



BETTER POLICIES FOR BETTER LIVES

# International Enforcement Co-operation An OECD perspective

*Antitrustitalia  
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# Overview

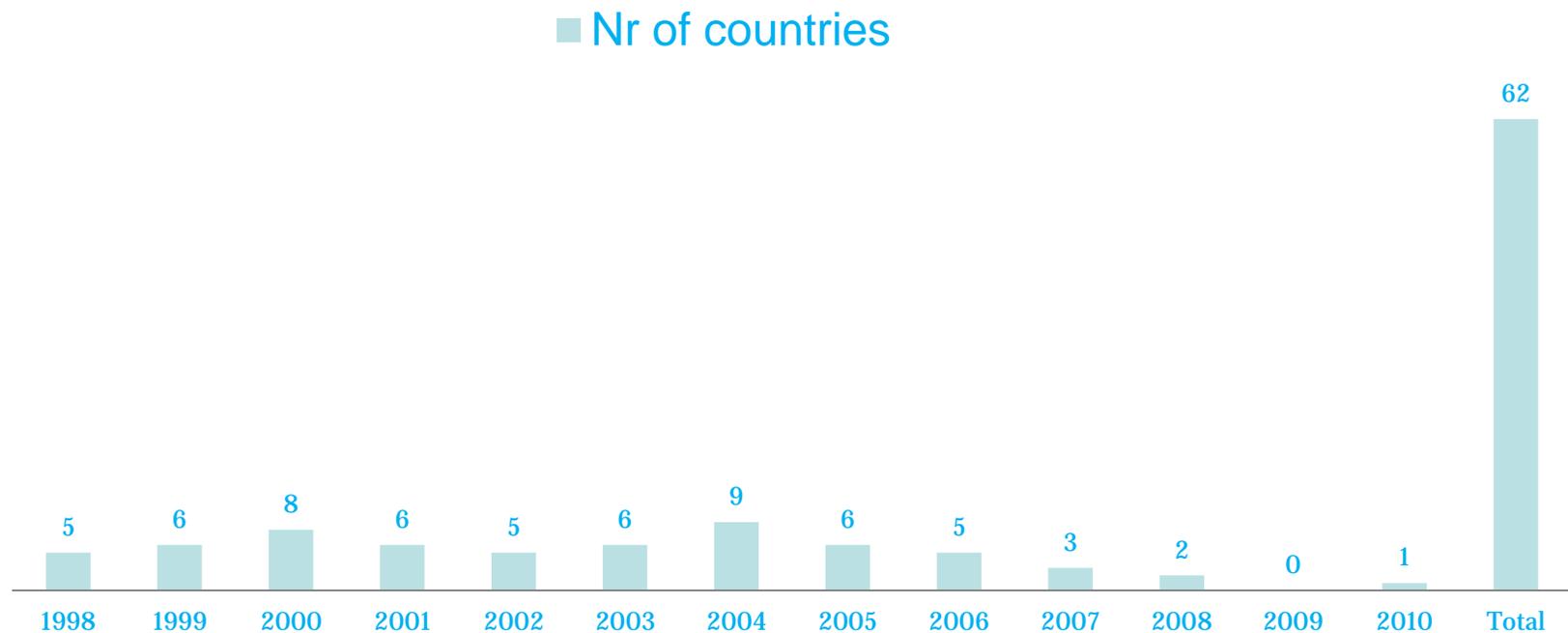
- Reasons for international co-operation
- Traditional approaches to international co-operation
- The role of the OECD
- The OECD project on international enforcement co-operation
- Key issues and problems with international co-operation
- Future challenges for international co-operation

# Why international co-operation?

- The number of jurisdictions with competition law has increased significantly
- Globalization of the economy
- Internationalization of antitrust infringements
- Risks of divergent decisions
- Need to access information and evidence in other countries
- Driver for international co-operation:
  - Multi jurisdictional merger filings
  - Proliferation of leniency programs

