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Working Party No. 3 on Co-operation and Enforcement

Developments in international co-operation in competition cases since 2014: monitoring the implementation of the Recommendation of the Council concerning International Co-Operation on Competition Investigations and Proceedings

Note by the Secretariat

4 June 2019

This note sets out developments and trends in international co-operation in competition cases since the adoption of the Recommendation concerning International Co-Operation on Competition Investigations and Proceedings [OECD/LEGAL/0408].

This note starts the process for monitoring the implementation of this Recommendation. It is submitted for discussion at the 129th Meeting of Working Party No 3 on Co-operation and Enforcement on 4 June 2019.

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Table of contents

Figures

Boxes

Developments in international co-operation in competition cases since 2014[*]

1. Background

1. Co-operation among competition authorities is a priority for the Competition Committee. Currently approximately 140 jurisdictions[1] have competition laws and authorities, which may need to co-operate in cross-border cases affecting their respective territories. As business becomes more globalised, such international cases are increasing.

2. A 2013 survey[2] carried out by the Secretariat and the International Competition Network ("ICN") showed that few jurisdictions co-operate effectively, primarily due to legal and practical obstacles.

3. The need for alignment of competition enforcement co-operation rules and policies, and for improvement of co-operation in competition cases led the OECD Council to adopt in 2014 a Recommendation on International Co-Operation on Competition Investigations and Proceedings [OECD/LEGAL/0408] (the "Recommendation", Annex A) to help Members and non-Members adhering to it ("Adherents") to "*co-operate closely in order to effectively and efficiently investigate competition matters, including mergers with anticompetitive effects, so as to combat the harmful effects of both cross-border and domestic anticompetitive practices and mergers with anticompetitive effects, in conformity with principles of international law and comity*".

4. The Recommendation is divided into seven substantive sections:

i. Section II on commitment to effective international co-operation recommends steps to minimise obstacles to effective enforcement co-operation between competition authorities.

ii. Sections III and IV on consultation and comity invites Adherents to exchange views, and request or accept consultations on cases and conduct affecting their important interests.

iii. Section V on notifications of investigations or proceedings recommends mechanisms for notifications in cases of investigations or proceedings affecting another Adherent's important interests.

iv. Section VI on the co-ordination of investigations or proceedings in the same or related cases invites Adherents to co-ordinate, for example by: informing on, and aligning, timetables of enforcement procedures; requesting waivers of confidentiality to co-operating competition authorities; discussing case analyses; and designing and implementing co-ordinated competition remedies.

v. Section VII on the exchange of information recommends that Adherents provide each other with relevant information to enable effective enforcement co-operation. It recommends the use of confidentiality waivers and the adoption of national provisions that allow competition agencies to exchange confidential information

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without the need to seek prior consent from the source of information (so-called "information gateways").

vi. Section VIII on investigative assistance to another competition authority calls for enhanced co-operation, including assisting in obtaining and compelling the production of information, ensuring the service of another Adherent's official documents and executing dawn-raids (inspections of premises) on behalf of another Adherent.

5. The Recommendation instructs the Competition Committee to serve as a forum for exchanges of views on matters related to the Recommendation, and to establish a list of contact points in each Adherent for the purposes of implementing it. The Competition Committee hosted several roundtables on international co-operation in competition enforcement over the years[3], and the Secretariat has done extensive dissemination work through articles, workshops and conferences. The Secretariat has also established and periodically updates the list of contact points [DAF/COMP/WP3(2017)3].

6. The Recommendation also instructs the Competition Committee to consider developing model bilateral and/or multilateral agreements on international co-operation reflecting the principles in the Recommendation. While the Competition Committee did not develop such model agreements, the Secretariat prepared, first, an inventory of intergovernmental co-operation agreements on competition in 2015[4] and, second, an inventory of international co-operation Memoranda of Understanding ("MoUs") between competition authorities in 2016.[5]

7. The Recommendation instructs the Competition Committee to monitor its implementation by Adherents (currently all OECD Members, Brazil, Colombia, Romania and the Russian Federation) and report to the Council every five years. This note aims to start the monitoring process by setting out developments and trends in co-operation among competition authorities since 2014. The note will be discussed in the Competition Committee's Working Party 3 on Co-operation and Enforcement ("WP3") at its meeting on 4 June 2019. The implementation of the Recommendation will be monitored through a survey. Section 4 of this note sets out the proposed timing for the monitoring process.

2. Main developments in international co-operation since 2014

8. This section describes the main developments and forms of international co-operation since 2014.

2.1. Drivers of international co-operation

9. There are three main drivers for international co-operation among competition authorities: the increasing number of jurisdictions with a competition law and authority; the increase of international trade; and the digitalisation of the global economy.

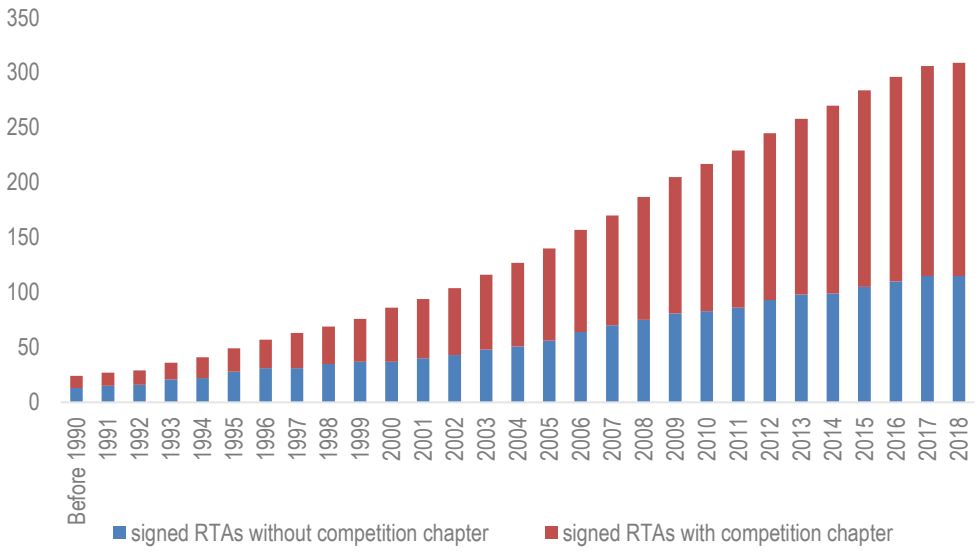
10. First of all, jurisdictions with a competition law regime keep increasing. In the last 25 years, the number of countries with competition law increased by more than 600%, from fewer than 20 in 1990 to about 140 in 2016.[6] Since 2014, the trend remained positive for at least two reasons. On the one hand, new competition regimes have been adopted (among others Hong Kong, China, in 2015, Philippines in 2015 and Thailand in 2017).[7] On the other, some competition regimes, existing before 2014, were strengthened by, for example, the introduction of merger control powers (among others, Argentina, Peru, Philippines).[8]

The higher the number of enforcing jurisdictions, the higher the likelihood their competition authorities may be looking at the same case or related cases and, consequently, the more the need for more co-operation.

11. Secondly, cross-border trade is on an upwards trend.[9] Cross-border business may lead to an increase in international competition cases. [10] For example, cross-border mergers accounted for almost half (47%) of all global mergers in terms of value and 36% in terms of volume in 2017.[11] These numbers have increased in the first half of 2018 when cross-border mergers hit their highest level of the last decade.[12] This means that a significant number of all mergers involved merger review in more than one jurisdiction. There is a similar upwards trend in international cartels cases. Figure 1 shows that the number of international cartel cases has grown consistently during the last 25 years, increasing from around 50 cases between 1995 and 1999, to about 450 between 2010 and 2017.

12. Regional trade agreements increased too since 2014 (Figure 1). In January 2019, about two-thirds (195) out of 310 regional trade agreements included competition chapters.[13]

Figure 1. Development in Regional Trade Agreements

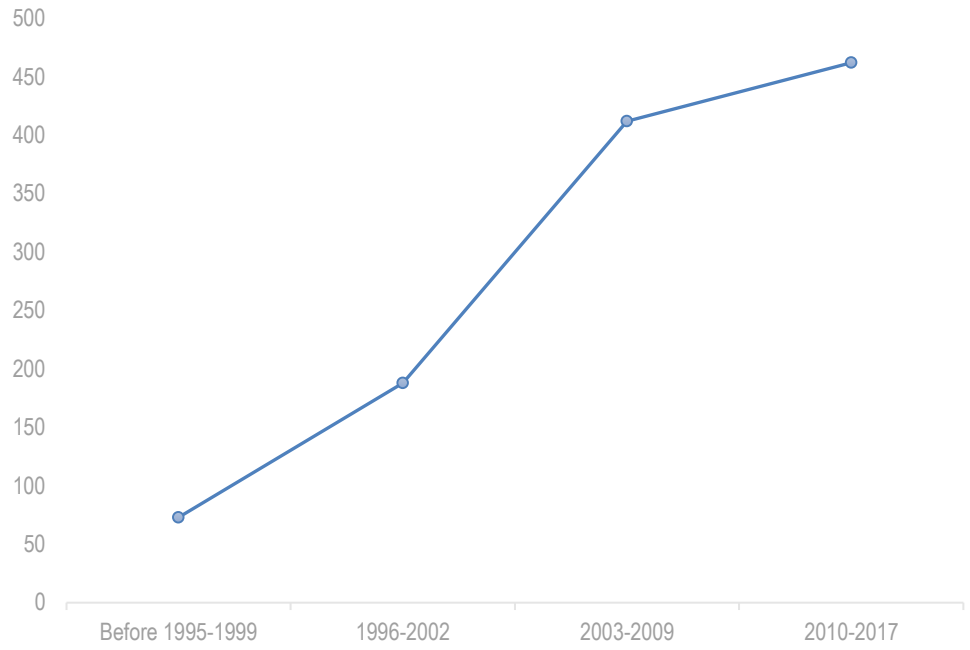


Source: WTO, Regional Trade Agreements Information System (RTA-IS).
Note: The database contains information on only those agreements that either have been notified, or for which an early announcement has been made to the WTO. It was last accessed on 29 January 2019.

13. Third, the digitalisation of the global economy may heighten the need for international competition enforcement co-operation. Many firms in digital markets are large businesses that operate across borders; their practices may attract the review of more than one authorities. As competition enforcement against digital firms often involves novel and complex issues (such as algorithmic collusion, network effects, two-sided markets, artificial intelligence), there is a potential for conflict in terms of methodologies used in the same or related cases and inconsistent enforcement outcomes; hence a higher need for effective enforcement co-operation.[14] In partial response, some market studies to analyse

and understand digital phenomena have been jointly conducted by different competition agencies.[15]

Figure 2. Number of international cartels detected



Source: Connor (2016)[16] The OECD calculations are based on the Private International Cartels database developed by Professor John Connor. In 2017, the OECD acquired the database and since 2018, it has started to verify and update it.

