of conflicting outcomes	
Investigative assistance • compelling evidence – statements/documents • servicing documents • enforcing rulings/fines	All necessary measures compelling evidence and gathering of information and documents from any Party to the JIT are covered by the JIT agreement.
Lead agency models	
Co-ordinating bodies	Eurojust, through the JIT Secretariat, provides overall support for the use of JITs. For example, it: • helps identify cases of linked or parallel investigations; • provides supporting tools and documents that help national authorities plan, set up and operate JITs (e.g., model agreement and practical guide); • provides organisational and logistics support for the set-up and operation of JITs (e.g. arrangement of coordination meetings between the partners and support in the drafting of JIT agreements); and • provides financial support for the JIT members (e.g. reimbursement of travel and accommodation expenses, as well as costs for interpretation and translation, and the transfer of items).
Provisions on costs	The JIT agreement specifies how the parties intend to share/incur the costs associated to the operation of JITs.
Reservations, opt-in/opt-out clause, limits of co-operation. If there are limits, is there a minimum degree of co-operation required?	
Features relevant to competition enforcement co-operation	● JIT can be established for a limited duration and for a specific case between agencies. JIT could be envisaged for investigations of a specific conduct of a specific company producing effects in multiple jurisdictions. ● The non-binding model agreement is very flexible (regarding for example the extent of assistance) and can be tailored to the specific needs of agencies. It might be more effective for agencies to conclude such an agreement. More general MoUs or co-operation agreements may not be designed to enable JIT or jurisdictions may not wish to enable them for all types of case co-operation and reserve them for specific cases in a specific legal setting. ● The exchange of information could be undertaken on the (sole) basis of the JIT agreement, but this may require enabling legislation in the respective jurisdictions or a legal instrument that allows for the exchange of confidential information. ● Eurojust plays a very active role in the set-up and operation of JITs. The OECD Secretariat or another appropriate body could potentially play such a role, subject to resource constraints.
Features that may make it difficult to apply to competition enforcement co-operation	● The model agreement does not provide concrete conditions as to how the parties share information or conduct joint investigations. While this provides sufficient flexibility for the signing agencies, it would not provide sufficient guidance on how in practice the joint investigation teams operate. ● Financial support provided by Eurojust may not be adjustable to OECD. ● JIT are established in a criminal enforcement context, and civil/administrative enforcement may face limitations regarding the effective implementation.

4. IOSCO - Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU) [44]

Characteristics	IOSCO - MMoU
General description and main functions	The Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information developed by the International Organization of Securities Commissions (IOSCO) (the "MMoU") sets out a common understanding among securities regulators of how they should consult, co-operate, and exchange information for the purpose of regulatory enforcement regarding securities markets. The MMoU includes requirements for: • what information can be exchanged and how it is to be exchanged; • the legal capacity to compel information; • the types of information that can be compelled; • the legal capacity for sharing information; and • the permissible use of information. The information shared pursuant to the MMoU can be used for a broad range of purposes (art. 10). In fact, in addition to the purposes set forth in the request for assistance (request for information exchange), it can be used for "a purpose within the general framework of the use stated in the request for assistance" including for civil, administrative or criminal proceedings and for "assisting a self-regulatory organisations surveillance or enforcement activities".[45] In order to further enhance the extent of the co-operation provided for in the MMoU, several countries have signed the ENHANCED Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (EMMoU). The additional scope of assistance available under the EMMoU are referred to as the "ACFIT" powers. These include for instance the exchange of auditing information, existing Internet Service Provider (ISP) records and existing Telephone records.[46]
Legal nature	While the MMoU is not legally binding, being a signatory to the MMoU represents a commitment of the signing regulators with regard to mutual assistance the exchange of information for the purpose of enforcing and securing compliance with the laws and regulations of the relevant jurisdictions. In fact, prior to

[44] https://www.iosco.org/about/?subsection=mmou

[45] J. Austin, "The Power and Influence of IOSCO in Formulating and Enforcing Securities Regulations", p. 10, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2717521.

[46] Provided that that there is nothing in the MMoU that is not covered by the EMMoU (EMMoU Frequently Asked Questions, p.8), the references to the provisions of the MMoU in this document are equally applicable to the EMMoU.

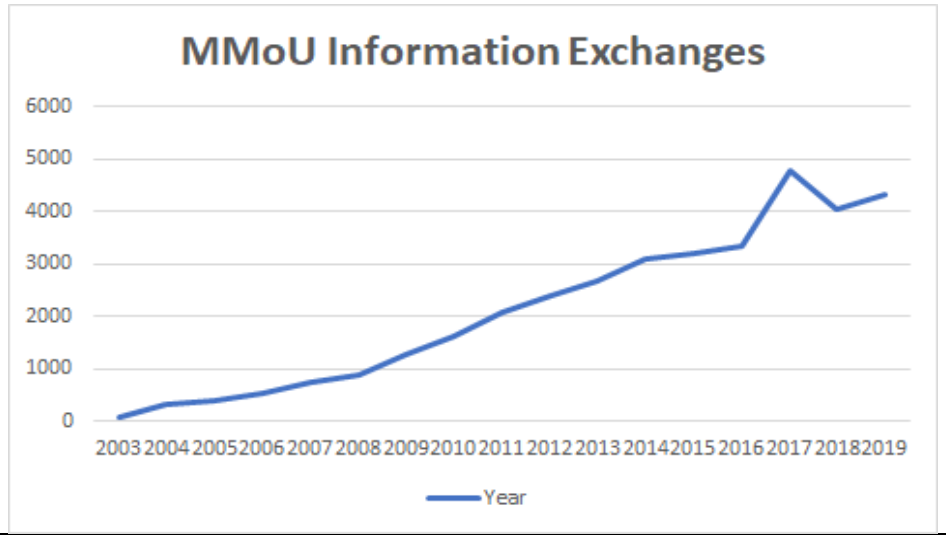
Characteristics	IOSCO - MMoU
	the signing of the MMoU, the signing regulator must have the legal ability and willingness to[47]: • Gather information key to investigating and prosecuting enforcement matters. • Provide information to foreign counterparts for the uses described in the MMoU. • Protect the confidentiality of information. The regulators that do not have yet the legal authority to meet the MMoU provisions may voluntarily express their commitment to seek the legal authority necessary to comply with the MMoU by being listed on Appendix B of the MMoU. In fact, through the application process to be part of the MMoU, applying regulators must identify the precise legislative limitations which preclude them from meeting the MMoU standards. According to the IOSCO, this process may be used by regulators to facilitate seeking the legislative changes necessary to comply with international principles and standards for information-sharing.[48]
National implementation requirements	The provisions of the MMoU are not intended to create legally binding obligations or supersede domestic laws (art. 6(a)). However, prior to signing the MMoU, the signing regulators are required to ensure that no domestic secrecy or blocking laws or regulations should prevent the mutual assistance provided for in the MMoU (e.g. exchange of information) (art. 6(b)).
Years of existence and steps in development	The MMoU was developed by IOSCO and established in 2002. The provisions of the MMoU are not new creations but the compilation of existing resolutions and agreements already voted for and adopted by IOSCO members.
Adherents/Parties	Currently, 125 securities regulators are signatories of the MMoU and listed in Appendix A of the MMoU.[49] Appendix A members commit to provide mutual assistance as provided in the MMoU. The regulators who lack the legal authority necessary to fully comply with the MMoU provisions can still be listed on Appendix B of the MMoU. Appendix B members are those who are committed to seeking the legal authority necessary to fully comply with the MMoU in their respective jurisdiction. According to the IOSCO, being Appendix B members may help achieve any legislative changes necessary in order to meet the commitments required by the MMoU. The list of signatories of the MMoU is available at here. 14 security regulators have signed the EMMoU.[50]
Use statistics and examples	In 2019, 4319 requests for information exchanges were made under the MMoU. The table below provides the number of information requested that have

[47] MMoU, Frequently Asked Questions ("FAQ"), p. 4-5, available at: https://www.iosco.org/library/mou/pdf/MoU-FAQS.pdf.

[48] MMoU, Frequently Asked Questions ("FAQ"), p. 7-8, available at: https://www.iosco.org/library/mou/pdf/MoU-FAQS.pdf.

[49] https://www.iosco.org/about/?subSection=mmou&subSection1=signatories, last accessed on 15 February 2022.

[50] https://www.iosco.org/about/?subSection=emmou&subSection1=signatories, last accessed on 15 March 2022. The EMMoU has another list of signatories with a limited scope of assistance (i.e. excluding the exchange of existing Internet Service Provider (ISP) records and existing Telephone records. There are currently 8 signatories on that list.

Characteristics	IOSCO - MMoU
	been made under the MMoU since 2003.[51] 
Process for negotiation	
Exchange of confidential information	Under the terms of the MMoU, the securities regulators can exchange information relating to their investigations of offences that are set out in the MMoU (e.g. insider dealing, market manipulation, etc.). A request for information exchange is made in accordance with the request format provided in Appendix C of the MMoU. Where such a request is made, the requested authority can provide information and documents held in its files (art. 7(b)(i)). In addition, under the MMoU, it is also possible to request another authority to actively obtain information and documents (by way of, for example, a written request for information or taking of a statement) from any person in the jurisdiction of the requested authority (art. 7 (b)(ii) and 7(b)(iii)). The MMoU also provides for the spontaneous exchange of information, whereby each regulator having signed the MMoU will make all reasonable efforts to provide, without prior request, the other regulators with any information that it considers is likely to be of assistance to those other regulators (art. 13). The EMMoU further extended the scope of information that could be exchanged between EMMoU signatories. Under the EMMoU, it is possible to request

