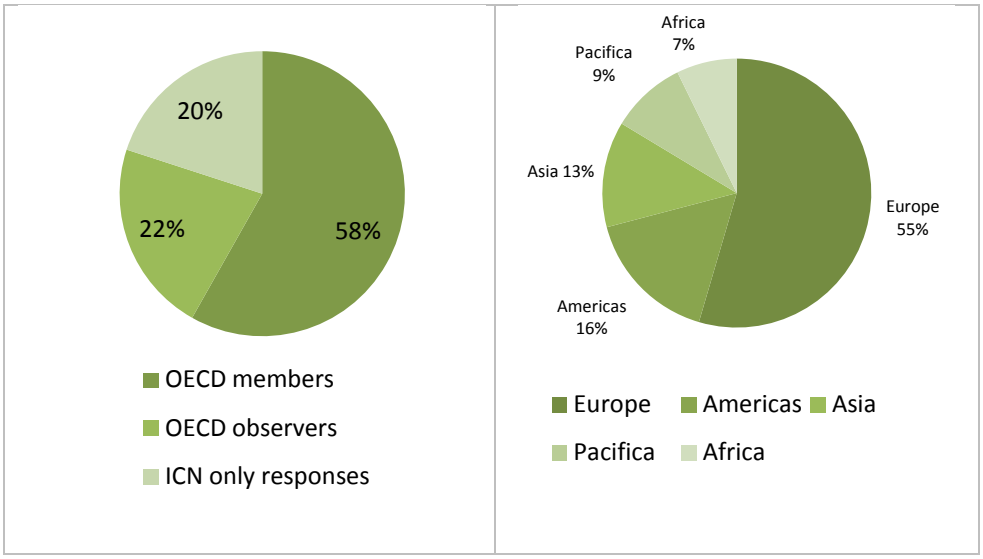
EXECUTIVE SUMMARY

(1) *The OECD/ICN Survey on International Enforcement Co-operation – Status Quo and Areas for Improvement (the Survey) was addressed to 120 competition agencies from around the world, including agencies from the 34 OECD member countries, the 15 OECD observer countries, and all other member agencies of the International Competition Network (ICN). The response rate among OECD members and observers was around 90%.*

A total of fifty-seven (57) responses were sent to the OECD Secretariat in response to the Survey. Of these, fifty-five (55) responses were used in the data set to produce the results presented in this Report. Thirty-two (32) responses came from agencies of thirty-one (31) OECD member countries (58% of the sample); thirteen (13) responses came from agencies of OECD observer countries (twelve [12] of these are included in the sample, 22% of the sample), and eleven (11) responses came from ICN-only agencies (20% of the sample). The response rate among OECD members is 91%; the response rate among OECD observers is 87%. Since all respondents are ICN members, the response rate for ICN respondents is 47%. The majority of responses (thirty (30) – 55% of the sample) were received from agencies of European countries. Nine (9) responses were received from agencies of countries in the Americas, seven (7) from agencies of Asian countries, five (5) from agencies of countries in the Pacific region, and four (4) from agencies of African countries.

