

International Cooperation in Competition Law Enforcement (an OECD case study)

Context

A globalised economy with multi-national enterprises leads to ever increasing numbers of competition enforcement cases with an international dimension. The digitalisation of the economy creates new challenges for all competition authorities. This makes co-operation between competition enforcers in different jurisdictions imperative for domestic enforcement to be truly effective. Success in discovering and prosecuting anti-competitive practices require competition authorities to significantly improve their ability to co-operate. International co-operation in competition enforcement cases is a topic that is widely discussed in many fora and is of considerable interest to both competition enforcers and the private sector. The OECD has contributed to these discussions and has fostered co-operation through its own instruments and reports. OECD Recommendations on international competition enforcement co-operation have been in place since 1967, with the 2014 version being the latest¹.

Competition authorities can use different legal bases for cooperation. The most effective ones are those designed specifically for competition purposes. This is the case in particular of bi-lateral cooperation agreements entered into by competition authorities to facilitate the relationship between the signatories.

In the absence of a specific competition instrument, other international cooperation instruments can apply. These are instruments negotiated by governments to allow their respective ministries and agencies to cooperate. These are usually less effective instruments, as they require the involvement of other parts of the government or of the judiciary, which tend to be time consuming and not apt for fast resolution of competition cases.

Cooperation can be informal, in that it is not based on the framework of a specific cooperation instrument, and so normally involves general forms of co-operation, such as technical assistance, or exchanges of public or authority information. The different instruments and tools as well as the various types of co-operation involved in cross border cases create a complex web of differing levels of possible engagement between authorities (see also²). Across different forms of International co-operation in the competition field, OECD members traditionally employ “comity”, the legal principle whereby an OECD Member should take other Members’ important interests into account while conducting its law enforcement activities, in return for their doing the same.

 [**OECD/ICN Report on International Co-operation in Competition Enforcement 2021 \(YouTube\)**](#)

Average number of cases involving international enforcement co-operation by enforcement area 2007 - 2018