[51] https://www.iosco.org/about/?subsection=mmou

Characteristics	IOSCO - MMoU
	subscriber records held or maintained by telephone/internet service providers or other electronic communication providers who are located within the jurisdiction of the requested authority, that identify subscribers (name and address), payment details and incoming and outgoing communications with date, time, duration and identification of phone numbers from which communications are made or received (art. 3(3)). The EMMoU also provides for a possibility to exchange recordings of telephone conversations or other electronic communications held or maintained by persons regulated by the requested authority.
Dual criminality requirements / assumptions	The MMoU provides that dual criminality requirements are not valid reasons to refuse to provide assistance (art. 7(c), "Assistance will not be denied based on the fact that the type of conduct under investigation would not be a violation of the Laws and Regulations of the Requested Authority").
Common databases/case information systems	
Joint notification systems/one-stop-shop systems	
Joint investigations/case teams	
Functions relevant for parallel investigations	
Acknowledgement/deferral to another jurisdiction's decision	
Arbitration mechanisms in case of conflicting outcomes	
Investigative assistance • compelling evidence – statements/documents • servicing documents • enforcing rulings/fines	The EMMoU provides for a possibility to require or request the freeze of assets located in the requested authority's jurisdiction (art. 3(2)(d)). It is explained that the EMMoU does not require an authority to freeze assets at the request of another regulator.[52] Under the MMoU, it is also possible to request another authority to: • obtain information and documents regarding the subject-matter of the request, including: o contemporaneous records to reconstruct all securities and derivatives transactions; o detailed information related to such transactions (e.g. the beneficial owner, the amount, the time, the involved banks); and o information identifying persons who beneficially own or control companied organised in the jurisdiction of the requested authority. • take or compel a statement or testimony under oath (art. 7 (b)). On this point, the EMMoU further included a possibility to request another authority to compel a person's "physical attendance" to take or, where permissible, compel that person's statement or testimony under oath (art. 3(2)(c)).
Lead agency models	
Co-ordinating bodies	The MMoU Screening Group of IOSCO reviews applications from authorities seeking to become MMoU signatories and is responsible for ensuring all

[52] EMMoU Frequently Asked Questions, p.7, available at: https://www.iosco.org/about/pdf/EMMoU-Frequently-Asked-Questions.pdf

Characteristics	IOSCO - MMoU
	requirements are met.[53] In this respect, IOSCO also assists members in their efforts to sign the MMoU by guiding them through the process. Cambodia, Iraq, Paraguay and Rwanda received IOSCO assistance in 2020, enabling them to advance their efforts to become MMoU signatories.[54] More generally, the Committee 4 on Enforcement and the Exchange of Information of the IOSCO encourages dialogue among members relating to the investigation of violations of securities and derivatives laws, good practices for investigation and international cooperation in investigations. It provides a platform for members to share experiences in identifying and addressing emerging types of misconduct.[55]
Provisions on costs	
Reservations, opt-in/opt-out clause, limits of co-operation. If there are limits, is there a minimum degree of co-operation required?	
Features relevant to competition enforcement co-operation	• A multilateral MoU to exchange information with the requirement to create the national conditions to allow for such exchanges could be considered in competition cases as well. This would avoid instances where agencies cannot proceed with co-operation due to the lack of legal basis in their respective domestic law. • The concept of Appendix B members (agencies that do not have yet the legal authority to meet the MoU provisions who are nonetheless committed to seeking the legal authority necessary to fully comply with the MoU in their respective jurisdiction) may help competition authorities achieve any legislative changes necessary in order to meet the commitments required by the MoU. Such an effort could be assisted by the OECD. • The MMoU can be signed by the regulators directly involved in the enforcement. This solution can be transposable for competition authorities. • A similar MMoU could be drafted/hosted by the OECD. In subsequent stages, it could be used to add features such as investigative assistance or joint investigation teams.
Features that may make it difficult to apply to competition enforcement co-operation	• It may be necessary to change national laws to comply with the MMoU commitments. This requires involving governments. • The MMoU works at least partly in a criminal enforcement context. Information exchanged can be used in criminal enforcement (Art. 10), and several of the covered subject matters (see Definitions) are of a criminal nature in certain jurisdictions (for example, insider dealing/market manipulation). • The questionnaire (responses of which need to be submitted by the regulator to the IOSCO prior to the signing of the MMoU) seems to require a fairly good amount of information. For example, it requires to identify and explain all the laws, rules and regulations that would enable or block the exchange of information subject to the MMoU. While it is a useful and necessary step to facilitate the signing of a MoU such as this IOSCO MMoU, it could be a laborious exercise for competition agencies.

[53] IOSCO annual report 2020, p. 56, available at: https://www.iosco.org/annual_reports/2020/pdf/annualReport2020.pdf.

[54] IOSCO annual report 2020, p. 63, available at: https://www.iosco.org/annual_reports/2020/pdf/annualReport2020.pdf.

[55] IOSCO annual report 2020, p. 24, available at: https://www.iosco.org/annual_reports/2020/pdf/annualReport2020.pdf.

5. OECD Model Convention with Respect to Taxes on Income and on Capital[56] and OECD Model Tax Information Exchange Agreement[57]

Characteristics	OECD Model Tax Convention Summary	OECD Model Tax Information Exchange Agreement Summary
General description and main functions	The Model Tax Convention on Income and on Capital (the "OECD Model Tax Convention") is a model tax treaty/convention which has been developed by the OECD. It serves as a basis for negotiation and application of bilateral tax treaties between countries wishing to eliminate double taxation and to prevent fiscal evasion. The main part of the OECD Model Tax Convention is made up of Chapters III to V, which settle to what extent each of the two Contracting States may tax income and capital and how international juridical double taxation is to be eliminated. In so far as the co-operation between agencies is concerned, the OECD Model Tax Convention provides for: • the exchange of information between the tax authorities of the Contracting States (art. 26); and • the assistance by Contracting States in the collection of each other's taxes (art. 27). For each Article in the OECD Model Tax Convention, there is a detailed Commentary that is intended to illustrate or interpret its provisions. For some cases, alternative or additional provisions are also mentioned in the Commentaries. The Commentaries have been drafted and agreed upon by the experts appointed to the OECD Committee on Fiscal Affairs by the Governments of member countries.	The Model Tax Information Exchange Agreement (the "OECD Model TIEA") is a model agreement developed by the OECD to promote international co-operation in tax matters through exchange of information. The first version of the OECD Model TIEA developed by the OECD in 2002 included the possibility of exchange of information **on request**. In 2015, the OECD Committee on Fiscal Affairs (CFA) approved a Model Protocol to the TIEA which includes the possibility of **automatic** exchange of information and **spontaneous** exchange of information. This Model Protocol can be used by jurisdictions which already have a TIEA in place between them and wish to rely on their TIEA for the purpose of establishing the legal basis for the automatic and/or spontaneous exchange of information. For each article in the Model TIEA, there is a detailed commentary intended to illustrate or interpret its provisions. The OECD also provides a model template for requests of information under TIEAs in English and French as well as Spanish, German, Italian, Japanese, Korean and Turkish.
Legal nature	The Model Convention is not legally binding. Member and non-member countries of the OECD have nevertheless expressed several reservations.	The Model TIEA is not legally binding. However, once parties enter into a TIEA, it will be legally binding upon them.
National implementation requirements		The Model TIEA provides that Contracting Parties shall enact any legislation necessary to comply with, and give effect to, the terms of the TIEA (art. 10).
Years of existence and steps in development	The first version of the OECD Model Tax Convention was published in 1963. It has been frequently updated since then. The last revision was undertaken in 2017.	The Model TIEA was developed in 2002 by the OECD Global Forum Working Group on Effective Exchange of Information ("the Working Group").

[56] https://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm.

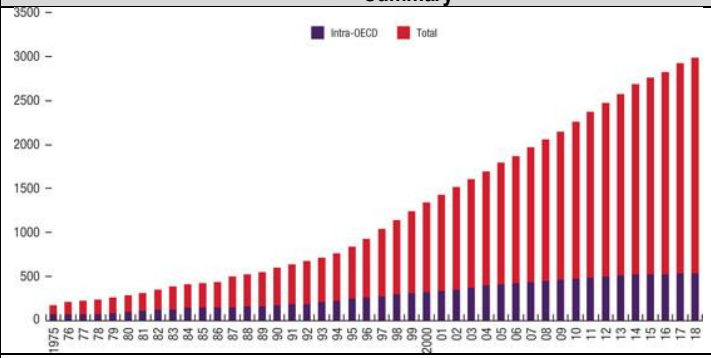
[57] https://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm

Characteristics	OECD Model Tax Convention Summary	OECD Model Tax Information Exchange Agreement Summary
	It is worthwhile noting that the OECD Committee on Fiscal Affairs adopted the concept of an ambulatory Model Convention providing periodic and more timely updates and amendments without waiting for a complete version. The Committee also decided that the revision process should be opened up to benefit from the input of non-member countries, other international organisations and other interested parties. The first ambulatory version published in 1992 was a loose-leaf format[58] and significantly different from the latest 2017 version. The OECD Model Tax Convention evolved gradually through 10 updates made to the 1992 version (in 1994, 1995, 1997, 2000, 2002, 2005, 2008, 2010, 2014 and 2017).	In 2015, the OECD Committee on Fiscal Affairs (CFA) approved a Model Protocol to the TIEA.
Adherents/Parties		
Use statistics and examples	When the OECD published its first Draft Model Tax Convention in 1963, only a few dozen tax agreements were in force. Since that time, the OECD Model Tax Convention has facilitated bilateral negotiations between countries and made possible a desirable harmonisation between bilateral conventions for the benefit of both taxpayers and national administrations. More than 3,000 tax treaties in force around the world are based on the OECD Model.[59] **Development of Worldwide Tax Treaty Network[60]**	As of 16 March 2022, 518 TIEAs were signed based on the OECD Model TIEA. The list of TIEAs signed can be found at: https://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm

[58] Available at: https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version-september-1992_mtc_cond-1992-en

[59] https://www.oecd.org/ctp/treaties/tax-treaties-2017-update-to-oecd-model-tax-convention-released.htm#:~:text=More%20than%203000%20tax%20treaties,published%20in%20the%20coming%20year.

[60] https://www.elibrary.imf.org/view/books/071/28329-9781513511771-en/ch008.xml

Characteristics	OECD Model Tax Convention Summary	OECD Model Tax Information Exchange Agreement Summary
		
Process for negotiation	The OECD Model Tax Convention has been developed and revised by the OECD.	The Model TIEA was developed by the OECD Global Forum Working Group on Effective Exchange of Information ("the Working Group"). The Working Group consisted of representatives from OECD Member countries as well as delegates from Aruba, Bermuda, Bahrain, Cayman Islands, Cyprus[61], Isle of Man, Malta, Mauritius, the Netherlands Antilles, the Seychelles and San Marino. The Model TIEA grew out of the work undertaken by the OECD to address harmful tax practices. See the 1998 OECD Report "Harmful Tax Competition: An Emerging Global Issue" (the "1998 Report"). The 1998 Report identified "the lack of effective exchange of information" as one of the key criteria in determining harmful tax practices. The mandate of the Working Group was to develop a legal model that could be used to establish effective exchange of information. The Agreement represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices.