# Uptake of competition law and policy

More than 62 new competition laws since 1998



# OECD and ICN memberships

- On 25 October 2001, 14 agencies launched the ICN
- The ICN has grown from 16 members in 2002 to 104 (from 92 jurisdictions) in 2009
- In April 2012 the ICN had 123 member agencies



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- 20 countries originally signed the OECD Convention on 14 December 1960
  - Since then 14 countries have become members
  - Today the Competition Committee has 34 members and 15 observers



# The economy is increasingly global

- In 1995, co-operation between the US, EU and Japan would cover about 75% of world GDP - and about 95% of the GDP of countries with competition law
- In 2010, the same trilateral co-operation covers only 60% of world GDP
- By 2030, on reasonable projections, those three economies will account for only 35% of world GDP
- To reach  $\frac{3}{4}$  of world GDP – which could be achieved with just trilateral co-operation in 1995 - by 2030 you will probably need at least the top nine economies
- Not a general trend though: for the top 500 multinational in Nord America on average, about 70% of their sales are made in their home region

# Traditional approaches to international co-operation

- Convergence
  - Policy movement among jurisdictions towards common or shared legal and economic standards
- Co-operation
  - Communication, consultation, and information sharing among agencies to ensure consistent approaches to parallel cases
- Comity
  - Negative comity
  - Positive comity

# The two worlds of international co-operation

## International enforcement co-operation

- Mergers
- Behavioural cases



## Exchange on policy developments and capacity building

- OECD, ICN, UNCTAD, ASEAN, APEC, etc.
- Outreach and capacity building

# The role of the OECD

- Harmonization and convergence:
  - Roundtables and policy discussions
  - Recommendations, reports and best practices
  - Outreach and capacity building (domestic and international)
- Informal co-operation through “soft” law

# 1995 Recommendation on international co-operation

- The **advance notification** of planned competition law enforcement actions to foreign competition authority when important interests of that country may be affected by the planned enforcement activity.
- The **co-ordination of parallel investigations** where ‘appropriate and practicable’.
- The **assistance in obtaining information**, providing factual and analytical material from its files and employing on behalf of the requesting country the authority to compel the production of information, subject to national confidentiality laws.
- **Consultations** aimed at developing or applying mutually satisfactory and beneficial measures for dealing with anticompetitive practices that affect international trade.
- Consideration should be given to important interests of foreign parties to the agreement when applying competition law domestically (**negative comity**) and vice versa, foreign parties should consider appropriate measures if important domestic interests are concerned (**positive comity**).

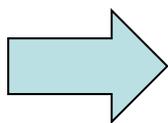
# 2005 Best Practices for the exchange of information in cartel cases

- International treaties should **protect confidentiality** of exchanged information
- Information exchange should be supported, but requested jurisdiction has **no obligation to share information** and has ability to apply conditions
- **Safeguards** should apply in the requesting jurisdiction when it is using the exchanged information
- Information exchanges should provide safeguards for the **rights of the parties** under the laws of member countries (e.g., legal privilege and privilege against self-incrimination)
- Best Practices advise against giving **prior notice to source of information**, unless required by domestic law or international agreement, as it can disrupt and delay investigations of cartels

# The OECD project on international co-operation

Started in 2012, the OECD international co-operation projects aims at:

- studying and sharing experience and insights on international co-operation among competition agencies
- exploring of the policy rationale for international co-operation
- reviewing the relative merits of various forms of co-operation and lessons to be learnt from co-operation efforts in other policy fields
- identifying constraints on greater co-operation
- analysing experience over the past years with OECD instruments