14. The proliferation of competition law and the increasing number of competition cases with a cross-border dimension require more and better competition enforcement co-operation. Co-operation can take different forms: informal and formal; bilateral and multilateral; through agreements between governments and MoUs between competition authorities, as well as through regional competition agreements.

2.2. Informal co-operation

15. Informal co-operation is all co-operation among competition authorities that is not based on formal instruments. It includes meetings, phone calls, emails, conferences, exchanges of views and non-confidential information, which all help spread expertise and mutual understanding.[17] In cross-border cases, informal ways of co-operation may include discussions on investigation strategies, exchange of public information, sharing of leads and comparing authorities' approaches. Even in the absence of formal co-operation agreements, informal co-operation may enable the co-ordination of surprise inspections.[18]

16. Informal co-operation is probably the most common type of co-operation, as it is easy and light on process. It has played, and continues to play, an important role in international enforcement cases. [19]

2.3. Formal agreements

17. Formal agreements between governments and between competition authorities, whether bilateral or multilateral, can complement informal co-operation.

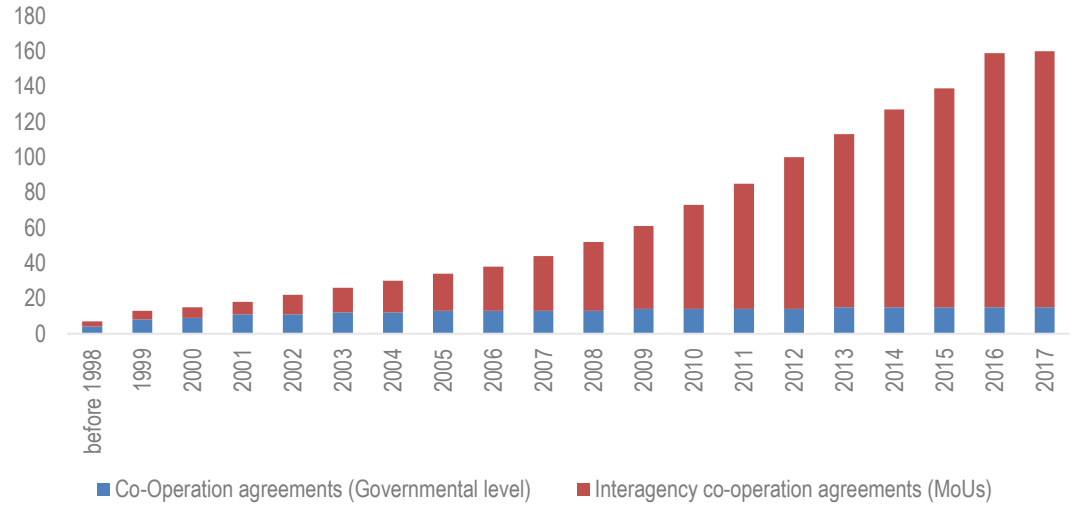
2.3.1. Bilateral co-operation agreements

18. Bilateral co-operation agreements in competition law enforcement multiplied since 1976 when the first agreement was signed between the United States (US) and Germany.[20] Over time, co-operation agreements have become more comprehensive and detailed.[21]

19. Bilateral co-operation agreements can be either inter-governmental agreements or inter-agency MoUs.[22]

20. Bilateral MoUs are the most widely used model of bilateral co-operation agreements, and their number keeps growing (Figure 3). To the knowledge of the Secretariat, at the end of April 2017, there were at least 180 MoUs where at least one of the signatories is the European Commission, a competition authority of an OECD Member, or an Associate or Participant in the Competition Committee. The number of bilateral co-operation agreements between governments kept steady and did not grow as much as MoUs.

Figure 3. Growth of co-operation agreements

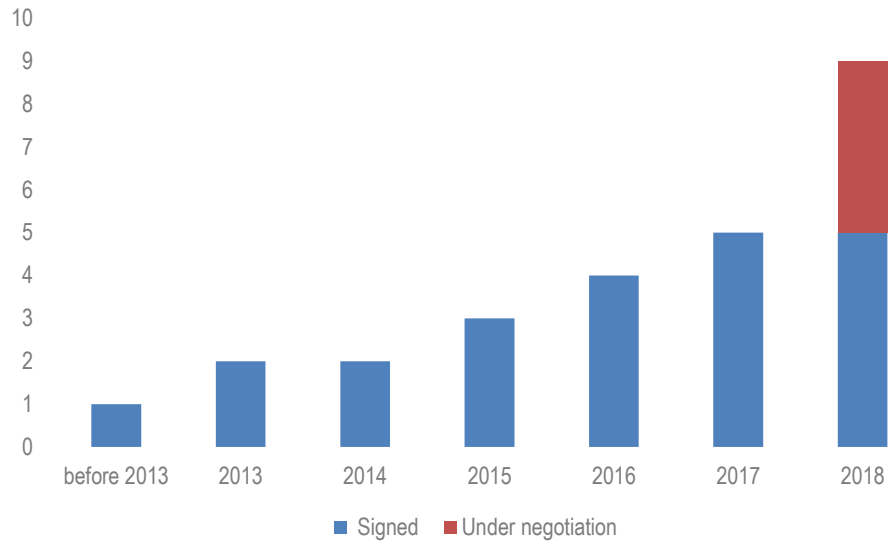


Source: OECD (2017), Inventory of Provisions in inter-agency co-operation agreements (MoUs).
Note: This graph includes inter-governmental co-operation agreements (concluded up until June 2015) and inter-agency MoUs (concluded up until April 2017) where at least one of the signatories is an OECD Member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

21. An interesting development following the adoption of the Recommendation is the increase in second-generation agreements (Figure 4). These are agreements that contain provisions enabling competition authorities to exchange confidential information under certain circumstances, without the need to seek prior consent from the source of information.[23] First-generation co-operation agreements only allow for the exchange of

non-confidential information, or the exchange of confidential information subject to the consent of the information source.

Figure 4. Development of second-generation co-operation agreements



Source: OECD analysis

22. To the knowledge of the Secretariat, at the end of 2018, six second-generation co-operation agreements have been signed (Box 1), and three were under negotiation.[24]

Box 1. Second generation agreements

- Australia-United States Mutual Antitrust Enforcement Assistance Agreement (April 1999);[1]
- Co-operation Agreement between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission in relation to the Provision of Compulsorily-Acquired Information and Investigative Assistance (April 2013);[2]
- Agreement between the European Union and the Swiss Confederation concerning co-operation on the application of their competition laws (May 2013);[3]
- Co-operation Arrangement between the Australian Competition and Consumer Commission and the Fair Trade Commission of Japan (April 2015);[4]
- Co-operation arrangement between the Commissioner of Competition (Canada) and the New Zealand Commerce Commission in relation to the sharing of information and provision of investigative assistance (April 2016);[5]
- Agreement on Co-operation in Competition Cases signed by the Government of the Kingdom of Denmark, the Government of the Republic of Finland, the

Government of the Republic of Iceland, the Government of the Kingdom of Norway, and the Government of the Kingdom of Sweden (September 2017).[6]

Sources:
[1] www.ftc.gov/policy/cooperation-agreements/usaaustralia-mutual-antitrust-enforcement-assistance-agreement
[2] www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20New%20Zealand%20Commerce%20Commission%20and%20the%20Australian%20Competition%20and%20Consumer%20Commission.pdf
[3] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A1203(01)&from=EN
[4] www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20Australian%20Competition%20%26%20Consumer%20Commission%20and%20the%20Fair%20Trade%20Commission%20of%20Japan.pdf
[5] www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04050.html
[6] www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf.

2.3.2. Regional co-operation agreements

23. Jurisdictions that are geographically close, face similar competition conditions and concerns, or are under the same trade rules have developed, in parallel to bilateral co-operation, regional enforcement co-operation and concluded regional competition agreements ("RCAs").

24. RCAs provide frameworks for: regional policy convergence; the adoption of competition laws in a region or their improvement over time; information exchanges for the enforcement of cross-border regional competition cases; and building the capacity of younger authorities in the region.[25] RCAs generally provide for a higher degree of enforcement co-operation than bilateral agreements. [26]

25. Among the RCAs for mutual assistance and co-operation set up by Adherents, the most advanced are the European Competition Network ("ECN"),[27] the Trans-Tasman economic co-operation,[28] and the recently revised Nordic Co-operation Agreement.[29] This last agreement was revised after the adoption of the Recommendation and is based on it, as set forth in its preamble ("*having regard to the Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings of 16 September 2014")*.

3. Selected developments in the areas covered by the Recommendation

26. This section describes selected developments that took place in the areas covered by the Recommendation.

3.1. Commitment to effective international co-operation

27. Section II of the Recommendation "*recommends that Adherents commit to effective international co-operation and take appropriate steps to minimise direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities*". Adherents should aim to: (i) minimise the impact of legislation that might restrict or reduce co-operation between competition authorities; (ii) "*make publicly available sufficient information on their substantive and procedural rules*"; (iii) "*minimise*

inconsistencies between their leniency or amnesty programmes that adversely affect co-operation".

3.1.1. Minimising the impact of legislation restricting international co-operation

28. Since 2014, the Competition Committee and the Secretariat have promoted the alignment of substantive and procedural enforcement rules and the elimination of legislative obstacles to international co-operation, through its roundtables, hearings and work with Members. During the same time, the International Competition Network ("ICN") also promoted competition enforcement convergence through the publication of manuals and recommendations.

29. Overcoming obstacles to international co-operation can be enabled by legislation as well as by soft law provisions. For example, the US *Antitrust Guidelines for International Enforcement and Cooperation* (2017)[30] refer to the need to avoid duplicative or conflicting decisions, and include a chapter on enforcement co-operation with foreign competition authorities. Several competition authorities have adopted best practices on co-operation in merger investigations and established mechanisms to conduct joint interviews and remedies negotiations.[31]

3.1.2. Making applicable rules public

30. The large majority of Adherents have increased transparency on their substantive and procedural rules and their enforcement record. A large number of competition authorities publish on their webpage the rules that they apply both in the national language(s) and English.[32] An increasing number of competition authorities also publish their enforcement decisions and provide either an English translation or an English press release.[33] OECD Members, Associates and Participants in the Competition Committee also submit to the OECD an annual report summarising their main enforcement developments during the relevant enforcement year.[34]

31. Transparency obligations can be found in competition chapters of Free Trade Agreements, like in the United States-Canada-Mexico Agreement (USCMA).

Box 2. United States- Canada-Mexico Agreement (USCMA)

Article 21.5: Transparency

1. The Parties recognize the value of making competition enforcement and advocacy policies as transparent as possible.

2. On request of another Party, a Party shall make available to the requesting Party public information concerning:

(a) its national competition law enforcement policies and practices; and

(b) exemptions and immunities to its national competition laws, provided that the request specifies the particular good or service and market of concern and includes information explaining how the exemption or immunity may hinder trade or investment between the Parties.