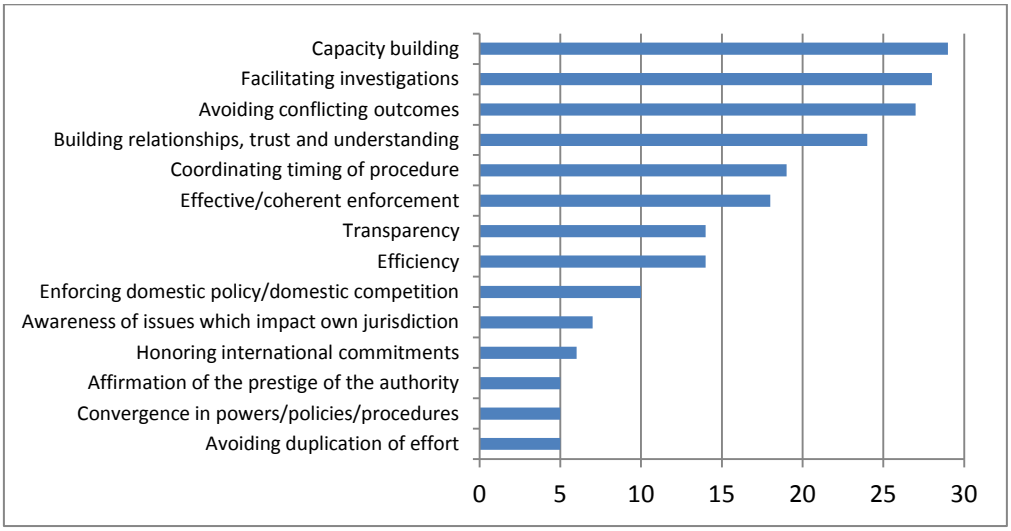
Distribution of responses



(2) *International co-operation is a policy priority for a vast majority of competition agencies; respondents emphasized that the globalization of markets, and consequently of anti-competitive activity, requires increasing and enhanced co-operation in enforcement.*

Many agencies, especially newer ones, tend to see co-operation broadly, as a way to build enforcement capacity, exchange experiences, and share methodologies and not just in a case-specific, enforcement context. In this respect, building relationships based on trust is seen as an essential element of international co-operation, and international *fora* like the OECD and ICN play an important role in forging these relationships. More experienced agencies pursue international co-operation in enforcement in order to facilitate investigations, by exchanging case-specific information and evidence and providing each other with investigatory assistance. The responses to the Survey demonstrate that agencies, through co-operation, achieve high-quality decision-making, overcome jurisdictional obstacles, and, in some cases, try to maintain the availability of evidence. Responses also indicate that they share the objective of avoiding conflicting outcomes and, when possible, coordinating remedies.

Objectives pursued in international co-operation, by number of respondents



(3) *Most agencies find international co-operation to be useful for their enforcement strategies. Informal co-operation has proven particularly valuable in investigations, and might be sufficient in-and-of itself in many cases. Benefits from co-operation overall outweigh the costs.*

Of the forty-five (45) agencies that reported having had sufficient experience with international co-operation to address the question, 98% found that international co-operation had been useful to their enforcement strategies. In particular, many highlighted benefits from informal case co-operation. These informal contacts often occur at an early stage of a case and include consultation among agencies on matters such as the timeline of the investigation, the theory of harm, and potential remedies in the case of merger reviews.

Agencies underscored how even exchanging non-confidential information and general views on a case can be very useful in an investigation, and might be sufficient in many cases; however, when instruments are available for the exchange of confidential information, this is perceived as extremely beneficial. Even non-OECD agencies, which may in general have less experience with international enforcement co-operation, mentioned that exchanges with other agencies are very beneficial, and that experience-sharing helps them to develop strategies to approach cases and strengthen enforcement even at the national level.

The overall assessment of experiences with international co-operation[1] is in fact extremely positive for almost all respondents. Even if agencies face some costs (especially in terms of resource and time constraints) in relation to international co-operation, respondent thought that overall the benefits of co-operation outweigh the costs. Many agencies suggested that the effectiveness of co-operation should be assessed from a long-term perspective and that, although immediate costs might be perceived as high, they should be considered as a form of investment.

(4) *Competition agencies can rely on different legal bases for international co-operation. Some are designed specifically for the purposes of competition enforcement. In the absence of a specific competition instrument, other international co-operation instruments can apply.*

Among the various existing legal instruments that can be used by competition agencies to co-operate with other agencies – both competition and non-competition specific – bilateral competition agreements and confidentiality waivers are the instruments available to the largest number of agencies. Co-operation-specific national law provisions closely follow as the next most commonly available legal instrument. The responses to the Survey indicate that confidentiality waivers are availability particularly in OECD countries; less so in non-OECD countries.

Competition-specific instruments such as national law provisions, confidentiality waivers and multilateral competition agreements were indicated as most relevant for co-operation, while non-competition-specific agreements (bilateral or multilateral) were perceived as least relevant by most respondents. In terms of 'frequency' of use of the available instruments, national law provisions, confidentiality waivers, letters rogatory and bilateral competition agreements are the instruments that respondents indicated were most frequently used in international co-operation.

