International Regulatory Co-operation: Case Studies, Vol. 1

CHEMICALS, CONSUMER PRODUCTS, TAX AND COMPETITION



OECD

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Foreword

This report is part of a mini collection of books on the topic of international regulatory co-operation (IRC). It comprises four case studies, upon which the synthesis report (*International Regulatory Co-operation: Rules for an Interdependent World*) builds:

- Chemical safety (provided by the Environment, Health and Safety Division, OECD Environment Directorate).
- Consumer product safety (provided by the Information, Communications and Consumer Policy Division, OECD Directorate for Science, Technology and Industry).
- Co-ordination of Bilateral Tax Treaties/the OECD Model Tax Convention (provided by the OECD Centre for Tax Policy and Administration).
- Competition law enforcement (provided by the Competition Division, Directorate for Financial and Enterprise Affairs).

These case studies directly build on the experience of the OECD as a platform for regulatory co-operation. These case studies have sought to capture the main characteristics of selected IRC experiences and follow a common structure to ensure comparability of approach. This work on IRC has been conducted under the supervision of the OECD Regulatory Policy Committee whose mandate is to assist both members and non-members in building and strengthening capacity for regulatory quality and regulatory reform. The Regulatory Policy Committee is supported by staff within the Regulatory Policy Division of the Public Governance and Territorial Development Directorate.

The OECD Public Governance and Territorial Development Directorate's unique emphasis on institutional design and policy implementation supports mutual learning and diffusion of best practice in different societal and market conditions. The goal is to help countries build better government systems and implement policies at both national and regional level that lead to sustainable economic and social development. The directorate's mission is to help governments at all levels design and

implement strategic, evidence-based and innovative policies to strengthen public governance, respond effectively to diverse and disruptive economic, social and environmental challenges and deliver on government's commitments to citizens.

This publication was co-ordinated by Céline Kauffmann, Senior Economist, under the supervision of Nick Malyshev, Head of the OECD Division on Regulatory Policy. The case study on chemical safety was written by Richard Sigman, Principal Administrator, Environment, Health and Safety Division of the OECD Environment Directorate. The case study on consumer product safety was written by Ewelina Marek, Policy Analyst, Information, Communications and Consumer Policy Division of the OECD Directorate for Science, Technology and Industry. The case study on the co-ordination of bilateral tax treaties and the OECD Model Tax Convention was written by Jacques Sasseville, Head of Unit in the OECD Centre for Tax Policy and Administration. The case study on competition law enforcement was written by Hilary Jennings, Head of Global Relations, and Antonio Capobianco, Senior Competition Law Expert, Competition Division of the OECD Directorate for Financial and Enterprise Affairs. The report was prepared for publication by Jennifer Stein.

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Acronyms and abbreviations

APEC	Asia-Pacific Economic Cooperation forum
ASEAN	Association of Southeast Asian Nations
CARICOM	The Caribbean Community
CFCs	Chlorofluorocarbons
COMESA	Common Market for Eastern and Southern Africa
CPSC	Consumer Product Safety Commission
CPSIA	Consumer Product Safety Improvement Act
ECN	European Competition Network
EFTA	European Free Trade Association
EHS	Environment, Health and Safety
GLP	Good Laboratory Practice
GTIN	Global Trade Item Numbers
HPVs	High Production Volume chemicals
ICPHSO	International Consumer Product Health & Safety Organization
ICPSC	International Consumer Product Safety Caucus
IGO	Intergovernmental organisation
IOMC	Inter-Organization Programme for the Sound Management of Chemicals
ISO COPOLCO	International Organization for Standardization – Committee on Consumer Policy
MAD	Mutual Acceptance of Data

MERCOSUR	Mercado Común del Cono Sur (Brazil, Argentina, Paraguay and Uruguay)
MLATs	Mutual Legal Assistance Treaties
MOUs	Memorandums of Understanding
MPD	Minimum Pre-Marketing set of Data
NAFTA	North American Free Trade Agreement
NCAs	National competition authorities
NGOs	Non-governmental organisations
OAS	Organization of American States
PFOS	Perfluorooctane sulfonate
PIC	Prior Informed Consent
POPs	Persistent Organic Pollutants
SAICM	Strategic Approach to International Chemicals Management
TARIA	Transatlantic Regulatory Impact Assessments
TBT	Technical barriers to trade
TFEU	Treaty on the Functioning of the EU
UNCED	UN Conference on Environment and Development
UNECE	United Nations Economic Commission for Europe
WAEMU	West Africa Economic and Monetary Union
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

Chapter 1

Chemical safety

by

Richard Sigman*

OECD governments have comprehensive regulatory frameworks for preventing and/or minimising health and environmental risks posed by chemicals. These frameworks ensure that chemical products on the market are handled in a safe way, and that new chemicals are properly assessed before being placed on the market. However, different national chemical control policies can lead to duplication in testing and government assessments. They may also create non-tariff or technical barriers to trade in chemicals, discourage research, innovation and growth, and increase the time it takes to introduce new products on the market. This case study shows how the development and implementation of the Mutual Acceptance of Data system – under which chemical safety data developed in one member country using the OECD Test Guidelines and OECD principles of Good Laboratory Practice must be accepted by all member countries – is helping minimise unnecessary divergences across regulatory frameworks and facilitate work-sharing by governments.

* Richard Sigman is Principal Administrator in the Environment, Health and Safety Division of the OECD Environment Directorate.

Introduction

Today, OECD governments have significant and comprehensive regulatory frameworks for preventing and/or minimising the health and environmental risks posed by chemicals. The objective of these frameworks is to ensure that chemical products already on the market are safe or managed in a safe way, and that new ones are properly assessed before being placed on the market. This is done by testing the chemicals, assessing the results, and taking appropriate action. Such a framework, while rigorous and comprehensive when implemented, is very resource-intensive and time-consuming for both governments and industry. For instance, the cost for a pesticide company to test one new active ingredient for health and environmental effects is approximately EUR 17 million, and the resources needed for a government to review and assess the data is approximately 2.2 person-years (OECD, 2010). As many of the same chemicals are produced in more than one OECD country (or are traded across countries), different national chemical control policies can lead to duplication in testing and government assessment, thereby wasting the resources of industry and government alike. Different national policies also create non-tariff or technical barriers to trade (TBT) in chemicals. The World Trade Organization has estimated that since 1998, there have been approximately 32 environment-related TBT specific trade concerns: 10 deal with control of hazardous substances, chemicals and heavy metals (WTO, 2010). Furthermore, differences in regulations and test standards discourage research, innovation and growth – as new research and products may only be accepted in the country or countries which apply the same test standards – and they increase the time it takes to introduce a new product onto the market. They can also lead to inefficiencies for governments, because authorities cannot take full advantage of the work of others which would help reduce the resources needed for chemicals control.

OECD's Environment, Health and Safety (EHS) Programme has been working for over 40 years, through international regulatory co-operation, to harmonise chemical safety tools and policies across jurisdictions and to share work on chemical assessments and common problems with the aim of minimising risks posed by chemicals and reducing non-tariff barriers to

trade. The development and implementation of the Mutual Acceptance of Data (MAD) system – under which chemical safety data developed using OECD Test Guidelines and OECD principles of Good Laboratory Practice in one Member country must be accepted in all member countries – underpins much of this work. The MAD system is the mechanism which provides the framework for regulatory co-operation and is the focus of this case study.

Main characteristics of the IRC under consideration

Actors involved

OECD's Joint Meeting of the Chemicals Committee and the Working Party on Chemicals, Pesticides and Biotechnology (and its 12 technical sub-bodies) carry out the work of the EHS Programme. In member countries, OECD government representatives (including the European Commission) from various ministries or agencies (health, labour, environment, agriculture, etc.) work on OECD projects at the national level. In addition, experts from the chemicals industry, academia, labour, environmental and animal welfare organisations, and several non-member economies participate in projects and meetings. These include, in particular, provisional and full adherents to the Council Acts on MAD: Argentina, Brazil, India, Malaysia, South Africa, Singapore and Thailand. The OECD also co-operates closely with other international organisations, most notably in the global effort to implement the recommendations of the UN Conference on Environment and Development (UNCED, Rio de Janeiro, 1992) and the Plan of Implementation of the World Summit on Sustainable Development (WSSD, Johannesburg, 2002). The OECD participates, along with eight other UN organisations involved in chemical safety, in the Inter-Organization Programme for the Sound Management of Chemicals (IOMC):

- Food and Agriculture Organization of the United Nations;
- International Labour Organization;
- United Nations Development Programme;
- United Nations Environment Programme;
- United Nations Industrial Development Organization;
- United Nations Institute for Training and Research;
- World Health Organization;
- World Bank.

OECD co-ordinates with individual IOMC IGOs based on topics or interest and expertise. This can take the form of joint workshops, joint experts groups, or both organisations working together on a publication. In general, each organisation takes the lead when a topic falls within their specialised expertise (e.g., UNITAR and training). Joint work with UNEP includes, for example, the areas of lead in gasoline, multimedia modelling for the transport of persistent substances and the publication and dissemination of OECD HPV SIDS initial assessment reports. In addition, OECD has a long standing co-operation with the WHO in the field of human health hazard and risk assessment. Similarly, OECD works jointly with FAO in the fields of pesticides, food safety and biotechnology, and partners with ILO and UNITAR on the implementation of the Global System of Harmonisation of Classification and Labelling.

In addition, at times, the OECD work lays the initial groundwork for broader international consensus on chemicals management. For instance, in 1984, OECD countries agreed that when exporting a chemical considered hazardous from an OECD country, the importing country should be informed. This principle was laid down in the 1984 Council Recommendation, and eventually constituted the basis for UNEP and FAO to develop the Rotterdam Convention on Prior Informed Consent (PIC) Procedures in 1998.

The Stockholm Convention on Persistent Organic Pollutants (POPs) is a global treaty to protect human health and the environment from chemicals that remain intact in the environment for long periods, become widely distributed geographically, bioaccumulate in humans and wildlife, and have adverse effects to human health or to the environment. Some Perfluorinated Compounds have been restricted in the European Union, United States, Canada, Australia and other countries and Perfluorooctane sulfonate (PFOS) and related chemical products have been considered for inclusion as new POPs under the Stockholm Convention. OECD's Steering Group on PFCs has worked to share information about scientific insights and regulatory approaches, as well as to collect more reliable data of the production and use of PFCs, including information from producers on environmental releases of targeted substances from manufacturing and the content of targeted substances in products, in support of the implementation of the Stockholm Convention. More recently, OECD and UNEP established a Global PFC Group to improve the outreach to developing countries where the production of PFCs is growing fast.

OECD's EHS Programme is also actively involved in the implementation of the Strategic Approach to International Chemicals Management (SAICM) which bring together governments from more than 150 countries and many stakeholders to support the achievement of the goal agreed at the 2002 Johannesburg World Summit on Sustainable Development of ensuring that, by the year 2020, chemicals are produced and used in ways that minimise significant adverse impacts on the environment and human health.

Intended objectives

The objectives of the MAD system are as follows:

- By accepting the same test results OECD-wide, unnecessary duplication of testing is avoided, thereby saving resources for industry and society as a whole.
- Non-tariff barriers to trade, which might be created by differing test methods required among countries, can be minimised.
- The use and suffering of laboratory animals needed for toxicological tests is greatly reduced, which is a significant contribution to animal welfare.
- By establishing the same quality requirements for tests throughout OECD, a level playing field for the industry is ensured.

The MAD system opens opportunities for countries to work together in the EHS Programme on issues of common concern. By using the results from the same test methods for making safety assessments, mutual understanding among countries about chemical safety assessment and resulting risk management is greatly increased. This allows countries to share work on assessing chemical safety and consider options for managing chemical risks.

Forms that the co-operation is taking:

The principal tools for harmonisation are a set of three OECD Council Acts which make up the OECD Mutual Acceptance of Data system, including its OECD Guidelines for the Testing of Chemicals and Principles of Good Laboratory Practice (GLP):

- The 1981 Council Decision on MAD states that data generated in a Member country in accordance with OECD Test Guidelines and Principles of Good Laboratory Practice (GLP) shall be accepted in other Member countries for assessment purposes and other uses relating to the protection of human health and the environment.

- The 1989 Council Decision-Recommendation which requires the implementation of the characteristics of national compliance programmes for GLP also deals with the international aspects of GLP compliance monitoring. It requires designation of authorities for international liaison, exchange of information concerning monitoring procedures and establishes a system whereby information concerning compliance of a specific test facility can be sought by another Member country where good reason exists.
- The 1997 Council Decision which sets out a step-wise procedure for non-OECD countries to take part as full members in this system.

The binding nature of these Acts, particularly the 1981 Council Decision, ensures that all countries abide by the requirements to accept data from other OECD members, and non members who also adhere to these Acts. In general, most countries adopt the OECD Test Guidelines and OECD Principles of GLP into national regulations, either verbatim or with minor, non substantive changes. With respect to national GLP compliance programmes, OECD's programme of continuing periodic on-site evaluations of members provides for an on-site team, composed of inspectors from other OECD countries, to evaluate each Monitoring Programme every ten years. Following discussion in the Working Group on GLP on the results from the on-site evaluation, a final report, including the conclusions and any recommendations agreed by the Working Group, will be prepared for use by GLP Compliance Monitoring Programmes in member countries in the framework of MAD. Finally, industry is encouraged to notify the OECD Secretariat if one country rejects a study from another country, conducted under the MAD system. Industry has also been provided access to a password-protected site to describe issues of dis-harmonisation across countries in the way they implement the GLP Principles. The Working Group on GLP will evaluate these comments and suggest a path forward.

By making the system accessible to non-member countries who adopt the same test methods and quality standards for chemical safety testing as OECD countries, the same level of protection of health and the environment is ensured. Access to markets is further enhanced by harmonisation and mutual recognition of standards for development of safety data. As a result of the MAD system, countries have confidence in the quality and rigour of the laboratories that generate the test data and the results from such testing, which is particularly important in many EHS activities (e.g., work on assessing the hazards of chemicals) in which countries work together to develop chemical assessments based on agreed data.

Functions being co-ordinated

The EHS Programme focuses on the following areas of co-ordination:

The MAD System

- *Harmonisation*: implementation by OECD countries of the OECD's Mutual Acceptance of Data (MAD) system – including the development and updating of OECD Test Guidelines and Principles of Good Laboratory Practice (GLP).