Source:https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-21.pdf.

3.1.3. Minimising inconsistencies between leniency or amnesty programmes

32. In a roundtable held in 2018, WP3 found that the different and sometimes conflicting requirements imposed by different jurisdictions to apply for and qualify for leniency, the diverse marker systems, and the costs and risks of parallel leniency applications can discourage potential applicants.[35] Minimising inconsistencies and standardising and co-coordinating leniency programmes can improve and help incentivise leniency applications in cross-border cartel cases.[36]

3.2. Notifications, Consultation, and Comity

3.2.1. Notification of competition investigations or proceedings

33. Section V of the Recommendation "*recommends that an Adherent should ordinarily notify another Adherent when its investigation or proceeding can be expected to affect the other Adherent's important interests*".

34. Notifications are necessary to enable international co-operation. They make the notified party aware of the notifying party's enforcement activity, and may trigger requests for co-ordination or consultations.

35. Notifications can be informal or based on MoUs. The majority of MoUs have provisions on notifications that only lay down a general principle that parties will notify each other of enforcement activities affecting their important interests. Few MoUs define specific notification requirements[37]; Box 3 provides an example.

Box 3. Australia-Japan (2015)

Paragraph [*03] Notification

3.1. Each competition authority will endeavour to notify the other competition authority of the enforcement activities of the notifying competition authority that the notifying competition authority considers are likely to affect the important interests of the other competition authority.

3.2. Enforcement activities of a competition authority that are likely to affect the important interests of the other competition authority are investigations or proceedings that:

(a) are directly relevant to enforcement activities of the other competition authority;

(b) are known by the notifying competition authority to be against a national or nationals of the country of the other competition authority, or against an enterprise or enterprises incorporated or organised under the applicable laws and regulations of the country of the other competition authority;

(c) involve anticompetitive activities, other than mergers or acquisitions, substantially carried out in the country of the other competition authority;

(d) involve conduct required, encouraged or approved by the other competition authority; or

(e) involve relief that requires or prohibits conduct in the country of the other competition authority.

3.3. Provided that it is not contrary to the laws and regulations of the country of the notifying competition authority and does not affect any investigation or proceedings being carried out by the notifying competition authority, notification pursuant to subparagraph 3.1 will be given as promptly as possible after the notifying competition authority becomes aware that its enforcement activities are likely to affect the important interests of the other competition authority.

3.4. Notifications provided under this Paragraph need not be formal (email will usually suffice for initial contact, followed by telephone dialogue) but will be sufficiently detailed to enable the notified competition authority to make an initial evaluation of the effect on its important interests.

Source: www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20Australian%20Competition%20%26%20Consumer%20Commission%20and%20the%20Fair%20Trade%20Commission%20of%20Japan.pdf

3.2.2. Consultation and comity

36. Section III of the Recommendation "*recommends that an Adherent that considers that an investigation or proceeding being conducted by another Adherent under its competition laws may affect its important interests should transmit its views on the matter to, or request consultation with, the other Adherent*." The addressee should "*give full and sympathetic consideration to the views expressed by the requesting Adherent*".

37. Section IV of the Recommendation "*recommends that an Adherent that considers that one or more enterprises or individuals situated in one or more other Adherents are or have been engaged in anticompetitive practices or mergers with anticompetitive effects that substantially and adversely affect its important interests, may request consultations with such other Adherent(s)*". If the addressed jurisdiction agrees, "*it should take whatever remedial action it considers appropriate, including actions under its competition law, on a voluntary basis and considering its legitimate interests*."

Consultation

38. Consultations can take place informally or formally. As most consultations take place informally, detailed empirical data of the developments are hard to obtain. MoUs do not usually include detailed consultation provisions. They only include a general provision that either party may request consultations on any relevant matter.[38]

39. Informal consultations can be enabled by improving mutual trust among competition through twinning projects,[39] staff exchange programmes,[40] and cross-appointments.[41]

Comity

40. Comity is the principle that a jurisdiction should take other jurisdictions' important interests into account in carrying out its law enforcement in return for their doing the same. Comity is a means for moderating the effects of the unilateral assertion of extraterritorial jurisdiction[42].

41. Traditional or negative comity involves a jurisdiction's consideration of how to prevent its laws and law enforcement actions from harming another jurisdiction's important interests. To avoid conflicts, a jurisdiction should notify others when its enforcement may

affect their important interests, and consider ways of enforcing its law without harming those interests.[43] Comity may involve competition agencies standing "*aside in appropriate cases where other authorities were better placed to take charge of the matter and where interests of the deferring authority would otherwise be protected*",[44] thus enabling more efficient enforcement in multi-jurisdictional competition cases.

42. Positive comity involves a request by a requesting jurisdiction that another (requested) jurisdiction undertakes appropriate enforcement actions in order to remedy anti-competitive occurring in the territory of the requested party that adversely affect important interests of the requesting party.[45]

43. Since comity is not a hard public international law rule, and a competition authority must act to prevent harm in its territory to fulfil its mandate (and will therefore not easily defer to another), comity is not frequently relied on.[46] Box 4 shows few cases where the comity was relied on.

Box 4. Cases using comity

Thermo Fisher/Life Technologies (2013)[1] and ***Continental/Veyance*** (2014)[2] mergers: in these cases, the Canadian Competition Bureau deferred to other agencies' remedies, finding them sufficient to protect consumers and eliminate competitive concerns in Canada.

GSK-Novartis merger case (2015): the Australian Competition and Consumer Commission concluded that merger remedies agreed with other agencies solved its competitive concerns. Therefore, it did not require Australia-specific remedies but only asked the parties' commitment to the other agreed remedies.[3]

Auto-parts cartel case (Nishikawa) (2016): in the case of a bid-rigging conspiracy involving body-sealing parts for automotive use, the Canadian Competition Bureau discussed with the US Department of Justice (DoJ) and agreed that the matter would be addressed by the DoJ as the conduct primarily targeted US consumers. The Bureau was satisfied that the DoJ USD 130 million fine addressed the adverse effects of the conduct in both Canada and the United States.[4]

Towage cartel case (2017): the Netherland's Authority for Consumers and Markets (ACM) deferred to the German Bundeskartellamt's enforcement seconding a member to the German authority.[5]

Sources:
1 www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03639.html.
2 hwww.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03862.html.
3 www.accc.gov.au/media-release/accc-will-not-oppose-three-part-gsk-%E2%80%93-novartis-deal.
4 www.canada.ca/en/competition-bureau/news/2016/07/unprecedented-cooperation-with-us-antitrust-enforcement-authority-leads-to-major-cartel-crackdown.html.
5 http://competitionlawblog.kluwercompetitionlaw.com/2018/02/06/towage-services-cartel-new-chapter-collaboration-competition-authorities/; www.acm.nl/nl/publicaties/samenwerking-bundeskartellamt-en-acm-leidt-tot-schikkingen-sleepsector; www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2017/18_12_2017_Hafenschlepper.html

44. Authorities in Australia,[47] Canada[48] and the United States[49] have developed guidance on their application of comity. There is renewed interest in relying on the comity principle.[50]

3.3. Co-ordination of Competition Investigations or Proceedings

45. Section VI of the Recommendation "*recommends that where two or more Adherents investigate or proceed against the same or related anticompetitive practice or merger with anticompetitive effects, they should endeavour to co-ordinate their investigations or proceedings where their competition authorities agree that it would be in their interest to do so*". By co-ordinating their proceedings, competition authorities "*should aim to (i) avoid possible conflicting approaches and outcomes among Adherents, including remedies; (ii) reduce duplication of enforcement costs and make the best use of the enforcement resources of adherents involved*."

46. The Recommendation, in order to promote co-ordination in competition proceedings, lists possible co-ordination arrangements.

47. Competition agencies may co-ordinate: (i) before opening formal investigations, to discuss the case or co-ordinate enforcement acts like information requests and inspections; (ii) in the course of the investigation, to discuss the theory of harm or the likely anti-competitive effects of the investigated conduct/transaction; (iii) at the end of the investigation, to discuss possible remedies or sanctions.

48. Informal contacts are the main means of inter-agency co-ordination. Around half of the MoUs in the OECD do not include provisions on co-ordination, and others include a general statement such as "*(w)here the competition authorities of both Parties are pursuing enforcement activities with regard to related matters, each intends to consider co-ordination of their enforcement activities as appropriate*".[51] Few MoUs have detailed co-ordination clauses. The second-generation agreement signed between Australia and Japan in 2015, for example, contains a list of factors to be taken into account when considering whether and which enforcement activities to co-ordinate.[52]

49. Box 5 gives some examples of successful inter-agency co-ordination.

Box 5. Cases of successful inter-agency co-ordination

Louisiana Pacific Corporation's/Ainsworth Lumber Company Limited merger (2014): the Canadian Competition Bureau co-operated with the DoJ through regular calls between case teams and sharing of information. The Bureau and the DoJ compared theories of harm, attended each other's depositions, and co-ordinated the review of the parties' proposed remedies. The authorities' economists also worked together, discussing data and econometric models. Ultimately, due to the authorities' shared anticompetitive concerns, the parties abandoned the transaction.[1]

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

GTCR/PR Newswire case merger (2016): The UK Competition and Markets Authority (CMA) co-operated with the DoJ for the acquisition of PR Newswire by GTCR, in order to align remedies to solve shared competition concerns. Both authorities cleared the

transaction requiring the divestment of PR Newswire's subsidiary Agility to Innodata, a global digital services and solutions company.[3]

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

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

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

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

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

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

Sources:
[1] www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03724.html.
[2] www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03862.html.
[3] www.justice.gov/opa/pr/gtcr-agrees-divest-third-largest-media-contact-database-provider-us-order-proceed-acquisition; www.gov.uk/government/news/cma-accepts-media-contact-databases-merger-remedy.
[4] www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal; http://europa.eu/rapid/press-release_STATEMENT-16-1642_en.htm; www.accc.gov.au/media-release/halliburton-and-baker-hughes-proposed-merger-terminated; http://en.cade.gov.br/press-releases/general-superintendence-issues-opinion-on-halliburton2019s-takeover-of-baker-hughes.
[5] http://europa.eu/rapid/press-release_IP-17-772_en.htm; www.justice.gov/opa/pr/justice-department-requires-divestiture-certain-herbicides-insecticides-and-plastics; http://en.cade.gov.br/press-releases/merger-between-dow-and-dupont-is-approved-with-restrictions.
[6] DAF/COMP/WP3/M(2017)2/ANN2/FINAL.

[7] www.ftc.gov/news-events/press-releases/2017/11/ftc-approves-final-order-preserving-competition-us-markets-two; http://europa.eu/rapid/press-release_IP-17-147_en.htm; www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04308.html.