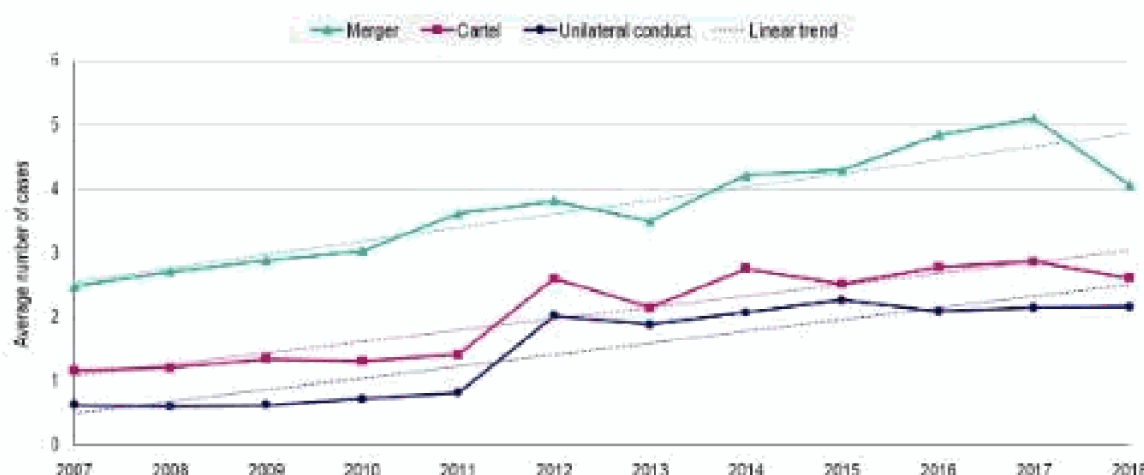


Photo Credit: OECD

Non-competition specific cooperation instruments

- Mutual Legal Assistance Treaties (MLATs):** bilateral treaties creating reciprocal international obligations between sovereign governments are not specific to competition investigations. An MLAT normally allows the signatories to request various types of assistance from each other, including the use of formal investigative powers and sharing of confidential information.
- Extradition Treaties:** Extradition treaties require the underlying conduct to be a crime in both jurisdictions. Given the relatively small number of jurisdictions to have made cartels a criminal offence, the proportion of extradition treaties that can be deployed for competition cases is even smaller than for MLATs.
- Letters rogatory:** This is a formal request whereby one court requests a foreign court to perform a judicial act, such as taking evidence, serving a summons, or other legal notice. The process is usually time-consuming and cumbersome. Some OECD Members insist that the requests be submitted through the diplomatic channel.
- Regional Trade Agreements which include competition provisions:** Regional agreements can also provide for co-operation on competition matters. There are currently 349 Regional Trade Agreements (RTAs) in force listed on the World Trade Organisation website, of which 238 contain competition provisions. The most frequent competition provisions concern commitments to prohibit abuses of market power and anti-competitive agreements, commitments to ensure that state-owned enterprises and subsidies do not distort the level-playing field, and provisions on international cooperation.

Competition-specific bilateral and multilateral cooperation agreements

A key development in enforcement co-operation has been the proliferation of bi lateral competition agreements, which have become more numerous, comprehensive and detailed over time³. Bi-lateral enforcement co-operation agreements can include inter-governmental agreements⁴ or inter-authority arrangements, such as MoUs⁵. Bi-lateral MoUs are the most widely used model of bi-lateral competition agreements, and their number keeps growing.

Common clauses in MoUs deal with the following substantive topics: transparency, notifications, enforcement cooperation and investigative assistance, exchange of information, co-ordination of investigations and proceedings, comity, consultation, regular meetings, confidentiality, legal bases and communication.

In addition, there are multi-lateral competition arrangements that focus on competition law and policy and a more general level of cooperation, such as the MoU between Brazil, the Russian Federation, India, China and South Africa (BRICS)⁶. The BRICS MoU created a framework for multi-lateral cooperation and sets up an institutional partnership, aimed at promoting and strengthening the cooperation in competition law and policy between the parties.

Some national laws provide a direct legal basis for cooperation between authorities or jurisdictions, while others provide a mandate to enter into cooperation agreements with other jurisdictions. Two types of national laws allow specific or deeper forms of co-operation: 1) national laws that provide a 'gateway' to confidential information sharing absent a waiver and 2) national laws that allow an authority to enter into second-generation international agreements.

Today international cooperation is largely based on waivers that companies subject to either a merger investigation or to a cartel investigation grant to authorities, allowing them to exchange confidential information on the case. Waivers of confidentiality enable authorities to exchange information quickly and at an early stage, which facilitates co-ordination of the initial steps in an investigation. This may avoid the need to use official channels in formal cooperation procedures and the ensuing delay this can entail.

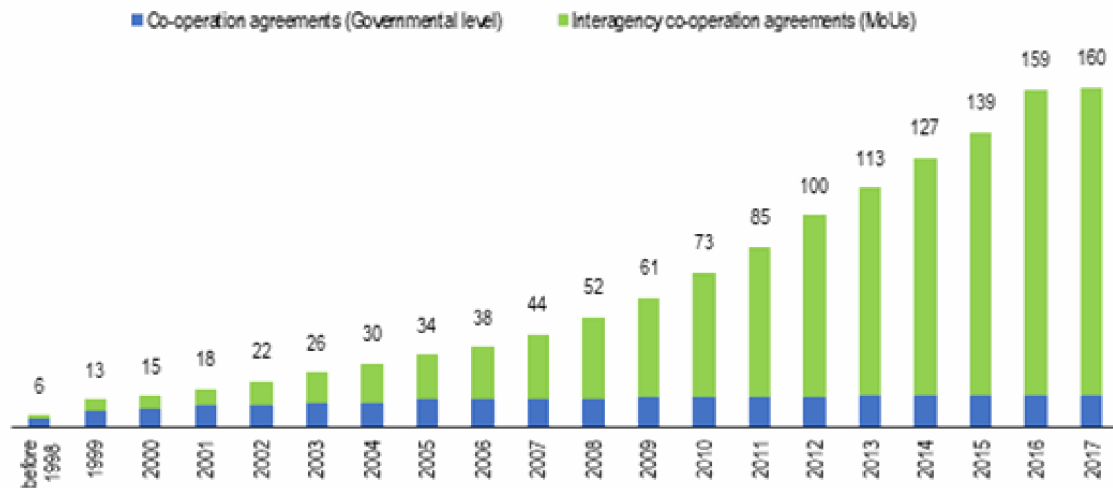


Photo Credit: <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0475>



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Benefits

The benefits of international cooperation will largely depend on the extent to which competition authorities are willing and able to create a cooperative culture in which they can justify bringing cases primarily for the benefit of others on the basis of the benefits that they expect to receive from cases brought by others.