EHS work made possible because of the MAD system

- *Burden sharing*: given the harmonisation of the test methods and GLP, countries can also collaborate on the actual assessments of chemicals (based on such testing data) for evaluating the safety of high production volume (HPV) chemicals. Through the OECD EHS Programme, individual countries and their chemical companies agree to take the lead on the testing and assessment of some of these chemicals based on the number of high volume chemicals produced or imported in their country. Costs are further reduced by allowing predictive models to be used for groups of similar chemicals so that each chemical does not have to be individually tested.
- *Harmonisation*: Another role for the EHS Programme is to harmonise industry dossiers – based on chemical test data – and review reports for pesticides registration.
- *Exchanging technical and policy information*: the EHS Programme acts as a forum for countries to exchange technical and policy information. By discussing their chemical control policies together, countries tend to develop similar policies and regulations and have greater confidence in each other's systems. In this way, not only are government resources saved, but products can also be brought to market faster. Finally, governments have access to the experience of the many scientific and policy experts from governments, industry, non-governmental organisations and academia who participate in the work of the EHS Programme.
- *Outreach*: the OECD's share in world chemical production is decreasing as non-OECD economies – particularly Brazil, Russia, India, Indonesia, China and South Africa – develop their chemical sectors. Greater international co-operation is needed with these economies to build capacity, share information and ensure that new national chemical management systems do not lead to duplicative work or conflicting regulations and new trade barriers. The OECD's

EHS Programme has a proactive outreach strategy to encourage the participation of non-OECD members in the work of the programme and to allow them access to technical and policy discussions and documentation. Of particular importance is opening the MAD Council Acts to non-members who wish to adhere to the 1981 Council Decision.

Short history of the development of the IRC

Triggers

Over the last four decades, there have been four principle drivers for International Regulatory Co-operation by OECD in the field of chemical safety. One, the chemicals industry – which includes industrial chemicals, pharmaceuticals, pesticides, biocides, food and feed additives and cosmetics – is one of the world's largest industrial sectors and many chemicals are produced and traded internationally.[1] Thus international co-operation on chemical safety was seen as a way to avoid non-tariff trade barriers due to varying regulatory requirements. As many of the same chemicals are produced in more than one OECD country (or are traded across countries), different national chemical control policies can lead to duplication in testing and government assessment, thereby wasting the resources of industry and government alike. Two, releases of chemicals during production and use can travel across national (and sometimes regional) borders and thus, international co-operation is essential for a more comprehensive management of risks. Three, OECD countries, in general, follow the same approach to the assessment of chemicals, and thus there are economic efficiencies if countries can work together on such assessments. Four, through OECD Council Acts there was a possibility to make commitments among countries which are legally (decisions) or politically (recommendations) binding. This level of political engagement that can be achieved through the OECD and the peer pressure that can be applied to help ensure implementation of agreements, are crucial instruments to make sure that countries will follow up on harmonisation arrangements.

OECD's IRC work in the field of chemical safety began in 1971 with a focus on specific industrial chemicals known to pose health or environmental problems, such as mercury or CFCs (chlorofluorocarbons responsible for depleting the ozone layer). The purpose was to share information about the risks of these chemicals and to act jointly to reduce them. One of the important achievements of the early years was the 1973

1. Global sales in 2009 amounted to over USD 3.5 trillion, with exports approximately USD 1.5 trillion.

OECD Council Decision to restrict the use of PCBs. This was the first time concerted international action was used to control the risks of specific chemicals. By the mid-1970s, however, it became clear that concentrating on a few chemicals at a time would not be enough to protect human health and the environment. With thousands of new chemical products entering the global market every year, OECD countries agreed that a more comprehensive strategy was needed. The OECD therefore began developing harmonised, common tools that countries could use to test and assess the risks of new chemicals before they were manufactured and marketed. This led to a system of mutual acceptance of chemical safety data among OECD countries, a crucial step towards international harmonisation and reduction of trade barriers.

Time period, main landmarks

The adoption of the Council Act on Mutual Acceptance of Data in 1981, opened up many new opportunities for governments to work together to tackle chemical management issues, as the same data would be accepted across all OECD countries.

The safety aspects of new chemicals being introduced to the market were obviously a key issue that needed consideration and relevant policies. In 1982, at an OECD High Level Meeting on Chemicals, countries decided that, before new chemicals are marketed, governments should have enough information about them in order to ensure that a meaningful assessment of hazards can be carried out. This decision signalled a policy change from a "react and cure" mode to "anticipate and prevent". As a result, most OECD countries began to set up notification systems for new chemicals. A Minimum Pre-Marketing set of Data (MPD) was agreed in an OECD Council Recommendation, which specifies the information needed in the notification. This data set includes detailed information regarding the toxicity of chemicals and their potential for accumulation and biodegradation in the environment.

Once member countries had established workable systems for managing the safety of new chemicals, their attention turned to so-called "existing chemicals". These were the tens of thousands of chemicals already on the market before new chemicals notification schemes had been put in place in the early 1980s. Member countries agreed that the task of investigating the safety of this large number of existing chemicals was too big for one country. Co-operation among countries on the assessment of these chemicals was initiated by a new Council Decision. The MAD system provided an excellent starting point on which to build such work. In order to organise the large amount of work, a number of priorities had to be set. It was agreed to deal first with High Production Volume chemicals (HPVs) – chemicals

produced or imported annually in quantities of greater than 1 000 tonnes in at least one OECD country or the European Union – because in most cases these would potentially lead to the largest exposures to man and the environment. Agreement was then reached on the information needed on the HPVs, which resembled to a large extent the MPD for new chemicals.

To further facilitate work sharing, OECD governments turned their attention to harmonising industry dossiers for the registration of new pesticides, or re-registration of existing pesticides. By using the same format, once a company compiles a dossier for one country, the costs and time involved in developing dossiers for other countries would be significantly reduced. In 1998, OECD adopted a guidance document for applicants wishing to have particular active substances approved or plant protection products registered. It provides guidance with respect to the format and presentation of the documentation to be submitted. Similarly, OECD issued a guidance document on the format and presentation of the documentation to be prepared by the regulatory authorities (i.e., a pesticide monograph), in the context of applications for the registration of plant protection products. The aim of these two documents was to reduce the cost to industry of submitting dossiers and facilitate the exchange of monographs between OECD countries with a view to achieve a sharing of the work necessary for the evaluation of plant protection products and their active substances. Initial steps have begun toward "joint reviews" conducted by countries on the same pesticide dossiers, with efforts to harmonise the end points derived from pesticide industry safety studies, with the ultimate objective of work sharing. This will save considerable resources for governments, and time for industry.

Similar efforts over the years to develop guidance documents, common formats and share assessments have since been applied in the EHS programme for biocides, chemical accidents, regulatory oversight of biotechnology, the safety of novel foods and feed, and manufactured nanomaterials. Around 20 OECD Council Acts deal specifically with chemical safety issues, many of which foster greater co-operation amongst countries.

Institutional set-up: who does what in the co-operation, at what level of government

The EHS Programme is implemented by the Joint Meeting and its twelve technical sub-bodies. In general, Heads of Delegation to the Joint Meeting comprise the Directors or Heads of Environment, Health and Safety programmes in governments, and their staff participate in the technical sub-bodies of the Joint Meeting.

Most of the work involves the development of instruments, methods, guidance documents and databases which support the harmonisation of chemical programmes, and facilitate work sharing. When the OECD addresses a new chemical safety issue, the starting point is often a survey of current practices in OECD countries. The analysis helps determine similarities and differences among national approaches, and also helps identify the areas where the OECD can add value. OECD countries may then agree on a programme of work with clear, practical objectives and specific timelines. Countries then work together towards the common objectives. They prepare proposals, technical guidance, recommendations and policy documents that are usually reviewed in meetings. After policies are adopted, the OECD plays a facilitator role and assists countries in the implementation of the decisions by developing high-quality tools and instruments and regularly reviewing the implementation in member countries. In many cases, one or more governments takes the lead on developing new instruments often based on existing material – such as existing national test guidelines with the intention of developing harmonised OECD Test Guidelines that can be used to generate data that will be accepted in all OECD countries. All of these products are freely available via the internet. Many member countries and the European Union have used these products directly as part of their regulations (for example the Test Guidelines and GLP as standards for testing), or they have used the EHS products as a basis for developing and implementing their regulations.

Typically, the staff of the EHS Division carries out the daily work, co-ordinating efforts with the work among experts and policy makers and with other intergovernmental organisations. The staff reviews and revises the first drafts proposed by lead countries, incorporates comments from experts in documents, organises the necessary meetings and teleconferences and works to build consensus on documents among member countries. The Secretariat also looks carefully at emerging issues in the chemical safety arena and brings them to the attention of countries, through proposals for work to be undertaken at the OECD. From the beginning of the work, stakeholders beyond government have also contributed actively through their participation in meetings. Many of the methods which are developed to address chemical safety have to be used by industry, and therefore it has been of great value to include the expertise from the chemical industry in the development of such methods. Participation by stakeholders from organised labour, environmental NGOs and the animal welfare community has also been important in ensuring a wider acceptance of this work.

Next steps envisaged in the co-operation

The Programme of Work for 2013-16 calls for a continuation of current efforts to support international regulatory co-operation, but also particularly in new areas:

- *Greater outreach to non-members*. Global shifts in patterns of production of chemicals will mean that more countries will consider it prudent to set up chemical safety policies. Given the experience of OECD – including its support of SAICM – further co-operation with selected non-members in a global context could prove to be very useful. In addition, input to OECD work from non-member experts will contribute to increasing the quality of the products and making them more widely applicable.
- *Co-ordination with experts to develop new methods* which can improve the efficiency of the chemical safety management (e.g., mathematical approaches designed to find relationships between chemical structures and biological activities of studied chemicals).
- *Sharing information to assist countries in risk management of specific chemicals* of concern, such as perfluorinated chemicals.

Assessment

Benefits

In 2010, an analysis was conducted to determine the net savings governments and industry accrue from their participation in the OECD EHS Programme (OECD, 2010) (a similar analysis was conducted in 1998). With respect to quantitative savings, the analysis focused on the benefits of two approaches: *harmonisation* (e.g, through the Mutual Acceptance of Data system) and *burden sharing* (e.g., from working together through the HPV programme).

Three surveys were conducted in March 2009 to collect data from OECD governments and the pesticide and industrial chemicals industry. Additional data were collected from the OECD's Event Management System (EMS) which contains data on the number of OECD meetings held each day and the number of delegates registered for those meetings, and from the OECD's High Production Volume database. In essence, the analysis compared two scenarios: *one* with the MAD system, sharing the burden activities, and use of common formats; and *the other*, without such approaches. For example, without the OECD MAD system, slightly different test methods and GLPs would have been developed by each country independently. Based on the results of the EHS surveys of the

pesticide and industrial chemicals industries, it was estimated that, in the absence of the EHS Programme, Country A would not accept 36% of the test data for *new industrial chemicals* nor 33% of test data for new *pesticides* emerging from Country B because of differing methods, and therefore, that testing would have to be repeated.

The savings can be summarised as follows:

Table 1.1. Annual savings resulting from the OECD's EHS Programme

Savings due to:	Savings
New chemicals	
• no need to repeat testing	EUR 27 576 000
New pesticides	
• no need to repeat testing	EUR 134 640 000
• use of OECD dossier format	EUR 1 546 800
• use of OECD monograph format	EUR 2 408 700
High production volume chemicals	
• no need to repeat testing; ability to use quantitative structure activity relationships (Q)SARs following OECD principles	EUR 1 547 400
• use of co-operative assessments	EUR 508 680
Total savings (not counting costs)	EUR 168 230 000

OECD (2010), *Cutting Costs in Chemicals Management: How OECD Helps Governments and Industry*, OECD Publishing. doi: 10.1787/9789264085930-en.

In addition, in developing this report it was not possible to quantify all of the benefits of the programme's work. However, these unquantified benefits are just as real, likely and important as the quantified benefits. Such benefits include the health and the environmental gains from governments being able to evaluate and manage more chemicals than they would if working independently. They also include the avoidance of delays in marketing new products; according to industry sources, these could represent similar amounts of money as those saved by avoiding duplicative testing (for example, delays in registrations of a pesticide might lead to missed sales for a full growing season). Further, by providing a forum for experienced experts from member countries to discuss scientific issues, the EHS programme is helping countries develop new and more effective methods for assessing chemicals (e.g., approaches for assessing chemicals with endocrine disrupting potential, the effects of chemicals on children, and the effects of exposure to multiple chemicals). Individually, no country could match this level of expertise in each field. A summary of the non-quantitative benefits is provided in the table below.

Table 1.2. Qualitative benefits of the EHS Programme

Benefits for governments	Benefits for industry	Benefits to society
Creation of networks among government and industry experts in OECD countries	Creation of networks among government and industry experts from the OECD countries	Reduction in animal testing
Forum to develop new policies to harmonise OECD-wide (9 Council Decisions, 12 Council Recommendations, 1 Council Resolution)	Reduction in delays for marketing new products	Better health and environment protection: • More chemicals can be evaluated, and action taken if necessary, than if countries work independently
Development of technical instruments that improve the quality of chemical evaluations and regulations	Harmonised classification and labelling systems for chemical products	• Worldwide availability of transparent, government-vetted, high quality information and data
Access to information and advice from countries with different policy experience	Reduction in non-tariff trade barriers	
Harmonised classification and labelling systems for chemical products	Opportunity to obtain information about OECD countries' policies and regulations	
Much increased availability of safety data on high production volume chemicals		

OECD (2010), *Cutting Costs in Chemicals Management: How OECD Helps Governments and Industry*, OECD Publishing. doi: 10.1787/9789264085930-en.