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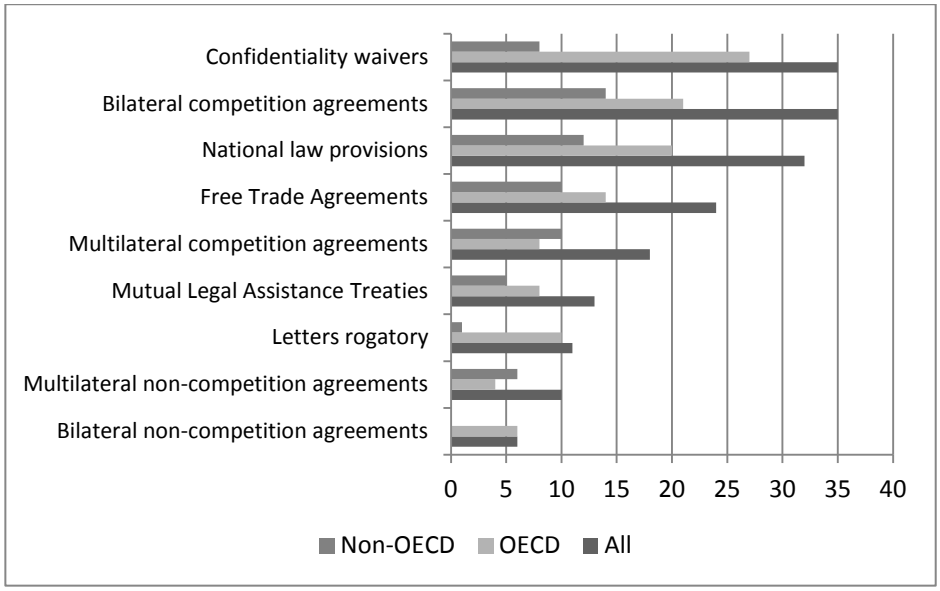
1 For purposes of the Survey, 'international co-operation' was defines as co-operation between international enforcement agencies in specific enforcement cases, *i.e.* merger, cartel, unilateral conduct/abuse of dominance, and other (*e.g.*, non-cartel agreement) cases. The Survey did not concern general co-operation on matters of policy, capacity-building, etc.; only international co-operation in the detection, investigation, prosecution and sanctioning of a specific anti-competitive behaviour or the investigation or review of mergers is covered.

Availability of legal bases for international co-operation, by number of respondents



(5) *Formal instruments for co-operation, such as comity provisions and notification mechanisms, are widely available but used only by a limited number of agencies.*

Comity provisions are available for many agencies in national laws, bilateral or multilateral agreements. However, formal mechanisms associated with comity provisions, such as notifications and requests for investigatory assistance, are used by only a limited number of agencies. There are no great differences in the use of the instruments for different enforcement areas, with only slightly fewer agencies reporting use of formal notifications in unilateral conduct/abuse of dominance cases.

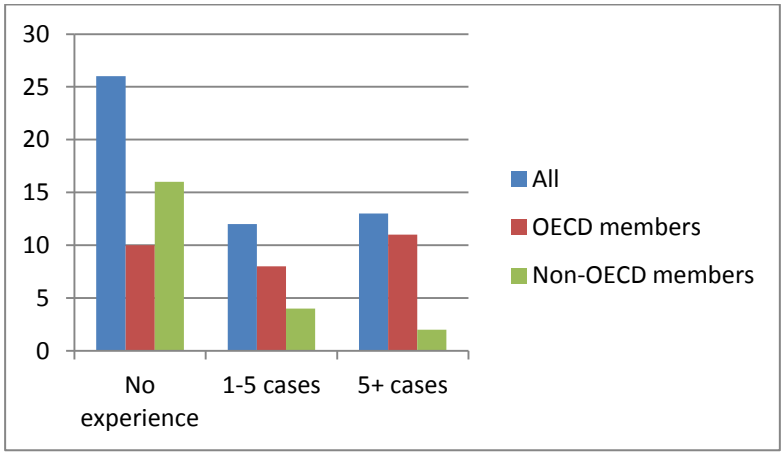
Most agencies that use these formal mechanisms do not give a particularly positive assessment of their usefulness. Agencies emphasize that formal notifications are today less important than in the past, since information on investigations is more easily available, either informally from other agencies or from press coverage, though some agencies assert that notifications may be useful in merger review. Outside of regional platforms, there seems to be limited experience with requests of investigatory assistance, although some of the agencies who have engaged in this type of co-operation are

established agencies accounting for an important share of the overall international co-operation activity. Other agencies stated that their limited experience is due to the lack of available legal basis and to the length and complexity of formal request processes.