The benefits include:

- **Improved effectiveness.** By invoking a requested OECD Member's laws, positive comity can provide a remedy for illegal conduct that the requesting OECD Member cannot remedy itself due to jurisdictional problems.
- **Improved efficiency.** Since positive comity results in an investigation by the Member in the best position to gather the necessary facts, it can improve efficiency by reducing investigation costs and the risk of inconsistencies.
- **Improved relationships, trust and transparency.** By creating personal and organisational relationships of trust, which can serve as a basis for effective and deeper enforcement cooperation, and improving transparency and understanding of counterpart authority practices and procedures.

In relation to specific enforcement challenges created by digitalisation and large online platforms that can act as gatekeepers on markets, an additional benefit can be identified:

Enabling cross jurisdictional solutions to globalised challenges. By creating and using mechanisms of enhanced co-operation such as recognition of another jurisdiction's decisions, one-stop-shop models (i.e. for leniency or merger cases), appointment of lead jurisdictions, joint investigative teams and cross-appointments, or co-operation at court level^{7, 8}.

Challenges to international cooperation

Competition authorities, the OECD, the ICN and others in the competition community have undertaken a significant amount of work to address some of the key limitations and challenges⁹. For example, in relation to improving transparency, authorities have increasingly made information on their substantive and procedural rules publicly available, and improved accessibility of their decisions. Remaining challenges relate i.e. to legal limitations, resource constraints, legal standards and differences between legal systems. Legal limitations are pertinent when it comes to the exchange of confidential information. Recent OECD work highlights the main challenges to more and better co-operation as perceived by member and non-member authorities alike:

Exchange of confidential information

One of the most sensitive areas of cooperation concerns the exchange of confidential information and data between competition authorities. In the antitrust context, the rationale for limiting authorities' powers to freely exchange confidential information is to avoid reducing the incentives for firms to cooperate in merger proceedings and under authorities' cartel leniency policies, both of which are essential for the effectiveness of an enforcement regime as a whole. Similarly, there is a concern that, once exchanged, confidential information submitted to an authority in another jurisdiction may get into the public domain (e.g. because of different rules on access to a competition file in the requesting OECD Member) or may simply become discoverable in the receiving

jurisdiction. This may expose strategic business secrets of the source of the information or create a risk of private actions and ensuing damages.

