



APEC Training Course on Competition Policy

Improvement and harmonisation of legislation / information exchanges in trans-border cases

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Overview

- Improvement and Harmonization of Competition Legislation in APEC
 - To what degree is there harmonization?
 - What are the key differences?
 - What would constitute an “improvement”?
- Information exchange in trans-border cases
 - Why exchange?
 - Exchange what?
 - When to exchange information
 - Mechanisms for exchange

Harmonisation

To what degree is there harmonization?

- By the end of this year 20 / 21 APEC economies will have:
 - A generalised competition law in force; and
 - An agency with specialist competition law investigation and enforcement staff.
- Common to all these countries are:
 - A prohibition against horizontal coordination that lessen competition (the “top priority”)
 - A prohibition against anticompetitive conduct of a single firm nature (a secondary priority)
- Ten years ago, the figure was only 17 / 21

Differences in substantive law - mergers

- What constitutes a ‘concentration’ or ‘merger’ differs— joint ventures; thresholds; minority stakes
- In mergers, for example, there are economies with:
 - Compulsory, suspensive pre-merger approval regimes
 - Non-suspensive compulsory post-merger regimes
 - Voluntary formal pre-merger regimes
 - Voluntary informal pre-merger regimes
- The test can vary between a pure competition test or a net public benefit test

Difference in substantive law – conduct

- Horizontal conduct:
 - In all countries the primary focus is on cartels Concerted practices and association decisions are explicitly illegal in some and not other economies
- Unilateral conduct:
 - The effects standard vs the purpose standard
 - In all countries exclusionary abuses are the focus but in some countries unfair pricing / exploitative abuses are also prohibited
- Vertical conduct:
 - The focus is on cases involving vertical leverage
 - Other vertical prohibitions vary greatly

Where are the differences? – detection & enforcement

- All three predominant enforcement models exist in APEC:
 - Administrative enforcement
 - Civil enforcement
 - Criminal enforcement
- Investigatory tools:
 - Some agencies have strong information/inspection powers and others rely on informants
 - Some have leniency policies or bounties and others don't
- Some impose penalties only on companies and

Practical differences

- At least as important as the differences in law are differences that are not as immediately apparent
- Some very large economies have very small agencies and some quite small economies have large agencies
- The markets they supervise are also very different both in terms of their size and the kinds of anticompetitive conduct that are most common
- Agencies' enforcement *culture* and *prominence within their own economy* can be more important than differences on paper

Differences are not undesirable in themselves

- Abuse of dominance: Where economies have current and former state owned monopolies, they may need excessive pricing powers even if they share a predominant focus on exclusionary abuses
- Mergers: Small countries with small agencies usually need to target their investigations to localised issues and defer the central aspects of global deals to larger countries
- Enforcement tools: Competition authorities may not initially be granted substantial powers and these may only be obtained once a successful track record has accumulated

Differences can often be exaggerated

- Generally speaking, competition authorities have the same priorities and when implementing their laws divergence is often much less important than it may appear on paper

Nevertheless, convergence is beneficial

- Different approaches have substantial costs
- For example, different abuse of dominance standards and vertical conduct regimes mean that companies must often have specific distribution arrangements in different countries
- Such different standards hamper the entry of businesses into new jurisdictions
- Divergence also adds to the complexity for managers with multi-jurisdictional responsibilities who seek to comply with the law
- Businesses are often regional or organise themselves internally by region