(6) *Outside of regional co-operation, frequent or regular experience in international co-operation appears to be concentrated among a few, more experienced agencies. Experience with international co-operation has, however, increased significantly in the last five years and is expected to keep doing so, since 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 co-operation.*

About one-half (52%) of the respondents reported some experience in international enforcement co-operation, excluding regional co-operation.

Number of cases/investigations in which agencies have co-operated (2007-2012)



Agencies have increased international co-operation over time, and that expect further increases due to the rising number of multi-jurisdictional cases. The estimated data provided in response to the Survey indicate approximate increases of 15% in cartel cases, 35% in merger review cases and 30% in unilateral conduct cases. It also confirms that merger review is the enforcement area in which respondents have co-operated most over the period 2007-2011; this is

the enforcement area in which there has been the highest number of cases involving international co-operation in each year.

Experience with international co-operation, by enforcement area, (2007-2011)

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

(7) *Regional co-operation (i.e. co-operation through existing, law enforcement co-operation networks relying on special rules and international agreements) is common in many parts of the world. However, actual experiences with case co-operation seem to differ significantly across regional networks. While some regional co-operation platforms (such as the ECN and the Nordic Alliance) provide competition-specific rules for co-operation in enforcement cases, other networks only provide for opportunities for policy discussion and exchanges of experiences.*

Two-thirds of respondents identified themselves as belonging to a regional network. Respondents referred to two broad types of regional networks: i) platforms that provide competition-specific rules for co-operation in enforcement, and ii) *fora* for general policy discussions on common regional issues, and exchanges of experiences.

The European Competition Network (ECN) is the main platform for co-operation in Europe and provides a unique experience in terms of both the number of participating agencies (all EU member countries' agencies), and the availability of formal instruments for co-operation (allowing for exchange of confidential information and investigatory assistance in antitrust and cartel cases). The Survey shows that many ECN respondents think that the ECN provides a unique setting for co-operation, in that its members apply the same substantive rules and the framework provides very powerful instruments for co-operation. Also in Europe, on a sub-regional scale, the Nordic Alliance has emerged as an enhanced network of co-operation and a platform where participating countries co-operate closely in enforcement.

In other geographical areas (Latin America, Africa and Asia) there are several regional networks that have adopted or are about to adopt regional competition law provisions, including establishment of regional agencies, though experience in case co-operation is still very limited. Other networks mentioned in the responses to the Survey provide a *forum* in which competition policy issues can be discussed at the regional level

(8) *Participants in regional networks identified specific advantages of regional co-operation, such as the strong legal basis for co-operation, and convergence in national laws and agency procedures, which are seen as contributing to increased effectiveness of competition enforcement. A few disadvantages of regional co-operation were also identified by some respondents.*

Most respondents who participate in regional co-operation networks gave a very positive assessment of their participation the role of regional networks. Specific advantages of regional co-operation networks include: a strong legal basis for co-operation, for example for provision of investigatory assistance and exchange of confidential information; convergence in national law and agency procedures; coherent application and development of overarching regional law; and optimal resource allocation.

Respondents perceive economic similarities across a region, including shared experiences of economic growth, to facilitate co-operation within a regional network. Another perceived benefit stemming from regional co-operation is the establishment, through continuous interaction, of a strong network of personal contacts, facilitating access to other agencies. Cultural and language similarities shared at the regional level were also mentioned as an advantage in regional co-operation.

The most commonly identified element undermining the potential advantages of a regional co-operation network is that agencies within the same region may face the same challenges, such as those related to limited resources, making regional co-operation ineffective and particularly burdensome.