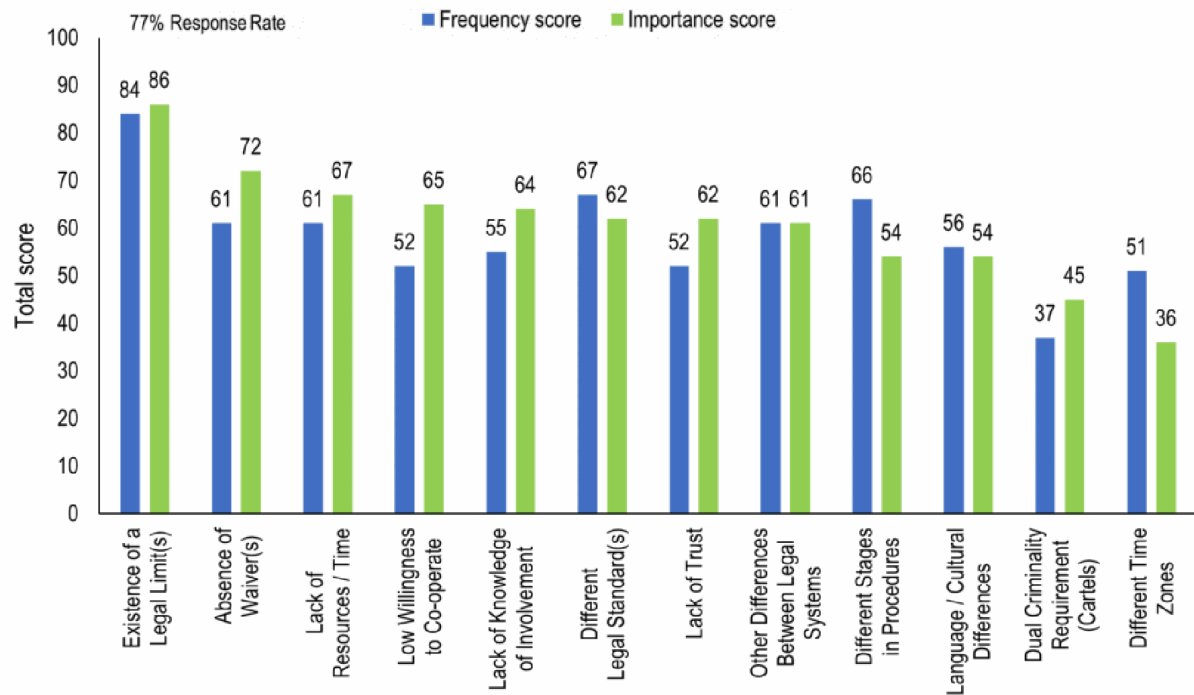


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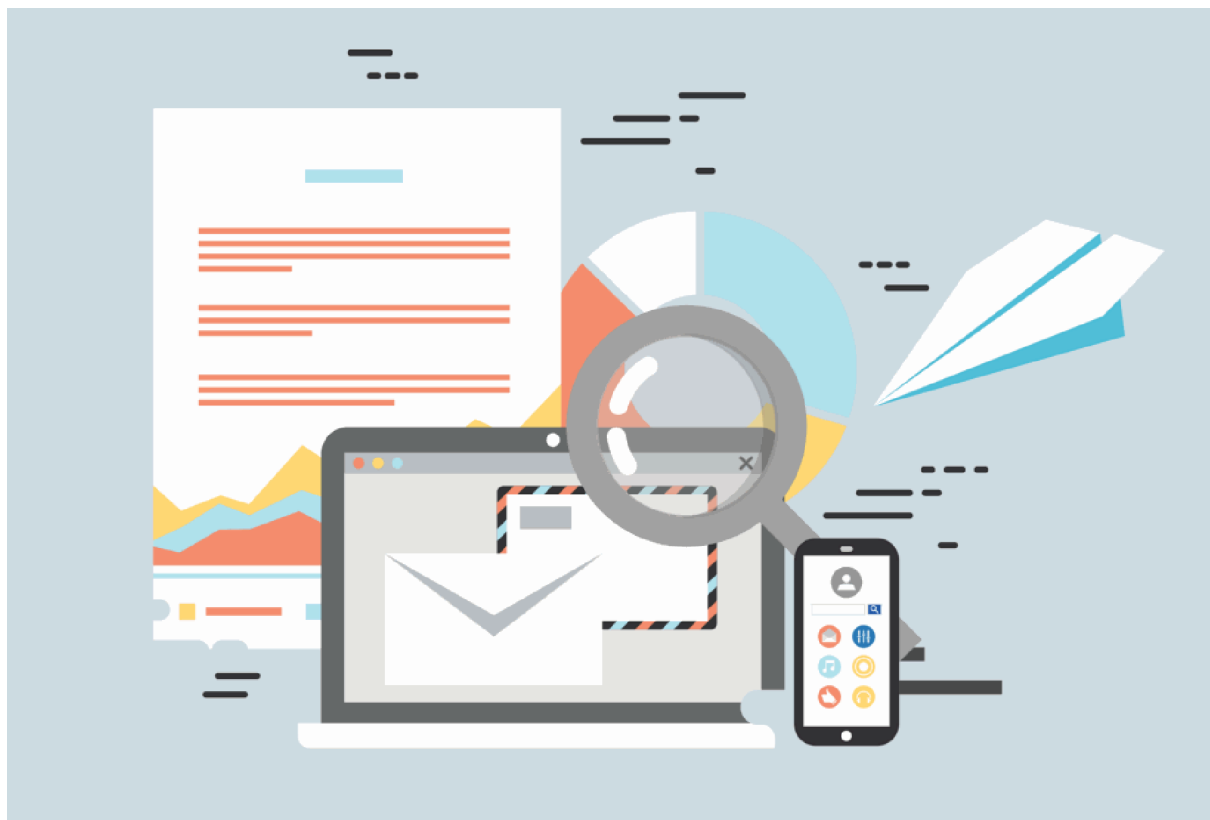


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Different definitions of what constitutes “confidential information”

There is no common definition of confidential information in the competition field. Differences in how competition authorities or courts define confidential information in cartel cases can represent an obstacle to effective cooperation.