[8] http://europa.eu/rapid/press-release_IP-18-2282_en.htm; www.justice.gov/opa/pr/justice-department-secures-largest-merger-divestiture-ever-preserve-competition-threatened; http://en.cade.gov.br/press-releases/cade-approves-with-restrictions-bayer2019s-acquisition-of-monsanto; www.compcom.co.za/wp-content/uploads/2017/01/Commission-Conditionally-Approves-Bayer-Transaction-Final.pdf.

[9] www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/18_06_2018_Anhaenger kupplungen.html; www.gov.uk/government/news/towbars-merger-abandoned.

[10] www.accc.gov.au/media-release/knauf%E2%80%99s-acquisitions-of-usg-and-awi-conditionally-approved; https://comcom.govt.nz/news-and-media/media-releases/2019/commerce-commission-grants-clearance-for-knauf-and-usg-to-merge-subject-to-a-divestment.

3.4. Exchange of Information in Competition Investigations or Proceedings

50. Section VII of the Recommendation "*recommends that in co-operating with other Adherents, where appropriate and practicable, Adherents should provide each other with relevant information that enables their competition authorities to investigate and take appropriate and effective actions with respect to anticompetitive practices and mergers with anticompetitive effects*."

3.4.1. Exchange of non-confidential information

51. The exchange of confidential and non-confidential information among competition authorities is a core part of the Recommendation. Non-confidential information is information the exchange of which is not subject to legal restrictions under domestic or international law. It includes information in the public domain and can extend to information generated internally by competition agencies, for which there is no statutory prohibition or restriction on disclosure and which does include confidential information of individual enterprises.

52. Non-confidential information can be exchanged informally, in meetings, phone calls, emails, etc. Informal exchanges of non-confidential information are becoming standard practice, as demonstrated by the growing number of cross-border cases where competition agencies consulted with each other (Box 6 and Box 7).

3.4.2. Exchange of confidential information

53. The Recommendation invites Adherents to consider exchanging confidential information using confidentiality waivers or information gateways. Confidential information is information the disclosure of which is subject to legal restrictions, like business secrets, leniency applications/statements and personal data.

54. Confidential information is more often exchanged on the basis of confidentiality waivers. Granting of confidentiality waivers is not unusual in merger cases, as merging parties provide them to enable the reviewing competition authorities to clear the transaction quickly and in a co-ordinated way. Investigated parties in antitrust proceedings do not have the same incentives, and therefore agree to waivers less frequently. Box 6 gives some examples of merger cases where confidential information was shared based on waivers.

Box 6. Confidential information exchanged through confidentiality waivers

United Technologies Corporation /Goodrich Corporation merger (2012): confidentiality waivers enabled extensive co-operation between the European Commission, the US Department of Justice and the Canadian Competition Bureau. The authorities undertook joint investigative actions and co-ordinated merger remedies, exchanging remedy proposals received from the parties and discussing the design of remedies.[1]

Baxter International/Gambro merger (2013): the Australian and New Zealand competition authorities and the European Commission co-operated relying on merger confidentiality waivers. The three agencies accepted the same remedy, appointing the same trustee, and accepting the same purchaser.[2]

Sources:
[1] http://europa.eu/rapid/press-release_IP-12-858_en.htm.
[2] http://europa.eu/rapid/press-release_IP-13-724_en.htm; www.accc.gov.au/media-release/accc-will-not-oppose-proposed-global-acquisition-of-gambro-by-baxter-following-divestiture-remedy; https://comcom.govt.nz/news-and-media/media-releases/2013/baxter-international-cleared-to-acquire-gambro-ab-subject-to-a-divestment-undertaking

55. Confidential information can be also shared based on information gateways, i.e. legal provisions that allow competition authorities to exchange confidential information without seeking prior consent from the source of information.

56. The Secretariat's desk research found five Adherents with information gateway provisions: Australia,[53] New Zealand,[54] Canada,[55] the UK,[56] and Germany.[57] The Australian information gateway is one of the more flexible ones (Box 7).

Box 7. Australian Information Gateway

Under Section 155AAA of the Competition and Consumer Act 2010, the Chair of the ACCC has discretionary power to share confidential information, either provided to the ACCC in confidence or gathered by the authority itself, with any "foreign government body" without requiring: (i) reciprocity as a precondition for disclosure; or (ii) pre-established conditions and factors to be mutually considered before disclosure. The Australian regime allows the exchange of confidential information with foreign counterparts irrespectively of their ability to reciprocate, the existence of a co-operation agreement, and on a case-by-case basis.

Source: www.australiancompetitionlaw.org/legislation/provisions/2010cca155AAA.html.

57. Second generation co-operation agreements may also include information gateway clauses based on enabling provisions in national legislation. They include, for example, the 2013 EU-Switzerland co-operation agreement (which may provide the basis for the agreements that the EU is currently negotiating with Canada, Japan, and Korea)[58] and the 2015 Australia-Japan (Box 8).

Box 8. Second generation agreements' provisions on information exchange

Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (2013)[1]

Article 7 Exchange of information

4. In the absence of a consent as referred to in paragraph 3, the competition authority of a Party may, upon request, transmit for use as evidence information obtained by investigative process that is already in its possession to the competition authority of the other Party, subject to the following conditions:

(a) information obtained by investigative process may only be transmitted where both competition authorities are investigating the same or related conduct or transaction;

(b) the request for such information shall be made in writing and shall include a general description of the subject matter and the nature of the investigation or proceedings to which the request relates and the specific legal provisions involved. It shall also identify the undertakings subject to the investigation or procedure whose identity is available at the time of the request; and

(c) the requested competition authority shall determine, in consultation with the requesting competition authority what information in its possession is relevant and may be transmitted.

Australia-Japan (2015)2

Paragraph [*04] Cooperation and Information Exchange in Enforcement Activities

4.3. Each competition authority will, where practicable and to the extent consistent with the laws and regulations of its country, give due consideration to sharing information obtained during the course of an investigation. Each competition authority retains full discretion when deciding whether to share such information or not. The terms of use and disclosure of such information will be decided in writing on a case-by-case basis.

Sources:
1 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.347.01.0003.01.ENG.
2 www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20Australian%20Competition%20%26%20Consumer%20Commission%20and%20the%20Fair%20Trade%20Commission%20of%20Japan.pdf

58. There are few examples where information gateways were used (Box 9). This may be due to the low number of information gateways, and to the cautious approach that authorities take in sharing confidential information in their possession.

Box 9. Cases where confidential information was exchanged through information gateways

Marine Hose case (2008-2010): this cartel was prosecuted by the US (DoJ),[1] UK (OFT – now CMA),[2] EU,[3] Australian (ACCC)[4] and Japanese[5] competition authorities, where the UK's overseas disclosure information gateway was used. The DoJ and OFT sent to the ACCC information which was decisive for ACCC's investigation. The OFT sent this

information under the relevant sections of the UK Enterprise Act. The ACCC and OFT had also been in close co-operation informally before the formal request was made.

Air ambulance evacuations cartel case (2012): New Zealand's NZCC asked from the ACCC the transcripts of confidential interviews of common witnesses. The ACCC sent the transcripts on the basis of the Australian information gateway under detailed conditions included in a signed undertaking.[6]

Sources:
1 U.S. v. Bridgestone Corp., Criminal No. H-11-651.
2 R v. Whittle, Allison, and Brammar, [2008] EWCA Crim. 2560, [2009] Lloyd's Rep. FC 77.
3 COMP/39.406 — Marine Hoses.
4 ACCC v Bridgestone Corporation & Ors [2010] FCA 584; Australia's written contribution to the 2012 Global Forum on Competition, p. 216, DAF/COMP/GF(2012)16, www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf
5 Japan Fair Trade Commission Press Release, Cease and Desist Order and Surcharge Payment Order against Marine Hose Manufacturers, 22 February 2008.
6 New Zealand's written contribution to the 2012 Global Forum on Competition, DAF/COMP/GF(2012)16, www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdfNew Zealand Commerce Commission Press Release, "Air ambulance companies warned over price fixing", https://comcom.govt.nz/news-and-media/media-releases/archive/air-ambulance-companies-warned-over-price-fixing

59. The Recommendation instructs the Competition Committee to consider developing model provisions for information gateways, subject to the safeguards as provided in this Recommendation. So far, the Competition Committee has not developed model provisions.

3.5. Investigative Assistance to another competition authority

60. Section VIII of the Recommendation "*recommends that regardless of whether two or more Adherents proceed against the same or related anticompetitive practice or merger with anticompetitive effects, competition authorities of the Adherents should support each other on a voluntary basis in their enforcement activity by providing each other with investigative assistance as appropriate and practicable, taking into account available resources and priorities*."

61. Investigative assistance consists in one authority helping another to access information or evidence located outside the enforcing authority's jurisdiction. It may include "*any of the following activities: (i) Providing information in the public domain relating to the relevant conduct or practice; (ii) Assisting in obtaining information from within the assisting Adherent; (iii) Employing on behalf of the requesting Adherent the assisting Adherent's authority to compel the production of information in the form of testimony or documents; (iv) Ensuring to the extent possible that official documents are served on behalf of the requesting Adherent in a timely manner; and (v) Executing searches on behalf of the requesting Adherent country to obtain evidence that can assist the requesting Adherent country's investigation, especially in the case of investigations or proceedings regarding hard core cartel conduct*."

62. In practice, investigative assistance takes place mainly between authorities that know and trust each other.

Box 10. Examples of investigative assistance

Premium Text Messaging case (2014): The Canadian Competition Bureau investigated Canada's three largest wireless companies and their industry association (Canadian Wireless Telecommunications Association, CWTA) for charging customers for premium-rate digital content that they did not purchase or agree to pay.[1] During the investigation, the Bureau sought the US Federal Trade Commission's (FTC) collaboration to obtain oral and documentary discovery from a US contractor (Aegis Mobile), a company hired by CWTA to collect and analyse data relevant for the investigation. The US District Court of Maryland ordered Aegis Mobile to provide documents for the FTC to send to the Bureau.[2] In this case, the co-operation between the Bureau and the FTC was enabled by the US Safe Web Act[3] which allows the FTC to provide and request assistance from foreign agencies in case of online/digital investigations.[4]

Investigation in the aviation insurance market (2017): in 2017, the Romanian Competition Council (RCC) opened an investigation on the aviation insurance market, and benefitted from evidence-gathering provided by the UK Competition and Markets Authority, as few undertakings were headquartered in the UK.[5]

Investigation in the immunoglobulin market (2018): in 2018, the RCC opened an investigation regarding an alleged agreement between several producers of human immunoglobulins. Following a request of the RCC, the Italian and Belgian Competition agencies conducted inspections at the premises of some companies located on their territory. Romanian officials assisted the inspections.[6]

Sources:
[1] www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03498.html.
[2] Maryland District Court, 4 August 2014, Aegis Mobile, LLC, 2014 U.S. Dist. LEXIS 106214.
[3] 15 U.S.C. §41, et seq.
[4] www.ftc.gov/sites/default/files/documents/reports/u.s.safe-web-act-first-three-years-federal-trade-commission-report-congress/p035303safewebact2009.pdf.
[5] https://ecd.org/document/DAF/COMP/WP3/WD(2018)38/en/pdf.
[6] www.consiliulconcurentei.ro/uploads/docs/items/bucket13/id13298/inspectii_imunoglobulina_english.pdf

63. In the European Union, the European Competition Network is the main platform for co-ordinating assistance. European Directive (EU) 2019/1 (so-called ECN+ Directive)[59] includes, in articles 24 to 28, detailed provisions on mutual assistance.