Advantages and Disadvantages of Regional Co-operation

Main Potential Advantages	Main Potential Disadvantages
Strong legal basis, including for exchange of information	Similar resource constraints (increased by obligation to make resources available in the region to regional partners)
Convergence of national laws/procedures	Mutual lack of experience
Economic similarities or shared history of development	Constraints on course of action
Coherent application and development of regional law	Enforcement actions of one agency may affect the others
High relevance of co-operation (similar companies and cases)	Potential delays
Strong network of contacts	Lack of competition law or strong competition institutions in the region

(9) *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 co-operation. Addressing these limitations could be beneficial to international co-operation, despite the costs associated.*

Limitations to co-operate can be of a legal nature, for example due to divergence in the national and/or international legal frameworks in which agencies operate; or they can be of a practical nature, such as lack of available resource, time constraints and language barriers. The existence of legal limitations to international co-operation was identified as the most important and one of the most frequently encountered limitations by respondents. Practical limitations appear to be relatively less important but more frequently encountered in the enforcement practice of responding agencies. With regard to the frequency, on average, respondents ranked their experience with limitations as ranging between 'never' and 'seldom'. Respondents also felt that practical difficulties with co-operation can usually be overcome, while limitations of a legal nature tend to bring co-operation to a halt. Limitations and constraints often appear to be relatively less important for OECD agencies than for non-OECD agencies. Non-OECD countries generally find these constraints more difficult to overcome.

Ranking of limitations and constraints, all respondents

Rank	By "importance"	By "frequency"
1	Existence of legal limits	Existence of legal limits
2	Low willingness to co-operate	Lack of resources/time
3	Absence of waivers	Different legal standards
4	Lack of resources/time	Different stages in procedures
5	Different legal standards	Low willingness to co-operate
6	Dual criminality requirements	Absence of waivers
7	Other differences/inconsistencies between legal systems	Other differences/inconsistencies between legal systems
8	Different stages in procedures	Language/cultural differences
9	Lack of knowledge of involvement	Lack of knowledge of involvement
10	Lack of trust	Lack of trust
11	Language/cultural differences	Different time zones
12	Different time zones	Dual criminality requirements

Some limitations have a general impact on all enforcement areas. Lack of prior interaction between agencies and lack of trust, for example, affect the willingness of enforcers to co-operate with each other, and limit effective co-operative relationships to a small group of agencies which regularly engage in co-operation, regardless of whether the co-operation under consideration is in the context of a cartel, merger or unilateral conduct case. Other limitations are specific to one enforcement area; dual criminality requirements, for example, affect co-operation in cartel cases between agencies operating under different legal regimes for cartel prosecution/investigation.

Respondents were willing to work to address existing limitations and maximise benefits from international co-operation. Respondents, however, noted that addressing these limitations may entail costs. These costs relate to: an increased administrative burden from increased co-operation; implementing the reforms required to address some of the restrictions, especially the limitations related to existing legal constraints; and the impact of these reforms on other enforcement policies.

(10) *Effective co-operation of agencies' enforcement actions is enhanced by the ability of enforcers to exchange information (confidential and non-confidential) about cases they are investigating. The exchange of information remains a core feature of international co-operation.*

Legal protection on the disclosure of information often is a constituent part of the authority of agencies to compel information in competition investigations. As such, confidentiality rules are fundamental components of an agency's ability to obtain information and ultimately are key underpinnings that facilitate international co-operation. National and international legal frameworks, however, often do not allow agencies to exchange confidential information. This may impact the effectiveness of international co-operation.

The exchange of non-confidential information is generally allowed and occurs frequently. Agencies engage in case discussions on analytical methods for a particular case (*e.g.* product and geographic market definition) or assessment of the competitive effects of the case, and potential remedies which could be accepted. While the exchange of confidential information relies on formal mechanisms for co-operation, the exchange of non-confidential information and internal agency information often occurs on an informal basis. However, practical limitations (such as language, lack of resource, or different timing of the investigations) can limit the effectiveness of these types of exchanges.

Regional co-operation platforms, such as the ECN and the Nordic Alliance, which provide effective mechanisms for exchanging confidential information can facilitate co-operation significantly. National legislation or international agreements (outside regional co-operation platforms) generally do not allow for the transmission of confidential information to other enforcers. Only in some cases national legislation or international agreements make specific provision for the exchange of confidential information, and even when this is possible agencies use these provisions rarely. The procedures and criteria allowing for the exchange can be burdensome and time-consuming and sometimes may not respond to the need of agencies for timely access to the information.