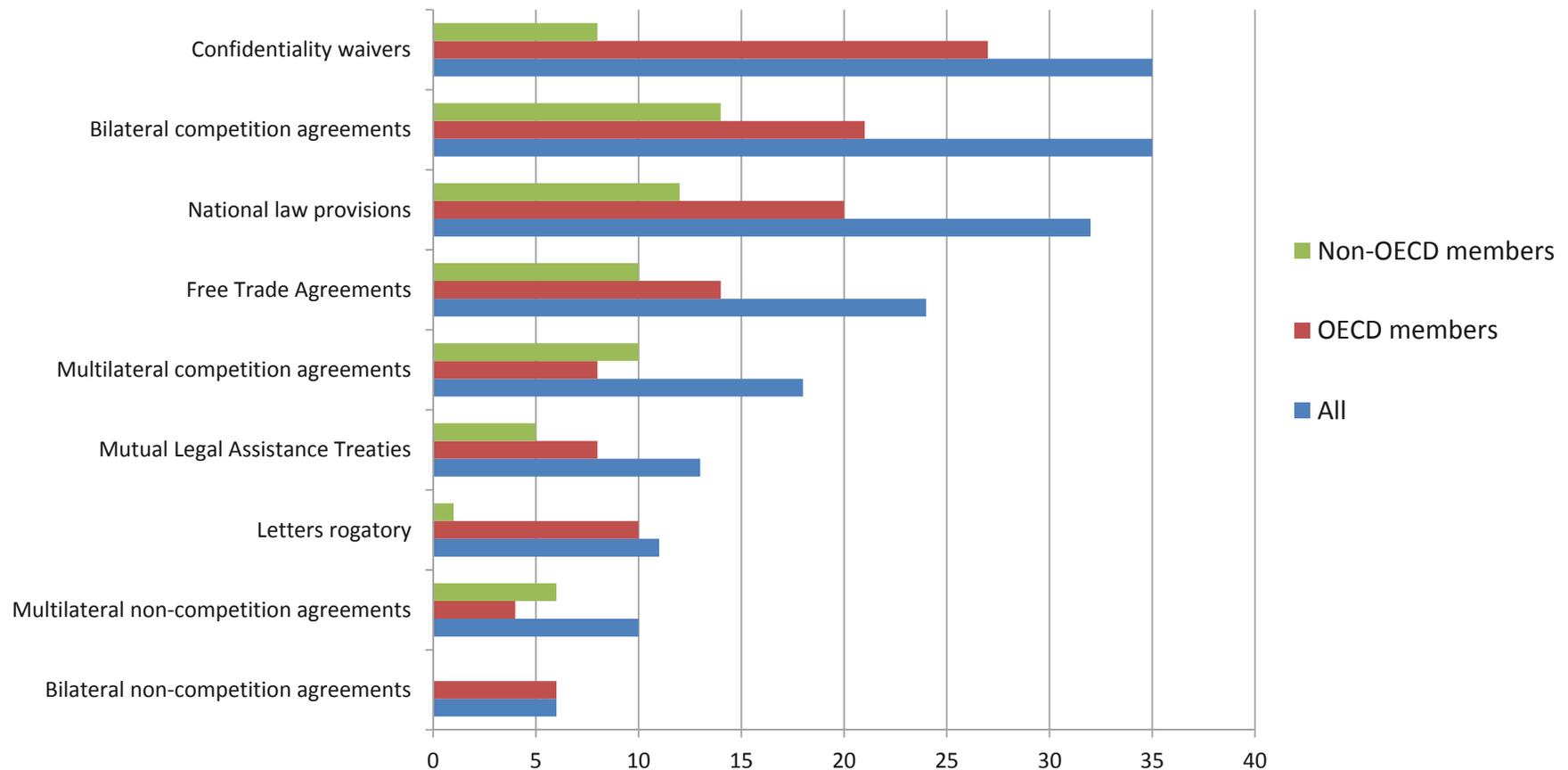
with a view to improving international co-operation and developing legal and practical solutions for agencies

# Legal basis for international co-operation

- **Formal** cooperation on cases
  - Co-operation based on provisions in national law
  - Co-operation based on non-competition specific agreements and instruments: mutual legal assistance agreements (MLAT), competition related provisions in bilateral free trade agreements (FTAs), rogatory letters
  - Co-operation based on competition-specific agreements
  - Co-operation based on waivers
  - Co-operation based on amnesty/leniency programs
- Significant degree of **informal** co-operation