[61] Note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognizes the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of United Nations, Turkey shall preserve its position concerning the "Cyprus" issue.

Note by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

Characteristics	OECD Model Tax Convention Summary	OECD Model Tax Information Exchange Agreement Summary
Exchange of confidential information	The OECD Model Tax Convention provides for exchanges of information between the tax authorities of the two Contracting States. The tax authorities shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws (art. 26(1)). The standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs (commentary on art. 26(1)). The exchange of information referred to in the OECD Model Tax Convention can be conducted in three different ways (commentary on art. 26(1)): • on request; • automatically; and/or • spontaneously. Any information received under this scheme of exchange of information shall be treated as secret in the same manner as information obtained under the domestic laws of the receiving State and disclosed only to persons or authorities concerned with the relevant tax affairs (art. 26(2)).	The Model TIEA provides that the competent authority of the requested Party shall provide upon **request** for the purposes defined in the TIEA. Such information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party (art. 5(1)). The 2015 Model Protocol to the TIEA aims to extend the modalities of information exchange by including the **automatic** exchange of information and **spontaneous** exchange of information. With regard to the spontaneous exchange of information, the Model Protocol provides that the competent authority of a Contracting Party shall, without prior request, forward to the competent authority of the other Contracting Party the information for the purposed defined in the TIEA under several circumstances. These include for example a situation where it has grounds for supposing that there may be a loss of tax in the other Contracting Party.
Dual criminality requirements / assumptions		As provided above, the requested information shall be exchanged without regard to whether the conduct being investigated would constitute a crime under the laws of the requested Party if such conduct occurred in the requested Party (art. 5(1)).
Common databases/case information systems		
Joint notification systems/one-stop-shop systems		
Joint investigations/case teams		
Functions relevant for parallel investigations		
Acknowledgement/deferral to another jurisdiction's decision		
Arbitration mechanisms in case of conflicting outcomes		
Investigative assistance	The OECD Model Tax Convention provides the rules under which Contracting States may	As mentioned in the "exchange of information" above, the Model TIEA

Characteristics	OECD Model Tax Convention Summary	OECD Model Tax Information Exchange Agreement Summary
• compelling evidence – statements/documents • servicing documents • enforcing rulings/fines	agree to provide each other assistance in the collection of taxes (art. 27). While the Model provides for comprehensive collection assistance, it is recognised that countries are free to provide a more limited type of collection assistance (e.g. limit the types of taxes to which the assistance should apply).	provides that if the information in the possession of the competent authority of the requested Party is not sufficient to enable it to comply with the request for information, that Party shall use all relevant information gathering measures to provide the applicant Party with the information requested, notwithstanding that the requested Party may not need such information for its own tax purposes (art. 5(2)). It also provides a possibility for a Contracting Party to enter the territory of another Contracting Party to interview individuals and examine records with the written consent of the persons concerned (art. 6(1)).
Lead agency models		
Co-ordinating bodies		The Model TIEA provides that, in case of a multilateral TIEA, the OECD serves as the depositary of the TIEA (to which instruments of ratification, acceptance or approval shall be submitted) (art. 15(1)).
Provisions on costs		The Model TIEA provides that incidence of costs incurred in providing assistance shall be agreed by the Contracting Parties (art. 9).
Reservations, opt-in/opt-out clause, limits of co-operation. If there are limits, is there a minimum degree of co-operation required?	The Model Convention is not legally binding. Member and non-member countries of the OECD have nevertheless expressed several reservations.	
Features relevant to competition enforcement co-operation	• A good example of model convention developed by the OECD successfully used by many jurisdictions. • The concept of "ambulatory Model Convention". The first ambulatory version published in 1992 was a loose-leaf format and significantly different from the latest 2017 version. Depending on the appetite of agencies, it could be envisaged to adopt a simple (less exhaustive) model with a view to updating it over time. The revision process is open to non-OECD countries as well as other international organisations.	• The Model TIEA is focused on the exchange of information which should be one of the key areas for international co-operation between agencies. This could be considered as a first step in view of further co-operation. • While the main purpose of the agreement is the exchange of information, the Model TIEA has certain provisions relating to investigative assistance. For instance, if the requested information is not available, the requested country shall use all relevant information gathering measures to provide the information requested.
Features that may make it difficult to apply to competition enforcement co-operation		• The TIEA is signed between governments which not be suitable for competition agencies. For competition agencies, an agency-to-agency agreement might be preferred.

6. The Convention on Mutual Administrative Assistance in Tax Matters[62]

Characteristics	Convention on Mutual Administrative Assistance in Tax Matters
General description and main functions	The Convention on Mutual Administrative Assistance in Tax Matters ("the Convention") is a multilateral convention which aims to facilitate international co-operation in tax matters such as tax avoidance and tax evasion on an international level. The Convention provides for all possible forms of administrative co-operation between states in the assessment and collection of taxes comprising (art. 1): • exchange of information, including simultaneous tax examinations and participation in tax examinations abroad; • assistance in recovery, including measures of conservancy; and • service of documents. Any State wishing to accede to the Convention may tailor the extent of its obligations, by virtue of a detailed system of reservations expressly provided for in the text; it may restrict its participation to certain types of mutual assistance or to assistance in connection with certain taxes.[63] The implementation and development of the Convention is monitored by a co-ordinating body composed of representatives of the competent authorities of the Parties under the aegis of the OECD. The co-ordinating body is responsible for, *inter alia*, acting as a forum to increase international cooperation in tax matters, recommending revisions or amendments to the Convention and furnishing opinions on the interpretation of provisions of the Convention.
Legal nature	Binding with a possibility to lodge reservations. The list of reservations and declarations can be found at here.
National implementation requirements	In applying the Convention, tax authorities will be bound to operate within the framework of national laws. The Convention specifically ensures that taxpayers' rights under national laws are fully safeguarded. However, **national laws should not be applied in a manner that undermines the object and purpose of the Convention**. In other words, the Parties are expected not to unduly prevent or delay effective administrative assistance.[64] Thus, the effect of strengthening co-operation between Parties is **not to extend the existing domestic powers of their tax administrations** but to improve them by widening the territorial area in which they can be effective.[65]
Years of existence and steps in development	The Convention was developed jointly by the OECD and the Council of Europe in 1988 and amended by Protocol in 2010. The objective of the 2010 Protocol was primarily to align the Convention to the internationally agreed standard on transparency and exchange of information and to open it up to States which are not members of the OECD or of the Council of Europe.[66]

[62] https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm

[63] https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=127

[64] Explanatory note to the Convention, introduction.

[65] Explanatory note to the Convention, para. 24.

[66] https://www.oecd.org/ctp/exchange-of-tax-information/Explanatory_Report_ENG_%2015_04_2010.pdf

Characteristics	Convention on Mutual Administrative Assistance in Tax Matters
	Opening of the treaty: 25/01/1988 Entry in force: 01/04/1995
Adherents/Parties	Currently, 144 jurisdictions currently participate in the Convention, including 17 jurisdictions covered by territorial extension. This represents a wide range of countries including all G20 countries, all BRIICS, all OECD countries, major financial centres and an increasing number of developing countries.[67][68] The list of participating jurisdictions as of 22 December 2021 can be found at here.
Use statistics and examples	A case example of exchange of information at the request of the Japanese National Tax Agency In the course of corporate tax examination of a Japanese company, the NTA found some suspicious points in its fee allegedly paid to Resident B in Country A, an export customer of its products, which led to a request by the NTA to the tax authorities in Country A to check the accounting of the said fee. The tax authorities in Country A made contact with Resident B and checked the accounting to discover that there was a significant difference between the amount of fee allegedly paid by the Japanese company and the amount actually received by Resident B and NTA found that the Japanese company had fictitiously recorded the fee payment.[69] A case example of spontaneous exchange of information made by the Japanese National Tax Agency While a Japanese company imports products from Company D located in Country C, the purchase payments are remitted to the account of Company E located in a third country other than Country C. As it was suspected that Company D might have excluded the sales to be declared in Country C, the NTA provided the documents concerning the remittance and transaction transactions to the tax authorities in Country C. [70]
Process for negotiation	In 1980s, the OECD and the Council of Europe jointly launched a project to develop a multilateral convention to facilitate administrative co-operation among OECD member countries. [71] The project resulted in the Convention in 1998, building on precedents for tax information exchange and assistance that had emerged in the European Union and in earlier arrangements for the sharing of tax information among smaller groups of nations (such as the so-called Nordic Union of the Scandinavian states).[72] The 1988 Convention was open to all members of the OECD and all members of the Council of Europe. Once five eligible members signed and ratified the Convention, it became binding on all signing and ratifying members. By the end of the year 1999, the Convention had been signed and ratified by the United

[67] https://www.oecd.org/tax/exchange-of-tax-information/convention-on-mutual-administrative-assistance-in-tax-matters.htm

[68] https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=127

[69] https://www.nta.go.jp/english/eoi_report/pdf/2017.pdf

[70] https://www.nta.go.jp/english/eoi_report/pdf/2017.pdf

[71] https://www.oecd.org/tax/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters-9789264115606-en.htm

[72] https://www.caplindrysdale.com/mutual-administrative-assistance-in-tax-matters?nonmobile=1

Characteristics	Convention on Mutual Administrative Assistance in Tax Matters
	States (1991) and by seven other European nations: the five Nordic nations (1995-96), the Netherlands (1996) and Poland (1997). Other parties followed by signing and ratifying the Convention.
Exchange of confidential information	The Convention provides for three types of information exchange[73]: • Exchange of information **on request** (art. 5); • **Automatic** exchange of information (art. 6); and • **Spontaneous** exchange of information (art. 7). The parties shall exchange any information that is **foreseeably relevant** for the administration or enforcement of their domestic laws concerning the taxes covered by the Convention (art. 4(1)). The Convention covers not only the exchange of taxpayer-specific information, but also allows the competent authorities to exchange other sensitive information related to tax administration and compliance improvement, for example, risk analysis techniques or tax avoidance or evasion schemes.[74] The **automatic** exchange of information is understood to involve the systematic and periodic transmission of pre-defined taxpayer information by the source country to the residence country concerning various categories of income (e.g. dividends, interest, royalties, salaries, pensions, etc.).[75] The information which is exchanged automatically is normally collected in the source country on a routine basis, generally through reporting of the payments by the payer (financial institution, employer, etc.). Automatic exchange can also be used to transmit other types of useful information such as changes of residence, the purchase or disposition of immovable property, value added tax refunds, etc. As a result, the tax authority of a taxpayer's country of residence can check its tax records to verify that taxpayers have accurately reported their foreign source income. In addition, information concerning the acquisition of significant assets may be used to evaluate the net worth of an individual, to see if the reported income reasonably supports the transaction.[76] Pursuant to Article 6 of the Convention, the **automatic** exchange of information is conducted based on a separate bilateral or multilateral agreements by two or more Competent Authorities of the Parties to the Convention. Such agreements determine the scope of the automatic exchange of information and the procedure to be complied with. Examples of such agreements are[77]: • The Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (the "CRS MCAA"); and • The Multilateral Competent Authority Agreement on the Exchange of Country-by-Country (CbC) Reports (the "CbC MCAA").