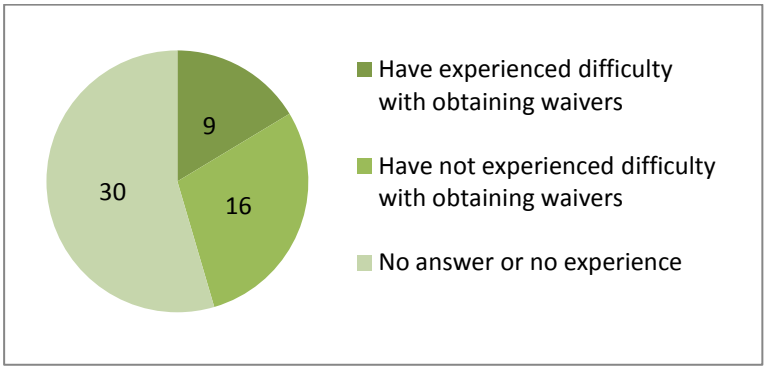
(11) *Confidentiality waivers are often relied upon by agencies, when possible, to address existing limitations to the exchange of confidential information. Experiences with waivers are generally positive. The use of waivers, however, is not as broad as it might be.*

Agencies rely significantly on waivers to address the statutory limitations preventing them from exchanging confidential information. More than two-thirds of respondents are allowed to use waivers in their enforcement activity and some of them have adopted a standard form for waivers. Most agencies, even those that have a standard waiver form, often negotiate the terms and condition for the parties' consent to the transmission of information and/or documents to another enforcement agency on a case-by-case basis.

The use of waivers, however, is not as broad as it might be. Some agencies (all non-OECD) responded that they are not allowed to use waivers under the provisions of their competition law. Agencies that can rely on waivers cannot mandate waivers, the provision of which remains at the discretion of the parties. Most importantly, parties' incentives to grant waivers differ somewhat between merger and cartel cases; in cartel cases their availability largely depends on whether the party has applied for amnesty/leniency.

With regard to issues encountered by agencies in obtaining waivers, over half of Survey respondents either declined to answer the question or had insufficient experience with waivers to be in a position to answer the question. Of those who responded, only a few had experienced some difficulties.

Experiences with obtaining waivers



(12) *Responses to the Survey confirm the important role played by the OECD in shaping the current framework for international enforcement co-operation. They also confirmed that the role of the 1995 OECD recommendation on international co-operation was significantly more effective than that of the 2005 Best Practices on the exchange of information in cartel investigations.*

Many respondents reported experiences with the 1995 Recommendation on international co-operation, in particular with three of the co-operation mechanisms provided for by the recommendation: notifications, exchange of information, and coordination of actions. By contrast, fewer respondents reported actual experiences with the 2005 OECD Best Practices for the formal exchange of information between competition agencies in hard core cartel investigations (2005 Best Practices). Many, however, recognised the important role of the 2005 Best Practices as guidance for legislative reforms at the national and international levels, and as a reference document for informal exchanges of information.

Experience with the 1995 Recommendation on International Co-operation

Instruments under the Recommendation	Respondents with experience
Notification of existing investigations (Rec. I.A.1)	14
Co-ordination of actions (Rec. I.A.2)	9
Exchange of information (Rec. I.A.3)	11
Consultation procedure (Rec. I.B.4 and 5)	4
Conciliation procedure (Rec. I.B.8)	1

The Survey also confirmed that the OECD instruments could be amended or revised to reflect the current status and needs of international co-operation. In particular, it was suggested that the notification procedure in the 1995 Recommendation on international co-operation should be modernised in light of technology advances; and that it should be revised to strengthen its provisions on the exchange of confidential information and eliminate the conciliation procedure, which did not have much use over the years.

(13) *The Survey results suggest that incentives to engage in international enforcement co-operation can be improved through the adoption of a clear legal and institutional setting for co-operation and through an increased awareness of the benefits of international co-operation.*

Several suggestions on how to improve the degree and quality of international co-operation were put forward.