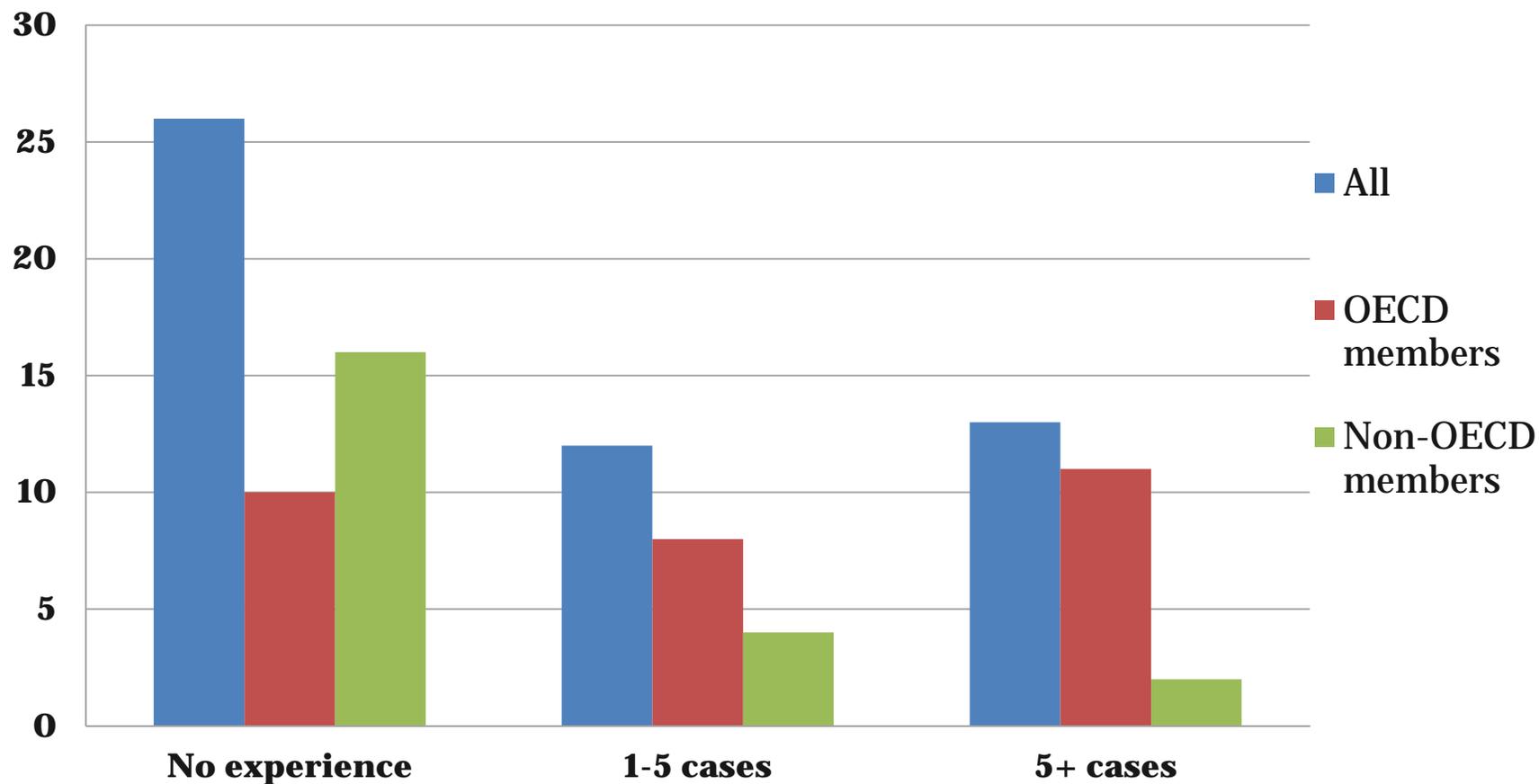
# Legal Basis for International Co-operation