64. In order to limit the costs of providing investigative assistance, some co-operation frameworks include provisions requiring the requesting agency to cover the assistance costs of the requested authority (Box 11).

Box 11. Provisions on investigative assistance costs

New Zealand Commerce Act
99J Conditions on providing compulsorily acquired information and investigative assistance[1]

(1) If the Commission provides compulsorily acquired information or investigative assistance to a recognised overseas regulator, the Commission may impose conditions on such provision, including conditions relating to:

(…)

(d) the payment of costs incurred by the Commission in providing anything or in otherwise complying with a request for information or investigative assistance.

Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market

Article 27 General principles of cooperation[2]

(…)

7. Member States shall ensure that, where requested by the requested authority, the applicant authority bears all reasonable additional costs in full, including translation, labour and administrative costs, in relation to actions taken as referred to in Article 24 or 25.

8. The requested authority may recover the full costs incurred in relation to actions taken as referred to in Article 26 from the fines or periodic penalty payments it has collected on behalf of the applicant authority, including translation, labour and administrative costs. If the requested authority is unsuccessful in collecting the fines or periodic penalty payments, it may request the applicant authority to bear the costs incurred.

Sources:
[1] www.legislation.govt.nz/act/public/1986/0005/89.0/DLM4854120.html
[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.011.01.0003.01.ENG&toc=OJ:L:2019:011:TOC.

65. The Nordic Co-operation Agreement also has detailed provisions on investigative assistance (Box 12).

Box 12. Nordic Agreement on Co-operation in Competition Cases

Article 4 – Requests for information

The competition authority of a Party may in its own territory carry out any requests for information under its national law on behalf and for the account of the competition authority of another Party in order for the requesting authority to apply competition rules or merger control rules. Any exchange or use of the information collected shall be carried out in accordance with Article 3.

Article 5 – Inspections

The competition authority of a Party may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf of and for the account of the competition authority of another Party in order to establish whether there has been an infringement of competition rules governed by the requesting Party. Any exchange or use of the information collected shall be carried out in accordance with Article 3.

The officials of the competition authority who are responsible for conducting the inspection as well as those authorized or appointed by them shall exercise their powers in accordance with their national law.

If so requested by the competition authority in whose territory the inspection is to be conducted, officials and other accompanying persons authorized by the competition authority requesting the inspection may assist the officials of the authority concerned.

Source: www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf.

66. The Recommendation instructs the Competition Committee to consider developing enhanced co-operation tools and instruments that can help reduce the overall costs associated with investigations or proceedings by multiple competition authorities, and at the same time avoid inconsistencies among Adherents' enforcement actions. So far, such instruments have not been developed.

4. Timing

67. This note aims to start the process for monitoring the Recommendation. An indicative timetable follows:

May 2019	Draft note on the monitoring of the Recommendation on O.N.E.
4 June 2019	Discussion of the monitoring process at the 129th meeting of WP3
Summer- autumn 2019	Survey monitoring the implementation of the Recommendation
2 December 2019	Discussion of survey results at the 130th meeting of WP3
March 2020	Draft monitoring report on O.N.E.
9 June 2020	Discussion at the 131st meeting of WP3
31 July 2020	Comments by delegates
September 2020	New draft monitoring report on O.N.E.
October 2020	Written approval by WP3
December 2020	Approval by the Competition Committee
January-February 2021	Council adoption

Endnotes

[1] OECD Roundtable on benefits and challenges of regional competition agreements DAF/COMP/GF(2018)5; UNCTAD, Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures, Geneva, 5-7 July 2017, https://unctad.org/meetings/en/SessionalDocuments/ciclpd44_en.pdf;

[2] OECD/ICN Survey on International Competition Enforcement Co-operation, 2013, www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf.

[3] Indicatively, roundtables on: local nexus and jurisdictional thresholds in merger control (DAF/COMP/WP3(2016)4); the extraterritorial reach of competition remedies (DAF/COMP/WP3(2017)4); challenges and co-ordination of leniency programmes (DAF/COMP/WP3/WD(2018)14); benefits and challenges of regional competition agreements (DAF/COMP/GF(2018)5).

[4] www.oecd.org/daf/competition/inventory-competition-agreements.htm

[5] www.oecd.org/daf/competition/inventory-competition-agency-mous.htm

[6] OECD Roundtable on benefits and challenges of regional competition agreements DAF/COMP/GF(2018)5;UNCTAD, Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures, Geneva, 5-7 July 2017, https://unctad.org/meetings/en/SessionalDocuments/ciclpd44_en.pdf; Kovacic W. E. and Mariniello, M. (2016). 'Competition Agency Design in Globalised Markets'. E15Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum. www.e15initiative.org/.

[7] OECD Competition Law in Asia-Pacific, A Guide to Selected Jurisdictions, OECD/Korea Policy Centre Competition Programme, 2018, www.oecd.org/daf/competition/Competition-Law-in-Asia-Pacific-Guide-2018.pdf.

[8] Joshua Holian and Amanda Reeves, Tracking Global Merger Control Changes for 2017, Law360, 2017, www.lw.com/thoughtLeadership/byline-tracking-global-merger-control-changes-for-2017.

[9] OECD Challenges of International Co-operation in Competition Law Enforcement, 2014, www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

[10] Duy D Pham, "Resolving Conflicts in International Merger Reviews through Merger Remedies" (2016) 39(2) World Competition 267, 272-75.

[11] Baker Mckenzie's cross-border M&A Index Q2 2017, www.mergermarket.com/info/baker-mckenzie-cross-border-ma-index-q2-2017.

[12] Stephen Grocer, "A record $2.5 Trillion in Mergers Were Announced in the First Half of 2018", www.nytimes.com/2018/07/03/business/dealbook/mergers-record-levels.html.

[13] Regional Trade Agreements Information System (RTA-IS), WTO, http://rtais.wto.org/ui/PublicMaintainRTAHome.aspx (last accessed on 29 January 2019). A minority of those FTAs include ambitious co-operation mechanisms designed to pave the way for convergence of competition laws of the parties. For example, the Chile-Costa Rica, Chile-El Salvador, and Korea-Australia FTAs require the parties to co-operate towards the adoption of common rules to avoid anticompetitive practices. François-Charles Laprévote, Sven Frisch, and Burcu Can, Competition Policy within the Context of Free Trade Agreements, theE15Initiative, September 2015, http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-FINAL.pdf.

[14] Antonio Capobianco and Anita Nyeso, "Challenges for Competition Law Enforcement and Policy in the Digital Economy" (2017) 1 JECL & Pract 1; James Manyika, Susan Lund, Jacques Bughin, Jonathan Woetzel, Kalin Stamenov and Dhruv Dhingra, "Digital Globalization: The New Era of Global Flows""(McKinsey Global Institute February 2016), www.mckinsey.com/business-functions/digital-mckinsey/our-insights/digital-globalization-the-new-era-of-global-flows ("*Remarkably, digital flows—which were practically nonexistent just 15 years ago—now exert a larger impact on GDP growth than the centuries-old trade in goods*"); UK Report of the Digital Competition Expert Panel, "Unlocking digital competition", March 2019, p. 122-123 (recommended action n. 19), www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel.

[15] Joint market studies conducted by the French Autorité de la Concurrence and the German Bundeskartellamt on big data (www.autoritedelaconcurrence.fr/doc/report competitionlawanddatafinal.pdf), and algorithms and their implications on competitions (www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/19_06_2018_Algorithmen.html).

[16] Connor, J.M. (2016b), "The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990 July 2016 (Revised 2nd Edition)". Available at SSRN: http://ssrn.com/abstract=2821254.

[17] Roundtable on improving international co-operation in cartel investigations (DAF/COMP/GF(2012)16), www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf

[18] An example is the co-ordinated investigation carried out by the Competition Commission of South Africa (CCSA) together with the EU and the US DoJ in 2007 in relation to a cartel involving freight forwarding companies. The three authorities conducted simultaneous raids (See South Africa's written contribution to the 2008 OECD Roundtable on Cartel Jurisdictional Issues, Including the Effects Doctrine, DAF/COMP/WP3/WD(2008)92 and to the 2012 OECD Global Forum on Competition, DAF/COMP/GF/WD(2012)51).

[19] Old examples of cases facilitated by informal co-operation are: (i) the *Marine Hose case*, where the Australian Competition and Consumer Commission relied on information and documentation provided informally by the US Department of Justice (DOJ), as well as information provided formally by the UK's Office of Fair Trading (See *ACCC v Bridgestone Corporation & Ors* [2010] FCA 584; *U.S. v. Bridgestone Corp., Criminal No.* H-11-651; *R v. Whittle, Allison, and Brammar*, [2008] EWCA Crim. 2560, [2009] Lloyd's Rep. FC 77); (ii) the *Lysine case*, where the Brazilian investigation started after its staff became aware of the US DOJ's investigation during a conference they attended in Washington. The information regarding the prosecution was already public and the US DOJ subsequently provided the Brazilian authorities with document and leads (Roundtable on improving international co-operation in cartel investigations (DAF/COMP/GF(2012)16), www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf (iii) the Vitamin cartel, where the Brazilian proceeding was aided by informal leads provided by the Canadian Competition Bureau, due to professional relationships between the staff of the Brazilian and Canadian authorities (see De Araujo Tavares (2002), The Brazilian Experience on International Cooperation in Cartel Investigation, Working Paper, 2002 pp.5, 7).

[20] Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices, 23 June 1976, 4 Trade Reg. Rep. (CCH) 13501.

[21] For examples see the OECD inventory of international co-operation agreements on competition www.oecd.org/daf/competition/inventory-competition-agreements.htm, and the OECD inventory of MoUs hwww.oecd.org/daf/competition/inventory-competition-agency-mous.htm.

[22] OECD (2016) Note by the Secretariat on Inventory of Provisions in inter-agency co-operation agreements (MoUs), DAF/COMP/WP3(2016)1/REV2; OECD (2015) Note by the Secretariat on Inventory of Co-operation Agreements, DAF/COMP/WP3(2015)12/REV1.