Incentives to co-operation depend on the effectiveness of the international enforcement system. Reforms of the legal and institutional setting for international co-operation can increase incentives for agencies to engage more effectively in case co-operation. Similarly, ensuring a high level of awareness of the benefits of international co-operation and the downside of lack of co-operation was suggested as one priority for the enforcement community.

Suggestions fell into three main categories:

(i) suggestions on how to maximise the benefits of co-operation within the existing legal and practical constraints;

(ii) suggestion on how to improve the existing system of co-operation by addressing the effects of legal and practical constraints on co-operation; and

(iii) a number of suggestions focussed on ways to improve interaction between enforcers, establish contacts, and develop procedures and best practices for more effective relationships.

In general, when asked about their views on the future of international co-operation in 5, or 10, or 15 years time, respondents emphasised that (i) they expect to see more international enforcement co-operation in the future, particularly at regional level; (ii) they hoped to see better provisions for international co-operation and for information sharing in particular; and (ii) globalization is a strong motivation for more co-operation.

(14) *Exchanges of information, and in particular of confidential information, between enforcers is a key area for improvement. Many respondents suggested that agencies should agree on a clearer legal framework for the exchange of confidential information. Reforms in the area of confidentiality waivers are viewed as a way to foster more valuable co-operation through a more effective exchange of confidential information between enforcers.*

According to many respondents, legal limitations preventing competition agencies from exchanging confidential information and evidence are the primary impediment to international co-operation. Generally, with few exceptions, national legislation, international

agreements and instruments do not allow, or allow only to a limited extent, the exchange of confidential information and data. Respondents identified information exchange as an important area for improvement. Many suggested that agencies should agree on a clear legal framework for the exchange of confidential information.

When asked about possible ways to improve the ability of agencies to exchange confidential information, respondents referred to the need to find structural solutions to what is in some ways a structural problem. In general, the report does not suggest that the way forward to address this issue is non-application of confidentiality rules, or their weakening. 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. In a number of these answers, reference is made to "*protocols*", "*instruments*", "*a model agreement*", "*an international agreement*", "*a better system of information sharing*", "*clear legal instruments*" and more generally to the need to "*develop and introduce a reliable mechanism for the exchange of confidential/sensitive information*".

Based on the Survey, an effective legal framework for the exchange of confidential information should address the following questions:

(i) what type of information can be exchanged, and what type of information cannot be exchanged;

(ii) the conditions for the transmission of confidential information to another enforcement agency, and

(iii) what use the receiving agency can make of the confidential information received.

Respondents also identified the use of confidentiality waivers as an area of possible improvement. In this context, suggestions referred to the need to further standardise the scope of and conditions attached to confidentiality waivers to ensure that in practice they do not limit or restrict the ability of agencies to exchange confidential information in a useful manner.

(15) *OECD instruments could be amended or updated to reflect the current status and needs of international co-operation. Developing a model bilateral or multilateral co-operation agreement and a model bilateral or multilateral agreement for the exchange of information are among the projects which obtained the largest support among respondents, followed by the development of a model confidentiality waiver.*

In general, respondents thought that the OECD could take a leading role as a forum to help member countries shape a new legal framework for international co-operation. Many respondents pointed out that the OECD should focus on its specific strengths (*e.g.* "whole of government" approach) and that it may, in particular, be well placed to deal with obstacles to effective co-operation, in particular those of a national legal nature. For example, many respondents believe that the OECD should encourage national legislators more explicitly to address legal obstacles to co-operation in their current legislation, *e.g.* by facilitating information exchanges and investigatory assistance between enforcers.

More generally, OECD members recognised the important role of the OECD as promoter of effective co-operation through the definition of best practices. Many respondents suggested that the OECD should work on a model bilateral or multilateral co-operation agreement and on a model bilateral or multilateral agreement for the exchange of information. For the same reason, interest was also expressed in a new OECD recommendation on international co-operation, or a revision of the 1995 Recommendation on international co-operation. The development of a model confidentiality waiver also gained a fair amount of consensus, ranking 4th in terms of 'priority' among OECD respondents.

Future Work for the OECD by „Priority', based on OECD responses