[73] These three types of information exchange are sometimes referred to as EOIR, AEOI and SEOI, respectively. See e.g., https://op.europa.eu/webpub/eca/special-reports/tax-03-2021/en/

[74] https://www.oecd.org/tax/the-multilateral-convention-on-mutual-administrative-assistance-in-tax-matters-9789264115606-en.htm

[75] http://www.oecd.org/tax/exchange-of-tax-information/automaticexchangeofinformationreport.htm

[76] http://www.oecd.org/tax/exchange-of-tax-information/automaticexchangeofinformationreport.htm

[77] https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/

Characteristics	Convention on Mutual Administrative Assistance in Tax Matters
	The CbC MCAA, for instance, sets forth rules and procedures to implement the automatic exchange between tax authorities of CbC reports that large multinationals have to file where their parent company is headquartered on an annual basis. Under the CbC MCAA, such CbC reports are automatically exchanged with the tax authorities of all jurisdictions in which the group of the reporting entity operates in the predetermined format called the CbC XML Schema[78]. Under the scheme of the **spontaneous** exchange of information, a Party shall, without prior request, forward to another Party information of which it has knowledge in the following circumstances: a the first-mentioned Party has grounds for supposing that there may be a loss of tax in the other Party; b a person liable to tax obtains a reduction in or an exemption from tax in the first-mentioned Party which would give rise to an increase in tax or to liability to tax in the other Party; c business dealings between a person liable to tax in a Party and a person liable to tax in another Party are conducted through one or more countries in such a way that a saving in tax may result in one or the other Party or in both; d a Party has grounds for supposing that a saving of tax may result from artificial transfers of profits within groups of enterprises; e information forwarded to the first-mentioned Party by the other Party has enabled information to be obtained which may be relevant in assessing liability to tax in the latter Party.
Dual criminality requirements / assumptions	Article 22(4) of the Convention foresees the possibility to exchange information for purposes other than taxation, in particular for criminal investigation purposes and for AML/CFT purposes. Such use requires consent from the Party that exchanged the information and the use must be legal under the laws of both the sending and receiving Party.
Common databases/case information systems	
Joint notification systems/one-stop-shop systems	
Joint investigations/case teams	
Functions relevant for parallel investigations	At the request of one of them, two or more Parties shall consult each other for the purposes of determining cases and procedures for simultaneous tax examinations (simultaneous examination, in each own territory, of the tax affairs with a view to exchanging any relevant information obtained). Each Party involved shall decide whether or not it wishes to participate in a particular simultaneous tax examination (art. 8).
Acknowledgement/deferral to another jurisdiction's decision	
Arbitration mechanisms in case of conflicting outcomes	
Investigative assistance • compelling evidence – statements/documents • servicing documents	At the request of the competent authority of the applicant State, the competent authority of the requested State may allow representatives of the competent authority of the applicant State to be present at the appropriate part of a tax examination in the requested State (art. 9). At the request of the applicant State, the requested State shall serve upon the addressee documents, including those relating to judicial decisions, which

[78] https://www.oecd.org/tax/country-by-country-reporting-xml-schema-user-guide-for-tax-administrations.htm

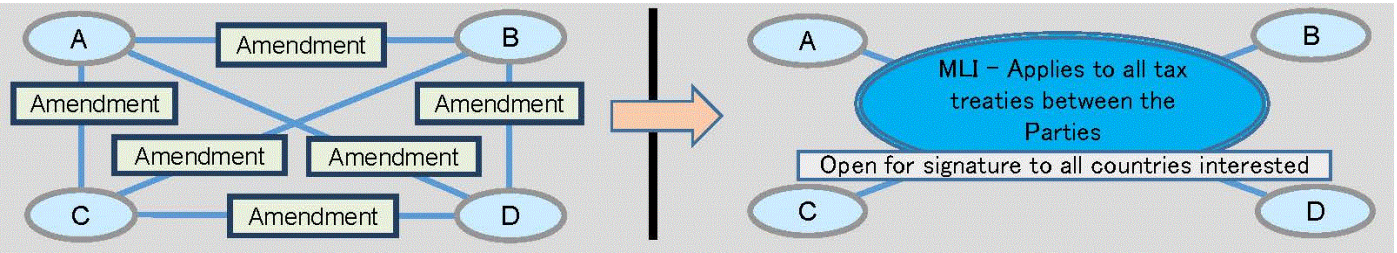
Characteristics	Convention on Mutual Administrative Assistance in Tax Matters
• enforcing rulings/fines	emanate from the applicant State and which relate to a tax covered by the Convention (art. 17). At the request of the applicant State, the requested State shall, subject to certain exceptions, take the necessary steps to recover tax claims of the first-mentioned State as if they were its own tax claims (art. 11).
Lead agency models	
Co-ordinating bodies	The implementation and development of the Convention is monitored by a co-ordinating body composed of representatives of the competent authorities of the Parties under the aegis of the OECD. The co-ordinating body is responsible for, *inter alia*, acting as a forum to increase international cooperation in tax matters, recommending revisions or amendments to the Convention and furnishing opinions on the interpretation of provisions of the Convention (art. 24(3)). The OECD Secretariat is responsible for supporting the activities of the co-ordinating body.[79] For example, the meetings of the co-ordinating body are in principle held at the OECD headquarters. The chair of the co-ordinating body is assisted by the Secretariat in the preparation of certain materials such as agenda and annual reports[80]. The Secretariat is also involved in several decision-making processes of the co-ordinating body, such as the decision to invite a state to become a Party to the Convention.
Provisions on costs	Unless otherwise agreed bilaterally by the Parties concerned: a ordinary costs incurred in providing assistance shall be borne by the requested State; b extraordinary costs incurred in providing assistance shall be borne by the applicant State (art. 26).
Reservations, opt-in/opt-out clause, limits of co-operation. If there are limits, is there a minimum degree of co-operation required?	By way of reservations, possibility to restrict its participation to certain types of mutual assistance or to assistance in connection with certain taxes (art. 30). Nothing in this Convention shall affect the rights and safeguards secured to persons by the laws or administrative practice of the requested State (art. 21(1)). There are further exceptions to co-operation contained in Article 21, such as for reasons of ordre public.
Features relevant to competition enforcement co-operation	• The classification of the types of information exchange (i.e. on request, automatic and spontaneous). It seems that this classification is commonly used in the tax policy area. • A good example of co-operation between the OECD and another institution (the Council of Europe in this example). • A gradual approach regarding the ratification: the Convention started with 8 countries to include 144 jurisdictions today. • An example of the use of the OECD Secretariat as a co-ordinating body. • A possibility to formulate reservations.
Features that may make it difficult to apply to competition enforcement co-operation	• The Convention is not the only instrument that provides for information exchange, but it is by far the most important global Convention for exchange of information and co-operation in tax matters. Some jurisdictions appear to exchange information based on another instruments such as bilateral tax conventions.

[79] Rules of Procedure of the Co-ordinating Body, Section V, available at: https://www.oecd.org/ctp/exchange-of-tax-information/co-ordinating-body-rules-of-procedure.pdf.

[80] Rules of Procedure of the Co-ordinating Body.

Characteristics	Convention on Mutual Administrative Assistance in Tax Matters
	• While reservations give flexibilities, this could also have a negative impact on the overall effectiveness of the co-operation (if for instance the majority of countries express reservations with regard to the essential elements of the convention).

7. Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting ("MLI")[81]

Characteristics	Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting
General description and main functions	The Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting (the "MLI" or "the MLI Convention") is an international tax treaty which aims at modifying the application of bilateral tax treaties in a fast and effective manner to implement the package of measures developed under the OECD/G20 BEPS ("Base Erosion and Profit Shifting") project.[82] The MLI operates to modify tax treaties between two or more Parties to the MLI, allowing them to avoid to adopt separate individual amendments to their existing bilateral tax treaties. It will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the tax treaties. Instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures.[83]  Source: https://www.mof.go.jp/english/policy/tax_policy/tax_conventions/mli.htm In practice, the MLI modifies tax treaties that are "Covered Tax Agreements" (art. 2(1)), which are the treaties notified by the signing countries to be covered under the MLI provisions. The MLI is intended to be flexible to accommodate a variety of tax policies while still ensuring that the BEPS measures are effectively implemented.

[81] https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm

[82] The OECD/G20 BEPS project consists of 15 actions to tackle tax avoidance, improve the coherence of international tax rules, ensure a more transparent tax environment and address the tax challenges arising from the digitalisation of the economy. For further information, please refer to https://www.oecd.org/tax/beps/. Action 15 of the package provided for an analysis of the possible development of a multilateral instrument to implement tax treaty related BEPS measures "*to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties*".

[83] Explanatory statement to the MLI, p. 3, available at: https://www.oecd.org/tax/treaties/explanatory-statement-multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-BEPS.pdf.