Challenges

Considering the work done so far in the EHS Programme and looking at expectations for future activities, the following challenges can be considered:

- while the commitment of member countries and stakeholders to provide expertise and extra budgetary resources for work in the Programme is listed as one of its strengths, in times of budgetary constraints, this dependence on such commitments in order to be able to produce high quality results, could also turn into a threat;

- After years of working on chemical safety, many of the "easy" issues have been dealt with and while for the remaining tasks international harmonisation and work sharing will continue to be as necessary as before, the technical complexity (including advancements in science) will be increasing, which will make the relevance of continued work on chemical safety more difficult to explain to policy makers;
- The shift in chemical production from OECD countries to non-members can make the OECD less representative and less influential in the global setting when not enough attention is paid to outreach;
- While obtaining consensus on methods and guidance is a necessity to ensure that these are also used in practice by all concerned, there is a risk that with the increasing complexity of issues and the increasing number of players involved, the process of obtaining consensus will become slower;
- The difficulty of the monetary quantification of the effects of chemicals on human health and the environment, as well as of the impacts chemical safety policies have on avoiding such effects, can also result in a lower policy priority for chemical safety. Cost of inaction calculations, which have been politically influential in other areas of environmental policy, are difficult to carry out for chemical safety policies.

Costs

In the 2010 analysis, the costs of the EHS Programme were calculated based on *i)* Secretariat costs (OECD Secretariat support, including staff salaries, benefits and travel; consultants and invited experts; and general overhead); and *ii)* Country costs (the costs to governments, industry and other non-governmental organisations (NGOs) of participating in and contributing to the work of the EHS Programme). These include both travel costs to attend OECD meetings and staff costs for developing and reviewing EHS documents and preparing for and attending EHS meetings.

The 2010 report estimated the annual costs of the EHS Programme as shown in the table below. From this, the *net* annual savings of the Programme were estimated to be EUR 153 000 000: *Total savings [EUR 168 230 000] minus Costs [EUR 15 228 000]*.

Table 1.3. Estimated total annual costs of supporting the EHS Programme

Country costs		Secretariat costs	
Number of meetings[a]	99	Part I budget[b]	
Average length of meetings[c] (days)	2.52	Expenditure on permanent staff and consultancy funds	EUR 342 050
Total number of participants[d]	3 589	Part II budget[f]	
Travel costs[e]	EUR 5 578 700	Special Programme on the Control of Chemicals	EUR 1 821 700
Country staff costs[g]	EUR 6 069 100	Grants[h]	EUR 1 416 100
Total country costs	EUR 11 648 000	Total Secretariat costs	EUR 3 579 800
Total costs (Secretariat and countries)		**EUR 15 228 000**	

Notes:

a Yearly average over the period 2006 to 2007 (from EMS data).

b The Part I Budget is the regular OECD Budget to which all member countries contribute.

c The average length of meetings is a weighted average based on the number of participants and the length of each meeting.

d Yearly average over the period 2006 to 2007 (from EMS data).

e Travel costs (rounded) = travel [weighted average cost of round-trip flight (EUR 1 000) x number of participants (3 589)] + expenses [length of meetings (2.52 days) x daily expenses (EUR 220) x number of participants (3 589)].

f The Part II budget constitutes assessed extra-budgetary contributions made by 27 out the 30 member countries to support the Special Programme on the Control of Chemicals.

g Country staff costs (rounded) = participation [length of meetings in hours (2.52 x 8 = 20.16) x number of participants (3 589) x staff costs per hour (EUR 36)] + preparation [(133% x 20.16 = 26.8128) x number of participants (3 589) x staff costs per hour (EUR 36)].

h Extra-budgetary contributions from countries to support specific activities in the EHS Programme.

Source: OECD (2010), *Cutting Costs in Chemicals Management: How OECD Helps Governments and Industry*, OECD Publishing. doi: 10.1787/9789264085930-en.

Factors of success

- Trust building:
  - Development of a common language / formats;
  - Alignment of testing methods and GLP;
  - Establishment of binding Council Acts on Mutual Acceptance of Data.
- Focused initiative that grew progressively;
- Strong industry buy-in and support.

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Chapter 2

Consumer product safety

by

Ewelina Marek*

Co-operation and co-ordination among product safety regulators have taken on increased importance in recent years, particularly with respect to products that are traded internationally. The situation reached a critical point in the summer of 2007, when a number of high-profile incidents occurred, leading to the launch of an action plan hosted by the OECD Working Party on Consumer Product Safety aimed at improving information sharing within and across jurisdictions. This case study identifies the main characteristics of this initiative, describes the instruments of co-operation and analyses how it contributes to promote regulatory co-operation in the area of product safety.

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Introduction

Consumer product safety authorities are responsible for protecting household consumers from unreasonable risks of illness, injury or death from products that they purchase and use. In many jurisdictions the responsibility for protecting the consumers is shared among a number of specialised agencies.

Co-operation and co-ordination among product safety regulators have taken on increased importance in recent years, particularly with respect to products that are traded internationally. The situation reached a critical point in the summer of 2007, when a number of high-profile incidents occurred, leading to the launching of a major project at the OECD.

The work resulted in the development of an action plan aimed at improving information sharing within and across jurisdictions (OECD, 2010). The scope of the work was limited to help keep it manageable; it does not, for example, include food and pharmaceutical products. The plan encompasses a series of short-, medium- and long-term actions. To support its implementation, the Committee on Consumer Policy established a Working Party on Consumer Product Safety in April 2010. The work has attracted increased interest as a number of OECD jurisdictions have recently adopted legislation that has lowered barriers to sharing information.

The mandate for the working party calls on it to promote the safety of consumer products in global markets by: *i)* promoting the exchange of information on product safety within and between economies, coming from OECD and non-Members and *ii)* promoting the development of systematic methods for monitoring and assessing developments in consumer product safety, including developments in policy and enforcement.

Main characteristics of the IRC under consideration

Actors involved

The working party provides a forum for identifying, examining and discussing emerging issues and developing practical tools to improve the way product safety issues are being addressed across borders. Participants include product safety regulators and experts from member and non-member countries and international organisations that focus on product safety issues.

In addition to the OECD member[1] countries and the European Commission, Brazil, Colombia, Egypt and India are also participants and a number of countries have been taking part on an *ad hoc* basis. They include Indonesia, Malaysia, the People's Republic of China, the Dominican Republic, Barbados, Suriname, Jamaica, United Arab Emirates, and Peru. International organisations that are involved in the work include:

- Asia-Pacific Economic Cooperation forum (APEC);
- Association of Southeast Asian Nations (ASEAN);
- European Free Trade Association (EFTA);
- GS1 (a non-profit business organisation that develops standards to facilitate supply-chain management; its work includes development of a product taxonomy that is widely used by business);
- International Consumer Product Safety Caucus (ICPSC);
- International Consumer Product Health & Safety Organization (ICPHSO);
- International Organization for Standardization – Committee on consumer policy (ISO COPOLCO);
- Organization of American States (OAS); and
- Working Party on Regulatory Co-operation and Standardization Policies (WP6) of the United Nations Economic Commission for Europe (UNECE).

Country representatives include delegates from consumer agencies (e.g., the National Institute for Consumer Protection of Spain and the Korea Consumer Agency), national market surveillance agencies responsible for product safety (e.g., the US Consumer Product Safety Commission and the Australian Competition and Consumer Commission), from relevant ministries (e.g., the Ministry of Industry, Trade and Labor of Israel), from standardisation bodies [e.g., the National Institute of Metrology, Quality and Technology of Brazil (INMETRO)]. In their jurisdictions, agencies are responsible for ensuring consumer product safety on the domestic marketplace.

Intended objectives

The mandate of the Working Party calls for it to promote the safety of consumer products in global markets by:

- Promoting the exchange of information on product safety within and between economies;
- Supporting research on product safety issues;
- Promoting the development of systematic methods for monitoring and assessing developments in consumer product safety, including developments in policy and enforcement;
- Promoting co-operation between Members and non-members on product safety issues of mutual interest;
- Promoting harmonisation of product safety requirements and information collection.

Box 2.1. **Summary of actions that could be taken to strengthen information sharing on product safety, and progress made**

Short-term actions

1. Pool information on recalls and emergency alerts on a single website.
2. Develop mechanisms to co-ordinate international product safety initiatives more effectively.
3. Support other regional and global fora: will help to *i)* increase understanding of domestic differences, *ii)* promote harmonisation of standards, *iii)* flag emerging issues.

Medium-term actions

4. Provide web access to studies of hazards.
5. Provide web access to updates on regulatory activities.
6. Establish restricted web directory of safety experts.

Longer-term actions

7. Reach agreement on format for injury data collection.
8. Pool information on product hazards on a web-based platform (for regulators only).
9. Develop confidentiality protocol for sharing research information.
10. Enhance international co-operation on traceability.

To this end it developed a ten-point action plan (Box 2.1). Top priority has been placed in developing a global portal on product recalls and an inventory of international and national consumer product safety initiatives. The former is aimed at an automatic gathering of information on unsafe products from domestic web sites into a single OECD platform and the latter at provision of a web space for exchange of information on ongoing and upcoming activities in the consumer product safety area. Both platforms are now operational. The information gathered on them is both quantitative and qualitative in nature.

Forms that co-operation is taking

Co-operation is voluntary and is based on a mutual interest between the working party members and related organisations. It is aimed at better co-ordination and streamlining of work in the product safety area. All participants are encouraged to actively participate in the working party's efforts to enhance information-sharing. The co-operation takes the form of a managed network to co-ordinate product safety activities. Non-governmental stakeholders are also benefiting from the work. For instance, it was agreed that the global portal on product recalls should be made publicly available, which has been done; therefore consumers, businesses and other stakeholders can access it at http://globalrecalls.oecd.org. The inventory of national and international initiatives has two separate sections: one for regulators only and another for a broader audience.

For 2013-14, the working party is developing an evaluation mechanism to assess the performance and impact of its activities on a regular basis. Thus far, it identified three main areas which could be assessed in the future: *i)* improving responsiveness and effectiveness of product safety policy and regulatory regimes, *ii)* improving co-ordination of international product safety work, and *iii)* enhancing co-operation and collaboration with non-members in examining and responding to product safety challenges. In addition, regular meetings and particularly organisation of roundtables on recent policy and regulatory developments during the working party sessions, help to gather and share information on an ongoing basis.

Functions being co-ordinated

The working party is currently focusing its work on data collection and monitoring. Over time, it is likely to become more active in using this information for identifying best practice and for co-ordinating enforcement actions.

Short history of the development of the IRC

Triggers

Interest in the IRC was triggered during 2007, when a series of highly publicised product recalls resulted in a number of countries proposing that the OECD will carry out work to determine what could be done to improve co-operation. Changes in the international situation heightened interest. With the growing role that developing countries have been playing in manufacturing and the increasing complexity of products and the supply chain, product safety authorities have been facing greater challenges in ensuring consumer safety, particularly in products traded internationally. Improving information sharing across borders has become increasingly important for addressing emerging concerns in the product safety area, so that unsafe products can be identified more swiftly and removed from markets in a timely fashion. At the same time, changes in regulations are allowing countries to share information about products more freely. Moreover, the ability of jurisdictions to share information has become easier with the development of the Internet as a cost and time-effective mechanism for information sharing; it is now possible to exchange information in real time, enabling regulators and other stakeholders to move quickly when products need to be recalled or alerts need to be made. Adoption of an industry-based classification for products[2] has further facilitated the sharing of information across borders.

Time period, main landmarks

The recent work on consumer product safety resumed related work carried out a number of years ago. In 1972, an OECD's Working Party on Consumer Safety was created and was active through 1997, when reductions in the resources allocated to consumer issues resulted in it being abolished. While it was active, the body provided a platform for carrying out research and developing policy guidance. As indicated above, work resumed in 2007. In 2008, an analytic review of existing consumer product safety regimes in OECD countries was prepared and discussed with stakeholders from member and non-member economies.

In 2009 and 2010, the OECD's Committee on Consumer Policy examined what could be done to improve the way safety issues were being addressed, deciding to focus on ways to improve information sharing. In April 2010, the Committee completed its work, with the publication of a report on "Enhancing Information Sharing on Consumer Product Safety (OECD, 2010), which contained the ten-point action plan mentioned earlier. At the same time, it decided that the OECD should take the lead in

implementing the recommendations, in co-operation with other organisations carrying out related work. It created the Working Party on Consumer Product Safety in April 2010, for this purpose.

As mentioned above, the working party has been focusing its attention on two projects: the global portal on product recalls and the web-based platform for collecting information on international and national initiatives since 2010.

In addition to these initiatives, the working party is being used as a vehicle for discussing policy and regulatory developments in product safety and organising workshops on key issues (e.g. risk assessment and traceability). It is expected that this will work towards greater consistency in the way that countries view problems and improved communication.

Institutional set-up: who does what at what level of government

The working party meets two times per year in plenary session. When possible, the timing and venue of the meetings are linked to other product safety events, to enhance efficiency. A number of informal project teams have been established to advance work in key areas in between meetings. These teams currently address five areas: the global portal on product recalls, the inventory of national and international initiatives, product risk assessment, a proposed global portal on injury data, and global relations. Participants in the working party and the project team include senior product safety officials and product safety experts.

The working party also co-ordinates its work with other organisations that are carrying out related work, as follows.

International Consumer Products Safety Caucus (ICPSC)

Membership in the ICPSC is open to consumer product safety regulators and market surveillance authorities worldwide. It aims at facilitating the exchange of information on consumer product safety issues in the area of governmental policy, legislation and market surveillance, with a view towards strengthening collaboration and co-operation among participating economies.

International Consumer Product Health and Safety Organization (ICPHSO)

The ICPHSO is a multi-stakeholder forum which addresses health and safety issues related to globally marketed consumer products through symposiums, training sessions, newsletters and its website. Consumer organisations and consumer advocates, government agencies, businesses, legal firms and academia participate in the organisation.

Organization of American States (OAS)

The OAS is a regional forum whose objective in the field of product safety is to enhance political dialog and economic efficiency in the Western Hemisphere (*i.e.*, North and South Americas and the Caribbean) by providing a venue for sharing information and co-ordinating domestic product safety initiatives. It mainly focuses on capacity building. It has recently developed a web platform, for collecting and disseminating information on product safety issues and recalls, in English, Spanish and Portuguese.

Association of Southeast Asian Nations (ASEAN)

The ASEAN's Committee on Consumer Protection, which was established in 2007, includes a working group that is developing a rapid alert system and information exchange designed to enhance information sharing on recalled/banned products and information on measures taken by businesses on unsafe products. The system covers all consumer products except food, pharmaceuticals, health supplements, traditional medicines, cosmetic products and medical equipment. The system relies on the completion of notification forms, which are then shared with other authorities in the region. In the future, the mechanism will be expanded to include voluntary recalls made by the private sector, from both manufacturers and importers. The recalls will be also published on the ASEAN website.