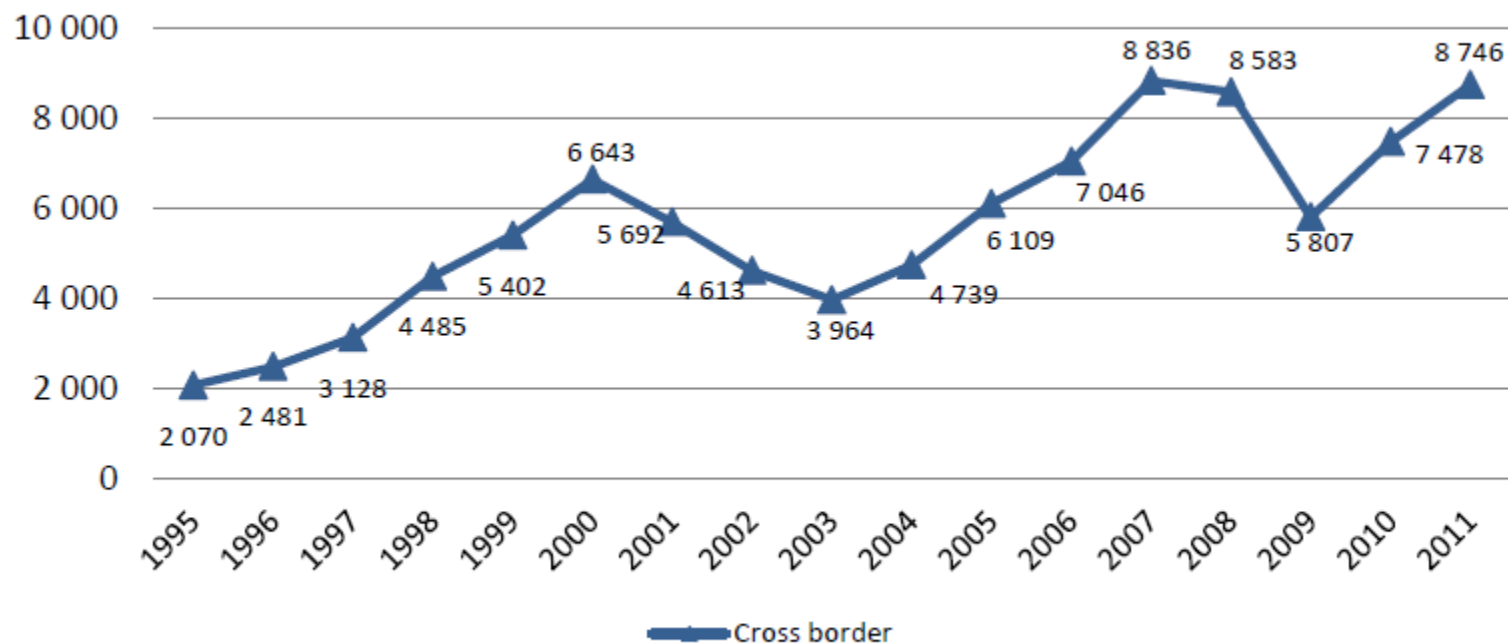
Suggestions for conversion

- The most important issue is conversion of analysis which means competition authorities need to share case theories in important cases
- When adopting new laws, draw on OECD, UNCTAD and ICN models
- Submit your system to periodic peer reviews
- Consult with each other when considering amending competition laws particularly within regional groupings