Characteristics	Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting
	While there is no legal requirement to prepare consolidated texts of modified treaties, for purposes of clarity, governments may choose to produce consolidated text as guidance to aid readers. For that purpose, the OECD has prepared guidance for the development of synthesised texts.[84]
Legal nature	The MLI is binding on a signatory based on the final MLI Position on reservations and notifications.
National implementation requirements	
Years of existence and steps in development	The negotiations of MLI were launched in February 2015 following a mandate for the formation of an ad hoc group for the development of a multilateral instrument approved by the OECD Committee on Fiscal Affairs and endorsed by the G20 Finance Ministers and Central Bank Governors. It also provided that the ad hoc group should conclude its work and open the multilateral instrument for signature by 31 December 2016.[85] The ad hoc group concluded the negotiations and adopted the text of the MLI as well as its accompanying explanatory statement. The ad hoc group was open to all interested countries participating on an equal footing. 99 countries participated in the ad hoc group as members. Four non-State jurisdictions and seven international or regional organisations participated as observers.[86]
Adherents/Parties	As of 28 February 2022, 99 jurisdictions are covered by the MLI. The list of signatories and parties to the MLI can be found at: https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf
Use statistics and examples	As of 1 February 2022, over 880 treaties concluded among the 70 jurisdictions which have ratified, accepted or approved the MLI Convention had already been modified by the Convention. An additional 940 treaties will be modified once the Convention will have been ratified by all Signatories.[87] The UK-Canada Double Tax Agreement signed in 1978[88] was modified following the entry into force of the MLI in the UK and Canada. The UK HMRC also published the consolidated text.[89]
Process for negotiation	

[84] Available at: https://www.oecd.org/tax/treaties/beps-mli-guidance-for-the-development-of-synthesised-texts.pdf

[85] Explanatory statement to the MLI, p. 2.

[86] Explanatory statement to the MLI, p. 2.

[87] OECD Press Release dated 28 February 2022, available at: https://www.oecd.org/tax/bahrain-and-romania-deposit-instruments-for-the-ratification-of-the-multilateral-beps-convention.htm

[88] Convention Between the Government of Canada and the Government of the United Kingdom of Great Britain and Northern Ireland For the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital Gains

[89] Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860344/Canada-UK_MLI_January_2020.pdf.

Characteristics	Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting
Exchange of confidential information	
Dual criminality requirements / assumptions	
Common databases/case information systems	
Joint notification systems/one-stop-shop systems	
Joint investigations/case teams	
Functions relevant for parallel investigations	
Acknowledgement/deferral to another jurisdiction's decision	
Arbitration mechanisms in case of conflicting outcomes	
Investigative assistance • compelling evidence – statements/documents • servicing documents • enforcing rulings/fines	
Lead agency models	
Co-ordinating bodies	The OECD Secretariat develops tools and guidance on the MLI, available at: https://www.oecd.org/tax/treaties/application-toolkit-multilateral-instrument-for-beps-tax-treaty-measures.htm. These include: • MLI matching database which allows to make projections on how the MLI modifies a specific tax treaty covered by the MLI by matching information from Signatories' MLI Positions; • Legal Note on the Functioning of the MLI under Public International Law; • Step-by-Step overview on the application of the MLI; • Flowchart on the application of MLI provisions; and • Guidance for the development of synthesised texts. The OECD also provides a platform through the ad hoc group to share experiences and information in the ratification processes.
Provisions on costs	
Reservations, opt-in/opt-out clause, limits of co-operation.	Countries have the possibility to choose to apply optional provisions and opt out of provisions (through a "reservation") with respect to all of their Covered Tax Agreements or to a subset of them. However, there are two "minimum standards" provisions that should apply to the Covered Tax Agreements selected by each

Characteristics	Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting
If there are limits, is there a minimum degree of co-operation required?	country.[90] Each signatory must prepare and submit its "**MLI Position**" before signing the MLI. The MLI Position sets out all of the signatory's choices with respect to the different options provided for in the MLI.
Features relevant to competition enforcement co-operation	• A multilateral convention that allows to modify bilateral treaties in a centralised manner. This allows to avoid the need to renegotiate individual bilateral tax treaties separately. The ever-growing body of competition MoU could benefit from such an instrument, which could also help to add teeth to the MoU and move them from declarations of intent to tools for actual enforcement co-operation. • Flexibility as to the scope of application with the "minimum standards" that need nevertheless be respected. • Extensive role of the OECD. It was involved in the negotiations of the MLI and is in charge of the ratification process. It also provides various materials relevant to the MLI, which could be useful also for a similar competition instrument. o Note: Technically, the negotiations took place within an ad hoc non-permanent group **that was not a formal OECD body** but was convened under the aegis of the OECD and the G20 serviced by the OECD Secretariat. • An OECD-led instrument that includes non-members.
Features that may make it difficult to apply to competition enforcement co-operation	• The MLI has effect on the existing bilateral tax treaties. It has no effect between countries that do not have existing treaties. If transposed to the competition enforcement, it would not have effect on the co-operation scheme of the competition agencies that do not have any agreements/MoUs between them. • The MLI does not directly amend the Covered Tax Agreements and needs to be read in parallel with the existing treaties. As there is no legal obligation to prepare the consolidated text, this system might not be user friendly. • The drawback of allowing flexibility would be to increase complexity in relation to the applicable provisions. The OECD's database (beta version) might help understand better which provisions are applicable in a given bilateral treaty. • The Convention/bilateral treaties have states as their signatories. More difficult to translate into the competition context, where only relatively few competition agreements between states exist compared to numerous MoU between competition authorities.

[90] These minimum standards relate to the prevention of treaty abuse (BEPS Action 6) and the improvement of dispute resolution (BEPS Action 14).

8. WIPO and the International Patent Co-operation Treaty (PCT)[91]

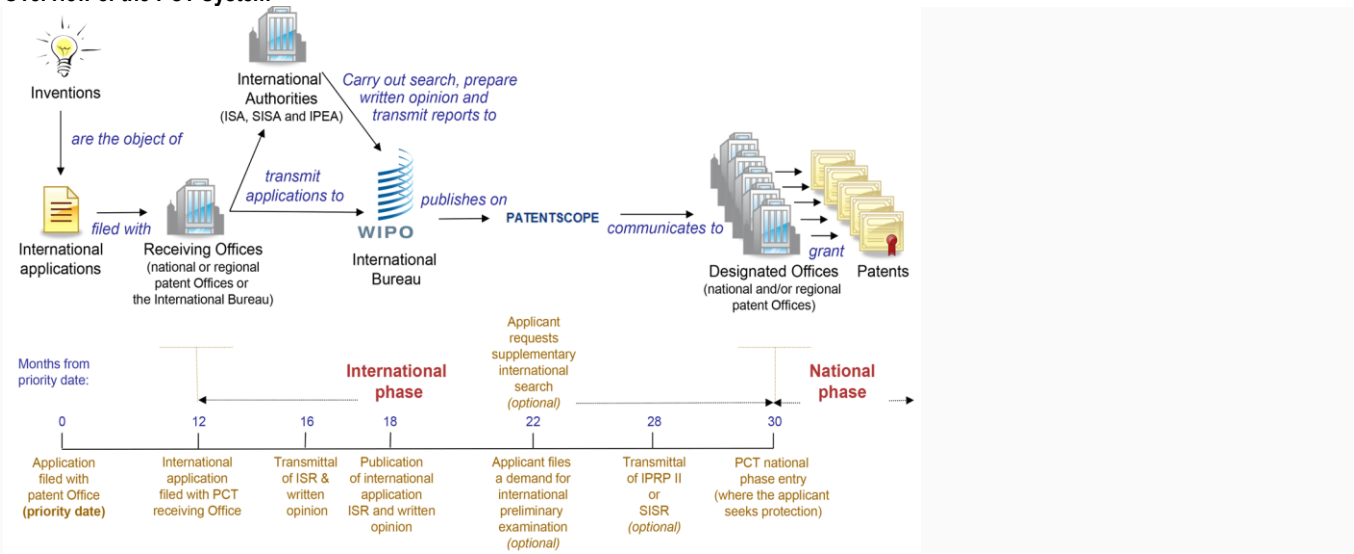
Characteristics	Summary
General description and main functions	The World Intellectual Property Organisation (WIPO) is a self-funding agency under the United Nations, and it is the global forum for intellectual property services, including patents.[92] The PCT is one of several IP related services under the roof of WIPO. The PCT enables innovators to seek patent protection for an invention simultaneously in a large number of countries by filing one single "international" patent application. This replaces the filing of several separate national or regional patent applications in the first stage, and delays national filings, which saves costs and allows applicants to make better informed decisions about the commercialisation of their inventions, and which national patent procedures to pursue. It also facilitates work sharing between national offices and prevents unnecessary duplication of work.[93] The granting of patents remains under the control of the national or regional patent offices in what is called the "national phase".[94] The international filing and examination process does not pre-empt the national phase and the national decision on granting the patent in a jurisdiction. An application can be filed with national or regional patent offices or WIPO. It needs to comply with PCT formality requirements and can be done in one language, and there is only one set of fees at the outset (more fees are incurred at the national phases, but much later, when it is easier for applicants to estimate the prospect of patent granting). ● Filing **one international patent application meeting minimum requirements equals national applications** for some or all PCT Contracting States, and meeting differing national formal requirements will not be necessary. ● Research on the novelty of the patent is carried out by **one dedicated research authority**, an International Research Authority (ISA), of which several were appointed by PCT Contracting States. The choice of the ISA is done by the office, where the international patent application was filed. The research in all ISA follows standards as established in the PCT. This results in a written opinion and an international preliminary report on patentability by the ISA, which is sent to the national patent offices and informs their decision. The preliminary report is not binding on them. ● By filing an international patent application, different from filing separate, national applications**, applicants ensure priority for their invention in all PCT signatories**. ● In addition, the PCT environment provides **a secure platform** for the exchange of priority documents and similar documents between participating intellectual property (IP) offices. ● Another database is the CASE platform, which allows the secure sharing of search and examination documents between national patent offices, to facilitate the individual national patent approval processes.

[91] https://www.wipo.int/pct/en/

[92] https://www.wipo.int/about-wipo/en/

[93] https://www.wipo.int/edocs/pubdocs/en/wipo_pub_901_2021.pdf; p 91.

[94] https://www.wipo.int/pct/en/faqs/faqs.html; FAQ, Q 1 ; Q 25-26.

Characteristics	Summary
	WIPO administers the PCT and is responsible for including applications in databases, distribution, sharing, translations etc. WIPO is responsible for the overall system co-ordination and offers assistance and capacity building to participating jurisdictions and applicants. **Overview of the PCT System**[95] 
Legal nature	The PCT is a legally binding international treaty. Reservations can be expressed with regard to specific provisions of the PCT. Regulations and Administrative Instructions complement the PCT, here.
National implementation requirements	
Years of existence and steps in development	The PCT is in place since 1970, with modifications and amendments in 1979, 1984 and 2001. It provides an alternative route to the Paris Convention for the Protection of Industrial Property (1883, with numerous amendments), and the PCT is to be understood as fully in line with the Paris Convention.
Adherents/Parties	155 Contracting States
Use statistics and examples	In 2021, there were 675,200 (+4.3%) PCT national phase entries; 275,900 (+4%) PCT applications filed; 125 (–3) Countries in which PCT applications were filed; 56.7% (–0.2 percentage point) Share of PCT national phase entries in worldwide non-resident patent application filings.[96]

[95] From https://www.wipo.int/pct/en/faqs/faqs.html.