Asia-Pacific Economic Cooperation (APEC)

In APEC, consumer product safety regulators have focused on issues related to toys. It has recently undertaken a toy safety initiative to enhance toy safety standards and practices, by increasing transparency, encouraging better alignment and reducing unnecessary impediments to trade.

International Organization for Standardization – Committee on Consumer Policy (ISO COPOLCO)

The ISO-COPOLCO is a technical committee that reports to the ISO Council. It provides a forum for the exchange of information on the experience of consumer participation in the development and implementation of standards in the consumer field, and on other questions of interest to consumers in national and international standardisation. This includes specific work on products safety standards. COPOLCO also proposes new areas for standardisation where there is a perceived need for enhanced consumer protection. The ISO COPOLCO currently has 62 participating country members and 43 observer country members.

GS1

The GS1 is a non-profit organisation, which develops voluntary standards for businesses and facilitates their co-operation at the international level. It has for instance developed a product taxonomy, which is a classification system for grouping products through use of the Global Trade Item Numbers (GTIN) that serve a common purpose, are of a similar form and material, and share the same set of category attributes. The system is used by businesses, and more recently by some customs, regulators and the working party to develop its global portal on product recalls. It is particularly helpful in supply chain management and has also proven to support market surveillance actions by regulators. In Korea, for example, consumer protection authority is able to block unsafe products at the point of sale within half an hour after issuing information that a product poses risk to consumers.

Informal initiatives at the international level

In addition to formal activities, regulators carry out informal initiatives at the international level. For example, currently Australia, Canada, the European Commission and the United States are seeking to clarify and address the hazards of a number of products, including corded internal window coverings, baby slings and chair top booster seats. A paper has been developed describing the approaches actively being pursued to address issues by participating countries. Another initiative, led by Australia, Japan, Korea and the United States, concerns button batteries, which are small batteries that are being used in a wide variety of products, in ways that may easily be accessible to young children. If swallowed the batteries can lodge in the throat (or intestines) and burn through tissue resulting in serious injury or death. Regulators are working with stakeholders including researchers, industry representatives and consumer groups to address the problem. The issue was examined at the World Health Organization conference held in October 2012 in New Zealand.

Next steps envisaged in the co-operation

In addition to further developing the recalls and inventory portals, the working party is now exploring a longer term project to develop a common framework for injury data collection and dissemination. Currently, there are several jurisdictional or regional based systems being used to collect injury data on consumer products. There is, however, no single source of this data at a global level. The feasibility of the project is currently being assessed.

Continued emphasis will be placed on strengthening ties with non-members. These countries will be invited to take part in meetings, initially on *ad hoc* basis. If mutual interest is established, participant status will be explored. In the longer term, the Working Party will explore possibilities for engaging non-members more fully in its work.

Assessment

Benefits

It is expected that the working party activities will bring financial and non-financial benefits for participating stakeholders, including government regulatory agencies (including customs authorities), businesses and consumers.

For regulators

Development of mechanisms for enhancing international co-operation in a more efficient and effective way will support regulators in detecting and acting on consumer product safety issues, both within and across jurisdictions. As a result of enhanced information-sharing across borders, enforcement actions could be better co-ordinated. This could avoid overlap of activities and more effective and efficient market surveillance. In other words, a recall in one domestic market could be swiftly pursued in another country in which the same product would be available on the market. With the OECD web-solutions, the working party members expect also to improve their market surveillance techniques, which would be based on a greater amount of information from their counterparts.

The stakes are high as injuries associated with the use of unsafe consumer products are affecting tens of millions of persons worldwide each year, with treatment costs that are estimated to exceed USD 1 trillion per year. Members of the OECD working party expect that the number of injuries could be reduced around the globe through enhanced information sharing as it could support regulators in removing dangerous products from markets in a more timely manner. At the same time, a publicly available global portal on product recalls could increase awareness of consumers and businesses about unsafe products worldwide. Sharing of information on legislative developments and case studies of hazards, moreover, could enhance the effectiveness of regulatory bodies.

The savings and benefits achieved are expected to greatly exceed the cost of the activity (estimated at EUR 215 000 to EUR 340 000 per year) in the long term. A quantitative evaluation of benefits is, however, not possible for the time being. Harmonisation of data can also lead to substantial

monetary savings. For instance in the United States, according to GS1,[3] the use of global trade item numbers (GTINs) could reduce the volume of imported consumer toy products subject to examination by the US Consumer Product Safety Commission (CPSC) by 75%, which would result in about USD 16.8 million in savings for toy importers and USD 775 000 in cost savings for the CPSC over five years. The estimated return on investment is over USD 8 for every dollar invested. Qualitatively, an analysis of OECD consumer product safety regimes identified the need for improved information sharing amongst governments internationally as one of the most emerging issues to be addressed (Figure 2.1).

Figure 2.1. Addressing emerging consumer product safety issues



1- Urgently needed; 2- High priority; 3- Not urgent; 4- Not needed.

This chart represents the views of 13 countries.

Source: OECD (2008), "OECD Analytical Report on Consumer Product Safety", OECD, Paris.

There are also benefits for countries which have not yet developed product recall systems (i.e. largely non-members), as they would have the possibility of adapting the global portal on product recalls for domestic use, at low cost.

The inventory is providing a robust platform for sharing information on product safety activities, which will ultimately improve quality and effectiveness of regulation. More efficient market surveillance is expected, as are increases in the compatibility of information systems, which will further enhance the effectiveness of regulation, particularly in cross-border contexts.

For businesses

For business, enhanced co-ordination and discussion among governments about product safety problems are expected, over time, to result in more consistent regulatory responses across jurisdictions, which will be beneficial to firms. More timely and effective responses to problems, could, moreover, reduce the number of persons affected, thereby resulting in fewer claims. The portal will also contribute to fight against counterfeited products, which do adhere to safety requirements.

For consumers

Governments play a critical role in establishing the framework in which consumer decisions are made. In this regard, market surveillance agencies are increasingly examining ways to go beyond protecting consumers, by improving and enhancing their ability to critically evaluate goods and services to avoid injuries. Providing information on products that could pose a danger or are unsafe in an easily accessible manner, e.g., *via* mobile phones or the Internet, would assist consumers in this regard. Ultimately, enhanced market surveillance activities may improve consumer trust in markets and the safety of purchased products.

For customs

Customs authorities play an important role in detecting unsafe products at borders. Linking the global portal on product recalls to the WCO classification system would facilitate their ability to identify unsafe products.

For economies

From a macroeconomic point of view, prevention of injuries and death would generate savings for participating economies. It would decrease the number and therefore the costs for treating the injuries and could, as a result, increase productivity.

Other

Over time, co-operation among regulatory bodies could well lead to greater harmonisation of standards, which could have benefits for all stakeholders. For business, the cost of compliance with varying standards and the potential need to modify products to meet different standards could diminish. At the same time, regulatory agencies could have greater possibilities to co-ordinate testing and market surveillance, thereby reducing costs. The business community is highly interested in the potential for savings in this regard. The US Chamber of Commerce, for example, has proposed that the US and EU regulatory agencies undertake Transatlantic Regulatory Impact Assessments (TARIA) on significant existing and pending product safety regulations in order to overcome the costs of unnecessary regulatory divergences and to enhance the efficiency and effectiveness of regulators (U.S. Chamber of Commerce, n.d.).

Challenges

Legal constraints to sharing information have been a significant challenge. These were recently relaxed to some extent in some jurisdictions but still do not allow for full information sharing on consumer product safety issues. One of the examples of lowering barriers to information sharing is the US Consumer Product Safety Improvement Act (CPSIA), which was passed by the Congress in 2008 to allow the sharing of confidential information with foreign regulators (Section 207 of the CPSIA). Previously the CPSC could only exchange certain general information (OECD, 2010).

Another important aspect of information sharing globally is related to identifying ways to code products in a way that would enable a recalled product in one country to be swiftly identified in another. Use of the GS1 system is helping to address the issue, but success depends critically on the ability jurisdictions to map products to the system at a detailed level, which remains a significant challenge.

Once in place, the global portal on product recalls, along with the inventory of initiatives will require continuous efforts to maintain their timeliness and relevance. Sufficient resources will be required to achieve this, which could also prove challenging.

Finally, there is an ongoing need to avoid duplication of work that might be taking place in other global *fora*. This is particularly important with respect to the global platforms. Efforts are therefore being made to co-operate closely with other organisations that are carrying out related work.

Notes

1. Participation is open to all OECD members. Thus far, the following OECD countries have indicated their interest in taking part in the working party's activities: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Finland, France, Hungary, Israel, Japan, Korea, Mexico, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.
2. The system developed by GS1 is being used; further information on GS1 is provided below.
3. US ITDS Product Information Committee "The business case for using e-commerce data to manage product admission at international borders: Guidance for Government Agencies and Interested Supply Chain and Trade Companies".

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Chapter 3

Model Tax Convention

by

Jacques Sasseville*

To avoid the important distortive effects that double taxation has on cross-border trade and investment, countries have developed a vast network of bilateral tax treaties. However, absent internationally-agreed standards and an easily accessible set of draft provisions, negotiations of these bilateral treaties between countries would be extremely difficult and these treaties would be applied and interpreted differently by countries. This case study deals with the role played by the OECD Model Tax Convention in the co-ordination of the internationally-agreed standards for the elimination of double taxation of income and the prevention of tax evasion. These standards are reflected in the network of more than 3 500 bilateral tax treaties that have been concluded, and are interpreted and applied, on the basis of these standards, which need to be continuously refined and adapted to new situations.

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Introduction

This case study deals with the co-ordination of the internationally-agreed standards for the elimination of double taxation of income (both at the corporate and individual levels) and the prevention of tax evasion. These standards are reflected in the network of more than 3 500 bilateral tax treaties that have been concluded, and are interpreted and applied, on the basis of these standards, which need to be continuously refined and adapted to new situations.

The need for bilateral tax treaties can be succinctly explained as follows. In order to remove tax-induced distortions between, on the one hand, domestic and foreign investments by resident investors and, on the other hand, domestic investments by resident and foreign investors, tax systems of most advanced countries follow the practice of taxing residents on their income regardless of its source ("residence taxation"), whilst, at the same time, taxing domestic income of foreigners ("source taxation"). This, however, creates a significant risk of double taxation since the income that a resident of State A derives from State B constitutes both the foreign income of a resident from the perspective of State A and the domestic income of a foreigner from the perspective of State B.

Since such double taxation, if it were to occur, would have an important distortive effect on cross-border trade and investment, countries have developed legal mechanisms to eliminate that double taxation. These mechanisms are incorporated in the vast network of bilateral tax treaties that currently exist (most countries also incorporate certain features of these mechanisms in their domestic laws).

These treaties also include rules on exchange of tax information and on assistance in the collection of taxes which allow countries to provide assistance to each other in the fight against cross-border tax evasion.[1]

The conclusion of tax treaties involves negotiations between countries that have different tax systems and tax policies, which explains the need for specifically-tailored rules. Absent internationally-agreed standards and an easily accessible set of draft provisions that have been thoroughly discussed and tested in practice, these negotiations would be extremely difficult,

particularly for countries that have limited experience with tax treaties (as was the case for many Central and Eastern European countries in the 1990s). Also, once concluded, these treaties must be applied in a large number of different situations, which creates the need for guidance on the application and interpretation of their general provisions in particular circumstances.

Main characteristics of the co-ordination in the area of tax treaties

Persons and institutions involved

The OECD Committee on Fiscal Affairs plays a key role in the development of the internationally-agreed standards applicable to tax treaties. The meetings of the Committee on Fiscal Affairs and its subsidiary bodies[2] allow tax officials from the ministries of finance and/or from the tax administrations of both OECD and non-OECD countries who are involved in the negotiation, interpretation and application of tax treaties to develop, and agree on, these standards.

Whilst tax officials play the key role in the development of the standards, tax treaties, like other treaties, are concluded by States (the vast majority of existing countries are party to at least one tax treaty) and are therefore subject to an approval and ratification process that varies from country to country. In most countries, that process involves some form of parliamentary approval. Also, since tax treaties are typically incorporated into domestic law and therefore give direct rights to taxpayers, they frequently require interpretation by domestic courts. Thus, domestic parliaments, courts and even taxpayers also play a role in the co-ordination of tax treaty rules to the extent that they all use the internationally-agreed provisions and interpretations developed as a product of the co-ordination of tax treaties.

In federal States, the negotiation of treaties is typically a federal prerogative. With only one or two exceptions, tax treaties have therefore been concluded by federal governments. Income taxes, however, are sometimes levied and/or administered at the sub-national level, which may require a certain involvement of officials at the sub-national level. Despite that fact, officials of sub-national government are rarely involved in the discussion and development of tax treaty rules and interpretations.[3]

Objectives of the co-ordination

As explained in the next section (Short history of the development of international co-operation related to tax treaties), the main objectives pursued by the international co-ordination related to bilateral tax treaties have evolved over the years.

From the 1920s to the early 1980s, the co-ordination efforts were primarily directed at developing the network of bilateral tax treaties.[4] It was correctly assumed that the drafting of standard provisions which negotiators of bilateral tax treaties could use would greatly facilitate the negotiation and conclusion of bilateral tax treaties. Since the main purpose of these treaties is to remove an important obstacle to cross-border trade and investment, the international co-ordination that took place during that period is best viewed as aimed at improving market access.[5] Secondary objectives of the co-ordination during that period could be described as follows:

- *Achieving regulatory efficiency gains through the adoption of common standards:* The OECD Council's Recommendation concerning the Avoidance of Double Taxation (adopted on 30th July 1963 together with the first OECD Model Tax Convention) refers to "the need for harmonising existing bilateral Conventions on uniform principles, with uniform definitions, rules and methods, and of agreeing on a common interpretation".

- *Improving the quality and effectiveness of domestic regulation, level the playing field and prevent regulatory arbitrage and facilitate the operation of own regulatory regime when dealing with trans-boundary activities*: for one State to be able to effectively tax the foreign income of its own residents, it is crucial that it be able to access foreign tax information. This is why the provisions of the Model Tax Convention dealing with the exchange of tax information have received so much attention (see below).