[23] OECD Inventory of co-operation agreements www.oecd.org/competition/inventory-competition-agreements.htm, and Valerie Demedts, Second Generation Agreements: Ignoring Crucial Issues, in The Future of International Competition Law Enforcement, Brill, 2018.

[24] Three second generation co-operation competition agreements are under negotiation: EU-Japan (http://ec.europa.eu/competition/international/bilateral/japan.html), EU-Canada, and EU-Korea. Valerie Demedts, Second Generation Agreements: Ignoring Crucial Issues, in The Future of International Competition Law Enforcement, Brill, 2018.

[25] Roundtable on benefits and challenges of regional competition agreements, DAF/COMP/GF(2018)5.

[26] Regional competition agreements - inventory of provisions in regional competition agreements, DAF/COMP/GF(2018)12. This document provides an overview of the different characteristics of regional competition frameworks.

[27] Regulation 1/2003 and *Commission Notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty, OJ C 313, 15/10/97, p. 3*

[28] The Trans-Tasman economic co-operation is based on the close geographical and economic relationship between Australia and New Zealand and includes various economic co-operation agreements concluded between the two jurisdictions. *Inter alia*, see New Zealand-Australia second generation agreement on compulsorily-acquired information and investigative assistance (2013), www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20New%20Zealand%20Commerce%20Commission%20and%20the%20Australian%20Competition%20and%20Consumer%20Commission.pdf.

[29] The 2017 agreement on Cooperation in Competition Cases was signed by Denmark, Finland, Iceland, Norway and Sweden www.konkurrensverket.se/globalassets/om-oss/nordic-agreement-on-cooperation-in-competition-cases.pdf. The agreement is subject to ratification, acceptance or approval by the parties in accordance with their respective constitutional requirements. As of October 2018, Sweden and Finland had deposited their ratification instruments in accordance with the agreement. The agreement between these countries entered into force on 28th November 2018.

[30] US Department of Justice and Federal Trade Commission, "Antitrust Guidelines for International Enforcement and Cooperation", 13th January 2017, https://www.justice.gov/atr/internationalguidelines/download. Also, Maureen K. Ohlhausen, Federal Trade Commission, Guidelines for Global Antitrust: The Three Cs – Cooperation, Comity, and Constraints, IBA 21st Annual Competition Conference September 8, 2017, www.ftc.gov/system/files/documents/public_statements/1252733/iba_keynote_address-international_guidelines_2017.pdf.

[31] Canada-US Merger Working Group, "Best Practices on Co-operation in Merger Investigations" (2015) http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03704.html; US-EU Merger Working Group, "Best Practices on Co-operation in Merger Investigations", available at: http://ec.europa.eu/competition/international/bilateral/eu_us.pdf.

[32] For example (i) the Bundeskartellamt webpage, www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/legislation/legislation_node.html; (ii) the French Autorité de la concurrence webpage, www.autoritedelaconcurrence.fr/user/standard.php?id_rub=556&lang=en; (iii) the Italian Autorità Garante della Concorrenza e del Mercato webpage, https://en.agcm.it/en/scope-of-activity/competition/legislation; (iv) the Japan Fair Trade Commission webpage, https://www.jftc.go.jp/en/legislation_gls/index.html.

[33] For example: (i) the interim measures decision in the case Amadeus v Google by the French Autorité de la concurrence, Decision 19-MC-01, www.autoritedelaconcurrence.fr/doc/19mc01_en_final.pdf; (ii) the case summary by the Bundeskartellamt on the Facebook decision, B6-22/16, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3; (iii) the Italian Competition Authority Press Release to launch the Amazon investigation, https://en.agcm.it/en/media/press-releases/2019/4/Amazon-investigation-launched-on-possible-abuse-of-a-dominant-position-in-online-marketplaces-and-logistic-services.

[34] The Annual Reports submitted to the OECD by competition agencies are available at the following link: www.oecd.org/competition/annualreportsbycompetitionagencies.htm.

[35] OECD Roundtable on challenges and co-ordination of leniency programmes, DAF/COMP/WP3(2018)1

[36] BIAC contribution to the OECD Roundtable on challenges and co-ordination of leniency programmes, DAF/COMP/WP3/WD(2018)34.

[37] Australia-Japan (2015), and Korea-Mexico (2004), www.oecd.org/daf/competition/mou-inventory-provisions-on-notifications.pdf.

[38] OECD Inventory of International Co-Operation MOUs between Competition Agencies, Provisions on Consultation, www.oecd.org/daf/competition/mou-inventory-provisions-on-consultation.pdf.

[39] Twinning Project "Further Development of Protection of Competition in Serbia" launched in 2019 between Italy and the Republic of Serbia, http://www.kzk.gov.rs/en/pocetak-tvinig-projekta-dalji-razvoj.

[40] FTC, International Fellows Program, https://www.ftc.gov/policy/international/international-fellows-program. Joint Contribution from Denmark, Finland, Norway, Iceland and Sweden to the 2018 Global Forum on Competition DAF/COMP/GF/WD(2018)14, and Canada's written contribution to the 2012 OECD Global Forum on Competition, http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf.

[41] Winnie Agbonlahor, "Australian and New Zeland competition watchdogs announce new cross-appointment" Global Government Forum 11 December 2015, www.globalgovernmentforum.com/australian-and-new-zealand-competition-watchdogs-announce-new-cross-appiontment/.

[42] www.oecd.org/daf/competition/mou-inventory-provisions-on-negative-comity.pdf

[43] Roundtable on the extraterritorial reach of competition remedies, www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm; www.oecd.org/daf/competition/mou-inventory-provisions-on-negative-comity.pdf

[44] Terry Calvani and Justin Stewart-Teitelbaum, "Is There Too Much Traffic on the Competition Law Enforcement Autostrada?" (Draft Paper Presented at the Fordham Competition Law Institute 43rd Annual Conference on International Antitrust Law & Policy, 22 September 2016) https://awards.concurrences.com/IMG/pdf/negative_comity_--_2016.11.30_--_calvani_stewart-te.pdf.

[45] www.oecd.org/daf/competition/mou-inventory-provisions-on-positive-comity.pdf

[46] Terry Calvani and Justin Stewart-Teitelbaum, "Is There Too Much Traffic on the Competition Law Enforcement Autostrada?" (Draft Paper Presented at the Fordham Competition Law Institute 43rd Annual Conference on International Antitrust Law & Policy, 22 September 2016) https://awards.concurrences.com/IMG/pdf/negative_comity_--_2016.11.30_--_calvani_stewart-te.pdf.

[47] The ACCC applies comity in cases where it has concluded that: (i) the nexus to Australia of the competitive harm being investigated was not sufficient (including considerations of the level of involvement of Australian businesses); and (ii) possible enforcement actions by sister agencies would nevertheless result in the termination of the offending conduct and protection for Australian consumers. Terry Calvani and Justin Stewart-Teitelbaum, "Is There Too Much Traffic on the Competition Law Enforcement Autostrada?" (Draft Paper Presented at the Fordham Competition Law Institute 43rd Annual Conference on International Antitrust Law & Policy, 22 September 2016) https://awards.concurrences.com/IMG/pdf/negative_comity_--_2016.11.30_--_calvani_stewart-te.pdf. The ACCC dedicates 50% of its cartel caseload to international cartels and 50% to national cartels.

[48] The Canadian Competition Bureau set out its approach to comity in merger cases in the "Information Bulletin on Merger Remedies in Canada" (Competition Bureau, "Information Bulletin on Merger Remedies in Canada" (22 September 2006), www. competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02170.html). The Bureau may apply comity and defer to another agency's merger remedies when the following conditions are met: (1) the assets that are subject to divestiture, or the conduct that must be carried out as part of a behavioural remedy, are primarily located in another jurisdiction; (2) the Bureau is confident that the foreign agency's remedy is effective and viable and that it will enforce the remedy; and (3) the Bureau is satisfied that the actions taken by the foreign agency are sufficient to resolve the competition issues in Canada. For international mergers, these conditions provide useful guidance for determining when a local remedy would be required or when another agency's measures would be enough. When considering comity in other areas of competition enforcement, the Bureau would apply the same general principles as it does for mergers. See Vicky Eatrides, "The Competition Bureau's Approach to International Cooperation and Comity" (Remarks at USC Gould's Center for Transnational Law and Business Inaugural Conference on Antitrust Enforcement in a Global Context: Extraterritoriality and Due Process 23 January 2017); Terry Calvani and Justin Stewart-Teitelbaum, "Is There Too Much Traffic on the Competition Law Enforcement Autostrada?" (Draft Paper Presented at the Fordham Competition Law Institute 43rd Annual Conference on International Antitrust Law & Policy, 22 September 2016) https://awards.concurrences.com/IMG/pdf/negative_comity_--_2016.11.30_--_calvani_stewart-te.pdf.

[49] US Department of Justice and Federal Trade Commission, "Antitrust Guidelines for International Enforcement and Cooperation", 13th January 2017, www.justice.gov/atr/internationalguidelines/download, which specify that U.S. agencies "*will assess the articulated interests and policies of a foreign sovereign beyond whether there is a conflict with foreign law. In determining whether to investigate or bring an enforcement action regarding an alleged antitrust violation, the Agencies consider the extent to which a foreign sovereign encourages or discourages certain courses of conduct or leaves parties free to choose among different courses of conduct*." Additionally, the Guidelines establish that the agencies "*will seek a remedy that includes conduct or assets outside the United States only to the extent that including them is needed to effectively redress harm or threatened harm to U.S. commerce and consumers and is consistent with the Agency's international comity analysis*".

[50] Frédéric Jenny, keynote address, OECD Competition Open Day, 27 February 2019, webcast available at: https://oecd.streamakaci.com/cod2019/; Florian Wagner-Von Papp, intervention at the OECD Roundtable on the extraterritorial reach of competition remedies, Summary of discussion, DAF/COMP/WP3/M(2017)2/ANN2/FINAL; John Pecman and Duy Pham, The Next Frontier of International Cooperation in Competition Enforcement, Frèdèric Jenny - Standing Up for Convergence and Relevance in Antitrust, Liber Amicorum, Concurrences, Paris, 2019.

[51] Section I-2 of Korea-US (2015). Also Colombia-US (2015), China (NDRC and SAIC)-EU (2012). OECD Inventory of International Co-Operation MoUs between Competition Agencies, Provisions on Co-Ordination of Investigations and Proceedings, www.oecd.org/daf/competition/mou-inventory-provisions-on-coordination-of-investigations.pdf.

[52] Paragraph 5(2), Australia-Japan Co-operation Arrangement between the Australian Competition and Consumer Commission and the Fair Trade Commission of Japan (April 2015), www.accc.gov.au/system/files/Cooperation%20arrangement%20between%20the%20Australian%20Competition%20%26%20Consumer%20Commission%20and%20the%20Fair%20Trade%20Commission%20of%20Japan.pdf.