Some authorities define information as confidential by the way it is collected (i.e. any information collected during an investigation is confidential). Other authorities consider the nature of the information, whereby information is confidential if its disclosure would harm the commercial interest of the source which provided it (i.e. information related to price, sales, costs, customers and suppliers). In the latter case, it can be difficult to distinguish between what is commercially sensitive or not. If in doubt, the risk of litigation may discourage authorities from disclosing such information to foreign authorities. See also^{1, 8}.

Civil/administrative versus criminal regimes

Cartels are criminally prosecuted in some jurisdictions, but not in others, and this places additional limitations on the ability of the respective authorities to exchange information and evidence between civil and criminal jurisdictions, and the ability to assist in their respective investigations.

As discussed above, criminal jurisdictions may be able to use MLATs to obtain foreign-located documents and witness testimony in international cartels investigations. However, this is limited to jurisdictions which both treat cartels as a criminal infringement. The United States for example, cannot share confidential information with the European Union pursuant to an MLAT because the European Union imposes only administrative penalties for competition law violations. There is, consequently, a lack of “dual criminality”.

Other common hurdles

- Language barriers or shortcomings in the internal organisation of competition authorities that result in a lack of competences to cooperate effectively.
- Practical difficulties in the coordination of investigations, for example if investigations are at different stages between the different authorities involved or if difficulties arise due to different time zones.
- Resource constraints for making or responding to requests, particularly where formal channels are required. Cooperation can be resource intensive, detracting scarce resource from other enforcement activities.

Challenges to specific relevance to developing and emerging economies

There is relatively little evidence of effective cartel enforcement co-operation between competition authorities in developing economies and between developed and developing economy authorities. This, in part, reflects that a number of jurisdictions have only recently adopted competition laws and so have only been enforcing their laws

for a relatively short period of time. Some may not have begun to target cartel activity as a priority in their enforcement programmes. It is also true, however, that many developing economies and new competition authorities have not yet developed sufficiently stable ongoing bilateral or multilateral relationships with other jurisdictions that could promote cooperation. The two main challenges for international cooperation for developing economies are lack of trust and confidence in legal systems, and institutional and investigatory impediments.

Endnotes

¹ OECD (2021), Recommendation of the Council on International Regulatory Co-operation to Tackle Global Challenges, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0475>.

² Caro de Sousa, P. (ed.) (Forthcoming), The Three Body Problem – Extraterritoriality, Comity and Cooperation in Competition Law, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659083.

³ For examples see [OECD inventory of international co-operation agreements on competition](#) and [OECD inventory of international co-operation agreements between competition agencies](#) (MoUs).

⁴ OECD (2015), Inventory of Co-operation Agreements: Note by the Secretariat, [https://one.oecd.org/document/DAF/COMP/wp3\(2015\)12/rev1/en/pdf](https://one.oecd.org/document/DAF/COMP/wp3(2015)12/rev1/en/pdf).

⁵ OECD (2016), Inventory of Provisions in inter-agency co-operation agreements (MoUs): Note by the Secretariat, [https://one.oecd.org/document/DAF/COMP/WP3\(2016\)1/REV2/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2016)1/REV2/en/pdf).

⁶ BRICS (2016), Memorandum of Understanding Between the Competition Authorities of Federative Republic of Brazil, Russian Federation, Republic of India, People's Republic of China and Republic of South Africa on Cooperation in the Field of Competition Law and Policy, <http://www.cade.gov.br/noticias/autoridades-antitruste-do-brics-ampliam-colaboracao-e-declaram-parceria-para-combater-efeitos-da-crise-de-covid-19-na-economia/brics-mou-en.pdf>.

⁷ OECD (2014), Executive Summary of the Hearing on Enhanced Enforcement Co-operation, [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/M\(2014\)2/ANN3/FINAL&doclanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/M(2014)2/ANN3/FINAL&doclanguage=en).

⁸ OECD (2021), OECD/ICN Report on International Co-operation in Competition Enforcement 2021, https://www.oecd.org/content/dam/oecd/en/publications/reports/2021/01/oecd-icn-report-on-international-co-operation-in-competition-enforcement_f4b1638e/86f9eb12-en.pdf.

⁹ OECD (2021), *OECD/ICN Report on International Co-operation in Competition Enforcement 2021* [Video], YouTube, <https://youtu.be/Rk5Xw6KUrFA>.