- *Facilitate inter-operability of systems*: most of the provisions of the Model Tax Convention deal with the allocation of taxing rights to the State of residence of the taxpayer and/or the State of source of the income. By doing so, these provisions address situations where the two States, through their domestic tax laws, claim taxing rights over the same item of income.

- *Conflict avoidance/resolution*: As indicated above, one of the goals pursued by the adoption, in 1963, of the first OECD Model Tax Convention was to achieve a uniform interpretation of the standard provisions included in this model, thereby reducing potential conflicts between taxpayers and tax authorities and between tax authorities of different countries concerning the meaning of these provisions. Also, that Model Tax Convention included provisions concerning the "mutual agreement procedure" through which a taxpayer can ask the competent authorities of the States that are party to a bilateral tax treaty to address cases of taxation not in accordance with the provisions of that treaty.

In the early 1980s, as the provisions of the OECD Model Tax Convention had already gained widespread acceptance and a large number of bilateral tax treaties were already in place (in particular between OECD countries), the co-ordination efforts of the OECD and its member countries started to focus a lot more on the interpretation and application of existing treaties. This change of focus is best illustrated by comparing the 1977 and the 2010 versions of the Model Tax Convention: whilst there have been relatively few changes to the provisions of the Model Tax Convention since 1977, the size of the detailed Commentary which explains how these provisions should be applied and interpreted has gone from 146 pages in 1977 to 418 pages in the 2010.

One could therefore consider that the main objectives of the co-ordination efforts have gradually moved towards conflict avoidance/resolution and facilitating the inter-operability of tax systems. This is not to say that the original objective of facilitating market access has been forgotten: since the 1990s, the OECD and its member countries have spent a lot of time and efforts helping non-OECD countries develop their tax treaty network.

Over the last 10 years, there has been another shift in the main objective of the co-ordination related to tax treaties. During that period, the OECD and its member countries have led a very successful campaign to improve transparency and exchange of information in tax matters. A main result of that campaign, which involved changes to the exchange of information provisions of the Model Tax Convention, has been the elimination of bank secrecy as an obstacle to the effective exchange of information upon request. The ongoing work of the Global Forum on Transparency and Exchange of Tax Information for Tax Purposes,[6] in which more than 109 countries and jurisdictions are involved, is currently the most resource-intensive project pursued by the OECD in the area of tax treaty co-ordination. On that basis, one could certainly argue that the main objective of tax treaty co-ordination currently falls within the categories "improving the quality and effectiveness of domestic regulation", "level the playing field and prevent regulatory arbitrage" and "facilitate the operation of own regulatory regime when dealing with trans-boundary activities".

Forms that the co-operation is taking

Since the mid 1950s, the co-ordination of bilateral tax treaties has primarily taken place through the activities of the Fiscal Committee of the O.E.E.C. and its successor the OECD Committee on Fiscal Affairs. The main instruments through which tax treaty co-ordination is achieved are the OECD Model Tax Convention, which is used for the negotiation, application and interpretation of bilateral tax treaties and, since 1995, the

OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, which provide detailed guidance concerning the application of Article 9 of the OECD Model Tax Convention. Unlike bilateral tax treaties, the OECD Model Tax Convention and Transfer Pricing Guidelines are not legally binding instruments and would therefore fall into the category of soft law.

This general statement should, however, be qualified. As already mentioned, tax treaties are incorporated into domestic law and therefore give legal rights to taxpayers; where the provisions of tax treaties conflict with those of domestic tax law, the provisions of tax treaties generally prevail. Since the provisions of tax treaties can result in a significant reduction in the amount of tax payable to a country, the legal rights granted to taxpayers by tax treaties are often the object of litigation: each year, there are hundreds of court decisions involving the application and interpretation of provisions of bilateral tax treaties.

Based on the provisions of Articles 31-33 of the *Vienna Convention on the Law of Treaties* concerning the interpretation of tax treaties, the Commentary of the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines play a crucial role in many of these cases.[7] Some countries have gone further and have included specific provisions in their tax treaties requiring that the treaty be interpreted in accordance with the Commentary on the Model Tax Convention[8] or have provided, in their domestic law, that their domestic transfer pricing rules should be interpreted in accordance with the OECD Transfer Pricing Guidelines. Also, where a treaty includes provisions on arbitration, it is usual to provide that the arbitrators will resolve issues of treaty interpretation having regard to the Commentary of the OECD Model Tax Convention as periodically amended and that transfer pricing issues will similarly be decided having regard to the OECD Transfer Pricing Guidelines. For these reasons, the OECD Model Tax Convention and the OECD Transfer Pricing Guidelines can be viewed as having an intermediary status between soft law and hard law.

In the context of its ongoing work on exchange of information, the OECD has also developed another approach aimed at ensuring that OECD and NOEs conform to its international treaty standard concerning exchange of tax information. Through a very elaborate system of peer review, the Global Forum on Transparency and Exchange of Tax Information for Tax Purposes is now examining how each member of the Global Forum and each country or jurisdiction found to be relevant complies with the internationally-agreed standard related to the effective exchange of tax information (see OECD, 2010).

Functions being co-ordinated/components covered in co-operation

As can be concluded from the above, the main co-ordination efforts in the area of bilateral tax treaties have focussed on the formulation of standards which are used for the negotiation, application and interpretation of tax treaties and of certain provisions of domestic tax laws (e.g. transfer pricing rules or rules for the collection of tax information) that are relevant for the purposes of tax treaties.

The OECD Committee on Fiscal Affairs has also been very active in setting the international tax agenda and goals: to take two recent examples, its work on transfer pricing (mid-1990s), its work on taxation of e-commerce (late 1990s) and its project on bank secrecy have all resulted in major developments in internationally-agreed standards.

Traditionally, there has been relatively little international supervision in the area of bilateral tax treaties. The recent OECD work on exchange of information, however, constitutes a significant exception. As explained above, the Global Forum on Transparency and Exchange of Tax Information for Tax Purposes, through its peer review system, monitors compliance with the internationally-agreed standard related to the effective exchange of tax information (see OECD, 2010).

Short history of the development of international co-operation related to tax treaties

In the early 1920s, at the instigation of the International Chamber of Commerce (which saw double taxation as an obstacle to European reconstruction), the Financial Committee of the League of Nations undertook work on the issue of international double taxation and tax evasion. At that time, a few countries had adopted unilateral measures to eliminate or at least reduce double taxation and a few bilateral treaties had already been concluded.[9]

Working as the Committee of Technical Experts on Double Taxation and Tax Evasion, senior tax officials of a few countries presented to the Financial Committee of the League of Nations, in 1927, a series of 4 draft treaties related to tax matters[10] together with a Commentary on each draft. In doing so, the Committee of Technical Experts expressed the view that the approach of preparing draft for bilateral treaties was to be preferred to the drafting of a multilateral convention. As indicated in the Committee's report League of Nations (1927):

> […] the fiscal systems of the various countries are so fundamentally different that it seems at present practically impossible to draft a collective convention, unless it were worded in such general terms as to be of no practical value […]. League of Nations (1927), p. 26

The League of Nations organised a General Meeting of government experts to discuss the 1927 report. In 1928, that General Meeting recommended certain changes and presented three versions[11] of the first draft (renamed "Bilateral Conventions for the Prevention of Double Taxation in the Special Matter of Direct Taxes").[12]

A new Fiscal Committee, which first met in 1929, was set up by the League of Nations to continue the work in this area. In 1933, that Committee approved the text of a multilateral convention intended to eliminate the double taxation of profits of enterprises ("Draft Convention Adopted for the Allocation of Business Income between States for the Purposes of Taxation") (League of Nations, 1933). In 1935, however, the Committee, recognising that few countries had expressed an interest for signing that convention, concluded that the idea of a multilateral convention should be abandoned in favour of a model for bilateral treaties (League of Nations, 1935, p. 4).

Work of the Fiscal Committee of the League of Nations continued until 1946, when the Committee published its last series of models for bilateral tax treaties, the 1943 Mexico Models and the 1946 London Models (League of Nations, 1946).

In 1956, international efforts to co-ordinate tax treaties intensified when the O.E.E.C. mandated its newly created Fiscal Committee "to determine, and make concrete proposals to the Council on, principles to be applied ... in order to avoid double taxation. The study shall cover the following questions: [...] In general, the standardisation of the most important concepts to be found in Double Taxation Agreements, e.g. domicile, permanent establishment, classification and localisation of income." (OEEC, 1956)

The Fiscal Committee set up a number of Working Parties to which it allocated the task of drafting the various articles of a model convention together with a detailed Commentary. These Working Parties and the Committee itself met regularly and, between 1956 and 1961, published four reports that included different draft articles for a tax treaty. In the first of these reports, the Committee recommended the elaboration of a new model bilateral convention acceptable to all OEEC member states and envisaged replacing the existing bilateral conventions with one multilateral convention.

In 1963, a consolidated revised version of the previously published draft articles and their commentaries was published under the title "Draft Double Taxation Convention: Report of the O.E.C.D. Fiscal Committee". At that time, the Committee still considered the possibility of transforming its work into a multilateral convention, as indicated in the introduction of the report (OECD, 1963, Paras 60, 61).

Over the following years, the Fiscal Committee (which became the Committee on Fiscal Affairs in 1971) continued its work on the Draft Convention and in 1977, published a revised version (OECD, 1977) that included a number of changes to the draft articles and an expanded Commentary. By the time this work was completed, the Committee had definitively abandoned the idea of a multilateral Convention.[13]

The tax treaty work of the Committee on Fiscal Affairs has continued without interruption since 1977. This work is primarily carried on by the Committee's Working Party 1 on Tax Conventions and Related Questions (in addition, Working Party 6 on the Taxation of Multinational Enterprises deals with treaty issues related to transfer pricing whilst issues related to treaty provisions on exchange of information and assistance in collection of taxes are dealt with by Working Party 10 on Exchange of Information and Tax Compliance, the Global Forum on Transparency and Exchange of Information being concerned with monitoring the application of the internationally-agreed standards on transparency and exchange of information).

As previously explained, the focus of the OECD work on tax treaties shifted after 1977. Throughout the 1980s, the Committee prepared and published a number of reports dealing with specific aspects of the application and interpretation of the 1977 Model Tax Convention. In 1991, recognising that the revision of the Model Tax Convention had become an ongoing process, the Committee on Fiscal Affairs adopted the concept of an ambulatory Model Tax Convention which would be periodically updated to take account of new developments. This led to the publication in loose-leaf format, in 1992, of a new version of the Model Tax Convention that incorporated the conclusions of the various reports adopted between 1977 and 1991.

Since then, the Model Tax Convention has been updated 8 times (in 1994, 1995, 1997, 2000, 2003, 2005, 2008 and 2010). The next update is currently scheduled for 2014. Each of these updates dealt with a number of new or previously unresolved questions. For instance, the 2010 update included the following changes and additions:

- the replacement of the treaty provisions, and their Commentary, dealing with the attribution of profits to permanent establishments (the new provisions and Commentary reflect work on this issue that Working Party 6 carried on between 1998 and 2008);
- new Commentary providing guidance on how treaty provisions should be applied with respect to the income of collective investment vehicles;
- new Commentary providing concerning the application of tax treaties to State-owned entities, including Sovereign Wealth Funds;
- new Commentary providing guidance on how treaty provisions should be applied to payments made in common telecommunication transactions (such as the payment of roaming charges between cell phone operators);
- new Commentary providing guidance on how treaty provisions concerning income from employment should be applied in the case of individuals who work in a foreign country for a short duration.

The process through which changes are made to the OECD Model Tax Convention is relatively uniform.

First, a treaty-related issue is brought to the attention of the Committee on Fiscal Affairs, or more frequently of its Working Party 1, by a delegate, a member of the Secretariat, a business representative or an academic. In many cases, the issue results from a court decision dealing with a particular aspect of tax treaties. The issue is first examined by the Steering Group on the Revision of the Model Tax Convention, a subsidiary body of Working Party 1 that was set up in 1991 and whose role is to examine all tax treaty issues brought to the attention of the OECD and to make a recommendation as to how the issue should be dealt with. That recommendation may take different forms, such as:

- where the issue will likely require substantial work, a proposal that a special Working Group be set up to deal with the issue;
- where the issue can be dealt with relatively easily, draft changes to the OECD Model Tax Convention;
- a proposal not to pursue the issue.

Proposals for changes to the OECD Model Tax Convention that result from the work of the Steering Group or of Working Groups set up to deal with complex issues are submitted to the approval of Working Party 1. In most cases, the Working Party will seek comments from business and other interested parties by releasing the proposals as a discussion draft (OECD,

2011, 2012). The Working Party finalises the proposed changes in light of the comments received (a second discussion draft may be released if substantial revisions are required) and adopts the proposed changes. The changes are then included in a report on the next update of the Model, together with the relevant "reservations" and "observations" of member countries and "positions" of non-member countries. Once approved by the Working Party, that report is submitted to the approval of the Committee on Fiscal Affairs and, a few weeks later, to that of the OECD Council.

The practice of including "reservations", "observations" and "positions", which goes back to the 1963 Draft Convention, provides a flexible way of making changes to the OECD Model Tax where there is substantial but not unanimous support for these changes. As explained in the Introduction to the Model Tax Convention, a "reservation" indicates a disagreement with the drafting of a specific Article of the OECD Model whereas an "observation" indicates a disagreement with an interpretation included in the Commentary of the OECD Model Tax Convention (as explained below, the term "position" refers to a disagreement recorded by a non-OECD country).

Involvement of non-OECD countries

The 1997 update to the OECD Model Tax Convention included the official views (referred to as "positions") of a number of non-OECD countries. These "positions" identify where these countries disagree with the text of an article of the OECD Model or with an interpretation given in the Commentary. These positions are kept up-to-date and the Model currently includes the positions of 28 non-OECD countries.[14] The inclusion of the positions of these countries reflects the growing need to take account of the views of non-member countries in the development of the internationally-agreed standards included in the OECD Model Tax Convention.