## Availability of legal bases for international co-operation



# Experience with international co-operation

## Number of Cases in Which Agencies had Co-operated (2007-2012)



# Experience with International Co-operation

## Number of Cases in which Agencies had Co-operated, by Enforcement Area (2007-2011)

		# of cases reported by agencies				
	# of agencies with any experience	2011	2010	2009	2008	2007
<b>Cartel</b>	19	55	51	49	47	48
<b>Merger</b>	21	116	101	106	96	86
<b>Abuse of Dominance</b>	13	29	26	22	22	22

# Experience with International Co-operation

- The number of cases involving international co-operation has increased over time

	Increase in Cases Involving Co-operation (2007-2011)
Cartel	15%
Merger	35%
Abuse of Dominance	30%

- Respondents expect the frequency of international co-operation to continue to increase, due to growth in the number of multi-jurisdictional cases

# Scope of International Cooperation in Enforcement Cases

- What is it about?
  - Exchange of information
  - Mutual assistance
  - Coordination of actions and outcomes
- When does it take place?
  - Before the investigation phase
    - What markets, which companies to investigate; location of evidence
  - During the investigation phase
    - Simultaneous dawn raids, subpoenas, requests for information, interviews of witnesses
  - After the investigation phase
    - Exchange of evidence obtained during investigation, general discussion

# Cooperation in Merger Review

- Notification
- Early and frequent contacts between staff
- Discussions about relevant market, theory of anticompetitive harm, potential remedies
- Extensive use of waivers to facilitate the exchange of confidential information
- Attend meetings with merging parties
- Coordination of remedies

# Cooperation in Cartel Cases

- Locating and identifying persons
- Serving documents
- Taking evidence
- Executing requests for searches and seizures
- Providing publicly available evidence
- Exchanging information
- Providing documents and reports
- Discussing the “theory of the case”
- Enforcing administrative and judicial decisions, including the collection of fines

# Lessons Learned

- Cooperation important and necessary
- Requires high degree of trust
- Regular and frequent contacts
- Earlier the better
- Respect for each other's interests
- Information sharing at all stages when possible
- Informal as important as formal
- Confidence in safeguards to protect confidential information
- Can help stretch resources

# How to improve international co-operation

- Suggestions fell into three main categories:
  - Suggestions on how to maximise the benefits of co-operation within the existing legal and practical constraints
  - Suggestion on how to improve the existing system of co-operation by addressing the effects of legal and practical constraints on co-operation
  - Suggestions on how to improve interaction between enforcers, establish contacts, and develop procedures and best practices for more effective relationships.

# How to improve the ability of agencies to exchange confidential information

- Solutions suggested include the adoption of national legislation or of international instruments which would allow exchanges of confidential information under clear conditions and with adequate safeguards.
- There was a general consensus that any improvement in the way confidential information can be exchanged between enforcers should always be accompanied by appropriate safeguards to protect legitimate interests and the rights to confidentiality.
- An effective legal framework for the exchange of confidential information should address the following questions:
  - what type of information can be exchanged, and what type of information cannot be exchanged;
  - the conditions for the transmission of confidential information to another enforcement agency, and
  - what use the receiving agency can make of the confidential information received.

# Key issues and problems with international co-operation

- Legal restrictions and absence of legal basis
- Constraints related to exchange of confidential information
- Limitations on admissibility and use of the information exchanged
- Complexity and duration of co-operation procedures
- Procedural differences and different enforcement powers
- Limits with waivers
- Practical limitations (lack of resource, language, etc.)

# Future challenges for international co-operation

- Increase the number of countries involved in international enforcement co-operation
- Improve legal basis for formal/information co-operation
- Reduce limits to exchange of confidential information
- Facilitate the exchange of public and agency information
- Convergence of rights of defendant
- Move from bilateral to multilateral co-operation?
- Envisage new means of enhanced co-operation?

**Thanks for your attention!**

***Please visit:***

**<http://www.oecd.org/daf/competition>**

**<http://www.oecd.org/daf/competition/internationalco-operationandcompetition.htm>**



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