[53] Section 155AAA, www.australiancompetitionlaw.org/legislation/provisions/2010cca155AAA.html. On 1 January 2011, the Competition and Consumer Act 2010 superseded the Trade Practices Act 1974. The discretionary powers of the ACCC to share information, introduced originally in 2007 under Section 155AAA, were not affected by this change.

[54] Section 99I, and 99J, Commerce (International Co-operation, and Fees) Amendment Act 2012, Public Act 2012 No. 84, date of assent 23 October 2012, www.legislation.govt.nz/act/public/2012/0084/latest/DLM1576307.html. Notably, the New Zealand information gateway require that an intergovernmental or inter-agency agreement is in place as a condition for using the national gateway.

[55] Section 29 Canadian Competition Act, https://laws-lois.justice.gc.ca/eng/acts/c-34/page-5.html#docCont; Information Bulletin on the Communication of Confidential Information under the Competition Act, Competition Bureau, 10 October 2007, www.competitionbureau.gc.ca/eic/site/cbbc.nsf/eng/01277.html; John Pecman, International Privacy Enforcement Meeting, Ottawa, Ontario June 4, 2015, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03957.html.

[56] Section 243 UK Enterprise Act 2002, www.legislation.gov.uk/ukpga/2002/40/section/243.

[57] § 50, § 50a, § 50b, § 50c of the German Competition Act – GWB, available at: http://www.gesetze-im-internet.de/englisch_gwb/. The German Competition Act allows co-operation with authorities outside the European Union, on condition that the sharing of confidential information outside the EU is based on a waiver from the source of information (§ 50b).

[58] Valerie Demedts, Second Generation Agreements: Ignoring Crucial Issues, in The Future of International Competition Law Enforcement, Brill, 2018.

[59] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33, https://eur-lex.europa.eu/eli/dir/2019/1/oj.

Annex A. Recommendation of the OECD Council concerning international co-operation on competition investigations and proceedings

As approved by Council on 16 September 2014 C(2014)108 - C/M(2014)10

The Council,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the fact that international co-operation among OECD countries in competition investigations and proceedings has long existed and evolved over time, based on the implementation of the 1995 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade [C(95)130/FINAL] and its predecessors [C(67)53(Final), C(73)99(Final), C(79)154(Final) and C(86)44(Final)], which this Recommendation replaces;

Having regard to the Recommendation of the Council concerning Effective Action Against Hard Core Cartels [C(98)35/FINAL], to the Recommendation of the Council on Merger Review [C(2005)34], and to the Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations [DAF/COMP(2005)25/FINAL] developed by the Competition Committee, as well as its analytical work on international co-operation, including the 2013 Report on the OECD/International Competition Network (ICN) Survey on International Enforcement Co-operation [DAF/COMP/WP3(2013)2/FINAL];

Recognising that anticompetitive practices and mergers with anticompetitive effects may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Adherents to this Recommendation;

Recognising that review of the same or a related practice or merger by multiple competition authorities may raise concerns of costs and the potential for inconsistent analyses and remedies;

Recognising that co-operation based on mutual trust and good faith between Adherents plays a significant role in ensuring effective and efficient enforcement against anticompetitive practices and mergers with anticompetitive effects;

Recognising that the continued growth of the global economy increases the likelihood that anticompetitive practices and mergers with anticompetitive effects may adversely affect the interests of more than one Adherent, and also increases the number of transnational mergers that are subject to the merger laws of more than one Adherent;

Recognising that investigations and proceedings by one Adherent relating to anticompetitive practices and mergers with anticompetitive effects may affect, in certain cases, the important interests of other Adherents;

Recognising that transparent and fair processes are essential to achieving effective and efficient co-operation in competition law enforcement;

Recognising the widespread adoption, acceptance and enforcement of competition law as well as the concomitant desire of Adherents' competition authorities to work together to ensure efficient and effective investigations and proceedings and to improve their own analyses;

Recognising that co-operation should not be construed to affect the legal positions of Adherents with regard to questions of sovereignty or extra-territorial application of competition laws;

Recognising that effective co-operation can provide benefits for the parties subject to competition investigations or proceedings, reducing regulatory costs and delays, and limiting the risk of inconsistent analysis and remedies;

CONSIDERING therefore that Adherents should co-operate closely in order to effectively and efficiently investigate competition matters, including mergers with anticompetitive effects, so as to combat the harmful effects of both cross-border and domestic anticompetitive practices and mergers with anticompetitive effects, in conformity with principles of international law and comity;

Considering Adherents' desire to enhance the existing level and quality of international co-operation and to consider new forms of co-operation that can make international competition enforcement more effective and less costly for competition authorities and for businesses alike;

Considering that in light of the increasing globalisation of business activities and the increasing number of competition laws and competition authorities worldwide, Adherents are committed to working together to adopt national or international co-operation instruments to effectively address anticompetitive practices and mergers with anticompetitive effects, and to minimise legal and practical obstacles to effective co-operation;

Considering that when Adherents enter into bilateral or multilateral arrangements for co-operation in the enforcement of national competition laws, they should take into consideration the present Recommendation:

On the proposal of the Competition Committee:

I. **AGREES** that, for the purpose of the present Recommendation, the following definitions are used:

- **"Adherents"** refers to Members and non-Members adhering to this Recommendation;
- **"Anticompetitive practice"** refers to business conduct that restricts competition, as defined in the competition law and practice of an Adherent;
- **"Competition authority"** means an Adherent's government entity, other than a court, charged with primary responsibility for the enforcement of the Adherent's competition law;
- **"Confidential information"** refers to information the disclosure of which is either prohibited or subject to restrictions under the laws, regulations, or policies of an Adherent, e.g., non-public business information the disclosure of which could prejudice the legitimate commercial interests of an enterprise;
- **"Co-operation"** includes a broad range of practices, from informal discussions to more formal co-operation activities based on legal instruments at the national or international level, employed by competition authorities of Adherents to ensure efficient and effective reviews of anticompetitive practices and mergers with anticompetitive effects affecting one or more Adherents. It may also include more general discussions relating to competition policy and enforcement practices;
- **"Investigation or proceeding"** means any official factual inquiry or enforcement action authorised or undertaken by a competition authority of an Adherent pursuant to the competition laws of the Adherent;
- **"Merger"** means merger, acquisition, joint venture or any other form of business amalgamation that falls within the scope and definitions of the competition laws of an Adherent governing business concentrations or combinations;
- **"Merger with anticompetitive effects"** means a merger that restricts or is likely to restrict competition, as defined in the competition law and practice of an Adherent and, for the purpose of this Recommendation, may include a merger that is under review by the competition authority of an Adherent according to its merger laws with a view to establishing if it has anticompetitive effects;
- **"Waiver"** or **"confidentiality waiver"** means permission granted by a party subject to an investigation or proceeding, or by a third party, that enables competition authorities to discuss and/or exchange information, otherwise protected by confidentiality rules of the Adherent(s) involved, which has been obtained from the party in question.

Commitment to Effective International Co-operation

II. RECOMMENDS that Adherents commit to effective international co-operation and take appropriate steps to minimise direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities.

To this end, Adherents should aim inter alia to:

1. minimise the impact of legislation and regulations that might have the effect of restricting co-operation between competition authorities or hindering an investigation or proceeding of other Adherents, such as legislation and regulations prohibiting domestic enterprises or individuals from co-operating in an investigation or proceeding conducted by competition authorities of other Adherents;
2. make publicly available sufficient information on their substantive and procedural rules, including those relating to confidentiality, by appropriate means with a view to facilitating mutual understanding of how national enforcement systems operate; and
3. minimise inconsistencies between their leniency or amnesty programmes that adversely affect co-operation.

Consultation and Comity

III. RECOMMENDS that an Adherent that considers that an investigation or proceeding being conducted by another Adherent under its competition laws may affect its important interests should transmit its views on the matter to, or request consultation with, the other Adherent.

To this end, without prejudice to the continuation of its action under its competition law and to its full freedom of ultimate decision, the Adherent so addressed should give full and sympathetic consideration to the views expressed by the requesting Adherent, and in particular to any suggestions as to alternative means of fulfilling the needs or objectives of the competition investigation or proceeding.

IV. RECOMMENDS that an Adherent that considers that one or more enterprises or individuals situated in one or more other Adherents are or have been engaged in anticompetitive practices or mergers with anticompetitive effects that substantially and adversely affect its important interests, may request consultations with such other Adherent or Adherents.

Entering into such consultations is without prejudice to any action under the competition law and to the full freedom of ultimate decision of the Adherents concerned.

Any Adherent so addressed should give full and sympathetic consideration to such views and factual materials as may be provided by the requesting Adherent and, in particular, to the nature of the alleged anticompetitive practices or mergers with anticompetitive effects in question, the enterprises or individuals involved and the alleged harmful effects on the interests of the requesting Adherent.

If the Adherent so addressed agrees that enterprises or individuals situated in its territory are engaged in anticompetitive practices or in mergers with anticompetitive effects harmful to the interests of the requesting Adherent, it should take whatever remedial action it considers appropriate, including actions under its competition law, on a voluntary basis and considering its legitimate interests.

In requesting consultations, Adherents should explain the national interests affected in sufficient detail to enable their full and sympathetic consideration.

Without prejudice to any of their rights, the Adherents involved in consultations should endeavour to find a mutually acceptable solution in light of the respective interests involved.

Notifications of Competition Investigations or Proceedings

V. RECOMMENDS that an Adherent should ordinarily notify another Adherent when its investigation or proceeding can be expected to affect the other Adherent's important interests.

Circumstances that may justify a notification include, but are not limited to (i) formally seeking non-public information located in another Adherent; (ii) the investigation of an enterprise located in or incorporated or organised under the laws of another Adherent ; (iii) the investigation of a practice occurring in whole or in part in the territory

of another Adherent, or required, encouraged, or approved by the government of another Adherent; or (iv) the consideration of remedies that would require or prohibit conduct in the territory of another Adherent.

The notification should be made by the competition authority of the investigating Adherent through the channels requested by each Adherent as indicated in a list to be established and periodically updated by the Competition Committee; to the extent possible, Adherents should favour notifications directly to competition authorities. Notifications should be in writing, using any effective and appropriate means of communication, including e-mail. To the extent possible without prejudicing an investigation or proceeding, the notification should be made when it becomes evident that another Adherent's important interests are likely to be affected, and with sufficient detail so as to permit an initial evaluation by the notified Adherent of the likelihood of effects on its important interests.

The notifying Adherent, while retaining full freedom of ultimate decision, should take account of the views that the other Adherent may wish to express and of any remedial action that the other Adherent may consider under its own laws, to address the anticompetitive practice or mergers with anticompetitive effects.