Other mechanisms are also used to involve non-OECD countries in the work related to tax treaties. For instance, for the last 16 years, an annual Tax Treaty Meeting has been held at the OECD for tax treaty officials of OECD and non OECD-countries. That meeting, which is attended by around 250 participants representing around 100 countries and international organisations, allows a technical discussion of tax treaty issues and facilitate the development of bilateral contacts among tax treaty negotiators. In addition, since the early 1990s, the OECD Secretariat organises each year an average of 10 week-long regional seminars and meetings which are held throughout the world and which allow non-OECD countries to better understand and apply the internationally-agreed standards in the area of tax treaties and to build their capacity to negotiate and apply tax treaties.

Work of the United Nations in the area of tax treaties

Since the late 1960s, the United Nations has also been involved in international co-ordination efforts related to tax treaties, first through the *Ad hoc* Group of Experts on International Cooperation in Tax Matters and more recently through the work of the Committee of Experts on International Cooperation in Tax Matters. That Committee is composed of 25 members acting in their personal capacity and meets once a year for 5 days.

The United Nations work in the tax treaty area has focussed on tax treaty relations between developed and developing countries. In 1980, it published the *Nations Model Double Taxation Convention between Developed and Developing Countries,* which was largely based on the 1977 OECD Model Tax Convention but was adapted to the particular circumstances of negotiations between developed and developing countries. The UN Model was updated twice, in 2001 and in 2012. In both cases, the update process focused primarily on previous changes that had been made to the OECD Model.

Whilst various proposals have been made in recent years concerning a possible upgrade of the status of the UN Committee (e.g. to make it a governmental body and increase the number of its members) and a possible increase in the resources allocated to its work, these proposals have not been adopted by the ECOSOC, which is the UN body to which that Committee reports.

Assessment

There are few areas in which countries are more jealous of their sovereignty than in tax matters. Tax systems, and in particular direct tax systems, continue to show considerable differences which can create distortions (in particular through double taxation and non-taxation situations) and result in significant administrative costs for tax administrations and compliance costs for taxpayers. Despite the potential for economic efficiency gains, there is no indication that countries are willing to consider any form of harmonisation of their direct tax systems.

Countries have, however, developed extensive co-ordination through a network of bilateral tax treaties which are based on common provisions and interpretations. A key feature of this co-ordination has been the development of the internationally-agreed provisions included in the OECD Model Tax Convention which countries typically incorporate in their bilateral tax treaties and, maybe more importantly, of common interpretations of these provisions (included in the Commentary of the OECD Model Tax

Convention and, as regards transfer pricing, in the OECD Transfer Pricing Guidelines) which are generally followed by tax administrations and which are often relied on by courts when deciding tax treaty issues.

This type of flexible co-ordination has clear advantages. It greatly facilitates the relations between tax administrations involved in the negotiation, application and interpretation of bilateral tax treaties whilst preserving the tax sovereignty of countries involved.

It also has, however, important limitations. As a general rule, countries are, in effect, free to adopt parts of the internationally-agreed standards and ignore others. Whilst the work of the Global Forum on Transparency and Exchange of Information constitutes a very effective form of peer pressure in the area of exchange of information, such peer pressure is not as developed in other tax treaty areas. Also, the OECD limited membership means that not all countries, especially major emerging economies, are directly involved in the development of the internationally-agreed standards.

Also, whilst the international co-ordination efforts related to tax treaties address a large number of topics, they cannot be considered as comprehensive. For instance, the way that treaties are incorporated into domestic law raises constitutional and legal issues that are specific to each country and are therefore difficult to co-ordinate even though these issues can affect a country's compliance with the provisions of its tax treaties. Another example is the way that domestic courts interpret the provisions of tax treaties: given the independence of the judicial branch and the fact that judges are usually not represented in international fora dealing with tax treaties, it is difficult to achieve a high degree of co-ordination in that area.

The inclusion of arbitration provisions in tax treaties may contribute to ensure a greater respect of the internationally-agreed standards. In 2005, the OECD Committee on Fiscal Affairs developed an arbitration provision to be included in bilateral tax treaties; according to that provision, where the competent authorities of two States that have concluded a tax treaty are unable to resolve a case brought to their attention under the mutual agreement procedure of their tax treaty, the issue(s) that have prevented them from reaching an agreement must be decided by independent arbitrators. This new provision is slowly beginning to appear in tax treaties but many countries, including OECD countries, are still very reluctant to accept it.

The challenges that result from the OECD limited membership are partly addressed by the innovative ways in which the Committee on Fiscal Affairs has involved non-OECD countries in its work on tax treaties. In addition to the mechanisms described above, the OECD has, since the 1980s, been actively involved in the work of the UN Ad Hoc Group of

Experts on International Cooperation in Tax Matters and, subsequently, the UN Committee of Experts on International Cooperation in Tax Matters. More recently, the UN Secretariat has become an observer to the Committee on Fiscal Affairs. Finally, major emerging economies such as Argentina, China, India, Russia and South Africa participate as observers in all the meetings of the Committee's subsidiary bodies dealing with tax treaties.

Notes

1. In some cases (*e.g.* where a country does not levy income taxes and does not, therefore, present a risk of double taxation), tax information exchange agreements have been concluded in order to allow such countries to exchange information with other countries. Except where indicated otherwise, these agreements are not covered by this note.
2. The Global Forum on Transparency and Exchange of Tax Information for Tax Purposes also plays a key co-ordinating role with respect to the application of the exchange of information provisions of tax treaties and of tax information exchange agreements. The Global Forum, whose secretariat is provided by the OECD, has been established as a part II programme of the OECD; as of June 2012, 109 countries and jurisdictions were members of the Global Forum (see www.oecd.org/tax/transparency).
3. The application of tax treaties to sub-national taxes raises a number of issues which are outside the scope of this note.
4. As explained below, this included a few failed attempts at developing multilateral treaties designed to eliminate the need for bilateral treaties.
5. This objective is clearly stated in the first recommendation on taxation adopted by the O.E.E.C. Council (C(55)37, dated 17 February 1955), according to which:

   > [...] Considering it desirable that obstacles to international trade and investment which arise from the double taxation of income and property should be removed and considering, in addition to unilateral legislative action, the conclusion of bilateral agreements the best means to that end;
   >
   > I. RECOMMENDS to the Governments of the Member and Associated countries that they should persevere in their efforts to avoid the double imposition of direct taxes by the conclusion of bilateral agreements with one another and that they should, where appropriate, review existing agreements which may no longer be adequate to deal with this problem.

6. *Supra*, Note 2.

7. For example, in a December 2011 decision of the Supreme Administrative Court of Finland dealing with the application of various tax treaties to software payments received by a Finnish company, the Court held that "When interpreting in a Finnish context tax treaty terms in accordance with the OECD model, it is reasonable to regard as significant what a commentary on the model says, irrespective of whether the other party is a member of OECD". The use of the Commentary on the OECD Model Tax Convention by courts is not restricted to OECD countries: for example, in a landmark decision rendered in 2003, *Union of India* v. *Azadi Bachao Andolan*, the Supreme Court of India expressly referred to the OECD Commentary in support of its conclusions concerning the interpretation of the tax treaty between India and Mauritius:

> There is a further reason in support of our view. The expression 'liable to taxation' has been adopted from the Organisation for Economic Co-operation and Development Council (OECD) Model Convention 1977. The OECD commentary on Article 4, defining 'resident', says: "Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as "resident" and, consequently, is fully liable to tax in that State". The expression used is 'liable to tax therein', by reasons of various factors.

8. For example, the use of such treaty provisions is part of Austria's treaty practice.

9. Whilst Austria, Hungary, Italy, Poland, Romania, and the Kingdom of the Serbs, Croats, and Slovenes attempted to deal with tax issues in a multilateral manner when they all signed a multilateral tax convention in Rome in 1921, that multilateral convention was only ratified by Italy and Austria.

10. Draft of a Bilateral Convention for the Prevention of Double Taxation, Draft Bilateral Convention for the Prevention of Double Taxation in the Special Matter of Succession Duties, Draft of a Bilateral Convention on Administrative Assistance in Matters of Taxation and Draft Bilateral Convention on Judicial Assistance in the Collection of Taxes.

11. Draft Convention No. Ia, Draft Convention No. Ib and Draft Convention No. Ic.

12. League of Nations (1928), p. 7. The report added the following explanation as regards the two additional versions of the draft "...which draw no distinction between impersonal and personal taxes, the first applying particularly to relations between countries in which taxation by reference to domicile predominates, and the second to relations between countries possessing different fiscal systems."

13. As indicated in Paragraph 37 of the Introduction of the 1977 Model Tax Convention.

14. Albania, Argentina, Armenia, Belarus, Brazil, Bulgaria, Croatia, Democratic Republic of the Congo, Gabon, Hong Kong (China), India, Indonesia, Ivory Coast, Kazakhstan, Latvia, Lithuania, Malaysia, Morocco, People's Republic of China, Philippines, Romania, Russia, Serbia, South Africa, Thailand, Tunisia, Ukraine, United Arab Emirates and Vietnam.

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Chapter 4

Competition law enforcement

by

Hilary Jennings and Antonio Capobianco*

The increasing number of competition enforcement cases with international dimensions 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. This case study presents how the OECD has contributed to these discussions and has fostered co-operation through its own instruments and reports.

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Introduction

The increasing number of competition enforcement cases with international dimensions makes co-operation between competition enforcers in different jurisdictions imperative for domestic enforcement to be truly effective. The introduction of competition law in more jurisdictions highlights the potential for co-operative relationships based on a shared commitment to fight anti-competitive practices. Success in discovering and prosecuting these practices will require competition authorities to significantly improve their ability to co-operate. International co-operation in competition enforcement cases is a topic that continues to be widely discussed in many fora and is of considerable interest to competition enforcers and the private sector alike. The OECD has contributed to these discussions and has fostered co-operation through its own instruments and reports, as have others.

On the face of it, there is more co-operation between competition authorities in merger review than cartel investigations because the nature of the proceedings is different. Unlike a cartel case, where parties are investigated for alleged infringements of the law, merger review is an authorisation process. In the latter, the parties have all the incentives to co-operate with the reviewing authorities and to ensure consistent outcomes through effective co-operation between the authorities involved. Conversely, in cartel cases the investigated parties have no interest in the authorities co-operating, which may only result in multiple sanctions, unless they are in leniency/amnesty programmes. Therefore, creating the incentives for co-operation in cartel investigations rests largely with competition authorities.

Comity: A defining principle of international co-operation

Comity is the legal principle whereby a country should take other countries' important interests into account while conducting its law enforcement activities, in return for their doing the same. For over 100 years, public international law has acknowledged comity as a means for tempering the effects of the unilateral assertion of extraterritorial

jurisdiction. Comity is therefore a horizontal, sovereign state -to-sovereign state concept, as laid down by the United States Supreme Court in Hilton *v* Guyot in 1895.[1] It is not the abdication of jurisdiction; instead, it is the exercise of jurisdiction with an accompanying understanding of the impact that the exercise of jurisdiction may have on the law enforcement activities of other countries.

International co-operation in the competition field employs two types of comity: negative comity and positive comity.

Traditional comity

Traditional comity involves a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interests. The OECD's successive Recommendations on co-operation in competition matters (the most recent in 1995) recommended that in seeking to implement negative or traditional comity a country should:

- notify other countries when its enforcement proceedings may affect their important interests, and
- give full and sympathetic consideration to ways of fulfilling its enforcement needs without harming those interests (OECD, 1995, I.A1 and I.B.4.b).

Positive comity

Positive comity involves a request by one country that another country undertake enforcement activities in order to remedy allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the referring country.[2] However, the underlying concept was decades old. Positive comity provisions have been included in the OECD Recommendations on Co-operation since 1973, although the term "positive comity" has not been used specifically. The 1995 OECD Recommendation sets out that a country should:

> Give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and take whatever remedial action it deems appropriate on a voluntary basis in considering its legitimate interests. (OECD, 1995, at I.B.5.b-c.)

Positive comity provisions are now included in many bilateral co-operation agreements between competition authorities. The first wave of co-operation agreements was limited to negative comity principles of

avoiding harm to other countries.[3] This changed with the 1991 EC-US Agreement referred to above. It was the first time that positive comity was included in a bilateral agreement on co-operation in antitrust matters.[4] The principle laid down in Article V of the 1991 EC-US Agreement was further consolidated in the Positive Comity Agreement signed by the European Community and the US in 1998.[5] The United States and Canada entered into a similar agreement in 2004.[6]

There was an initial enthusiasm for positive comity, which was particularly strong after the signing of the 1998 EC-US Positive Comity Agreement. However, expectations have since been lowered. It is regarded sceptically by academics (Atwood, 1992, p. 84) and appears to have been a little used instrument, despite its potential.

Main forms of co-operation and instruments/tools of co-operation

Competition enforcers are the key players in international co-operation in the competition area. As independent enforcers, competition authorities have little if no supervision by line ministries. Their actions are reviewed under the domestic judicial review system. Co-operation with foreign jurisdictions is key in the investigation phase, as it allows enforcers to access information that are located abroad and it ensures a consistent outcome of parallel competition investigations. Competition authorities can use different legal bases for co-operation. The most effective ones are those designed specifically for competition purposes. This is the case in particular of bi-lateral co-operation agreements entered into by competition authorities to facilitate the relationship between the signatories. In the absence of a specific competition instrument, other international co-operation instruments can apply. These are instruments negotiated by governments to allow their respective ministries and agencies to co-operate. 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.

International co-operation between competition authorities takes place in a multiplicity of forms. It can take place at the bilateral, regional, or multilateral levels. It can be based on formal instruments such as a national legal provision or an agreement between jurisdictions or competition authorities. It may be based on a waiver from a provider of evidence. It can be informal, in that it is not based the framework of a specific co-operation 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 creates a complex web of differing levels of possible engagement between authorities. The drivers for co-operation and

the instruments and networks that underpin it are equally distinct across different jurisdictions and groupings of countries. In spite of all of these variables there is agreement between cartel enforcers that international co-operation is a key tool to ensuring that anti-competitive conduct that touches upon several jurisdictions is dealt with effectively and optimally. Means of facilitating international co-operation are therefore actively pursued.

Non-competition-specific co-operation instruments

Some co-operation is facilitated by instruments with broad application across multiple enforcement areas like Mutual Legal Assistance Treaties (MLATs), extradition treaties and letters rogatory (letters of request).