Information exchange

International Mergers

Figure 5. Number of cross-border M&A deals: 1995 - 2011

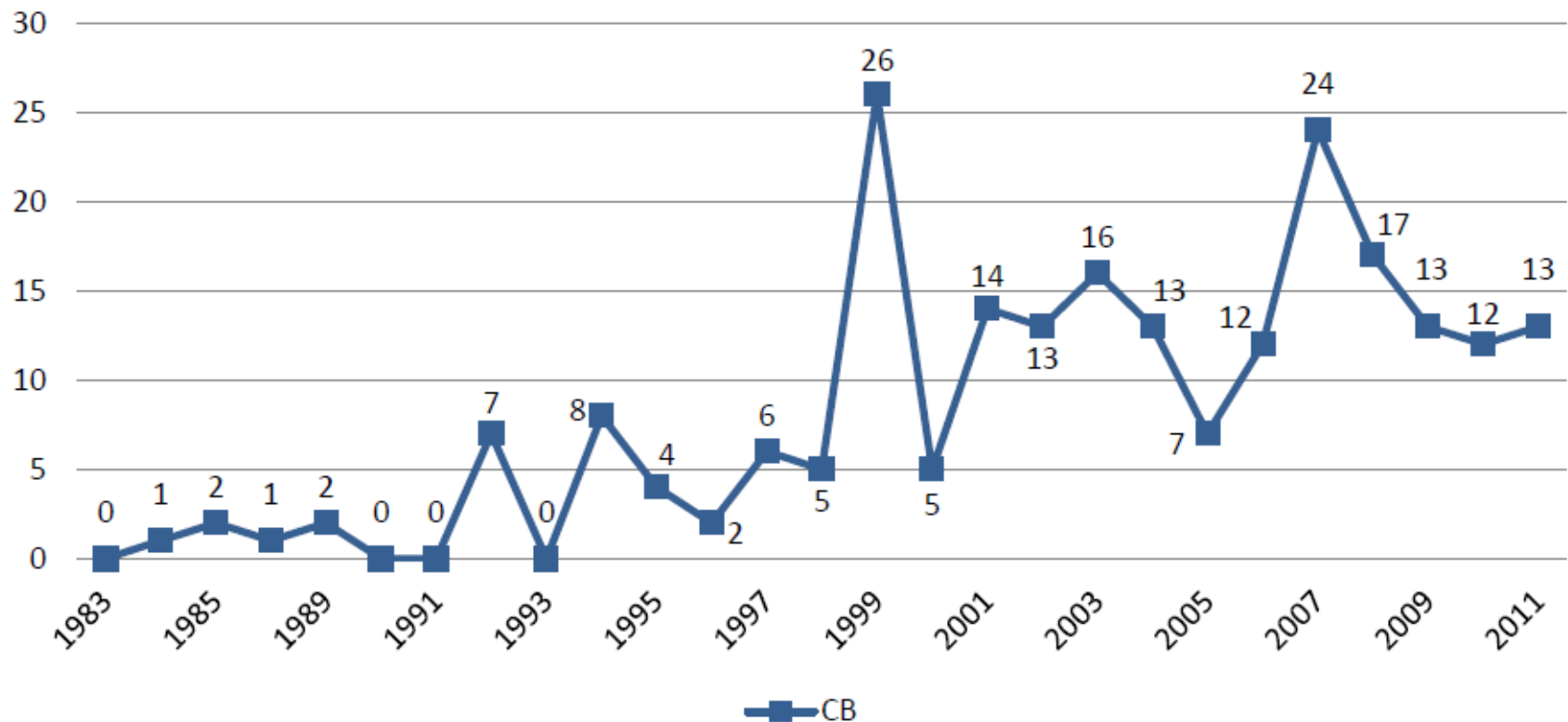


Source: Dealogic Global M&A Database, OECD calculations

OECD 2014 Challenges of International Co-operation in Competition Law Enforcement - <http://www.oecd.org/daf/competition/challenges-international-coop-competition-2014.htm>

International Cartels (revealed)