Co-ordination of Competition Investigations or Proceedings

VI. RECOMMENDS that where two or more Adherents investigate or proceed against the same or related anticompetitive practice or merger with anticompetitive effects, they should endeavour to co-ordinate their investigations or proceedings where their competition authorities agree that it would be in their interest to do so.

To this end, co-ordination between Adherents:

1. should be undertaken on a case-by-case basis between the competition authorities involved;
2. should not affect Adherents' right to make decisions independently, based on their own investigation or proceeding;
3. should aim to:
    (i) avoid possible conflicting approaches and outcomes among Adherents, including remedies; and
    (ii) reduce duplication of enforcement costs and make the best use of the enforcement resources of Adherents involved;
4. might include any of the following steps, insofar as appropriate and practicable, and subject to appropriate safeguards including those relating to confidential information:
    (i) Providing notice of applicable time periods and schedules for decision-making;
    (ii) Co-ordinating the timing of procedures;
    (iii) Requesting, in appropriate circumstances, that the parties to the investigation and third parties voluntarily grant waivers of confidentiality to co-operating competition authorities;
    (iv) Co-ordinating and discussing the competition authorities' respective analyses;
    (v) Co-ordinating the design and implementation of remedies to address anticompetitive concerns identified by competition authorities in different Adherents;
    (vi) In Adherents in which advance notification of mergers is required or permitted, requesting that the notification include a statement identifying notifications also made or likely to be made to other Adherents; and
    (vii) Exploring new forms of co-operation.

Exchange of Information in Competition Investigations or Proceedings

VII. RECOMMENDS that in co-operating with other Adherents, where appropriate and practicable, Adherents should provide each other with relevant information that enables their competition

authorities to investigate and take appropriate and effective actions with respect to anticompetitive practices and mergers with anticompetitive effects.

The exchange of information should be undertaken on a case-by-case basis between the competition authority of the Adherent that transmits the information ("the transmitting Adherent") and the competition authority of the Adherent that receives the information ("the receiving Adherent"), and it should cover only information that is relevant to an investigation or proceeding of the receiving Adherent. In its request for information, the receiving Adherent should explain to the transmitting authority the purpose for which the information is sought.

The transmitting Adherent retains full discretion when deciding whether to transmit information.

In order to achieve effective co-operation, Adherents are encouraged to exchange information that is not subject to legal restrictions under international or domestic law, including the exchange of information in the public domain and other non-confidential information.

Adherents may also consider the exchange of information internally generated by the competition authority that the authority does not routinely disclose and for which there is no statutory prohibition or restriction on disclosure, and which does not specifically identify confidential information of individual enterprises. In this case, the transmitting Adherent may choose to impose conditions restricting the further dissemination and use of the information by the receiving Adherent. The receiving Adherent should protect it in accordance with its own legislation and regulations and should not disclose the views of the transmitting Adherent without its consent.

When the exchange of the above information cannot fully meet the need for effective co-operation in a matter, Adherents should consider engaging in the exchange of confidential information subject to the following provisions.

Exchange of confidential information through the use of confidentiality waivers

Where appropriate, Adherents should promote the use of waivers, for example by developing model confidentiality waivers, and should promote their use in all enforcement areas.

The decision of an enterprise or an individual to waive the right to confidentiality protection is voluntary.

When receiving confidential information pursuant to a confidentiality waiver, the receiving Adherent should use the information received in accordance with the terms of the waiver.

The information should be used solely by the competition authority of the receiving Adherent, unless the waiver provides for further use or disclosure.

Exchange of confidential information through "information gateways" and appropriate safeguards

Adherents should consider promoting the adoption of legal provisions allowing for the exchange of confidential information between competition authorities without the need to obtain prior consent from the source of the information ("information gateways").

Adherents should clarify the requirements with which both the transmitting and receiving authorities have to comply in order to exchange confidential information and should establish sufficient safeguards to protect the confidential information exchanged, as provided in this Recommendation. Adherents might differentiate the application of the provisions, e.g., on the basis of the type of investigation or of the type of information.

The transmitting Adherent should retain full discretion whether to provide the information under the information gateway, and may choose to provide it subject to restrictions on use or disclosure. When deciding whether to respond positively to a request to transmit confidential information to another Adherent, the transmitting Adherent may consider the following factors in particular:

(i) The nature and seriousness of the matter, the affected interests of the receiving Adherent, and whether the investigation or proceeding is likely to adequately safeguard the procedural rights of the parties concerned;

(ii) Whether the disclosure is relevant to the receiving authority's investigation or proceeding;

(iii) Whether competition authorities of both the transmitting and receiving Adherents are investigating the same or related anticompetitive practice or merger with anticompetitive effects;

(iv) Whether the receiving Adherent grants reciprocal treatment;

(v) Whether the information obtained by the transmitting Adherent under an administrative or other non-criminal proceeding can be used by the receiving Adherent in a criminal proceeding; and

(vi) Whether the level of protection that would be granted to the information by the receiving Adherent would be at least equivalent to the confidentiality protection in the transmitting Adherent.

The transmitting Adherent should take special care in considering whether and how to respond to requests involving particularly sensitive confidential information, such as forward-looking strategic and pricing plans.

Before the transmission of the confidential information can take place, the receiving Adherent should confirm to the transmitting Adherent that it will:

(i) Maintain the confidentiality of the exchanged information to the extent agreed with the transmitting Adherent with respect to its use and disclosure;

(ii) Notify the transmitting Adherent of any third party request related to the information disclosed; and

(iii) Oppose the disclosure of information to third parties, unless it has informed the transmitting Adherent and the transmitting Adherent has confirmed that it does not object to the disclosure.

When an Adherent transmits confidential information under an information gateway, the receiving Adherent should ensure that it will comply with any conditions stipulated by the transmitting Adherent. Prior to transmission, the receiving Adherent should confirm to the transmitting Adherent the safeguards it has in place in order to:

(i) Protect the confidentiality of the information transmitted. To this end, the receiving Adherent should identify and comply with appropriate confidentiality rules and practices to protect the information transmitted, including: (a) appropriate protection, such as electronic protection or password protection; (b) limiting access to the information to individuals on a need-to-know basis; and (c) procedures for the return to the competition authority of the transmitting Adherent or disposal of the information transmitted in a manner agreed upon with the transmitting Adherent, once the information exchanged has served its purpose; and

(ii) Limit its use or its further dissemination in the receiving Adherent. To this end, the information should be used solely by the competition authority of the receiving Adherent and solely for the purpose for which the information was originally sought, unless the transmitting Adherent has explicitly granted prior approval for further use or disclosure of the information.

The receiving Adherent should take all necessary and appropriate measures to ensure that unauthorised disclosure of exchanged information does not occur. If an unauthorised disclosure occurs, the receiving Adherent should take appropriate steps to minimise any harm resulting from the unauthorised disclosure, including promptly notifying and, as appropriate, co-ordinating with the transmitting Adherent, to ensure that such unauthorised disclosure does not recur. The transmitting Adherent should notify the source of the information about the unauthorised disclosure, except where to do so would undermine the investigation or proceeding in the transmitting or receiving country.

Provisions applicable to information exchange systems

The Adherent receiving confidential information should protect the confidentiality of the information received in accordance with its own legislation and regulations and in line with this Recommendation.

Adherents should provide appropriate sanctions for breaches of the confidentiality provisions relating to the exchange of confidential information.

The present Recommendation is not intended to affect any special regime adopted or maintained by an Adherent with respect to exchange of information received from a leniency or amnesty applicant or an applicant under specialised settlement procedures.

The transmitting Adherent should apply its own rules governing applicable privileges, including the privilege against self-incrimination and professional privileges, when transmitting the requested confidential information, and endeavour not to provide information deemed privileged in the receiving Adherent. The transmitting Adherent may consider working with the parties to identify privileged information in the receiving Adherent in appropriate cases.

The receiving Adherent should, to the fullest extent possible:

(i) not call for information that would be protected by those privileges, and

(ii) ensure that no use will be made of any information provided by the transmitting Adherent that is subject to applicable privileges of the receiving Adherent.

Adherents should ensure an appropriate privacy protection framework in accordance with their respective legislation.

Investigative Assistance to Another Competition Authority

VIII. RECOMMENDS that regardless of whether two or more Adherents proceed against the same or related anticompetitive practice or merger with anticompetitive effects, competition authorities of the Adherents should support each other on a voluntary basis in their enforcement activity by providing each other with investigative assistance as appropriate and practicable, taking into account available resources and priorities.

Without prejudice to the applicable confidentiality rules, investigative assistance may include any of the following activities:

(i) Providing information in the public domain relating to the relevant conduct or practice;

(ii) Assisting in obtaining information from within the assisting Adherent;

(iii) Employing on behalf of the requesting Adherent the assisting Adherent's authority to compel the production of information in the form of testimony or documents;

(iv) Ensuring to the extent possible that official documents are served on behalf of the requesting Adherent in a timely manner; and

(v) Executing searches on behalf of the requesting Adherent country to obtain evidence that can assist the requesting Adherent country's investigation, especially in the case of investigations or proceedings regarding hard core cartel conduct.

Any investigative assistance requested should be governed by the procedural rules in the assisting Adherent and should respect the provisions and safeguards provided for in this Recommendation. The request for assistance should take into consideration the powers, authority and applicable confidentiality rules of the competition authority of the assisting Adherent.

Adherents should take into account the substantive laws and procedural rules in other Adherents when making requests for assistance to obtain information located abroad. Before seeking information located abroad, Adherents should consider whether adequate information is available from sources within their territory. Requests for information located abroad should be framed in terms that are as specific as possible.

When the request for assistance cannot be granted in whole or in part, the assisting Adherent should inform the requesting Adherent accordingly, and consider providing the reasons why the request could not be complied with.

The provision of investigative assistance between Adherents may be subject to consultations regarding the sharing of costs of these activities, upon request of the competition authority of the assisting Adherent.

IX. INVITES non-Adherents to adhere to this Recommendation and to implement it.

X. INSTRUCTS the Competition Committee to:

1. serve periodically or at the request of an Adherent as a forum for exchanges of views on matters related to the Recommendation;

2. establish and periodically update a list of contact points in each Adherent for purposes of implementing this Recommendation;

3. consider developing, without prejudice to the use of confidentiality waivers, model provisions for adoption by Adherents allowing the exchange of confidential information between competition authorities without the need to obtain the prior consent from the source of the information and subject to the safeguards as provided in this Recommendation;

4. consider developing model bilateral and/or multilateral agreements on international co-operation reflecting the principles endorsed by Adherents in this Recommendation;

5. consider developing enhanced co-operation tools and instruments that can help reduce the overall costs associated with investigations or proceedings by multiple competition authorities, and at the same time avoid inconsistencies among Adherents' enforcement actions; and

6. monitor the implementation of this Recommendation and to report to the Council every five years.