[96] https://www.wipo.int/edocs/pubdocs/en/wipo_pub_901_2021.pdf; p 5.

Characteristics	Summary
Process for negotiation	
Exchange of confidential information	Both the Digital Access Service and the CASE platform (see below) provide secure information platforms to be accessed by all participating intellectual property offices, containing all relevant documentation related to a an international patent application, including search results and reports.
Dual criminality requirements / assumptions	
Common databases/case information systems	• The PCT environment provides **a secure platform, the Digital Access Service** for the exchange of priority documents and similar documents between participating intellectual property (IP) offices. • Another database is the CASE platform, which allows the secure sharing of search and examination documents between national patent offices, to facilitate the individual national patent approval processes.
Joint notification systems/one-stop-shop systems	One international notification under the PCT to the agency of a Contracting State secures priority in all Contracting States. It does not replace national filings in the final patent application phase, which is exclusively at the discretion of the national agencies. Only in so far as the dedicated research authority carries out the first thorough research and provides an opinion, which can guide national patent offices' proceedings in the national phase. The international search carried out by one dedicated research authority has a strong indicative value if the submitted innovation meets the standards. All national or international offices that show that they meet the requirements for a dedicated research authority (Art. 16 PCT) can be appointed as dedicated research authority.
Joint investigations/case teams	-
Functions relevant for parallel investigations	All applications submitted by requesting parties and all search results and documents can be accessed by all participating national patent offices, which saves time and resources in the national phase and avoids unnecessary duplication. The international search report can provide a basis for the national assessments. The CASE platform also allows national patent offices to upload their search and examination documents to be accessed by other national patent offices, carrying out parallel approval processes.
Acknowledgement/deferral to another jurisdiction's decision	-
Arbitration mechanisms in case of conflicting outcomes	Art. 59 provides for a mechanism in case of disputes between Contracting States in cases concerning interpretation and application of the PCT before the International Court of Justice. Not related to conflicting outcomes of patent decisions.
Investigative assistance • compelling evidence – statements/documents • servicing documents • enforcing rulings/fines	Submission of information into the Digital Access Services platform and the CASE database, to be used in parallel national patent proceedings.
Lead agency models	Only in so far as the dedicated research authority provides a thorough first examination, which can serve as a basis for the separate national patent proceedings.
Co-ordinating bodies	WIPO has co-ordinating function in the system, to do formality checks, forward documentation, provide translations, assistance and capacity building.
Provisions on costs	Applicants pay fees when they submit their patent application. One fee for the international application, and multiple fees to national patent offices when they decide to enter the national phase.

Characteristics	Summary
Reservations, opt-in/opt-out clause, limits of co-operation. If there are limits, is there a minimum degree of co-operation required?	Reservations can be expressed with regard to specific provisions of the PCT. Art. 64 provides for reservations with regard to Chapter II (international preliminary examinations) and a few other provisions.
Features relevant to competition enforcement co-operation	● Universal priority of international patent application can inform one-stop-shop marker systems for cartel investigations. One application has the effect of a national/regional application for all Contracting States. When certain formal requirements are met, no adaptation to national formal requirements will be necessary. One marker placed at any NCA could equally replace parallel national filings and preserve priority/ranking. ● A filing can be done in any language that a receiving Office (as exist in all Contracting States) accepts. ● Secure case and information platforms accessible to the relevant authorities of Contracting States help to share case related information and avoid unnecessary duplication of work. However, the information sharing relates mostly to factual, public information as this is what is considered in the patent application process to determine novelty of an invention. Applications as such also mandatorily public 18 months after priority was established, to allow third parties access to the information. ● National patent offices take independent decisions on granting the actual patent, not prejudiced by opinions/actions taken in the international patent application process. This may be very relevant to for systematic information sharing/one-stop-shop marker systems in competition cases.
Features that may make it difficult to apply to competition enforcement co-operation	● Resource intensive international co-ordinating body (but WIPO also serves lots of other functions/instruments) ● Nature of the information exchanged – mostly not business secrets but research results and opinions – factual information, often public (scientific documents) ● Databases that grant unrestricted access to all Contracting States – risk of information leaks and reduced incentives to apply for leniency/immunity because of potentially high number of investigations and subsequent damages actions. Could be addressed by giving parties that set a marker discretion as to which Contracting States it should apply and be provided access to information. Does not address potential NCA concerns about co-operation risks with specific other NCA. – could inform marker systems in closer regional/trusted multilateral co-operations.

9. OECD Decisions[97]

The table below provides insights into a number of OECD Decisions, which in and of themselves may at least partly seem somewhat out of scope for considering their relevance to competition enforcement co-operation. However, each contains at least one element which could provide meaningful inspiration in the competition context, developed and implemented at OECD level. The summary will focus on these elements.

[97] https://www.oecd.org/legal/legal-instruments.htm

Characteristics	Summary
General description and main functions	**1. OECD Framework for Mutual Acceptance of Data and Good Laboratory Practice (MAD)[98].** The MAD aims at harmonising national approaches to the regulation of chemicals, to avoid duplicative and conflicting requirements by governments on producers and users of chemicals. MAD consists of a set of OECD Council Decisions which make up the **OECD Mutual Acceptance of Data (MAD) system**, including its OECD Guidelines for the Testing of Chemicals[99] and OECD Principles of Good Laboratory Practice (GLP)[100]. The Decision provides that data generated in the testing of chemicals in an OECD Member country in accordance with OECD Test Guidelines and OECD Principles of Good Laboratory Practice shall be accepted in other Member countries for purposes of assessment and other uses relating to the protection of man and the environment. In addition, assurances of the implementation of GLP in a jurisdiction are recognised by other participating jurisdictions. 2. Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations (The **OECD Control System for waste recovery)**[101]**.** The OECD Control System for waste recovery aims at facilitating trade of recyclables in an environmentally sound and economically efficient manner by using a simplified procedure as well as a risk-based approach to assess the necessary level of control for materials**.** Since March 1992, transboundary movements of wastes destined for recovery operations between member countries of the OECD have been supervised and controlled under a specific intra-OECD Control System. It entails different types of control procedures, dedicated competent national authorities, pre-approved recycling facilities, standardised notification and approval procedures, and regularly updated databases of competent authorities and recovery facilities. The Decision obliges member countries to control transboundary movements of wastes destined for recovery operations within the OECD area in accordance with the provisions of the Decision and its appendices. 3. Decision of the Council on Conflicting Requirements being imposed on Multinational Enterprises[102]. The Decision is part of an overarching investment policy framework, the OECD Declaration and Decisions on International Investment and Multinational Enterprises.[103] It expresses a policy commitment by adhering governments to provide an open and transparent environment for international investment and to encourage the positive contribution multinational enterprises can make to economic and social progress. In this context, the Decision on Conflicting Requirements foresees a consultation mechanism for problems that arise when multinational enterprises are made subject to conflicting requirements. In this case, Member countries shall give prompt and sympathetic consideration to requests by Member countries for consultations in the Committee or through other mutually acceptable arrangements. 4. Decision revising the OECD Standard Codes for the Official Testing of Agricultural and Forestry Tractor[104] . The OECD Tractor Codes allow participating countries to perform tractor tests according to harmonised procedures, and to obtain OECD official approvals which facilitate international trade. In each country, the national stations in charge of tractor testing follow the OECD Codes when performing their tests, and then submit results to OECD for approval. The results of approved tests are published and used by tractor manufacturers, sellers and users.[105]

[98] https://www.oecd.org/env/ehs/mutualacceptanceofdatamad.htm

[99] https://www.oecd.org/chemicalsafety/testing/oecdguidelinesforthetestingofchemicals.htm

[100] http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=env/mc/chem(98)17&doclanguage=en

Legal nature	Member countries and non-Member Adherents are bound under international law by the provisions of the Decisions and all Adherents are obliged to implement OECD Decisions and must take the measures necessary for such implementation, except those Member countries which abstain at the time of adoption. They can also be coupled with OECD Recommendations as Decision-Recommendations, making only some parts of the Recommendation binding. Decisions set out specific rights and obligations and may contain monitoring mechanisms.
National implementation requirements	Member countries and non-Member Adherents are obliged to implement OECD Decisions and must take the measures necessary for such implementation.
Years of existence and steps in development	1. MAD was adopted in 1981 and last amended in 2019. 2. OECD Control System for Waste Recovery was adopted in 1992 and last amended in 2021. 3. Decision on Conflicting Requirements – the Declaration was adopted in 1976, the Decision in 1991. 4. The OECD Tractor Codes were first approved in 1959, latest amendment in 01/2022.
Adherents/Parties	1. MAD – OECD Members, seven non Member Adherents 2. OECD Control System for Waste Recovery – OECD Members 3. Decision on Conflicting Requirements – OECD Members, 12 non Members 4. OECD Tractor Codes – 23 OECD Members, 5 non Members
Use statistics and examples	1. MAD - by reducing duplication, and creating a framework for the sharing of work, the MAD system saves governments and industry around € 309 million each year, as well as reduces the number of animals used in such testing.[106] 2. OECD Control System for Waste Recovery - ? 3. Decision on Conflicting Requirements – presumably one case of Committee consultation 4. OECD Tractor Codes - on average OECD Tractor Codes member countries report a 30 percent increase in tractor exports;[107] more than 2 000 tractor models have been tested for their performance characteristics, and 10 000 variants of tractors have been tested for noise measurement at the driving position or for the driver's protection in case of tractor roll-over.[108]
Process for negotiation	1. MAD – OECD Council Decision in 1981, last amended in 2019; 1989 Council Decision-Recommendation on Compliance with Principles of Good Laboratory

[101] https://www.oecd.org/env/waste/theoecdcontrolsystemforwasterecovery.htm

[102] https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0261#mainText

[103] https://www.oecd.org/daf/inv/mne/oecddeclarationanddecisions.htm

[104] www.oecd.org/agriculture/tractors

[105] https://www.oecd.org/agriculture/tractors/codes-background-and-usage.htm

[106] https://www.oecd.org/chemicalsafety/saving-costs-in-chemicals-management-9789264311718-en.htm.