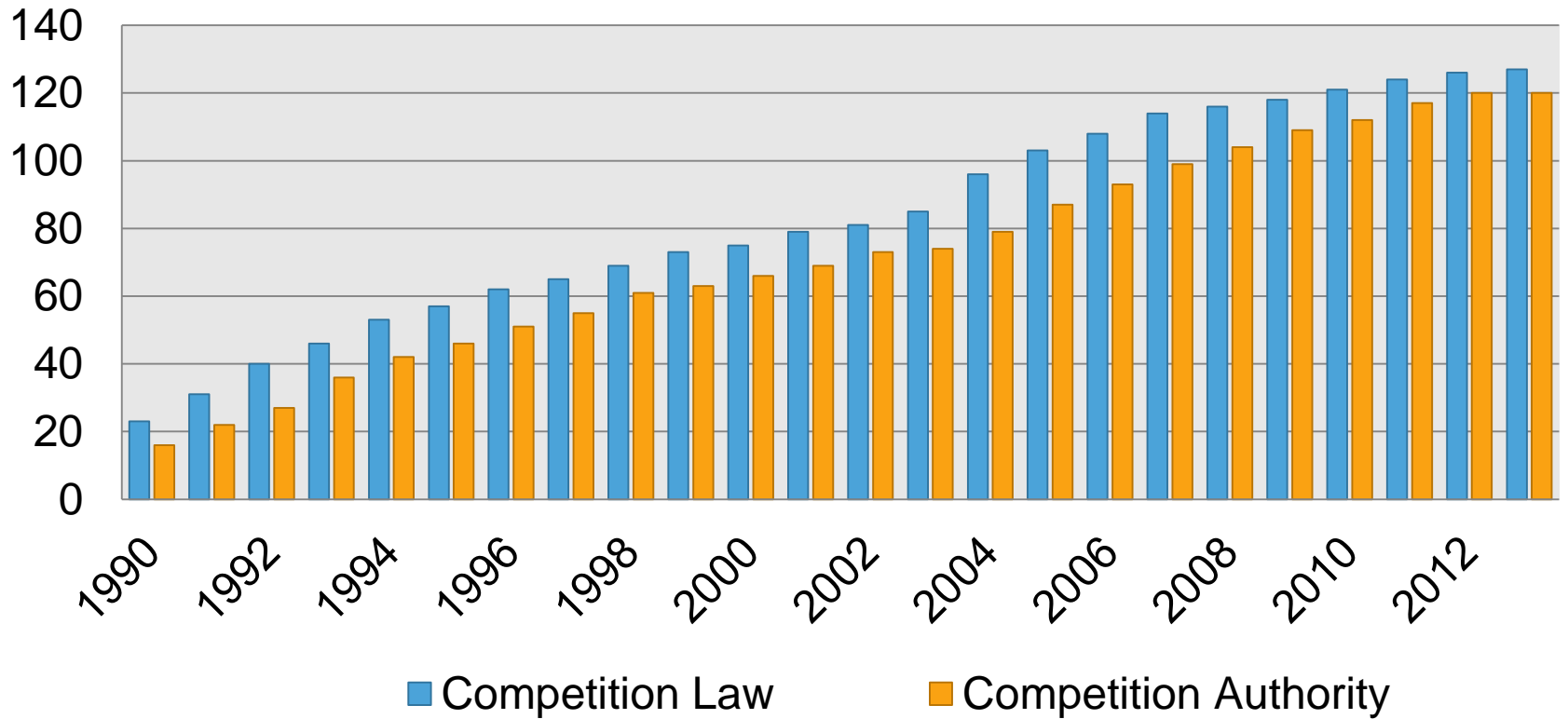
Figure 10. The number of cross-border cartels revealed per year



Source: OECD calculations using the Private International Cartels dataset

OECD 2014 Challenges of International Co-operation in Competition Law Enforcement - <http://www.oecd.org/daf/competition/challenges-international-coop-competition-2014.htm>

Jurisdictions with a competition law and a competition authority



Source: OECD

Why exchange information

- Illegal conduct can be very difficult to detect and enforcing the provisions can be difficult
- Information can be costly to compile
- Agencies have different strengths based on the different investigative tools or due to where evidence is located
- Information exchange enables competition authorities to obtain scale economies to match those of global businesses
- Parties providing information to you cannot always be trusted and 'cross checking' is a way to ensure you efficiently obtain the truth / whole truth
- Given the number of agencies that now exist, sometimes private parties who hold information simply do not have the capacity to supply all agencies with the relevant information
- Global enforcement can be necessary for global deterrence

The latest and greatest materials



Available at:

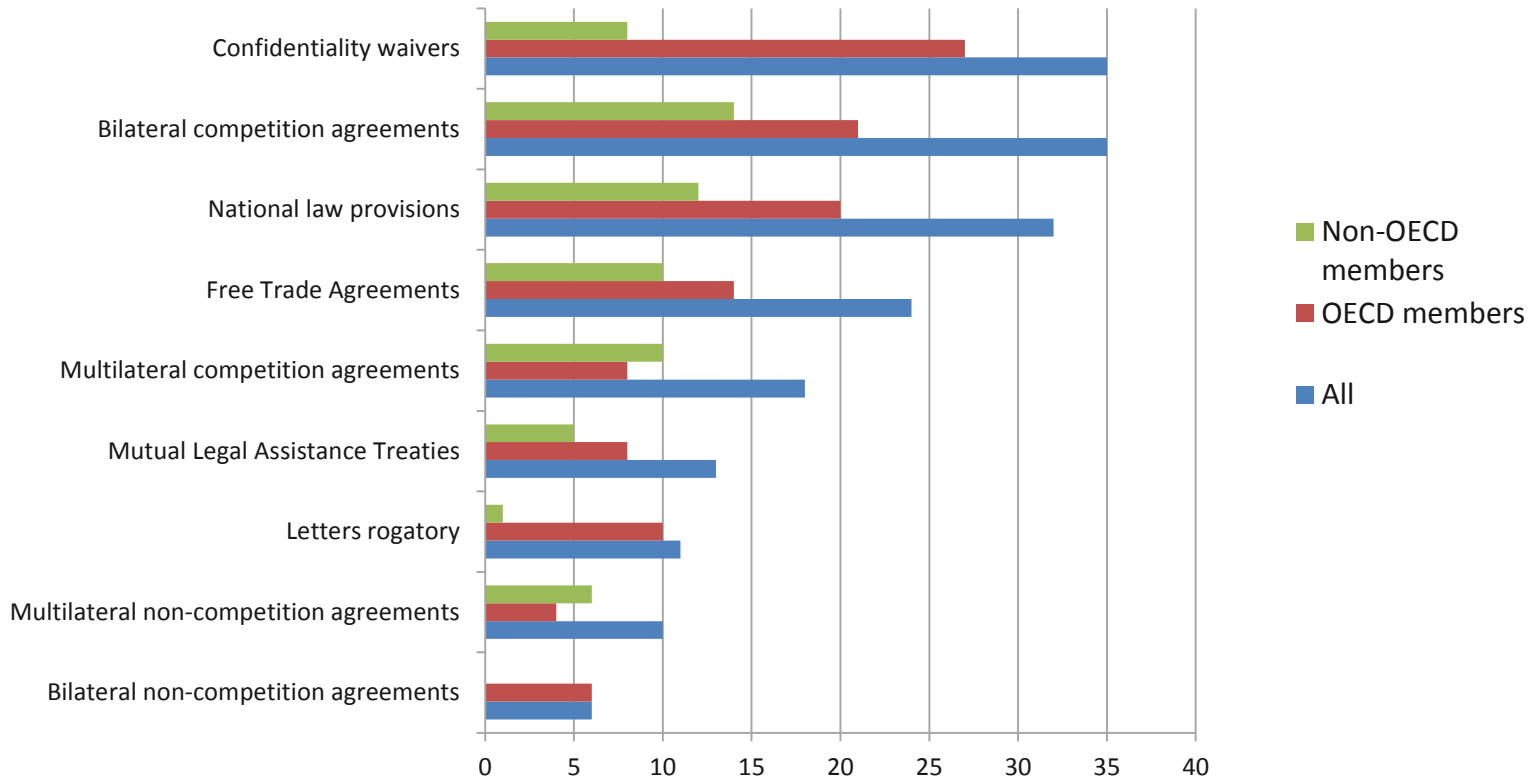
<http://www.oecd.org/daf/competition/oecd-icn-international-cooperation-survey.htm>

OECD Recommendation Provisions on Information Exchange 2014

UNCTAD 2014, *Informal cooperation among competition agencies in specific cases*



Mechanisms



Improving the Ability of Authorities to Exchange Information

Non-confidential information

- e.g. publicly available information

Agency confidential information

- Information internally generated by competition authorities

Third-party confidential information

- Promote the use of waivers
- Adoption of “information gateway” provisions

Safeguard

- to adequately protect confidential information

Confidentiality Waivers

- A waiver is the (written) consent of the party providing information to the (limited) exchange of it between authorities
- These will not be provided unless there is an incentive
- What are the incentives to offer such a waiver?
 - Mergers: accelerated approval
 - Cartels: condition of leniency
 - Generally: complainants may want to facilitate multiple investigations
- Beware that sharing information voluntarily with the government is generally contrary to the culture of businesses and advisors