Mutual Legal Assistance Treaties

Many countries have entered into MLATs. They are bilateral treaties creating reciprocal international obligations between sovereign governments and 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. MLATS are therefore potentially powerful tools, but they have traditionally been restricted to criminal matters. MLATs require the underlying offence to be a crime in at least the requesting country's jurisdiction. In most jurisdictions, cartel conduct is not a crime and so MLATs are little used in cartel investigations.

Although a significant number of MLATs exist (the US, for example, has entered into MLATs with approximately 70 countries), not all MLATs can be used for co-operation in competition cases. There may be an explicit exclusion for competition matters from the scope of the treaty, as is the case in the Switzerland-US MLAT.[7] Some MLATs also require that both jurisdictions treat the conduct under investigation as a crime ("the dual criminality requirement").

When applicable, MLATs are generally the most effective means of cross-border evidence gathering in competition cases. They provide a mechanism for the signatories to obtain a wide variety of legal assistance for criminal matters generally, including the compulsory taking of evidence on oath and the execution of searches of domestic and business premises. Unlike "soft" co-operation agreements, MLATs oblige the parties to assist each other by obtaining evidence located on the requested nation's territory and, it is not permissible for the requested country to refuse its aid unless the offence is political or military, or compliance would jeopardize national security or prejudice its own investigations.

Extradition treaties

Extradition treaties also 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

Competition authorities can also use letters rogatory in order to obtain assistance from abroad in the absence of an MLAT or executive agreement. 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 countries 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 214 Regional Trade Agreements (RTAs) in force listed on the World Trade Organisation website, of which 98 contain competition provisions.[8] In the competition sphere there are a number of well known RTAs including the EU, COMESA, WAEMU, CARICOM, ASEAN, NAFTA, MERCOSUR, and the Andean Community.[9] RTAs are no longer strictly based on geographic location, and they can be agreed bilaterally between individual countries (Free Trade Agreements), between one country and a group of countries (plurilateral agreements), or between regions or blocs of countries (multilateral agreements).

In 2006, a paper was commissioned by the OECD Joint Group on Trade and Competition to examine competition provisions in regional trade agreements (Solano and Sennekamp, 2006). Out of the 86 agreements analysed for the paper, 68% were between developing or emerging economies (South-South), 27% were between developed and developing countries or emerging economies (North-South) and only 5% were between developed countries (North-North). All of the analysed RTAs referred generally to anti-competitive behaviour or practices. However the scope and content of the provisions vary. Some RTAs have very broad and non-binding language with no definition of the types of practice considered anti-competitive,[10] while others mandate the parties to prohibit very specific types of practices within their jurisdiction.[11] Most agreements fall somewhere in between the two.[12]

Regional competition agreements, notably those with a functioning competition authority, offer deeper levels of integration and a higher degree of co-operation on competition enforcement than bilateral agreements. They offer scale economies in enforcement, particularly important for developing and emerging economies (Gal, 2011, p. 256). One example of a well-functioning regional agreement is the EU and its European Competition Network. This provides a framework for co-operation between the EU member states' competition authorities in cases where Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU) are applied. The European Competition Network (ECN) is widely accepted as the model of regional co-operation. It is established under a European Council Regulation (European Commission, 2003, 2004) (the "Modernisation Regulation") and is based on a system of parallel competences which allows all national competition authorities (NCAs) to apply the same competition rules (European Commission, 2004).

The ECN facilitates case allocation to the authority "well-placed" to deal with the case and ensures a consistent application of the EU's competition rules. The ECN is an informal network in that it does not take 'decisions' and cannot compel its members to act in a certain way. It is, however, expected that the constructive dialogue will help solve most of the issues which may arise. Should a deadlock occur, the Commission retains the power to relieve national competition authorities of their competence by opening proceedings. The Regulation creates a number of co-operation mechanisms for the purpose of case allocation and assistance. National competition authorities (NCAs) should inform each other before or without delay after starting the first formal investigative measure, and make relevant information available to other NCAs.

Competition-specific bilateral co-operation agreements

Bilateral agreements

Competition-specific bilateral co-operation agreements have proliferated since 1976 when the first one was concluded between the United States and Germany.[13] The agreements have evolved from these early incarnations which were either defensive or provided only for vague and general principles of co-operation. More recent agreements, signed since the 1990s, have been inspired by the OECD Recommendations on international co-operation and the principles of positive comity. On the face of it, therefore, these second generation agreements demonstrate greater commitment to strengthening co-operation in the enforcement of competition law at the international level. The agreements between the EU, Canada and the US were the forerunners of a growing network of bilateral agreements with and between younger competition jurisdictions.

Bilateral agreements constitute soft law, as they express a desire to consult and co-operate and do not limit the discretion of the regulatory authorities (Stephan, 2005). Although these are binding international agreements, signed by governments,[14] they do not amend domestic laws that prohibit the sharing of confidential business information without the provider's consent, and the agreements specifically allow the requested party to take its own national interests into account in determining whether and to what extent to provide the requested co-operation. The net effect, in the case of parallel investigations, is that authorities can only share confidential information if the source of the information grants a waiver.

Antitrust Mutual Assistance Agreements

Antitrust mutual assistance agreements enable greater co-operation than traditional bilateral co-operation agreements. The greater level of co-operation is enabled by domestic laws that permit certain assistance to be provided pursuant to the mutual assistance agreement that otherwise could not be provided, particularly in terms of access to foreign-located evidence and information sharing. There are few examples of third generation agreements in force. The first example is the Cooperation and Coordination Agreement between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission signed in 1994, and updated in 2007. However, this did not provide for the exchange of confidential information. The 1999 Antitrust Mutual Enforcement Assistance Agreement was signed between the United States and Australia.[15] This provided a vehicle for the signatory authorities to request broad assistance in criminal and civil non-merger antitrust matters, including the exercise of compulsory power to obtain testimony and documentary information.

Memorandums of Understanding

Non-binding memorandums of understanding (MOUs) between countries amount to a "getting to know you" best endeavours agreement between competition authorities. MOUs do not necessitate a formal international agreement. These executive agreements may memorialise existing working relationships, or they may mark a new level of engagement between competition authorities. The recent signing of the Sino-US MOU was characterised by the then US Department of Justice Assistant Attorney General as "… a reflection of that relationship, and, by establishing a framework for enhanced co-operation among our agencies, the Memorandum of Understanding also allows us to move to the next chapter in our collaboration on competition law and policy matters." (Varney, 2011). MOUs provide a tentative first step in the process of establishing a longer-term co-operation framework. Some MOUs go further and are more in line with the bilateral co-operation agreements described above.[16]

Provisions in national laws

Some national laws provide a direct legal basis for co-operation between authorities or jurisdictions, while others provide a mandate to enter into co-operation agreements with other jurisdictions. In either case, jurisdictions with laws directly permitting co-operation also have bilateral co-operation agreements in place with other jurisdictions, suggesting that bilateral agreements have added utility (ICN, 2007, p. 13).

National laws may provide statutory "gateways" for voluntary disclosure to foreign law enforcement authorities of information gathered in the course of the requested country's own investigations. This would permit the sharing of information relating to criminal or civil investigations of the requesting authority.

Co-operation based on confidentiality waivers provided by the parties to the investigations

Today international co-operation 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 co-operation procedures and the ensuing delay this can entail.

Informal co-operation

The term "informal co-operation" has come to refer to all co-operation among competition authorities that does not include sharing confidential information or obtaining evidence on behalf of another authority. This type of co-operation is more common than the formal variety, no doubt because it is easier to conduct and it does not confront the legal constraints on the exchange of confidential information that exist in every country.

Despite its limitations, informal co-operation can contribute to more effective enforcement. Conferences, bilateral meetings, and other exchanges of know-how spread both expertise and mutual understanding. Bilateral co-operation agreements can facilitate case-specific co-operation by further clarifying the parties' understanding of each others' systems and expectations. Case specific informal co-operation can include discussion of investigation strategies, market information, witness evaluations, sharing leads and comparing authority approaches to common cases. The information or assistance obtained in these instances can streamline the investigative strategy and help focus an investigation.

Informal co-operation is often underpinned by the personal contacts and trust built through participation in the competition networks, many of which have emerged in recent years. International and regional forums, such as the OECD, UNCTAD, ICN, ASEAN, APEC, African Competition Forum and ICAP, all provide avenues for authorities and staff to get together, share ideas, practices and develop understanding of each other's legal frameworks and institutions. This helps with the creation of "pick-up-the-phone" relationships and institutionalising co-operation between authorities. The provision of capacity building is a means of building technical expertise as well as fostering mutual understanding and future co-operation.

Practice suggests that co-operation in the detection and investigation of competition cases often involves a mixture of formal and informal co-operation between competition authorities. The existence of international agreements does not guarantee co-operation, nor does their absence preclude it. The advantage of the complex web of international agreements that exist between governments or their authorities is that it offers a formal framework for co-operation, despite the legal limits. In turn, the conclusion of international agreements signals willingness and the ability to engage in a constructive dialogue with foreign peers. The challenge for competition authorities from developing countries, in particular, is to identify the right balance between what can be achieved through informal co-operation and what requires more formal mechanisms.

Functions being co-ordinated/components covered in co-operation

Co-operation can take place at different phases of an investigation:

- At the pre-investigatory phase, that is, the phase before evidence-gathering takes place, agencies can co-operate regarding markets to be investigated, companies to be targeted, the location of evidence, and avoidance of destruction of evidence;
- At the investigatory phase, the phase during which evidence is gathered and analysed, and the case built up, they may co-ordinate investigatory measures. This could include the organisation of simultaneous searches, raids or inspections, issuing of subpoenas or other requests for information, or interviewing of witnesses;
- At the post-investigatory phase, which concerns prosecution, adjudication and sanctioning, agencies may exchange evidence and other information which they have obtained, and they may co-operate via general case discussions between the investigators.

In all of these phases competition authorities can make use of the various instruments discussed above. Competition specific tools for international co-operation are generally used by competition authorities across all the three phases of the investigation. Informal co-operation is most intense during the pre-investigatory phase where due process guarantees are lower, since there is no formal investigation yet. Non competition specific instruments, such as MLATs and letters rogatory, are most used during the investigatory phase as they are complex and time-consuming but allow some form of co-operation when specific competition instruments are not available (e.g. when there competition authorities concerned do not have a co-operation agreement).

Box 4.1. **Information exchange between enforcers**

Exchange of information is a key aspect of co-operation, although by no means the only aspect. The kinds of information which may be exchanged fall largely into four categories:

- *Public information.* In this case, one agency simply helps another agency to gain time by providing information which is already in the public domain (perhaps a hard-to-find market report, or information about the market arising from studies carried out by the agency);
- *Agency information*. This is information which is not necessarily in the public domain, but which is generated within the agency itself, rather than provided by parties to the investigation (although it may be based on information supplied by the parties). Such 'agency information' may concern for example the stage which the investigation has reached, the planned timing of further steps, the provisional orientation of the investigation, conclusions reached about the nature of the market and so forth;
- *Information from the parties already in the possession of one agency.* This kind of material can be evidence of an infringement or background information on the market or the activities of the parties (such as turnover figures). The information may have been provided voluntarily (by an immunity / amnesty applicant, for example) or under compulsion (in an inspection, under subpoena, and so forth);
- *Information obtained from the parties at the request of another agency.* Where two agencies have a highly developed co-operative relationship, it may be possible for one of them to request the other to obtain information from parties in its jurisdiction, which is not already in its possession. This could involve carrying out surprise searches, raids or inspections, issuing subpoenas, interviewing witnesses, and so forth.

Benefits of international co-operation in competition cases

The potential benefits of international co-operation will largely depend on the extent to which competition authorities are willing and able to create a co-operative culture in which authorities 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 country's laws, positive comity can provide a remedy for illegal conduct that the requesting country cannot remedy itself due to jurisdictional problems.
- *Improved efficiency*. Since positive comity results in an investigation by the country in the best position to gather the necessary facts, it can improve efficiency by reducing investigation costs and the risk of inconsistencies.
- *Reducing the need for sharing confidential information*. Since the proceeding is handled by the competition authority with the best access to the evidence, there is likely to be less need for sharing confidential information (OECD, 1999, pp. 22-23).

Challenges to international co-operation in competition cases

The increasing number of countries with cartel prohibitions and the consequent need for competition authorities to co-ordinate investigations of cartel conduct with cross-border effects has highlighted the constraints of the current system for international co-operation. Some of these constraints are common to competition authorities in both developed and developing countries; others are more specific to new and less experienced authorities.

Problems common to all jurisdictions

Exchange of confidential information

One of the most sensitive areas of co-operation concerns the exchange of confidential information and data between competition authorities. The reasons for these problems can be found in the restrictions on the sharing of confidential information under the respective domestic laws. Most national laws do not permit the sharing of confidential information from a competition authority's investigation file, nor do they permit an authority to

use its compulsory gathering powers on behalf of a foreign competition authority. With the very few exceptions described in the sections above, the majority of instruments and agreements in the antitrust field do not permit the exchange of confidential information.

In the antitrust context the rationale for limiting authorities' powers to freely exchange confidential information is to avoid reducing the incentives for firms to co-operate under authorities' leniency policies, and therefore the effectiveness of national cartel enforcement programmes as a whole. Similarly, there is a concern that, once exchanged, confidential information submitted to an authority in one jurisdiction may get into the public domain (e.g. because of the more relaxed rules on access to a competition file in the requesting country) or may simply become discoverable in the receiving jurisdiction. This may expose the source of the information to the risk of private actions and ensuing damages. This risk is particularly high if the information can be used before courts where punitive damages can be awarded to successful plaintiffs, as is the case of treble damages in the US.

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 co-operation. Since, as discussed above, many international co-operation instruments do not allow for the exchange of confidential information, in most cases the requested authorities must demonstrate that the information is not confidential before they are allowed to share it with the requesting authority.[17] This can be a time consuming process and errors can expose the requested authority to legal liabilities.

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.

Civil/administrative versus criminal regimes

Cartels are criminally prosecuted in some jurisdictions, but not 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 US for example, cannot share confidential information with the EU pursuant to a MLAT because the EU imposes only administrative penalties for competition law violations. There is, consequently, a lack of "dual criminality".

