



The OECD/ICN Joint Survey on International Enforcement Cooperation: A Ground-Breaking Initiative

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The last 20 years have seen a marked increase in international competition enforcement cooperation. This has been driven largely by the work of organizations such as the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD), and as a result of the growth in numbers of national competition authorities.¹

Competition authorities around the world recognize the value of cooperation as a vital part of ensuring effective enforcement of competition law. International cooperation at the global level is, however, in many respects still in its formative stages. Work is being undertaken in both the ICN and OECD aimed at improving international cooperation. The two bodies are engaged in a ground-breaking initiative beginning with a joint OECD/ICN survey identifying competition authorities' experiences of international enforcement cooperation. The results are due this month and will inform the future work to be undertaken by both organizations that, it is hoped, will contribute to a major step-change in work on international cooperation.

Benefits from Cooperation

There are a number of clear benefits for a competition authority from international cooperation, not least that cooperation between national authorities enables consistency in the application of the law. Cooperation on cases is also critical given the global nature of many businesses and the inter-connected nature of the global economy.

Cooperation enables authorities to select and pursue complementary cases as they seek to tackle anti-competitive behavior and to boost competition in key sectors across the economy. This is not simply a benefit for the authorities, but also for businesses. Good cooperation means more effective and efficient enforcement and a reduction in duplicative efforts all around. In turn, good enforcement secures a level playing field, which creates a more attractive investment climate.

As well as enabling more effective enforcement, closer workings between competition authorities enables them to learn from each others' experiences. There are benefits to be gained from procedural convergence and from the simple exchange of operational experience and ways of working. It is vital for authorities to be able to share experiences, even if they cannot share detailed specifics of a

¹ For example, the ICN has grown from 16 to 123 competition authorities since 2001.

case. Authorities can learn from each others' successes and, just as importantly, from what has not gone so well.

Convergence – in procedures, legislation and policy – facilitates cooperation but also goes a long way to helping to create enhanced certainty for businesses. Uncertainty for businesses costs money and creates unease, thus chilling investment and innovation. As co-operation grows and convergence deepens, business certainty about processes and potential outcomes can grow. This reduces both costs and risks for companies that respect the law, encouraging competitive markets, investment and, of course, promoting understanding and respect for competition law, and thus compliance.

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In April 2012, the ICN as an outcome of its Second Decade initiative approved a Steering Group project to assess member agencies' needs with respect to international enforcement cooperation and to identify appropriate work to be carried out by the ICN to address those needs.² The project, led by the US Department of Justice and Turkish Competition Authority, marks a new stage in ICN's work. Consistent with the ICN's Second Decade objectives, it is a cross-cutting project drawing together experiences from and seeking to develop ways forward for all three enforcement areas – cartels, mergers and unilateral conduct. At around the same time, the OECD's Competition Committee also agreed to begin its own strategic project on international cooperation.

Together the ICN and OECD Competition Committee agreed to carry out a joint survey to identify current practices on international cooperation between competition authorities in enforcement investigations and to identify examples of effective cooperation and possible areas for improvement. The survey was conducted during the autumn of 2012. Fifty-seven ICN members responded to the survey (46 of which are also OECD members or observers). The OECD Secretariat and an ICN project team³ have subsequently reviewed the results, producing reports that will be discussed at the OECD Competition Committee and Global Forum on Competition in Paris at the end of February.

Key findings of the survey include:

² See project proposal, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc794.pdf>

³ The ICN Working Group is made up of the US Department of Justice, Turkish Competition Authority, European Commission, UK Office of Fair Trading, US Federal Trade Commission and Colombian Superintendency.

- International cooperation is a policy priority for a vast majority of competition agencies. The globalization of markets, and consequently of anti-competitive activity, requires increasing and enhanced cooperation in enforcement;
- Most agencies find international cooperation to be useful for their enforcement strategies. Informal cooperation has proved particularly valuable in investigations (and might be sufficient in-and-of-itself in many cases). The benefits from cooperation outweigh the costs;
- Competition agencies can rely on different legal bases for international cooperation. Some are designed specifically for the purposes of competition enforcement; in the absence of a specific competition instrument, other international cooperation instruments can apply;
- Formal instruments for cooperation, such as comity provisions and notification mechanisms, are widely available but are used only by a limited number of agencies;
- Outside of regional cooperation, frequent or regular experience in international cooperation appears to be concentrated among a few, more experienced, agencies. Experience with international cooperation has, however, increased significantly in the last five years and is expected to keep doing so (responses indicate that the number of multi-jurisdictional cases is rising over time). Merger review is the enforcement area in which there has been the highest number of cases involving international cooperation;
- Regional cooperation is common in many parts of the world. However, actual experiences with case cooperation seem to differ significantly across regional networks;
- Participants in regional networks identified specific advantages (such as the strong legal basis for cooperation, convergence in national laws and agency procedures) that are seen as contributing to increased effectiveness. A few disadvantages of regional cooperation also were identified;
- Legal limitations, due to differences in legal systems and to restrictions in domestic legislation, appear to be one of the more important limitations on

international cooperation. Addressing these limitations could be beneficial, despite the costs associated with it;

- Effective cooperation of enforcement action is enhanced by the ability of enforcers to exchange information (both confidential and non-confidential) about the cases they are investigating. The exchange of information remains a core feature of international cooperation;
- Confidentiality waivers are often relied upon by agencies, when possible, to address existing limitations to the exchange of information. Experiences with waivers are generally positive, although the use of waivers is not as broad as it might be;
- Incentives to engage in international cooperation might be improved through the adoption of a clear legal and institutional setting for cooperation and increased awareness of the benefits of cooperation;
- Exchanges of information (especially confidential information) is a key area for improvement. Many respondents suggested that agencies should agree on a clearer legal framework for the exchange of information. Reforms in the area of confidentiality waivers are viewed as a way to foster more valuable cooperation through a more effective exchange of confidential information between enforcers.

The survey also identified the important role played by existing ICN and OECD work product in supporting cooperation, and obtained authorities' views on usefulness. It has obtained suggestions for how these could be amended or updated to improve cooperation as well as agencies' views on the priorities for future cooperation-related work.

The results of the survey will inform the ICN and the OECD Competition Committee in the coming weeks and months, and promise to provide a valuable resource for both organizations in identifying where each might choose to focus its efforts to improving enforcement cooperation.