[107] https://www.oecd.org/agriculture/tractors/advantages-oecd-tractor-codes-en.pdf.

[108] https://www.oecd.org/agriculture/tractors/codes-background-and-usage.htm

<table>
<tr><td></td><td>Practices[109].</td></tr>
<tr><td>Exchange of confidential information</td><td></td></tr>
<tr><td>Dual criminality requirements / assumptions</td><td></td></tr>
<tr><td>Common databases/case information systems</td><td>2. OECD Control System for Waste Recovery - OECD database for Competent Authorities and Recovery Facilities; uniform templates for notification, movement documents, certification of receipt and certification of recovery.[110]
4. OECD Tractor Codes – online database for all tractor summary test reports.[111]</td></tr>
<tr><td>Joint notification systems/one-stop-shop systems</td><td>4. OECD Tractor Codes - tests can be carried out in one country only, and the OECD ensures through a system of co-ordinating centres for the OECD tests that tractors meet the approved standards as set out in the Codes. They are accepted in all other Adherent jurisdictions. In the case that tests are not approved, the Decision provides for a conflict resolution mechanism at OECD level.</td></tr>
<tr><td>Joint investigations/case teams</td><td></td></tr>
<tr><td>Functions relevant for parallel investigations</td><td></td></tr>
<tr><td>Acknowledgement/deferral to another jurisdiction's decision</td><td>1. MAD enables the mutual recognition of laboratory testing results for chemicals when the test procedure complies with agreed OECD standards. It also ensures that that Member countries shall recognise the assurance by another Member country that test data have been generated in accordance with GLP Principles.
<table>
<tr><th>Country</th><th>Successful OECD Evaluation</th><th>The country must accept data from Full MAD Adherents and OECD members who have been evaluated by OECD</th><th>All OECD members, Full and Provisional Adherents must accept data from them</th></tr>
<tr><td colspan="4">OECD member countries</td></tr>
<tr><td>OECD country
OECD country</td><td>Yes
No</td><td>Yes
Yes</td><td>Yes
No</td></tr>
<tr><td colspan="4">Non-member countries</td></tr>
<tr><td>Full adherent to MAD
Provisional Adherent to MAD</td><td>Yes
No</td><td>Yes
Yes</td><td>Yes
No</td></tr>
</table>
4. OECD Tractor Codes – Agreed standards and acceptance of tests carried out in another jurisdiction if tests follow the Codes.</td></tr>
<tr><td>Arbitration mechanisms in case of conflicting outcomes</td><td>3. Decision on Conflicting Requirements – provides that Adherents shall seek early consultation in case of conflicting requirements imposed on MNE, in the Investment Committee or any other mutually acceptable arrangement.
4. OECD Tractor Codes – Conflict resolution mechanism at OECD level when approval is denied.</td></tr>
</table>

[109] https://legalinstruments.oecd.org/en/instruments/58

[110] See Appendix 8 of the Decision, https://legalinstruments.oecd.org/en/instruments?mode=advanced&typeIds=1#appendix-8.

[111] https://qdd.oecd.org/subject.aspx?subject=TRACTOR_TEST_RESULTS

Investigative assistance • compelling evidence – statements/documents • servicing documents • enforcing rulings/fines	
Lead agency models	
Co-ordinating bodies	1. MAD - The OECD evaluates a government's national GLP compliance monitoring programme before they can fully participate in the MAD. 4. OECD Tractor Codes – The OECD controls the implementation and approves test results.
Provisions on costs	4. OECD Tractor Codes – funded by an annual fee by Adherents
Reservations, opt-in/opt-out clause, limits of co-operation. If there are limits, is there a minimum degree of co-operation required?	
Features relevant to competition enforcement co-operation	1. MAD – Example for a framework for the **mutual recognition of another jurisdiction's decisions** based on an agreed standard and procedure for the review and method leading to this decision. This could inspire a framework for the mutual recognition of decisions in areas of enforcement where widespread unanimity about the legal treatment exists, for example hard core cartels, by adapting and recognising requisite procedural rules and guarantees. The agreed standards and procedures are **evaluated by the OECD** before country becomes part of MAD. 2. OECD Control System for Waste Recovery – OECD database of competent authorities and unified forms for notification and certification documents. List of authorities and contact points is not new and OECD contact lists/CEC Template may even go beyond. Unified forms could inspire **template documents** to be used for **parallel merger notifications or leniency** notification/marker applications. 3. Decision on Conflicting Requirements – a **conflict resolution mechanism** could help resolve or minimise inconsistencies or overlaps (ne bis in idem) in agency decisions. This could apply to merger cases and their outcomes, in particular remedies but may be difficult due to tight timelines. Possibly more realistic for unilateral conduct cases and agency measures to address unlawful conduct, when the conduct is similar across jurisdictions and measures cannot be limited to the imposing jurisdiction. Equally interesting instrument to resolve conflicting fining issues, when there might be ne bis in idem concerns, or conflicts about fines due to inability to pay issues. 4. OECD Tractor Codes – example for the use of the OECD as a co-ordinating body to ensure uniform application of agreed standards in all Adherent jurisdictions. This could inform solutions for one-stop-shop notifications or a global marker system in cartel cases, where a central body co-ordinates and/or disseminates information.
Features that may make it difficult to apply to competition enforcement co-operation	1. MAD – relates to technical processes and best practices in the testing of uniform chemical substances. The resulting decisions are factual and have little room for discretion, which makes it easier for mutual recognition. 2. OECD Control System for Waste Recovery – purely technical nature of the harmonisation, no differences on substantive assessment of substances, procedural harmonisation and facilitation. 3. Decision on Conflicting Requirements – none, if an appropriate body for consultation/conflict resolution can be created, which issues non-binding recommendations to resolve the conflict. 4. OECD Tractor Codes – co-ordination and mutual recognition apply to technical standards, which leave little room for discretion in decision making.

Endnotes

[1] References to all OECD work on international co-operation in competition enforcement can be found on https://www.oecd.org/competition/internationalco-operationandcompetition.htm.

[2] See https://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm.

[3] Versions of the 2014 Recommendation since 1967, years indicating the year of adoption/abrogation:

- 1967; 1979 Recommendation of the Council concerning Co-operation between Member Countries on restrictive Business Practices Affecting International Trade [OECD/LEGAL/0082]
- 1973; 1979 Recommendation of the Council concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade [OECD/LEGAL/0109]
- 1979; 1986 Recommendation of the Council concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade [OECD/LEGAL/0180]
- 1986; 1995 Revised Recommendation of the Council concerning co-operation between Member Countries on Restrictive Business Practices affecting International Trade [OECD/LEGAL/0223]
- 1995; 2014 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade [OECD/LEGAL/0280]

2014; in force today Recommendation of the Council Concerning International Cooperation on Competition Investigations and Proceedings

[4] References to all OECD work on digital competition issues can be found on https://www.oecd.org/daf/competition/digital-economy-innovation-and-competition.htm.

[5] On drivers for international enforcement co-operation, see (OECD/ICN, 2021, pp. 69-74[1]).

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

[7] Working Party 3 had already agreed in November 2021 to further explore legal models and instruments existing in other areas of law enforcement to inform renewed efforts to improve multi-lateral competition enforcement co-operation, see Meeting Summary Record, https://one.oecd.org/document/DAF/COMP/WP3/M(2021)2/en/pdf.

[8] All materials relating to the Hearing can be found here https://www.oecd.org/daf/competition/thinking-out-of-the-competition-box-enforcement-cooperation-in-other-policy-areas.htm.

[9] In addition to the instruments from the anti-corruption area referenced in this Note, various other Conventions that allow for mutual legal assistance (MLA) exist and can serve as precedent. Sometimes their scope goes even beyond the scope of the introduced instruments, and they may be considered as at least as adequate models for MLA in the competition context. However, we consider enforcement against corruption as closest in nature to competition and think that the presented Conventions present a good starting ground. Future work considering

the introduction of MLA provisions should, however, take into account for example UNTOC; the 1959 Strasbourg MLA Convention; the EU 2000 MLA Convention; or the OAS Convention.

[10] https://www.oecd.org/corruption/oecdantibriberyconvention.htm.

[11] https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=173.

[12] https://www.unodc.org/unodc/de/treaties/CAC/.

[13] Art. 9 of the OECD Anti-Corruption Convention could be interpreted as also providing a direct legal basis.

[14] https://www.oecd.org/daf/anti-bribery/2021-oecd-anti-bribery-recommendation.htm.

[15] https://www.unodc.org/pdf/legal_advisory/Model%20Law%20on%20MLA%202007.pdf.

[16] https://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

[17] https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf.

[18] https://www.coe.int/en/web/cybercrime/the-budapest-convention.

[19] See https://www.coe.int/web/conventions/full-list?module=treaty-detail&treatynum=189.

[20] See https://rm.coe.int/1680a49dab.

[21] For example, UNCAC, Art. 49; Anti-Bribery Recommendation, XIX C v.; 2nd additional protocol to European Convention on Mutual Assistance in Criminal Matters, Article 20; 2nd additional protocol to the Convention on Cybercrime, Art. 12(1).

[22] See 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and Council Framework Decision on Joint Investigation Teams.

[23] See https://www.eurojust.europa.eu/de/model-agreement-setting-joint-investigation-team.

[24] This model agreement provides at its beginning a non-exhaustive list of legal bases for JIT, which ar not limited to the EU 2000 MLA Convention.

[25] See https://www.iosco.org/about/?subsection=mmou.

[26] See https://www.iosco.org/about/?subsection=emmou.

[27] See https://www.iosco.org/about/?subSection=mmou&subSection1=signatories.

[28] For the sake of completeness, in the EU, the EU law also provides the legal basis for the exchange of information between national tax administrations. See "Overview of Legislation Practices Regarding Exchange of Information Between National Tax Administrations in Tax Matters", p. 7, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2015/563452/IPOL_STU(2015)563452_EN.pdf.

[29] The primary purpose of tax treaties is the avoidance of double taxation of income arising from cross-border transactions. These can also be referred to as DTAs (Double Tax Agreements).

[30] See e.g. https://www.oecd.org/ctp/treaties/tax-treaties-2017-update-to-oecd-model-tax-convention-released.htm.

[31] The OECD Model Tax Convention is supported by the Recommendation of the Council concerning the Model Tax Convention on Income and on Capital [OECD/LEGAL/0292], which recommends its use.

[32] See https://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm.

[33] Including 17 jurisdictions covered by territorial extension (e.g. Bermuda and British Virgin Islands which are extensions by the UK).

[34] Assistance within the meaning of the MAAC comprises all mutual assistance activities in tax matters which can be carried out by the public authorities, including the judicial authorities (Art. 1 and explanatory note). In the original version of the MAAC, criminal matters were expressly excluded from its scope. It provided that "Action by judicial bodies carried out pursuant to criminal law and intended to punish criminal offences committed in the tax fields does, not therefore fall within the scope of application of the present instrument", see https://www.oecd.org/ctp/exchange-of-tax-

information/Convention_On_Mutual_Administrative_Assistance_in_Tax_Matters_Report_and_Explanation.pdf. This reference was removed by the 2010 Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters [OECD/LEGAL/0382]. However, certain jurisdictions expressly exclude the application of the MAAC in criminal matters by way of reservations and declarations. For instance, Germany declares that "It is therefore the understanding of the Federal Republic of Germany that the Convention, in particular Article 4 thereof, covers only the exchange of data in purely tax-related matters, with the consequence that data transmitted on the basis of the Convention may not be used for other purposes, in particular for criminal proceedings that are not related solely to tax crimes, without the consent of the State transmitting the data. The Convention does not cover international legal assistance in criminal and civil matters." see https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=127&codeNature=0.

[35] The OECD/G20 BEPS project consists of 15 actions to tackle tax avoidance, improve the coherence of international tax rules, ensure a more transparent tax environment and address the tax challenges arising from the digitalisation of the economy. For further information, please refer to https://www.oecd.org/tax/beps/. Action 15 of the package provided for an analysis of the possible development of a multilateral instrument to implement tax treaty related BEPS measures "*to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties*".

[36] See https://www.wipo.int/pct/en/.

[37] See https://www.wipo.int/portal/en/index.html.

[38] See (OECD/ICN, 2021[1]); (OECD, 2022[2]).

[39] This is true for international enforcement co-operation outside regional networks. Regional networks such as the ECN and others (see (OECD/ICN, 2021[1]), Annexes I and J) have to a wider or lesser degree created legal bases to enable information exchanges, assistance and joint enforcement action within the regional groupings. The considerations presented here address solutions that could enable enforcement co-operation outside such networks, on a global scale.

[40] See https://www.oecd.org/daf/competition/enhanced-enforcement-cooperation.htm, with links to all materials.

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

[42] See https://one.oecd.org/document/DAF/COMP/WP3(2021)2/en/pdf

[43] The Competition Enforcement Co-operation Template (CEC Template) was recently approved by the Competition Committee [DAF/COMP/WP3/WD(2022)1]. It will create an online database with relevant contact information and legal background explaining the ability and legal bases for competition authorities to engage in various types of international co-operation, outside of regional competition arrangements. It goes beyond the existing OECD contact list, as it provides significant additional information relevant to international co-operation, and includes non Members.

[44] See, for example, https://www.internationalcompetitionnetwork.org/members/ and https://www.internationalcompetitionnetwork.org/frameworks/.

[45] See (Martyniszyn, 2021, p. 702[11]), for international cartels. Martynsiszyn proposes UNCTAD as a possible supplier for such information clearinghouse services.

[46] Agency confidential information can be defined as "Information internally generated by the competition authority that the authority does not routinely disclose but for which there is no statutory prohibition or restriction on disclosure, and that does not specifically identify confidential information of individual enterprises. For example, it can include information on procedural steps in an investigation, investigative techniques, theories of harm, or potential remedies. Synonyms used are Authority Non-Public Information and Authority Internal Information." See also section VII 4. of the 2014 OECD Recommendation.

[47] Confidential information can be defined as "Confidential Information refers to information the disclosure of which is either prohibited or subject to restrictions under the laws, regulations, or policies of a jurisdiction, e.g., non-public business information or business secrets the disclosure of which could prejudice the legitimate commercial interests of an enterprise." The definition of confidential information (and what this means for

whether and with whom it can be shared) varies between jurisdictions. See also section I of the 2014 OECD Recommendation, and section 18 of 2021 OECD/ICN Report (OECD/ICN, 2021[1]).

[48] Under Art. 21 (4), CMAAT expressly states that "in no case shall the provisions of this Convention, including in particular those of paragraphs 1 and 2, be construed to permit a requested State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person."

[49] It should be noted though that the conduct underlying the non-criminal investigation against the legal person is still always criminal in nature. Corporate liability for foreign bribery under the OECD Anti-Corruption Convention arises only when foreign bribery has been committed by a natural person, and that liability of the natural person is necessarily criminal in nature. The purpose of Recommendation XIX.A.iv is to ensure the provision of assistance even if the requesting state is not also prosecuting the natural person criminally, e.g. if the natural person has absconded or died.

[50] See https://rm.coe.int/16800656ce.

[51] See https://rm.coe.int/168008155e.

[52] See https://www.eurojust.europa.eu/document/2000-eu-mutual-legal-assistance-convention.

[53] "Assistance will not be denied based on the fact that the type of conduct under investigation would not be a violation of the Laws and Regulations of the Requested Authority".

[54] https://www.unodc.org/pdf/legal_advisory/Model%20Law%20on%20MLA%202007.pdf.

[55] https://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf.

[56] For definition and background information see (OECD, 2022, p. 65[2]), (OECD/ICN, 2021, p. 67[1]), and https://www.oecd.org/daf/competition/enhanced-enforcement-cooperation.htm.

[57] See https://one.oecd.org/document/C(2022)23/en/pdf, p 6.

[58] See https://www.coe.int/en/web/conventions/new-treaties, Art. 12.

[59] See https://www.unodc.org/unodc/de/treaties/CAC/, Art. 49.

[60] See https://www.oecd.org/daf/anti-bribery/2021-oecd-anti-bribery-recommendation.htm, XIX C.

[61] See https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/bribery-corruption-and-sanctions-evasion/international-anti-corruption-centre. The following law enforcement agencies participate in the IACCC: Australian Federal Police; New Zealand's Serious Fraud Office; New Zealand Police; Royal Canadian Mounted Police; Corrupt Practices Investigation Bureau of the Republic of Singapore; UK's National Crime Agency; US Federal Bureau of Investigation; US Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HSI). The IACCC is funded by the UK Government's Prosperity Fund.

[62] See also (OECD, 2012, p. 24[8]).

[63] See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN, in particular Art. 4.

[64] See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(02)&from=EN.

[65] See Art. 4.3 OECD Anti-Bribery Convention.

[66] The ECN Damages Directive https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG establishes a binding effect of national decisions for damages actions brought before other national courts, Art. 9.

[67] See https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf.

[68] See https://www.oecd.org/daf/anti-bribery/countrymonitoringoftheoecdanti-briberyconvention.htm.

[69] Art. 24 (3) CMAAT.

[70] See https://qdd.oecd.org/subject.aspx?subject=TRACTOR_TEST_RESULTS.

References

Budzinski, O. (2014), *TOWARDS RATIONALIZING MULTIPLE COMPETITION POLICY ENFORCEMENT PROCEDURES: THE ROLE OF LEAD JURISDICTION CONCEPTS*, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/wp3(2014)6&doclanguage=en. [12]

Charbit, N. and S. Ahmad (eds.) (2020), *The Next Frontier of International Cooperation in Competition Enforcement*, Concurrences, https://www.concurrences.com/en/all-books/frederic-jenny-liber-amicorum-standing-up-for-convergence-and-relevance-in-en. [4]

Eurojust (2021), *Joint Investigation Teams Practical Guide*, https://www.eurojust.europa.eu/sites/default/files/assets/joint_investigation_teams_practical_guide_2021_en.pdf. [3]

Gal, M. (2008), *Free Movement of Judgments: Increasing Deterrence of International Cartels Though Jurisdictional Reliance*, NYU Center for Law, Economics and Organization, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291844. [10]

ICN (2020), *Guidance on Enhancing Cross-Border Leniency Cooperation*, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf. [9]

International Chamber of Commerce (2016), *PROPOSAL TO THE ICN FOR A ONE-STOP-SHOP FOR LENIENCY MARKERS*, https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-proposal-to-ICN-for-a-one-stop-shop-for-leniency-markers-final.pdf. [15]

Martyniszyn, M. (2021), "COMPETITIVE HARM CROSSING BORDERS: REGULATORY GAPS AND A WAY FORWARD", *Journal of Competition Law & Economics*, pp. 686–707, https://doi.org/10.1093/joclec/nhaa034. [11]

OECD (2022), *OECD Competition Trends 2022*, http://www.oecd.org/competition/oecd-competition-trends.htm. [16]

OECD (2022), *Report on the implementation of the OECD Recommendation Concerning International Co-operation on Competition Investigations and Proceedings*, https://www.oecd.org/daf/competition/international-cooperation-on-competition-investigations-and-proceedings-progress-in-implementing-the-2014-recommendation.htm. [2]

OECD (2021), *Implementation Toolkit on Legislative Actions for Consumer Protection Enforcement Co-operation*, https://www.oecd.org/fr/sti/implementation-toolkit-on-legislative-actions-for-consumer-protection-enforcement-co-operation-eddcdc57-en.htm. [5]

OECD (2020), *Criminalisation of cartels and bid rigging conspiracies*, https://one.oecd.org/document/DAF/COMP/WP3(2020)1/en/pdf. [7]

OECD (2017), *International co-operation in corruption cases*, https://www.oecd.org/corruption/acn/OECD-International-Cooperation-in-Corruption-Cases-2017.pdf. [6]

OECD (2014), *EXECUTIVE SUMMARY OF THE HEARING ON ENHANCED ENFORCEMENT CO-OPERATION*, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/M(2014)2/ANN3/FINAL&doclanguage=en. [13]

OECD (2013), *Report on the OECD/ICN Survey on international co-operation*, https://one.oecd.org/document/DAF/COMP/WP3(2013)2/FINAL/en/pdf. [18]

OECD (2012), *Improving International Co-operation in Cartel Investigations*, https://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf. [8]

OECD (2012), *Limitations and constraints to international cooperation*, https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2012)8&docLanguage=En. [17]

OECD/ICN (2021), *OECD/ICN Report on International Co-operation in Competition Enforcement*, https://www.oecd.org/daf/competition/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf. [1]

Taladay, J. (2012), *Time for a global "one-stop-shop" for leniency markers*, https://heinonline.org/HOL/LandingPage?handle=hein.journals/antitruma27&div=11&id=&page=. [14]