Criminal sanctions for cartel conduct have been introduced or are currently being considered in a number of countries. This could, potentially, facilitate co-operation and create a "virtual" alliance among jurisdictions that have criminalised cartels. This trend towards criminalisation is not yet matched by a comparable criminal enforcement record. Outside of the US, very few jurisdictions have actually prosecuted cartels under their criminal provisions, but instead continue to investigate their cartels under their civil/administrative powers. This significantly limits the scope for co-operation on parallel investigations.

Other common hurdles

Other common hurdles include:

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

Challenges of specific relevance to developing and emerging economies

There is relatively little evidence of effective cartel enforcement co-operation between competition authorities in developing countries and between developed and developing country 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 countries and new competition authorities have not yet developed ongoing bilateral or multilateral relationships with other jurisdictions that could promote co-operation.

Institutional and investigatory impediments

New and less experienced competition regimes need to establish credible competition institutions and develop the necessary instruments and policies to become effective cartel enforcers. Until they do so, they may not have the resources or experience to harness the benefits of greater co-operation in the same manner as more experienced jurisdictions (UNCTAD, 2011, p. 33).

Lack of investigatory powers, such as the ability to conduct unannounced dawn raids, impedes the ability of an authority to take part in co-ordinated dawn raids with foreign authorities. A number of countries have amended their laws to align themselves to the standard of more experienced jurisdictions to be considered, in theory, for joint evidence gathering exercises.[18] The lack of fully functional corporate leniency programmes, as discussed above, is also challenge to effective co-operation in the investigation of international cartels.

As with any new authority, human resource capacity is a challenge. It takes time to develop the requisite skills and experience. Even where competition authorities are conferred with strong powers, for example to compel the production of documents and conduct surprise inspections, these may be hampered by inexperience and a lack of institutional capacity.

Lack of trust and confidence in legal systems

Trust is central to building co-operative relationships between authorities (see OECD, 2012a, 2012b). A lack of trust can be caused by a weak legal framework in the country seeking co-operation, insufficient transparency of the competition authority's procedures and inadequate safeguards for due process. This heightens perceptions that information may be leaked, putting the investigations of foreign authorities at risk and

undermining the effectiveness of their cartel enforcement programmes and associated tools. There may be a lack of confidence in the ability of the requested country to provide information of the quality and/or standard necessary for the requesting country to use it in its own investigation. This is a higher risk with newer authorities that have not yet established the necessary safeguards or acquired sufficient experience to handle such requests.

The role of the OECD in fostering international co-operation in competition cases

Over the last 45 years, the OECD approved a series of Council Recommendations which have been elaborated and progressively refined by the Committee, dealing directly or indirectly with international co-operation between competition authorities on enforcement cases. While four of these instruments date from before the period covered by the stocktaking exercise, for completeness they have been included in the following section. The section also covers the 2005 Committee Best Practices on the exchange of information between competition authorities in hard core cartel cases.

Since their very beginning, the OECD and its Competition Committee have taken a leading role shaping the current framework for international co-operation between competition enforcement. Instruments, best practices and policy roundtables have served not only as model and inspiration for national initiatives but have served as the primary drive for promoting co-operation on a global scale. The OECD and its Competition Committee offers competition officials from developed and emerging economies a unique platform to monitor the state of international co-operation and to develop new solutions to increase its effectiveness. The Committee's work benefits from the support of a professional Secretariat and from the Organisation whole-of-government approach, taking advantage of expertise and experience with international co-operation that are available through other OECD Committees.

Going forward, the OECD Competition Committee has decided to focus its future work on two strategic themes and international co-operation in competition enforcement is one of them. The work on international co-operation remains at the core of the activities of the Committee and its working parties and will contribute to shaping new models for co-operation for the benefits of enforcers and business alike. The international co-operation projects aims at studying and sharing experience and insights on international co-operation among competition agencies with a view to improving it; exploring of the policy rationale for international co-operation; reviewing the relative merits of various forms of co-operation, lessons from

co-operation efforts in other policy fields; identifying constraints on greater co-operation, and analysing experience over the past 17 years with the 1995 Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and checking if there are areas where improvements are needed.

Key issues that will be address over the next 18 months include the following questions: What are the existing types of international co-operation? What is the value of international co-operation? What are the changes in co-operation since the issuing of the 1995 Recommendation? What is the OECD role? What are the constraints on further co-operation?

OECD Recommendations on international co-operation

The first Recommendation on international co-operation in enforcement cases dates back to 1967 (OECD, 1967). This first instrument recognising that the powers of competition authorities to co-operate are limited, encouraged Member countries to *a)* notify other countries of an investigation involving their important interests and *b)* co-ordinate their respective actions when more than one jurisdiction is looking at the same case, and *c)* supply each other with any information on anti-competitive practices. The Recommendation acknowledges that competition authorities should operate within the limit of existing national laws and that the Recommendation should not be construed as affecting national sovereignty and extra-territorial application of national competition laws.

In 1973, the Council adopted a new Recommendation (OECD, 1973) which, in keeping with the earlier version, recognised that closer co-operation between Member countries is needed. In order to facilitate the resolution of cross-border cases, it recommends that Member countries implement on a voluntary basis a consultation procedure in cases where anti-competitive business actions in foreign jurisdictions affect the interests of a Member country. Should the consultation fail to provide a satisfactory solution, the issue could be submitted to the Committee for conciliation. This dispute resolution mechanism has never been used so far.

In 1979 a new version of the Recommendation was adopted (OECD, 1979), repealing the previous two recommendations of 1967 and 1973. The 1979 recommendation combined the previous two, and is divided in two sections. The first deals with notification, exchange of information and co-ordination of actions when a Member country decides to take an enforcement action which is likely to affect the interests of another member country(ies). The second part of the Recommendation deals with consultation and conciliation procedures when a Member country considers that anti-competitive actions by firms located in another member country(ies) are likely to affect its important interests.

The 1979 recommendation was replaced in 1986 by a new version (OECD, 1986), which in addition to the provision of the 1979 text includes in an Annex a set of 'Guiding Principles', which are intended to clarify the procedures laid down in the Recommendation on notification, exchange of information, consultation and co-ordination. The Guiding Principles were then refined by the Committee in 1995 (OECD, 1995), when the Council adopted the latest recommendation on international co-operation (the "1995 Co-operation Recommendation"). In the revision there were no substantive amendments to the recommendation itself, only to the Appendix.[19] The 1995 Co-operation Recommendation is still in force today.

Other OECD Recommendations indirectly dealing with international co-operation

The 1998 Recommendation on Hard Core Cartels

The *1998 Recommendation on Hard Core Cartels* (OECD, 1998) marked the first time the OECD defined and condemned a particular kind of anti-competitive conduct. The Recommendation was expected to contribute to the efficient operation of international markets by promoting, *inter alia*, co-operation among Member and non-Member countries. The first part of the 1998 Cartel Recommendation provides that Member countries should ensure their competition laws effectively halt and deter hard core cartels. The second part of the Recommendation stresses Member countries' common interest in preventing hard core cartels and sets forth principles concerning the "when" and the "how" of co-operating with respect to hard core cartels.

The Recommendation invites member countries to improve co-operation by positive comity principles, under which a country could request that another country remedy anti-competitive conduct that adversely affects both countries. It recognizes that Member countries' mutual interest in preventing hard core cartels warrants co-operation that might include sharing documents and information in their possession with foreign competition authorities. It also recognizes the benefit of investigatory assistance in gathering of documents and information on behalf of a foreign authority. The Recommendation also encourages the review of obstacles to effective co-operation with respect to hard core cartels and consideration of actions, including national legislation and/or bilateral or multilateral agreements or other instruments, to eliminate or reduce them.

The 2005 Recommendation on Merger Review

The *2005 Recommendation on Merger Review* (OECD, 2005) came out of a desire to consolidate and reflect the wide-ranging work on merger control, and also take into account important work by other international bodies in this area, in particular the International Competition Network (ICN).[20] The goal was to create a single document that would set forth internationally recognised best practices for the merger review process, including co-operation among competition authorities in merger review. Part B of the Recommendation deals specifically with Co-ordination and Co-operation on cross-border merger cases. In particular, it invites Member countries to co-operate and to co-ordinate their reviews of transnational mergers in order to avoid inconsistencies. Member countries are encouraged to consider actions, including national legislation as well as bilateral and multilateral agreements or other instruments, by which they can eliminate or reduce impediments to co-operation and co-ordination.

Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations

In 2004, the Committee started developing a set of Best Practices for the formal exchange of information in cartel investigations. The final version of the Best Practices on formal exchange of information in cartel investigations (the "2005 Best Practices") was adopted in October 2005. The 2005 Best Practices aimed to identify safeguards that Member countries should consider applying when they authorise competition authorities to exchange confidential information in cartel investigations. By identifying appropriate safeguards for information exchanges, the 2005 Best Practices assist Member countries in removing obstacles to effective co-operation by authorising the exchange of confidential information in cartel investigations.

The 2005 Best Practices were based on the following principles:

- International treaties or domestic laws authorising a competition authority to exchange confidential information in certain circumstances should provide for safeguards to protect the confidentiality of exchanged information. On the other hand, such safeguards should not apply where competition authorities exchange information that is not subject to domestic law confidentiality restrictions.
- Member countries should generally support information exchanges in cartel investigations. It should, however, always be at the discretion of the requested jurisdiction to provide the requested information in a specific case, or to provide it only subject to

conditions, and there should be no obligation to act upon such a request. A country may decline a request for information, for example, because honouring the request would violate domestic law or would be contrary to public policy in the requested jurisdiction.

- When initiating an exchange of information, jurisdictions should act with the necessary flexibility in light of the circumstances of each case. They should consider engaging in initial consultations, for example to assess the ability of the jurisdiction receiving the request for information to maintain the confidentiality of information in the request as well as the confidentiality of exchanged information.
- Appropriate safeguards should apply in the requesting jurisdiction when it is using the exchanged information. In this context, the Best Practices address in particular the use of exchanged information for other public law enforcement purposes, disclosure to third parties, and efforts to avoid unauthorised disclosure.
- Information exchanges should provide safeguards for the rights of parties under the laws of member countries. The Best Practices specifically mention the legal profession privilege and the privilege against self-incrimination. In this context, Member countries may have to take into account differences in the nature of sanctions for violations of competition laws concerning hard core cartels in different jurisdictions.

Notes

1. 159 U.S. 113 (1895), 163-64: "'Comity', in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."
2. The term "positive comity" appears to have been coined during the negotiation of the 1991 Co-operation Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition

Laws ("the 1991 EC-US Agreement"). See 1991 US/EC Agreement, OJ 1995 L 95/45, corrected at OJ 1995 L 131/38, Article V.

3. Starting with the 1976 Germany –US Antitrust Accord and followed by the 1982 US-Australia Agreement and the 1984 US-Canada Memorandum of Understanding.

4. "First generation agreements" are formal bilateral co-operation agreements incorporating the negative comity principle. In contrast, "second generation agreements" incorporate a positive comity principle. "Third generation agreements" refer to antitrust mutual assistance treaties which as a result of domestic law amendments provide for more extensive co-operation.

5. Agreement Between the European Communities and the Government of the United States of America Regarding the Application of Positive Comity Principles in the Enforcement of their Competition Laws, OJ 1998 L 173.

6. Agreement Between the Government of the United States of America and the Government of Canada on the Application of Positive Comity Principles to the Enforcement of their Competition Laws (2001).

7. The previous exclusion of competition matters was removed from the 1994 US-UK MLAT in 2001.

8. See World Trade Organisation RTA database: www.wto.org/english/tratop_e/region_e/region_e.htm.

9. Members include Bolivia, Colombia, Ecuador, Peru and Venezuela.

10. Free Trade Agreement between Chile and Central America (1999), Agreement between New Zealand and Singapore on a Closer Economic Partnership (2001), Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership (2004).

11. Caribbean Community (CARICOM).

12. For an analysis and taxonomy of competition provisions in bilateral, trade and regional agreements which include competition provisions see, for example: Dabbah (2010); Papadopoulos (2010); Holmes et al. (2005).

13. Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Co-operation Regarding Restrictive Business Practices, 23 June 1976, 4 Trade Reg. Rep. (CCH) 13501.

14. Or on a delegation of authority to the competition authority.

15. Agreement between the Government of the United States of America and the Government of Australia on Mutual Antitrust Enforcement Assistance, 1999, [1999] ATS 22.

16. See for example the Memorandum of Understanding between the Commissioner of Competition (Canada) and the Fiscal Nacional Economico (Chile) Regarding the Application of their Competition Laws (2001).

17. Similar issues arise with regard to information which is considered to be covered by the client-attorney privilege in one jurisdiction but not in other jurisdictions. The OECD Best Practices for Information Exchange provide useful guidance to competition authorities in cases where the rights of defense and legal systems differ (Section IIC "Protection of Legal Professional Privilege").

18. For example, Chile and Mexico recently amended their competition laws (in 2009 and 2010 respectively), which improved their investigatory powers, including the ability to conduct surprise inspections.

19. For example, the text lists new circumstances in which notification would be appropriate including the *possibility of remedies that would require or prohibit conduct in the territory of another Member country***.** It also includes a new section on *co-ordination of concurrent investigations and proceedings*, which specifies that such co-ordination should be undertaken on a case-by-case basis and should include notification of applicable time periods and schedules, sharing of information consistent with national laws on confidentiality, and co-ordination of negotiation and implementation of remedies. It also introduces a new description of various *means by which information may be provided by one competition agency to another, including obtaining information by compulsory means*. As in the case of concurrent investigations, it was specified that such co-operation should be undertaken on a case-by-case basis, with assistance subject to the applicable national laws of the assisting agency.

20. The Recommendation addressed all steps of the merger review process, including the definition of thresholds to establish jurisdiction over international mergers, notification requirements, transparency of the merger review process, procedural fairness, the protection of confidential business information, and co-ordination and co-operation among competition authorities. It also encouraged Member countries to ensure that competition authorities have sufficient powers to conduct efficient and effective merger review and to effectively co-operate and co-ordinate with other competition authorities in the review of transnational mergers. Recommendations were made on *a)* notification and review procedures, *b)* co-ordination and co-operation, *c)* resources and powers of competition authorities, *d)* periodic review, *e)* definitions.

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