Model texts:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc1012.pdf> and

<http://ec.europa.eu/competition/mergers/legislation/npwaivers.pdf> and

<http://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust>

Information Gateways

- Provisions which allow competition authorities to exchange confidential information without waivers under certain requirements

International agreements
(i.e. the second generation agreement)

- US-Australia
- EU-Swiss
- Australia-NZ
- Nordic countries
- ECN

National provisions

- Australia (Section 155AAA)
- Canada (Section 29)
- Germany (§ 50)
- UK (Section 243)

Risks Related to Disclosure of Information Between Authorities

- The importance of protecting sources: If the business community loses faith in the protection of confidential information it:
 - will not agree to waivers
 - will stop providing confidential information to authorities and there will not be anything valuable to share through gateways

Risks of Disclosure of Information Between Authorities

- Different notion of ‘confidential’ information
- Information is used for a purpose/infringement different from the initial investigation
- Information is used for sanctions on individuals/under criminal procedure
- Different provisions on disclosure of information/access to file to parties/third parties/other authorities
- Different rules on authority-internal access
- Risk of leaks or unauthorised use of information

Summary of Provisions on Information Exchange/Transmission

- Information gateways should be based on these principles:
 - Full discretion of the transmitting authority (seriousness of infringement, safeguards, procedural rights, relevance ...)
 - Exchange in similar (mostly: parallel) proceedings/competition law matters and limited to these
 - Reciprocity of information provision and equivalence in confidentiality protection
 - Internal and external protection of confidential information, no access of (any) third party/authority (without explicit consent)
 - Extra care for very sensitive business information and protection of legally privileged information

The Use of Gateways: Examples

Marine Hose

- Controlling prices, bid rigging and allocating market involving marine hose
- The ACCC co-operated closely with UKOFT, USDOJ
- The use of the UK overseas information gateway by the ACCC
 - Disclosed information: email communications and witness statements
- The ACCC investigation resulted in a sanction of a total of AUD \$8.24 million

Fine paper

- Price fixing in the supply of copy paper
- The ACCC exercised its information gateway provision (155AAA) to assist the NZCC.
- The ACCC allowed the NZCC to see, but not take copies of, protected information. The NZCC later obtained a subpoena by itself.

Exchange what/when?

- Information exchange can be a costly process
- ‘Leads’ where conduct is clandestine is the top priority
- Detailed information may be more cost effectively obtained from the parties directly when it needs to be adapted to location (eg retail markets) or needs to be in the local language
- Generally speaking, the earlier discussions occur, the more useful is information exchange. There is not much point exchanging information after both agencies have gone through a complete investigation process in which they have sought and obtained the same information

Conclusion

- Harmonisation and information exchange can assist competition authorities to:
 - Maximise detection and enforcement
 - Minimise costs for themselves and the parties from whom they gather information
 - Contribute to greater domestic and international wealth
 - Practical convergence of enforcement approach is more important than uniform laws
 - Take care with confidential information to ensure informants have correct incentives

Materials (information exchange)

- OECD Recommendations (competition related) -
<http://www.oecd.org/daf/competition/recommendations.htm>
- OECD work on international co-operation –
<http://www.oecd.org/daf/competition/challenges-international-coop-competition-2014.htm>
- OECD work on procedural fairness -
<http://www.oecd.org/daf/competition/abuse/proceduralfairnessandtransparency-2012.htm>
- ICN work on international co-operation -
<http://internationalcompetitionnetwork.org/about/cooperationwork.aspx>
- UNCTAD work on international co-operation -
<http://unctad.org/en/Pages/DITC/CompetitionLaw/ccpb-PubsPage06.aspx>
- On waivers -
<http://www.internationalcompetitionnetwork.org/uploads/library/doc1012.pdf>
and <http://ec.europa.eu/competition/mergers/legislation/npwaivers.pdf> and
<http://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust>