



The **E15** Initiative

STRENGTHENING THE GLOBAL TRADE AND INVESTMENT SYSTEM  
FOR SUSTAINABLE DEVELOPMENT



**Implications of Globalisation for Competition Policy:  
The Need for International Cooperation  
in Merger and Cartel Enforcement**

Antonio Capobianco, John Davies, and Sean F. Ennis

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E15 Expert Group on  
Competition Policy and the Trade System

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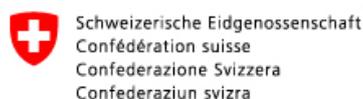
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# ABSTRACT

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The complexity of cooperation in cross-border competition law enforcement increased significantly between 1990 and 2011, underlining the urgency to improve techniques and tools of competition authority cooperation. As international trade has increased, the number of competition law enforcement activities related to cross-border mergers and cartels has risen substantially (up by about 250–466% since the 1990s). At the same time, the number of competition authorities has increased by a factor of six since 1990, from under 20 to 120 as of 2013. The spread of competition law is a positive development but cooperation has become more complicated as a result. Between 1990 and 2011, an index of complexity of cooperation on cross-border cases has increased of between 23 and 53 times. As trade and cross-border business activity increases in the future, and young competition authorities become more active, effective cooperation will become even more complicated. Ultimately, the complexity of cooperation can lead to undesirable outcomes, such as inconsistent decisions and unchallenged illegal conduct. The costs of failures of cooperation are identified, and found to be substantial. To overcome potential failures in cooperation, new and enhanced methods of competition law cooperation should be explored, such as mechanisms for the secure exchange of confidential information, and agreements between competition authorities to make more use of one another's work on parallel investigations.

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# LIST OF ABBREVIATIONS

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BRICS	Brazil, Russia, India, China, South Africa
BRIICS	Brazil, Russia, India, Indonesia, China, South Africa
CC	Competition Commission
DG COMP	Directorate-General for Competition of the European Commission
DOJ	Department of Justice
EU	European Union
FDI	foreign direct investment
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
G20	Group of Twenty
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
ICTSD	International Centre for Trade and Sustainable Development
M&A	mergers and acquisitions
MOFCOM	Ministry of Commerce, People's Republic of China
OECD	Organisation for Economic Co-operation and Development
PIC	Private International Cartel
UK	United Kingdom
UN	United Nations
US	United States
WEF	World Economic Forum
WTO	World Trade Organization

# EXECUTIVE SUMMARY

In the past two decades competition law has gone global, with more countries than ever enforcing some form of competition law. There has been more than a 600% increase in the number of jurisdictions with competition law enforcement since 1990, from fewer than 20 to about 120 today. Effective competition promotes growth and well-being, so this is a good thing. However, as business increasingly globalises, there is more and more likelihood that multiple competition authorities will investigate the same matter. This paper examines how frequently such parallel investigations are likely to happen – now and as globalisation deepens – and what happens if two or more authorities reach conflicting decisions.

We find that:

- Increasingly, the cases competition authorities investigate have an international dimension. For example, the number of cartel cases investigated in the European Union involving a participant from outside the EU has increased by more than 450% since 1990. The number of cross-border mergers more than doubled from the late 1990s to around 2010. Around two-thirds of the merger decisions by the Competition Commission of India in its first three years of merger review had an international dimension.
- Competition authorities are therefore cooperating with one another on investigations more frequently than ever before. Most competition authorities responding to an OECD/International Competition Network (ICN) survey in 2012 had cooperated with a foreign authority at least once, but only a handful of authorities – representing the larger and mostly more experienced jurisdictions – had done so more than five times. Some pairs of authorities cooperate very frequently and effectively, most significantly the European Union and United States authorities have a good and close relationship.
- However, with many more competition authorities out there, there are many more authorities likely to be involved in investigating the same cartel or merger. One multinational company told us that none of its mergers in the early 1990s required filing in three or more jurisdictions, but more than 30% do today. The direct costs of dealing with multiple parallel investigations are therefore likely to be rising for business and public expenditure.
- There has been significant international convergence of approaches and the authorities are cooperating more often and more effectively than they used to but there is still a danger of their reaching inconsistent decisions

on a common case. Such conflicting decisions create economic costs, particularly if remedies with local application are not available.

- As globalisation continues, and if nothing is done to improve international cooperation, we would expect higher costs to authorities as the number of enforcing partners that they must work with increases; more global mergers to be blocked (because they need to be approved in all major jurisdictions); and perhaps a chilling effect on global merger activity as a result.

To avoid these costs, we propose several ways in which cooperation can be improved, whether by actions of the competition authorities themselves or (more fundamentally) legislative change:

- Improved bilateral cooperation, as competition authorities from emerging economies especially become more integrated into the international competition system.
- Developing standards for legislative/regulatory frameworks that would enable sharing of information (such as those several countries already possess) and include legislative protections for information received from counterpart competition authorities.
- Developing common form waivers and suggestions to facilitate the use of waivers.
- Adopting multilateral instruments that address the most pressing needs for cooperation. OECD Council Recommendations could provide a platform, or new instruments could be created by ad hoc groups of like-minded jurisdictions.
- Developing international standards for formal comity, such as a legal instrument defining criteria for requesting an enforcement action in or assistance to another authority, and clarifying participating authorities' comity obligations.
- Allowing authorities to choose to recognise the decisions of other competition authorities in the investigation of cross-border matters and even, as a development of this, an agreement for giving non-binding deference to one 'lead authority'.

Finally, convergence towards international consensus on the objectives and basic principles of competition law needs to continue. Our focus here has been on practical cooperation, but we assume that authorities are attempting to achieve much the same purpose. Differences in substantive approaches do remain, most prominently between the European Union and the United States on 'abuse of dominance/monopolisation' and between established and some emerging jurisdictions. However, these differences are actually rather minor, compared to the gulf that existed

just 20 years ago. We therefore expect convergence will continue, so that jurisdictions enforce a shared 'economic' understanding of competition. However, if this does not happen – if jurisdictions actually diverge and follow their own paths so there is no multilateral understanding of competition law – then of course no mechanism for coordinating authority actions can bring coherence to international enforcement.

# INTRODUCTION

This paper describes how globalisation and trends in the enforcement of competition law come together to create a greater need than before for international cooperation in enforcing competition law. Global business activities face multiple investigations and remedies, leading to duplication of cost, possible inconsistencies and in some cases ineffective enforcement. This problem will grow worse as globalisation deepens. The paper concludes by describing briefly some of the policy measures that could help to achieve such enhanced cooperation.

This paper was produced for the competition workstream of the World Economic Forum/International Centre for Trade and Sustainable Development (WEF/ICTSD) 'E15' project. It is based closely on work by the same authors released as a background paper for the May 2014 Ministerial Council Meeting of the Organisation for Economic Co-operation and Development (OECD) under the title 'International Co-operation in Competition Law Enforcement'.

# HISTORICAL BACKGROUND

Competition policy and enforcement have been on the international agenda for many decades. In the 1940s, the 'Havana Charter' and the planned (but never ratified) of the International Trade Organization as a specialised agency of the United Nations (UN) referred to competition as a key component to eliminate trade barriers and to improve trade liberalisation. Similarly, the General Agreement on Tariffs and Trade (GATT) with its market-oriented nature and provisions seeking to eliminate artificial barriers and discriminatory practices seemed to pave the way for a code of international competition applicable to interstate trade. However, no common standard or rule on competition developed at international level. At regional level, the 1957 European Treaty put competition at the core of the European construction and of the common market by prohibiting anti-competitive agreements and abuses of a dominant position through a series of provisions in the treaty itself.

In the 1980 the UN adopted the 'Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices'. The Uruguay Round (1986–94) of GATT

resulted in an internationally agreed set of rules and codes of conduct that, although not directly targeting competition, have indirectly enhanced competitive outcomes because of their market oriented character. In 1997, a working group was established in the World Trade Organization (WTO) to investigate the relationship between trade and competition policies. The 2001 WTO ministerial meeting in Doha agreed that negotiations on this subject were to be launched at the 5th WTO ministerial in 2003 on the basis of modalities to be agreed by consensus. At the 2003 Cancun meeting, no such consensus emerged, reflecting continued differences in views on the merits of introducing binding competition law disciplines into the WTO.

Some of the well-known international disputes in competition enforcement – such as the Boeing/McDonnell Douglas and the GE/Honeywell cases – led to active efforts to improve cooperation among competition enforcers. Authorities sought to ensure convergence between substantive competition standards applied by different jurisdictions and to establish closer cooperation. This led to significant substantive convergence in the area of cartels (started by the OECD Council Recommendation Concerning Effective Action against Hard Core Cartels, in 1998) and in the area of mergers where today most jurisdictions apply similar economic standards of review despite differences in the wording of the law. Today, most competition authorities around the world speak the same economic and legal competition language, and enforce competition laws using comparable tools and principles.

Authorities have also sought ways to cooperate more effectively. In the United States, for example, in 1997 the then US Attorney General and Assistant Attorney General created the International Competition Policy Advisory Committee (ICPAC) to address the following topics: (1) multi-jurisdictional merger review; (2) the interface of trade and competition issues; and (3) the future directions in enforcement cooperation between US antitrust authorities and their counterparts around the world, particularly in their anti-cartel prosecution efforts. The ICPAC produced a Final Report on International Competition Policy in 2000 with important recommendations. These included:

- Enhancing cooperation on merger review by establishing a transparent legal framework for cooperation with safeguards to protect the privacy and fairness interests of private parties.
- Rationalising the existing systems for merger notification and review.
- Developing work-sharing arrangements with the objective to reduce duplication of enforcement actions, while preserving the right of each jurisdiction to take its own measures, as necessary.
- Making more use of positive comity provisions, possibly in a multilateral context.

This revived interest in international cooperation led to two main developments:

- First, the creation of the International Competition Network (ICN), which offered and continues to offer a platform for authorities to exchange experiences on enforcement issues.<sup>1</sup>
- Second, some governments and authorities engaged in frequent cooperation have negotiated bilateral cooperation agreements with their main trading partners. The most recent 'second generation' agreements provide for extensive cooperation between the signatories, including the possibility to exchange confidential case information between enforcers. Similarly, at national level, some jurisdictions have adopted national laws providing statutory 'gateways' for voluntary disclosure to foreign law enforcement authorities of information gathered in the course of their own investigations.

An OECD/ICN Survey on International Enforcement Co-operation<sup>2</sup> confirmed an increase in the use of international cooperation between 2007 to 2012. However, the survey found that only a very small number of authorities (mainly OECD members) cooperated *frequently* on cases, as shown in Figure 1, below.

The purpose of international enforcement cooperation is twofold. Cooperation offers authorities the opportunity for more effective investigations and to generate efficiencies, for the authorities and affected businesses. Secondly, cooperation aims at minimising risks of divergent outcomes.

## THE DEMAND DRIVERS FOR COMPETITION LAW ENFORCEMENT COOPERATION

The need for competition law enforcement cooperation is driven by:

- the increasingly interconnected nature of economic activity; and
- the increased number of jurisdictions enforcing competition law, and the increasing activity that can be expected from young/new competition authorities.

1 | See <http://www.internationalcompetitionnetwork.org/>.

2 | *International Enforcement Co-operation*, Secretariat Report on the OECD/ICN Survey (OECD, 2013)

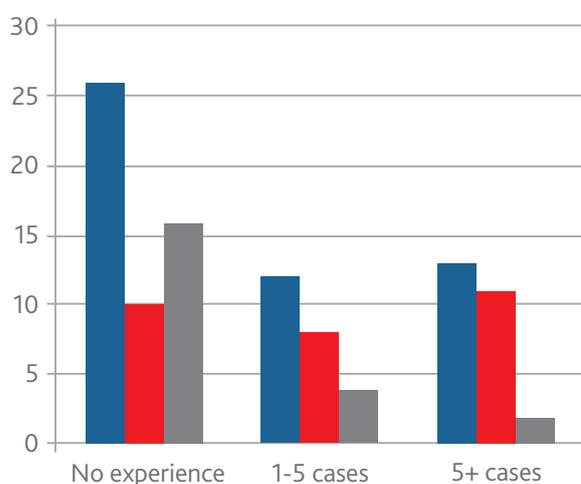


FIGURE 1:

Number of cases/investigations in which authorities cooperated (2007–2012)

LEGEND:

- All
- OECD members
- Non-OECD members

Source: *International Enforcement Co-operation*, Secretariat Report on the OECD/ICN Survey (2013), p. 14.

## INCREASING INTERNATIONAL CONNECTEDNESS AND ITS IMPACT ON COMPETITION ENFORCEMENT

Policymakers have to deal with two intertwined developments: rising global interdependence and an increasingly multipolar world as emerging economies form a growing share of the world economy.

### Trade

Trade and cross-border investment have increased substantially since the early 1990s. For example, the value of trade among 50 countries analysed here rose from about USD 90 billion per year in 1990 to USD 270 billion in 2011 (all values deflated to USD 2005), as shown in Figure 2.<sup>3</sup>

While the growth rate of trade is expected to slow from about 6% to 3.5% in the 50 years through 2060, mainly because of the maturing of the Chinese economy,<sup>4</sup> this would still result in world trade growing by about 540% in the 50 years from 2010 to 2060, reaching USD 1,450 billion in value by 2060.

### Foreign direct investment

Foreign direct investment (FDI) has also expanded substantially since the early 1990s. OECD statistics show that, worldwide, the inflow of FDI increased by more than four times between 1990 and 2012 (Figure 3). The levels of increase vary between OECD, G20 and the European Union, but the broad findings are similar, with a high variability between 2000 and 2012, though nonetheless much higher levels than in 1990.

### Cross-border mergers and acquisitions (M&A)

Trade statistics are closely reflected in experience with cross-border deals. Based on an OECD analysis of data on 63,824 deals and investment stakes in Dealogic's Global M&A Database from 1995 to 2011, the number of cross-border deals has increased substantially, from an average of 3,513 per year over the five years from 1995 to 1999 to 7,523 per year over the five years from 2007 to 2011 (see Figure 4).<sup>5</sup> For the purpose of this exercise, we considered cross-border acquisitions characterised by the acquisition of 50% or more shares of a company with a headquarters in one country by a company with its headquarters address in another country as a proxy for cross-border notifiable mergers in the antitrust sense.

The geographic spread of merger activity has also changed substantially since 1995, with more acquirers or targets in Asia, Latin America and Africa.

## INCREASE IN THE NUMBER OF JURISDICTIONS ENFORCING COMPETITION LAW

The spread of competition law enforcement around the world has been remarkable. At the end of the 1970s only nine jurisdictions had a competition law, and only six of them had a competition authority in place. By 1990, there were 23 jurisdictions with a competition law and 16 with a competition authority. As of October 2013, about 127 jurisdictions had a competition law,<sup>6</sup> of which 120 had a functioning competition authority. Figure 5 illustrates this.<sup>7</sup>

This rate of expansion in national competition law regimes will surely slow down. Many of the states that do not have competition laws are lower income countries that are less likely to adopt such laws soon. While not all countries are equally active in enforcing the law, particularly against companies headquartered outside their borders, the reach and self-confidence of new authorities could increase substantially in the future.

In some cases this expansion will have been the result of foreign pressure, for example from donors of foreign aid, to provide a good environment for business. However, there is also increased recognition that a strong competition policy contributes substantially to successful economic development.

### Increase in activity of new competition authorities

Many of the authorities that have been established since 2000 are likely to become considerably more active in the future than they are currently. For example, in India the competition law was passed in 2002 and was assented to in 2003, but the provisions on anti-competitive agreements and abuse came into effect in May 2009 (and there were amendments to the Act in 2007)<sup>8</sup> and the merger control provisions were not

3 Trade is calculated for countries that are members of the OECD, G20, BRICS (Brazil, Russia, India, China, South Africa) and the European Union (EU).

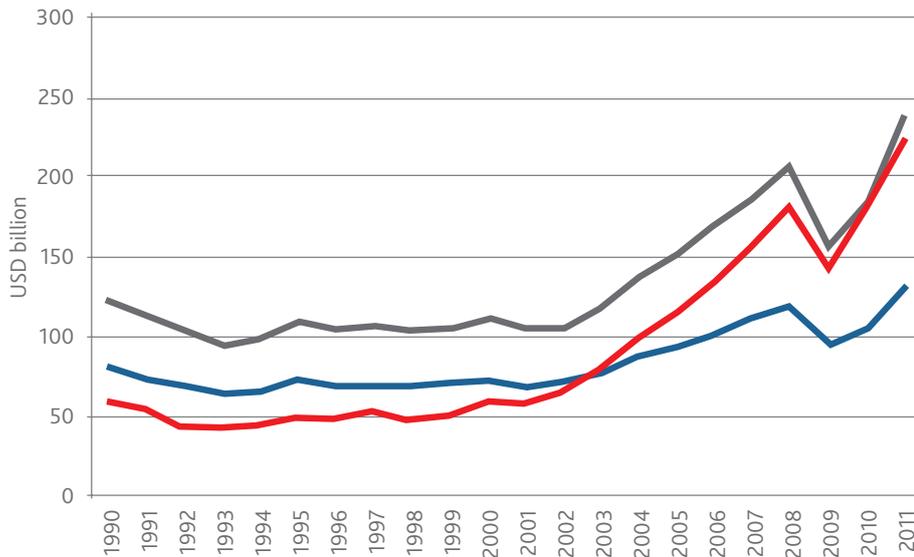
4 Giuseppe Nicoletti, *OECD@100: Policies for a Shifting World* (OECD, 2014).

5 Mergers between companies located within Member States of the EU are not categorised as cross-border for the purposes of this analysis.

6 The year of the competition law is the year in which each country's competition law was enacted, not necessarily the date the law came into force. The law needs to cover abuse of dominance, merger control or cartel enforcement and an institutional mechanism for enforcement.

7 Jurisdictions with competition law enforcement include not only countries and economies, but also regional entities, such as the European Commission's Directorate-General for Competition (DG COMP), the Common Market for Eastern and Southern Africa (COMESA) Competition Commission and others. The authorities include seven regional authorities, namely for the Andean Community, the Caribbean Community and Common Market (CARICOM), COMESA, South America's 'Common Market of the South' (MERCOSUR), EU, European Free Trade Association and the West African Economic and Monetary Union (WAEMU).

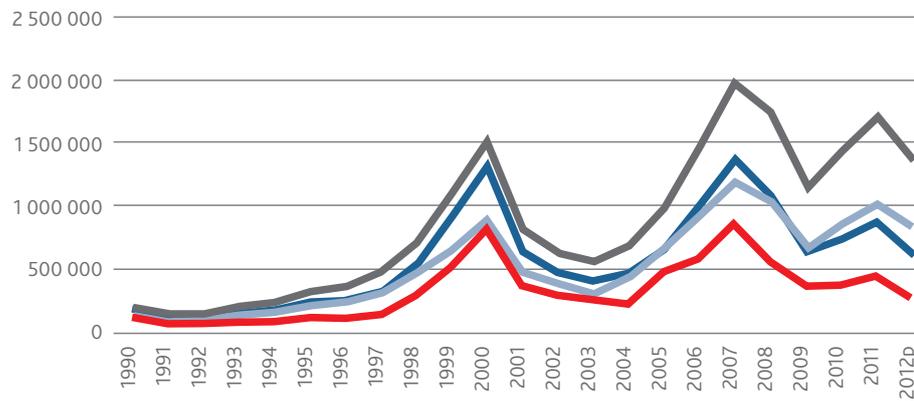
8 See the website of the Competition Commission of India, at [http://www.cci.gov.in/index.php?option=com\\_content&task=view&id=18](http://www.cci.gov.in/index.php?option=com_content&task=view&id=18).



**FIGURE 2:**  
Average trade value for a country in grouping

**LEGEND:**  
 — OECD  
 — BRICS  
 — G20

Source: UN Commodity Trade Statistics database, OECD calculations.  
 Note that the countries in the BRICS grouping consist of Brazil, Russia, India, Indonesia, China and South Africa.

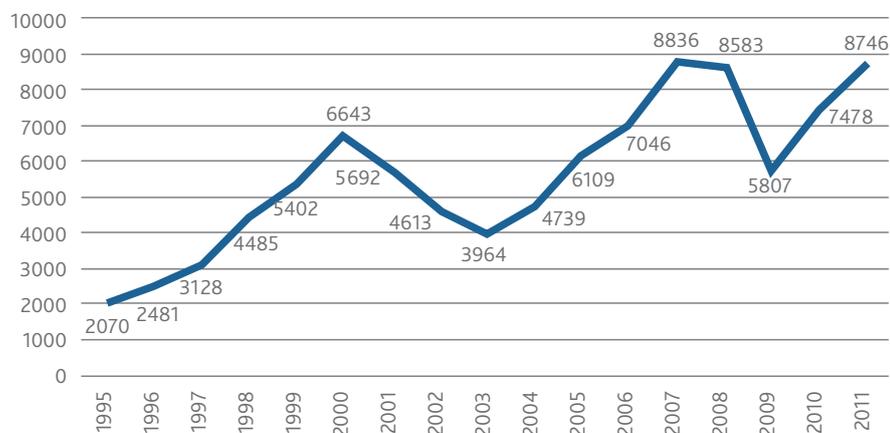


**FIGURE 3:**  
FDI inflows (annual, in USD million)

**LEGEND:**  
 — OECD  
 — European Union  
 — Total World  
 — G20 countries

Source: OECD.

Note: OECD includes 34 countries and excludes Special Purpose Entities for Austria, Hungary, Luxembourg and Netherlands. European Union is EU15 until end 2003, EU25 in 2004 - 2006, EU27 as from 2007. 'Total World' totals are based on available FDI data at the time of update as reported to OECD and International Monetary Fund. Figures projected to end-year, for 2012.



**FIGURE 4:**  
Number of cross-border M&A deals, 1995-2011

Source: Dealogic Global M&A Database, OECD calculations.

put into effect until 2011. If one looks at the track record on merger decisions of the Competition Commission of India, in 2011 it issued 12 decisions, in 2012 80 decisions, and in 2013 46 decisions were released (see Table 1). From 2011 to 2013, 89 of the merger decisions involved international companies.

## THE IMPACT OF INCREASED INTERCONNECTEDNESS ON ANTITRUST CROSS-BORDER ENFORCEMENT

The integration of domestic economies into an increasingly global economy has had an important impact on the nature of the enforcement activity of competition authorities. Cases and

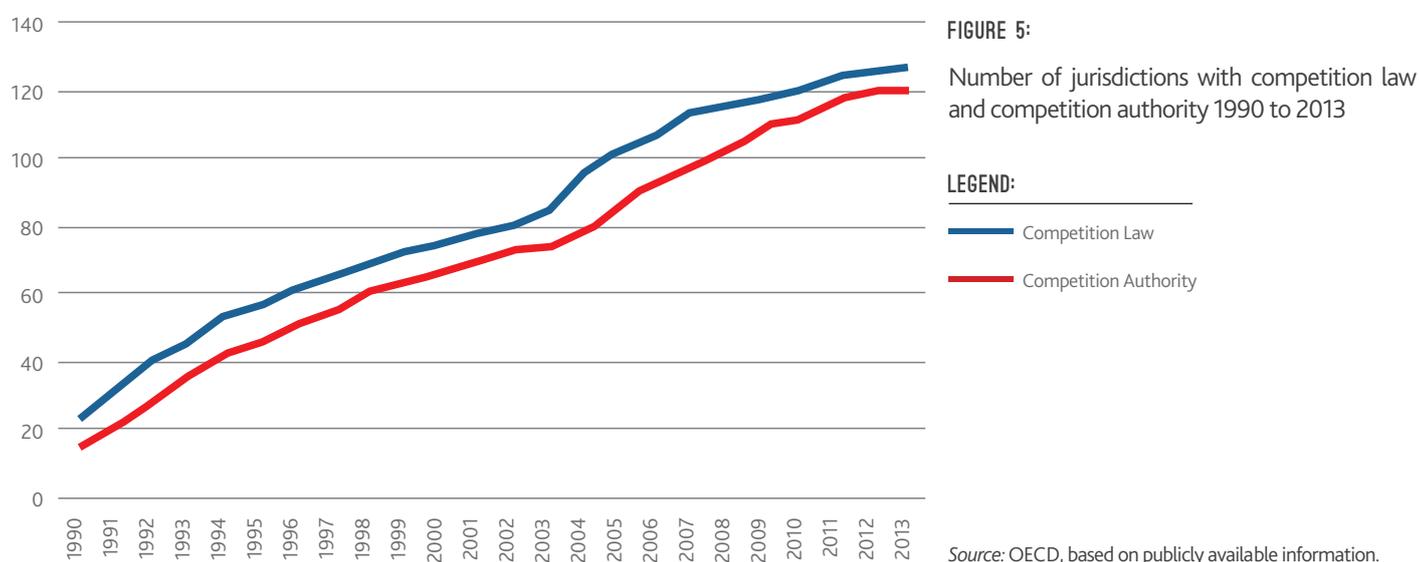
investigations reflect the increasingly cross-border activities of businesses and often require support from foreign enforcers.

### International cartels have been an increasing focus of prosecutions

Cartels can be either domestic or cross-border. A cross-border cartel would involve illegal behaviour by the same companies in at least two jurisdictions.

The number of cross-border cartels revealed in an average year has increased substantially since the early 1990s, mainly reflecting the increased use of leniency programmes. According to the Private International Cartel (PIC) database,<sup>9</sup> about three

<sup>9</sup> The PIC database is a highly detailed list of cartel cases around the world produced by Professor John Connor.



**TABLE 1:** Merger decisions by the Competition Commission of India

	2011	2012	2013	Total
Total number of cases	12	80	46	138
Number of cases in which an international company was involved	11	40	38	89
Rate of cases with international company involved	91.67%	50.00%	82.61%	64.49%
Total number of companies	34	230	130	394
Total number of international related companies	23	88	67	178
Rate of international companies	67.65%	38.26%	51.54%	45.18%

cross-border cartels were revealed via competition authority decisions or prosecutions in an average year between 1990 and 1994. In recent years, from 2007 to 2011, an average of about 16 cross-border cartels has been revealed per year. Figure 6 shows the number of cartels revealed per year, between 1983 and 2011. The data suggest a 527% increase in cross-border cartel enforcement between 1990–4 and 2007–11.

Similarly, as Figure 7 shows, since 1992 there has been a substantial increase in cross-border cartel fines per year, according to the PIC database, though the levels clearly vary significantly from year to year. A large part of this increase may be due to a greater effort devoted to ensuring that fines for cartel violations compensate for their large potential illicit gains and consumer harm.

In a number of high profile cartel investigations, dawn raids have been conducted simultaneously across multiple jurisdictions, including the United States, the European Union, the Republic of Korea, Australia, Canada and Japan. While these dawn raids appear at times to have involved truly global cartels, only a small percentage of the world's competition authorities have been involved in raiding and prosecuting the firms.

### EU enforcement increasingly concerns non-EU companies

#### Mergers

The increasing amount of cross-border M&A activity reported above is confirmed by the increase in EU merger filings for

deals with one company with headquarters in the EU and another with headquarters outside the EU. The number of filings increased from 67 in 1991 to 309 in 2011, an almost fivefold increase, as shown in Figure 8. EU merger filings are an indicator of the number of international deals that would have produced overlaps of interest to a competition authority.

#### Cartels

The number of DG COMP cartel investigations has also risen sharply in the past ten years, indicating that cartel enforcement has become one of its top enforcement priorities.<sup>10</sup> Using public information from the decisions published by DG COMP on its website, we show that the number of cartel cases involving one non-EU company or more has also increased significantly, from 35% of the EU cartel decisions in the period 1990–2000 to 58% since 2001. More non-EU companies have been under investigation in recent years, as Figures 9 and 10 show.

#### US Department of Justice cross-border cartel enforcement

The cartel enforcement activity of the US Department of Justice (DOJ) can also serve as an indication of the increasingly cross-border nature of cartels.

According to Scott Hammond (former Deputy Assistant Attorney General for Criminal Enforcement), in 2010 the

<sup>10</sup> DG COMP issued 26 cartel decisions between 1990 and 2000. Between 2001 and July 2013 the number of decisions issued by DG COMP went up to 74.

FIGURE 6:

The number of cross-border cartels revealed per year

Source: OECD calculations using the Private International Cartels dataset.

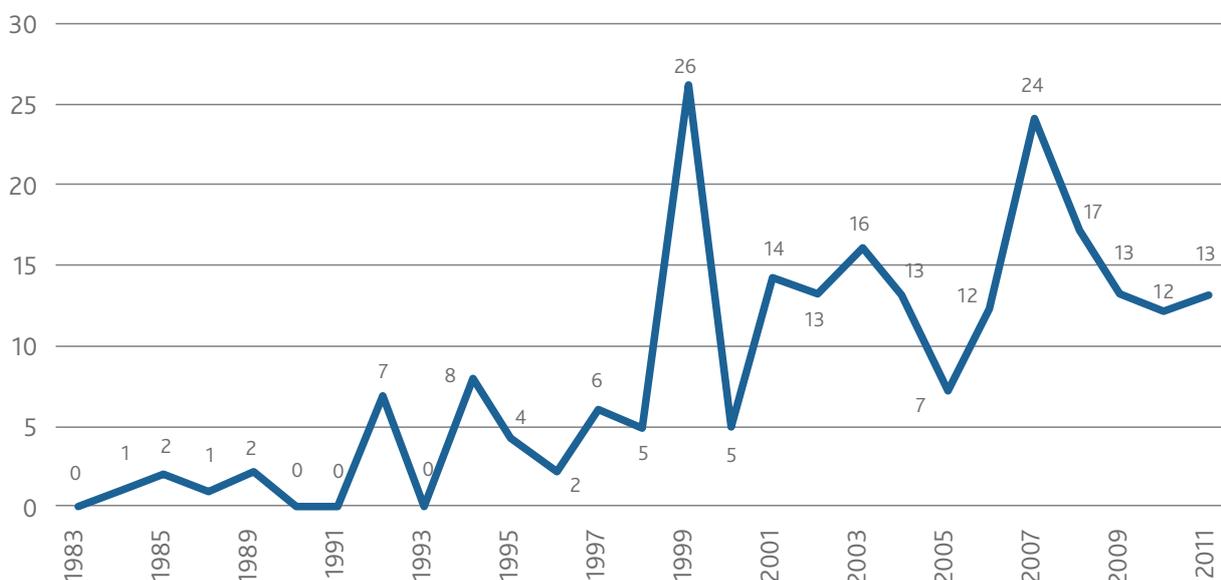


FIGURE 7:

Total fines from cross-border cartel investigation (USD million)

Source: Private International Cartels dataset, OECD calculations.

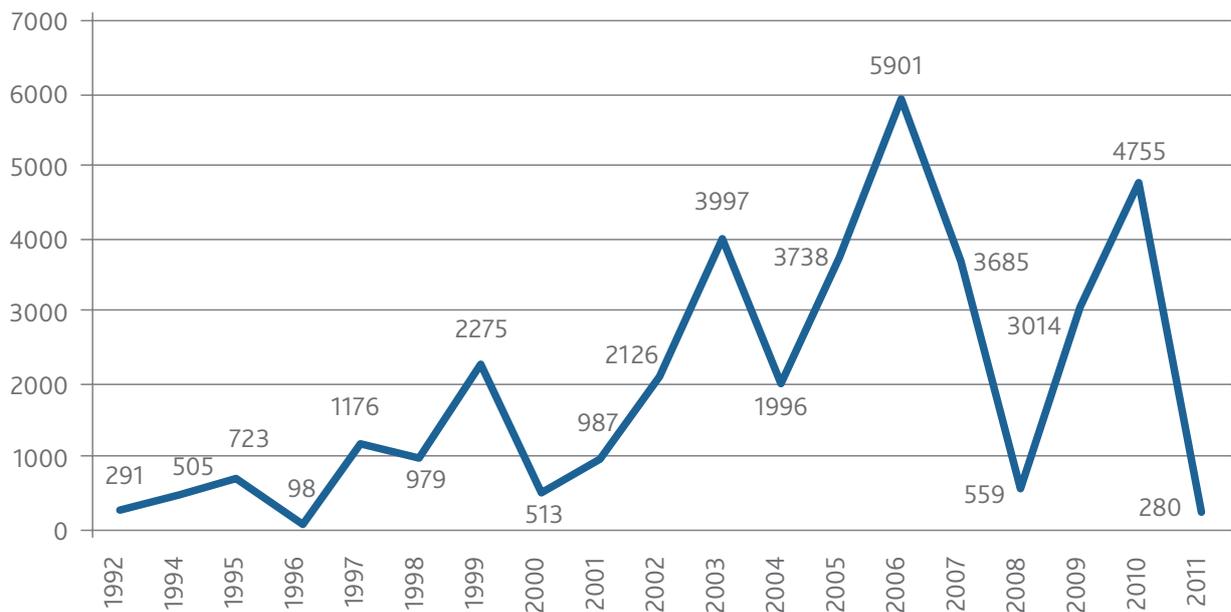
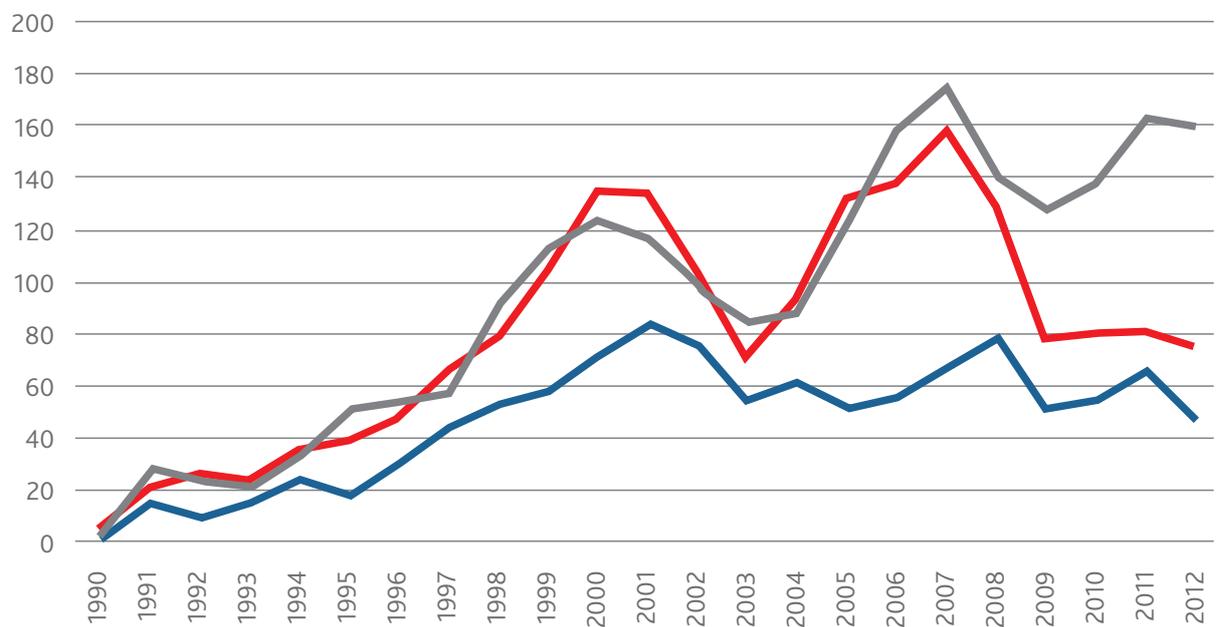


FIGURE 8:

EU merger filings between 1991 and 2012

Source: EU Directorate-General for Competition, OECD calculations.



LEGEND:

- 1. Mergers between companies headquartered in the same EU member state
- 2. Mergers between companies headquartered in more than one EU member state.
- 3. Mergers involving at least one company based outside the EU, and with effects in the EU.

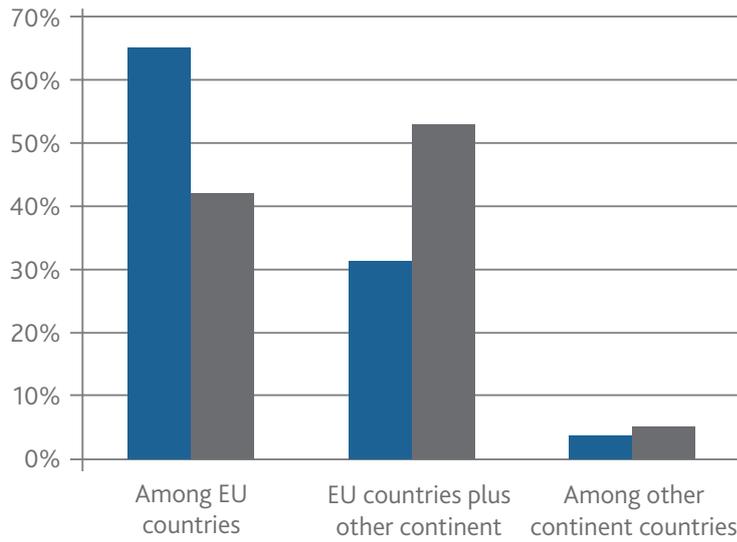


FIGURE 9:

The geographical distribution of European Commission cartel cases since 1990

LEGEND:

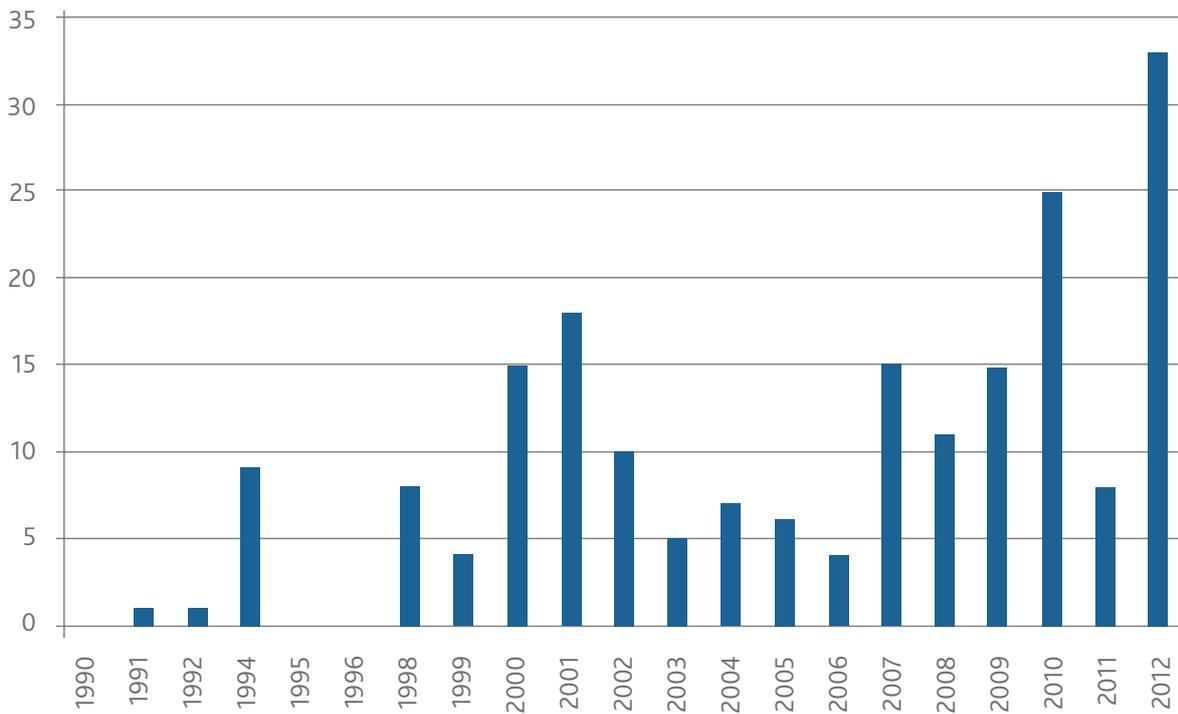
- 1990-2000
- 2001-2013

Source: EU Directorate-General for Competition, OECD calculations.

FIGURE 10:

Number of non-EU companies in European Commission cartel enforcement cases, by year

Source: EU Directorate-General for Competition, OECD calculations.



Antitrust Division typically had approximately 50 international cartel investigations open at a time.<sup>11</sup> Since May 1999, more than 40 foreign defendants had served, or were serving, prison sentences in the United States for participating in an international cartel or for obstructing an investigation of an international cartel. Foreign nationals from France, Germany, Japan, the Republic of Korea, Norway, the Netherlands, Sweden, Switzerland, Chinese Taipei and the United Kingdom are among those defendants. In the well-known vitamins case of 1999, for example, 12 individuals, including six European executives, were sentenced to serve time in US prisons for their role in the vitamin conspiracy.

Based on public data concerning US DOJ cases with an international dimension, the number of individual prosecutions of US and non-US companies involved in these cartel investigations has generally increased over time (Figure 11).

Criminal fines also indicate how US DOJ cartel enforcement has an increasingly international reach. Today more than 90% of the total amount of significant criminal fines imposed each year involves cartels with an international dimension. Figure 12 shows that since 1996, fines from international cartels have accounted for more than 90% of all fines exceeding USD 10 million.<sup>12</sup>

### Calibrating the increased complexity in bilateral cooperation between competition authorities

The complexity of bilateral cooperation increases with the number of authorities potentially involved in an enforcement case and the potential number of interfaces of cooperation on that case. There are already situations today where 15 authorities from different jurisdictions are notified of the same merger for approval under their national law, and in many cases five or more authorities act on a merger.

For example, data from one large multinational corporation that has an active flow on its M&A deals originating in the period 1990–2012 shows that in eight instances (all of them after the year 2000) filings were made to ten or more authorities. Between 1991 and 2000, that company had just five M&A deals with five or more filings, while between 2001 and 2010, it had 40–50 filings with more than five authorities, an increase of about 900%. Table 2 shows that the percentage of M&A deals for its filings in three or more jurisdictions (outside the US) rose from 0% in 1991–5 to 34% in 2006–10.

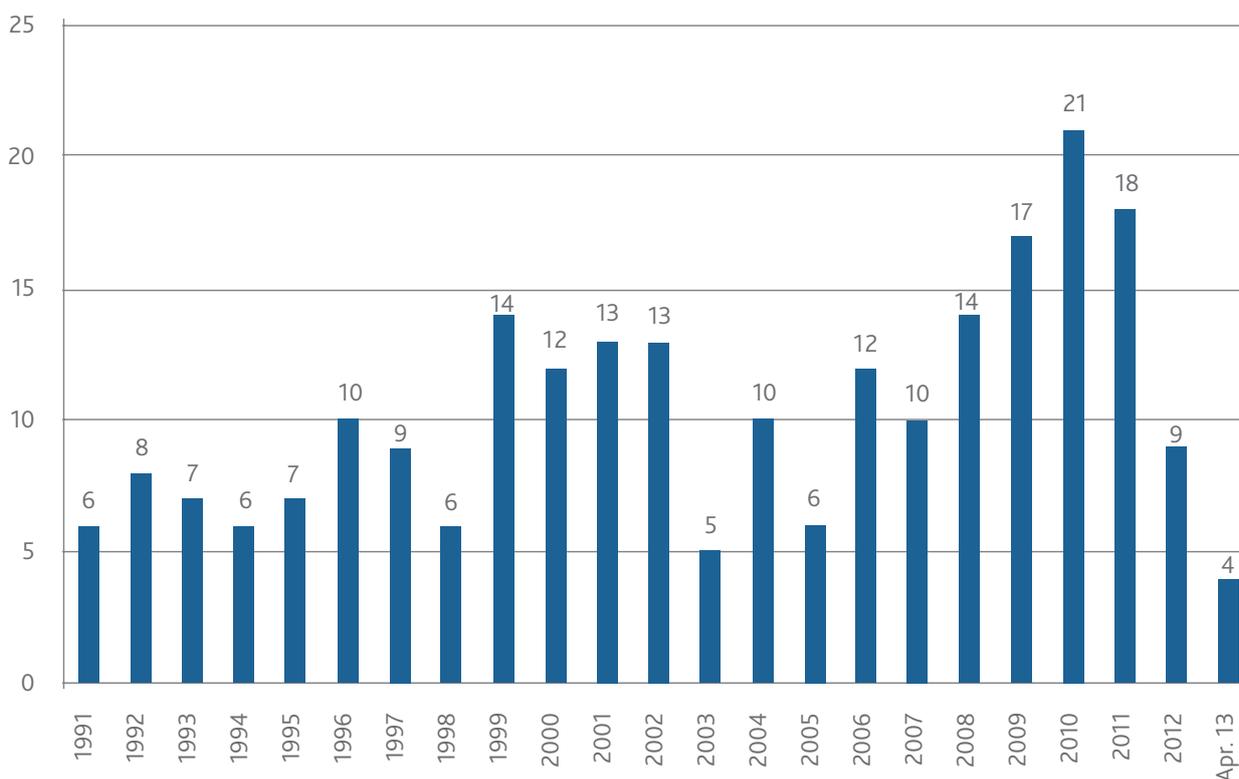
11 Scott D. Hammond, 'The Evolution of Criminal Antitrust Enforcement over the Last Two Decades', 25 Feb. 2010, at <http://www.justice.gov/atr/public/speeches/255515.htm>.

12 The years in the figure are fiscal years, not calendar years.

FIGURE 11:

US Department of Justice cartel enforcement: number of companies (domestic and foreign) charged in cases with an international dimension

Source: Public US DOJ data, OECD calculations.



If 15 different authorities are reviewing the same transaction and if they need to cooperate bilaterally in their national reviews, the number of possible interactions would be more than a hundred.

As the number of authorities increases, the total number of potential bilateral interfaces increases in a non-linear fashion. The 'cooperation complexity index' can be calculated as a function of the number of active authorities and cases, by calculating the number of potential interfaces in which two authorities are both dealing with the same case at the same time. This is not a measure of actual cooperation but of potential cooperation. The cooperation complexity index for global M&A cases in a given year  $t$ ,  $I_t$ , is given by the formula:

$$I_t = i(n_t)c_t$$

where  $i(n_t)$  is the function of the number of authorities active in time  $t$ ,  $n_t$ , and the number of global cases taking place in a given year,  $c_t$ :

The effect of increasing the number of co-operating authorities on the number of interfaces is shown in Figure 3, below.

Taking the number of cross-border Fortune top 50 mergers, which increased from about 65 in 1995 to 153 in 2011, and supposing for illustration that each of these mergers and acquisitions featured global product overlap requiring investigation, and again assuming that the number of active authorities increased from two to five over the same period, the cooperation complexity index rises from  $(1)*(65)=65$  to, conservatively,  $(10)*(153)=1,530$ , representing an increase of 23 times between 1995 and 2011.

Similarly, the number of opportunities for cartel enforcement coordination has also increased substantially in recent years, from  $(1)*(3)=3$  to  $(10)*(14)=140.7$ . These figures imply an increase in the complexity of cooperation index by a factor of about 53 times between 1990–4 and 2007–11.

## COSTS OF ENFORCEMENT DISAGREEMENTS: MERGERS AND CARTELS

Both merger reviews and cartel investigations are susceptible to various types of incompatible outcomes or lack of cooperation that can have a chilling effect on legitimate business activity or (less likely, we suspect) a freeing effect on harmful business activity. Some of the costs related to merger disagreements and cross-border cartel enforcement are discussed in turn below.

In this paper we do not specifically address the cost of possible lack of cooperation in investigations of abuse of dominance/unilateral conduct. This is because there have been fewer investigations of unilateral conduct by multiple authorities to allow us to draw conclusions, although the number has increased in recent years (especially in high

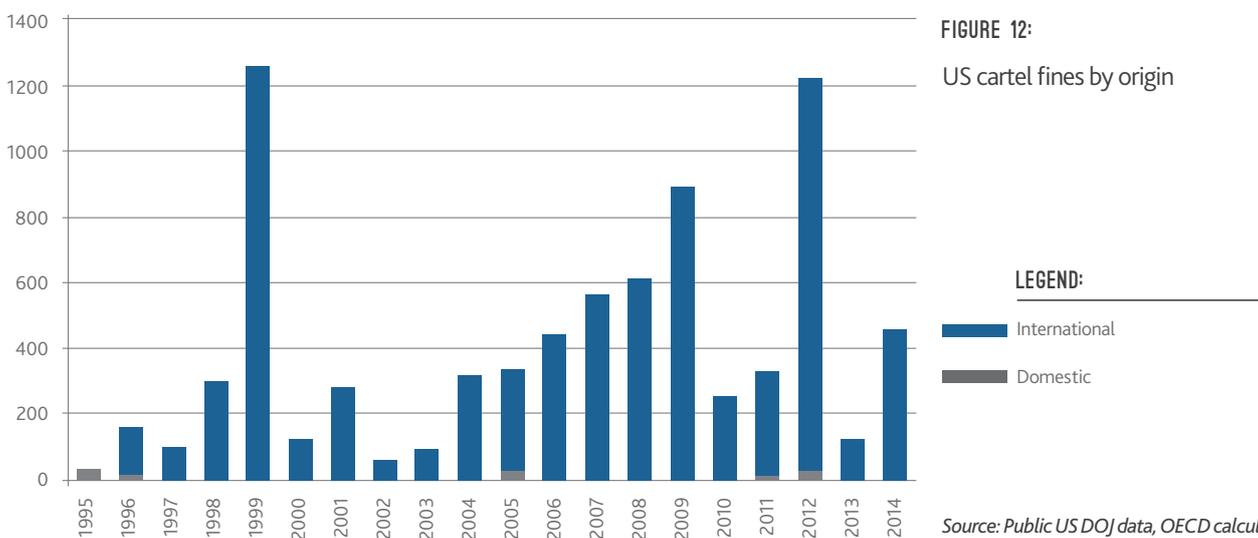


FIGURE 12:  
US cartel fines by origin

LEGEND:  
█ International  
█ Domestic

Source: Public US DOJ data, OECD calculations.

technology markets) even more quickly than investigations involving mergers and cartels. That said, the need to consider new approaches to enhanced cooperation applies equally to these investigations. In this respect, cross-jurisdictional disagreement in abuse of dominance investigations can create particularly complex situations for international businesses.

## CROSS-BORDER MERGERS

Cross-border mergers create scope for disagreement between competition authorities and can give rise to substantial costs when such disagreements occur. Failure to prevent anti-competitive global mergers, for example, may create large companies that can operate with market power throughout the world. If they are effectively much larger than any potential entrant anywhere in the world and able to sustain their position through threats and unwritten business practices that penalise purchasers who deal with new entrants, there is a real possibility their market power may be sustained internationally and over time. In this sense, stopping an anti-competitive global merger may be more important than stopping an anti-competitive national merger, as there will be fewer options for remedying the situation later.

### The scope for disagreement on international mergers

Authorities in two or more different jurisdictions could reach different views on a global merger for at least three reasons:

- 1 The authorities in the two jurisdictions have different aims (for example, one might be protecting a national producer interest) or apply different rules of substantive analysis; or
- 2 Conditions of competition are materially different in the two jurisdictions; or

- 3 The two authorities have simply come to different outcomes, for example because the case is borderline or because of differences in the evidence collected and/or its interpretation.

### Different substantive rules

Competition specialists have long discussed the problems caused by differing substantive rules.<sup>13</sup> For example, in the GE/Honeywell case,<sup>14</sup> different approaches taken for the assessment of a merger between suppliers of complementary products were seen as an important reason for the conflicting decisions taken by the US and EU authorities.

In a few cases, substantive differing evaluation criteria might be embodied in legislation – such as considering employment effects, or the protection of small sellers against buyer power. However, many conflicting decisions under this category probably stem from less well-defined differences, reflecting different precedents and practices despite similar legal standards. For example, one authority might pay more attention to market shares than another, or be more concerned about vertical linkages. A study comparing US and EU approaches to merger control, for example, found that the EU is 'tougher' overall, but the US is 'tougher' on coordinated effects cases.<sup>15</sup> Another study suggests that Chinese merger

<sup>13</sup> Such substantive differences are considered here to include differences in legal and procedural matters, such as where the burden of proof lies (e.g. regarding efficiencies).

<sup>14</sup> This very well-known case has been discussed in many places. See, for example, Eleanor Fox's account in E. M. Fox and D. A. Crane (eds), *Antitrust Stories* (Foundation Press, 2007). Note that the General Court overturned the finding relating to complementary products, but upheld the EU Commission's decision on other grounds.

<sup>15</sup> M. A. Bergman, M. B. Coate, M. Jakobsson and S. W. Ulrick, 'Comparing Merger Policies in the European Union and the United States', *Review of Industrial Organization* 36.4 (2010): 305–31.

TABLE 2:

Percentage of M&A deals in different ranges of competition law filings, by time period, for a single multinational corporation

	2 or fewer filings	3 to 5 filings	6 or more filings
1991–1995	100%	0%	0%
1996–2000	81%	15%	4%
2001–2005	63%	19%	18%
2006–2010	66%	21%	13%

Source: Data supplied to OECD on a confidential basis by a multinational corporation.

TABLE 3:

Interfaces for cooperation on a single investigation with cross-border impact

Number of authorities	Interfaces of cooperation
1	0
2	1
5	10
10	45
20	190
30	435

Source: OECD.

control 'aims to promote pro-domestic objectives', which may be a consequence of the underlying law, observing that, of the 21 prohibitions and non-conditional clearances up until 27 August 2013, all have involved foreign companies.<sup>16</sup> Conflicting decisions may also, at times, stem from different goals of competition law enforcement in different economies. For example, in the US the goal has been to ensure competition thrives and to prevent companies from achieving monopoly positions via anti-competitive means, in Europe the goal has been market integration and in China the goal has been economic development.

Convergence in substantive approaches is certainly important. However, even complete substantive convergence would not entirely eliminate inconsistent decisions, because there are at least two more reasons for competition authorities in different jurisdictions to make conflicting determinations on a merger affecting both jurisdictions.

### *Differing conditions of competition*

The effects of mergers will differ across jurisdictions, so the assessment of their effects can differ accordingly. The number of alternative suppliers may be different, for example. A merger that is a 'five to four' companies deal in a large jurisdiction could be a 'two to one' in one smaller jurisdiction, for example, but have no effect whatsoever in another smaller jurisdiction with a different 'two' out of the 'five'. Regulation can also result in products that are substitutes in one jurisdiction not being able to act as substitutes in another. Customer behaviour may differ, again resulting in authorities quite legitimately reaching different views either on market definition<sup>17</sup> or on competitive effects of the merger.

While differing conditions of competition are a natural – and obviously legitimate – reason to arrive at different conclusions, the remedies adopted following different conclusions can still raise problems, for example if the remedies adopted to counter the merger's adverse effects have harmful consequences for another jurisdiction where there are no adverse effects.

### *Different evaluation*

Finally, competition authorities might simply disagree on the effects of a particular merger, even if the substantive test is the same and the conditions of competition are the same in both jurisdictions. Disagreement on effects can occur because the assessment of competitive effects is difficult. Reasonable people often differ, even on the likely effects of particular mergers. For example, in the US Federal Trade Commission (FTC) with its long history of competition law enforcement, during 2011–12, 17% of merger cases with a Commission vote<sup>18</sup> featured a differing vote among commissioners on whether to file a complaint. If one looks at unilateral conduct cases decided by the US FTC, in almost 55% of the cases there was at least one dissenting vote.<sup>19</sup>

The frequency of *international* disagreements appears lower than the prevalence of disagreements between decision-

makers within an authority: authorities seem to disagree with one another less often than they have internal disagreements. This could reflect a desire to avoid international disagreements, particularly when a case seems finely balanced.

### **The costs of international disagreements**

Inconsistent decisions do occur in merger cases. Whether this inconsistency matters depends on whether there are any efficiencies from the merger and on whether efficient remedies can be implemented on a purely national basis. If national remedies are feasible, the effects of the merger can be remedied in jurisdiction A, while allowing the merger to proceed as is in jurisdiction B. For example, if the merging firms' business activities are essentially national, while their parent companies are merging globally, a divestment that effectively blocks the merger in jurisdiction A might be possible, while allowing it in effect to proceed in jurisdiction B (and the rest of the world). In practice however effective national remedies are not always possible.

In many cases the most effective remedy available in jurisdiction A will have effects on jurisdiction B. This will be true of most structural remedies, particularly those affecting upstream production. A common model for global businesses is for production to be concentrated in a few locations, with sales across the world. This model does not easily allow a national structural solution; requiring a divestment of a local marketing company would not eliminate the producers' changed incentives from their merger.

The inability to establish a national remedy creates an externality, with one agent – the competition authority in one jurisdiction – taking a decision that will affect the citizens of another jurisdiction, while not taking those citizens' interests into account. Consequently, the decision will not maximise the welfare of both sets of citizens, taken jointly. If the merger results in general benefits (through efficiencies), but imposes harm in one jurisdiction that blocks it, then blocking the merger denies the benefits to other jurisdictions.

In practice, when the most effective remedy would impose such an externality, the authority in the blocking jurisdiction could instead choose a less effective 'local' remedy. It might do so out of concern that blocking a global merger because of

16 M. Mariniello, 'The Dragon Awakes: Is Chinese Competition Policy a Cause for Concern?', *Bruegel Policy Contribution*, Issue 2013/2014 (Oct. 2013).

17 The UK and French authorities reached different views on a merger between salmon producers, in part because French consumers regard Scottish and Norwegian salmon as distinct, while British consumers regard them as being in the same market – so the market is narrower in France. See *Pan Fish ASA/Marine Harvest N.V.* merger inquiry, Competition Commission (UK), 2006.

18 The vast majority of mergers were cleared without the need for a Commission vote.

19 OECD data, compiled from the public record of FTC decisions.

purely local concerns would be disproportionate,<sup>20</sup> or because any such prohibition (or significant upstream divestment) could not be enforced because the assets are not within the authority's jurisdiction. This does not imply that behavioural remedies are necessarily less efficient, or that structural remedies can never be imposed at a purely national level. The point is that sometimes smaller jurisdictions will be constrained to choose them.<sup>21</sup>

How large does a jurisdiction have to be to impose a structural remedy on an international merger? The Competition Commission (CC) in the United Kingdom implemented behavioural remedies through undertakings on a merger between producers of medical equipment,<sup>22</sup> both of which manufactured products only outside the UK and then transported them to the UK. In its report, and in a subsequent retrospective analysis,<sup>23</sup> the CC noted two practical constraints: one on its ability to enforce a structural remedy overseas, and another reflecting a concern that the merged entity could simply withdraw from the UK. As the UK is the eighth largest economy in the world, it is clear that most authorities will face some practical constraints on their ability (and willingness) to block global mergers.

Only a handful of very large jurisdictions can apply remedies or block global mergers for reasons relating solely to their own jurisdictions: the US, the EU, Japan and perhaps increasingly the major emerging economies – China, India and so on.<sup>24</sup> This is a matter of bargaining power against companies that might threaten to withdraw from markets, rather than legal power. China, for example, assessed the 'P3' shipping alliance as a merger in 2014, after the US and EU had chosen not to challenge it, and prohibited the deal.<sup>25</sup> The shipping market is inherently global and so the entire global deal was prevented (in its original form) by this decision. In contrast, competition authorities in the smallest jurisdictions are well aware that they cannot effectively block international mergers.

What matters is the size of the market in the jurisdiction seeking to block the merger, compared to the total size of the markets for the merging firms. Mergers with a narrow geographic scope could be blocked by the local authorities.

## Implications

The effective requirement for a jurisdiction to have sufficient size before blocking a global merger avoids a situation in which 120 jurisdictions could each individually prevent the same merger. It may be better for global economic welfare that only the largest jurisdictions can block global mergers for domestic considerations. However, no economy – however large – constitutes much more than 20% of world GDP,<sup>26</sup> so any national decision with global consequences represents a large potential externality, affecting up to 80% of the world economy. Such decisions are rare but can have politically as well as economically destabilising consequences – and they might become more common in the future.

Decisions to block or to clear are not symmetrical. While at times a remedy imposed to address one jurisdiction's concerns will have impacts solely in that jurisdiction, at other times, the remedy will have cross-border or even global impact. A large economy can impose its decision to block a merger on the world; it cannot impose a decision to clear it. Consequently, the more jurisdictions there are that can block mergers (because they have a competition law and are large), the more mergers will be blocked. A truly global merger will be contingent on five, six or more jurisdictions reaching a decision not to challenge it. The unintended effect might be to chill merger activity, for two reasons:

- the strictest standard will prevail; and
- even if all apply the same standards, requiring multiple independent clearances makes overall clearance less likely.

### *Strictest standard will prevail*

If competition authorities independently impose remedies with global implications, the most interventionist standard will be the one that prevails. In 2001, the US authorities cleared the GE/Honeywell merger subject to remedies<sup>27</sup> while the EU required remedies that caused the deal to be abandoned. Many commentators suggest that the EU was applying a tougher standard to a merger between producers of complementary products than the US applied.<sup>28</sup> The merger did not go ahead, so the EU's standard prevailed in this case.

The same applies to globally effective remedies that fall short of prohibition. For example, Glencore and Xstrata are Switzerland-based mining companies with production

20 Whether it would have a duty to do so, or on the contrary be forbidden to do so, will depend on the precise wording of the legislation under which it operates.

21 For example, the Austrian delegation at an OECD roundtable on remedies is quoted in the summary of discussion as noting that in Austria in some cases, behavioural remedies 'may have been a necessity since, due to Austria's relatively small size, the assets that would have been subject to a structural remedy were located outside the jurisdiction'. See OECD, *Remedies in Merger Cases* (OECD, 2011), p. 291.

22 *Dräger Medical AG/Air-Shields Hillenbrand Industries Inc.* merger inquiry, Competition Commission (UK), 2004.

23 Competition Commission UK, *Understanding Past Merger Remedies: Report on Case Study Research* (2012).

24 Of course, even medium-sized countries will be important markets, regionally or for some specific products.

25 See, for example, Katrine Grønvald Raun, 'China Rejects P3 Alliance', 17 June 2014, at <http://shippingwatch.com/carriers/Container/article6809622.ece>.

26 OECD *Economic Outlook*, 2013, reports US GDP at \$13.8 trillion, 22% of world GDP at \$62.3 trillion. The EU is the second largest economy and China is the third.

27 See US Department of Justice press release, 2 May 2001, at [http://www.justice.gov/archive/atr/public/press\\_releases/2001/8140.htm](http://www.justice.gov/archive/atr/public/press_releases/2001/8140.htm).

28 See, for example, Eleanor Fox's account in Fox and Crane, *Antitrust Stories*.

at sites in various countries and global sales. The Antitrust Division of the US DOJ took no action against the merger in 2012,<sup>29</sup> while China's Ministry of Commerce (MOFCOM) in 2013 required divestment of the Las Bambas copper mine, now under development in Peru<sup>30</sup> (in addition to some behavioural remedies). It is quite possible that the conditions of competition differed materially between these jurisdictions. However, the merged entity's market share of copper sales in China was less than 18% – below the level at which most competition authorities would consider intervening. Copper is a global market, and it is hard to escape the conclusion that the US DOJ and China's MOFCOM considered essentially the same facts, and ultimately reached different conclusions, with the result that the stricter standard – MOFCOM's – was applied.<sup>31</sup>

### *Difficulty of obtaining multi-jurisdictional clearances*

Even if authorities apply the same standards, independent investigations in multiple jurisdictions can reduce the overall likelihood of global mergers being approved, and therefore raise the bar, cutting off many efficiency-promoting mergers that would otherwise be proposed. Fairly obviously, if a merger requires unanimous approval by authorities in all large jurisdictions, then the more such authorities there are, the less likely it is that the merger will proceed – and the less likely it is that the merger would be attempted in the first place.

This can be illustrated with an oversimplified and hypothetical example. Suppose that mergers have the same effects everywhere and all authorities apply the same standard: namely that they will approve mergers that are likely to raise welfare, and block those that are not. There are many mergers for which the facts and complexity of analysis make decisions uncertain: they are neither obviously harmful nor obviously harmless. These 'borderline' mergers can be considered to have a probabilistic chance of approval by competition authorities. A highly problematic merger might be considered to have a 20% chance of success, for example, evaluated before the merger is proposed.<sup>32</sup>

Suppose further that businesses are likely to engage in mergers whose 'true' probability to be cleared is 75% or greater. Suppose that each authority's assessment is independent of the others<sup>33</sup> but for an international merger, more authorities independently need to approve.

Suppose there are five important jurisdictions that must give their approval for a 'global' merger to go ahead.<sup>34</sup> To have a 75% chance of clearance by all five authorities, a proposed merger would need to have a probability of 94% of being approved by any one authority.<sup>35</sup> So, if firms will only propose mergers that have a 75% chance of being approved globally, then only those mergers which are relatively safe bets – with a 94% chance or more of being regarded by any one competition authority as enhancing welfare – will be proposed. Global mergers with a probability between 75% and 94% of being cleared will not be proposed, because the chances of getting five approvals is less than the required level, even

though each individual competition authority is more likely than not to approve. Such mergers are (by definition) welfare enhancing. But because they are not proposed, welfare will be lower than otherwise possible.

The multiplicity of authorities, each with the ability to veto a global merger, has much the same effect as a decision significantly to tighten the standards for merger approval. Yet while practitioners have debated and refined the appropriate standard for intervention for decades, some concerned about possible 'chilling' effects of over-enforcement, there has been very little discussion of how the need for multiple approvals might have an identical chilling effect on the largest global mergers.<sup>36</sup>

## CROSS-BORDER CARTELS

### Scope for cooperation

Cross-border cartels exhibit substantial scope for cooperation between authorities, for example:

- Coordinating raids to ensure evidence is not destroyed.
- Sharing evidence or finding evidence located elsewhere than the initial investigating jurisdiction, especially when there is no leniency applicant or no waiver.

29 See, for example, 'The Long March: The Final Hurdle Is Cleared in Glencore's Takeover of Xstrata as Chinese Regulators Give Merger the Go Ahead', Eversheds, 17 Mar. 2013, at <http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/Competition/Glencores-takeover-of-Xstrata170513>.

30 See, for example, Lester Ross and Kenneth Zhou, 'China Clears Glencore's Acquisition of Xstrata Subject to Remedies', WilmerHale: Publications and News, 26 Apr. 2013, at <https://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737421260>.

31 We also note that the European Commission imposed a structural remedy relating to the market for zinc because of particularities of the European zinc market. CASE COMP/M.6541 – *Glencore International plc/Xstrata plc* (2012).

32 Of course, merger decisions are not random, but expert advisers to merging companies often express likelihoods of success in such terms.

33 Note that while independence may be a strong assumption, the view that probabilistic distributions of approval likelihood exist, given the same facts and legal structure, can be supported by the fact that experts – even decision-makers – often disagree on the same case.

34 Then the probability that a perfectly 'borderline' case with a 75% chance of obtaining all five approvals is  $75\%^5 = 24\%$ . So only 24% of such global mergers would be able to proceed, even though 75% of them would be welfare enhancing.

35 Because  $0.944^5 = 0.75$ .

36 Of course, others have been concerned about under-enforcement and might therefore be tempted to argue that this chilling effect is a good thing. However, there is no reason to suppose that the mergers that are blocked because of this chilling will be the least beneficial. In practice, international firms face a tougher merger regime than purely domestic ones, which seems completely arbitrary.

- Assisting another agency by obtaining waivers from the industry.
- Mutual recognition of fines or prison sentences. Mutual recognition of served prison time may limit a perception of excessive enforcement. For example, in the Marine Hose case,<sup>37</sup> a US judge allowed an offending executive sentenced by the UK courts to serve time in prison in the UK. If the UK had released the executive from prison earlier than a certain time deemed by the judge to be the US sentence, the executive would have had to go to a US prison to complete his jail term.

### Consequences of lack of cooperation

If authorities are unable to cooperate effectively in investigating cartels, harmful cartel activity could go unpunished (so future harmful behaviour will not be deterred), additional costs could be imposed on the global economy, and consumers would be harmed. This can happen for several reasons.

- Some international cartels may simply be *beyond the effective reach of the laws* in the countries where they have their most pernicious effects. A striking example is provided by the beer market in Africa. In several deals, large beer producers effectively agreed to divide the continent up, with each given a near-monopoly in its own set of countries.<sup>38</sup>
- Some countries specifically exempt '*export cartels*' from competition law, while many others will only investigate cartels if there are adverse effects within their own jurisdictions. Although most such export agreements probably serve more as legitimate marketing mechanisms than as cartels, when export cartels have market power the effects can be substantial. For example, Jenny estimated that, between 2011 and 2020, China will pay an average overcharge of about USD 900 million per year due to the cartelisation of the potash export market.<sup>39</sup>
- Due to the absence of effective cooperation, multiple jurisdictions may *repeat the same investigative steps*, resulting in extra costs related to the investigations for business and costs to competition authorities from unnecessary duplication.
- Without effective cooperation between authorities, an investigating authority might *in practice* be unable to obtain the information it needs from overseas authorities, especially if the companies it is investigating are headquartered elsewhere or witnesses to be interviewed are located outside the jurisdiction.

### Risks of cooperation

Cooperation is not without risks. One notable risk of cooperation is excessive enforcement, in which, for example, multiple jurisdictions might base their fines for cartel violations

on the worldwide, as opposed to domestic,<sup>40</sup> revenues in the relevant product line, or multiple jurisdictions might ultimately put executives in jail for the same violations, without crediting time served in prison by violators in outside jurisdictions.

Another risk of cooperation is that documents containing legitimate business secrets will be made public, whether as a part of proceedings or by accident, by a jurisdiction other than the one that initially obtained the documents, resulting in possible damage to the affected company and risks for one or more authorities of violating laws protecting confidential information or business secrets. Cooperation agreements are designed to avoid such disclosure, but businesses are often wary, especially of information being released to less experienced competition authorities.

## FUTURE DEVELOPMENTS

### A GAP IN GOVERNANCE?

Competition law practitioners tend to believe that competition rules should be based on reasonably objective criteria and applied in a consistent, fair and transparent way. It is difficult to see that these criteria are fully satisfied in the way global merger outcomes are determined. Different authorities impose different remedies and some authorities are effectively able to unilaterally block a deal while many others are powerless to affect the outcome, regardless of the

37 A press release from US Department of Justice states 'The U.S. plea agreements in effect provided for concurrent prison sentences in the United States and in the U.K. Thus, because the U.K. prison sentences were longer than the sentences recommended in the U.S. plea agreements, the defendants will not be required to serve prison sentences in the United States.' See 'Italian Marine Hose Manufacturer and Marine Hose Executives Agree to Plead Guilty to Participating in Worldwide Bid-Rigging Conspiracy', press release, 28 July 2008, at <http://www.justice.gov/opa/pr/2008/July/08-at-663.html>.

38 See Jenny, F. (2009) 'Competition Enforcement in Testing Times: beyond the national level', presented at Competition Principles Under Threat, IDRC Pre-ICN Forum on Competition and Development, Zurich, Switzerland, 2 June 2009, [www.idrc.ca/uploads/user-S/1244752374/Frederic\\_Jenny.ppt](http://www.idrc.ca/uploads/user-S/1244752374/Frederic_Jenny.ppt)

39 Frédéric Jenny, 'Export Cartels in Primary Products: The Potash Case in Perspective', in Simon J. Evenett and Frédéric Jenny (eds), *Trade, Competition, and the Pricing of Commodities* (Centre for Economic Policy Research, Feb. 2012), pp. 99–132, at p. 115. See <http://ssrn.com/abstract=2064686>.

40 While many jurisdictions do take into account only the turnover generated in their jurisdiction for the purpose of setting fines, criteria might diverge as to how to allocate turnover to one jurisdiction, or there may be situations (such as online sales) where the geographic allocation of turnover might be difficult in practice.

merger's effects in their country.<sup>41</sup> It is also difficult to see that these criteria are met with respect to global cartels or cross-border unilateral conduct cases, for which relatively few authorities have the ability to obtain information sufficient for prosecution and fines are not levied in all the jurisdictions where there is harm.

Following conflicting decisions by the British and French competition authorities in 2013, France's transport minister announced that he would seek a meeting with his British counterpart to 'arbitrate between the decisions of the two competition authorities'.<sup>42</sup> As a spokesperson for the UK Competition Commission pointed out,<sup>43</sup> even if the Ministers were able to agree at such a meeting, it would not change the decision, which is the Commission's alone to take and, ultimately, for the Competition Appeal Tribunal to review.

If decision-makers from the British and French authorities had sought to avoid reaching conflicting decisions, there would not have been a clear legal basis for them to reach an agreement to resolve the inconsistency. If a competition authority changed its decision explicitly to achieve consistency with the decision of an overseas authority, such a decision could well face a successful appeal if any party with standing objected. The result is that competition authorities are less likely to defer to decisions of other authorities.

More than 40 major cartels with an international aspect have been identified in recent years.<sup>44</sup> Many, if not most, competition authorities where the law has been violated have either not investigated in their own jurisdictions or did not have access to sufficient evidence to impose fines.<sup>45</sup> As the OECD/ICN Survey on International Enforcement Co-operation showed, some jurisdictions had requested sharing of evidence but the evidence in question was not provided.<sup>46</sup> While deterrence may be achieved by large fines from major authorities, the purpose of making the victim whole through damages is not met in the vast majority of jurisdictions, and the ability of authorities to enforce their domestic law is clearly hindered by the lack of effective information sharing for such matters.

At times, market allocations or cartel agreements may have been established outside the jurisdictions of predominantly small and poor countries, but with a direct effect on those countries. Successful prosecution would require gathering evidence from other jurisdictions and there is relatively little experience with small jurisdictions successfully obtaining, receiving or communicating such information across borders. As a result certain regional cartels may continue to have an effect. This is also the case for investigation of unilateral conduct by dominant firms which are located in one jurisdiction (where the core evidence is also likely to be located) but operate their businesses globally.

A gap in governance appears to exist both with respect to international cooperation for merger review and cartel investigations, as well as for abuse of dominance/unilateral conduct cases.

## TRENDS

Looking to the future, some trends are likely to result in the problems outlined above becoming less severe. In particular, continued convergence of substantive and legal standards is likely, building on the successful convergence between longer established authorities that has been seen in the last 10–15 years. The OECD/ICN Survey of International Enforcement Co-operation found that no country thought cooperation would become less common in the future and all of those who expressed an opinion felt that it would become more common. There are several reasons for expecting a future increase in cooperation and coordination.

However, there are also reasons to believe the problem might become worse (in the absence of better methods of coordination between jurisdictions).

First, the process of economic globalisation is continuing. Today, there are few truly global businesses, and most economic activity remains local – particularly national. This means that the transformation of the world economy that we have seen so far, and described in the first part of the paper, is only beginning. There will be more global activity, and so there will be more global mergers and perhaps other sorts of competition cases too. Even if all jurisdictions apply exactly the same system, multiple independent decisions are likely to result in significantly greater externalities being imposed on the global economy, for example through chilling effects on international M&A activity, than we see today.

Secondly, as more authorities become more active in enforcement regarding global activity, lack of effective coordination tools would increase the risk that authorities will apply substantive rules differently in their enforcement practice over time.<sup>47</sup>

41 | The nature of a remedy may inherently be behavioural when productive assets are located outside the remedying jurisdiction.

42 | Reported in *Global Competition Review*, 11 June 2013.

43 | 'The UK has an independent competition regime designed to exclude government involvement in decision-making – and we have a duty to take the necessary action to protect competition and the interests of customers. In that context, it's difficult to see what the role or purpose of such a meeting would be' (UK Competition Commission spokesperson, quoted by *Global Competition Review*, 11 June 2013).

44 | The figure is based on data from EU cartel enforcement cases that involve participant companies based on other continents (and potentially some participants based in the EU).

45 | Clarke and Evenett show that in Latin America, Asia and Western Europe, economies that did not enforce cartel laws experienced greater overcharges than economies that actively enforced their cartel laws. See J. L. Clarke and S. J. Evenett, 'The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel', *Antitrust Bulletin* 48 (Fall 2003).

46 | See *International Enforcement Co-operation*, Secretariat Report on the OECD/ICN Survey (OECD, 2013), Box 1, p. 42.

47 | See the first reason for disagreement mentioned above, 'Different substantive rules' in section 4.1.1.

Thirdly, the newer competition authorities from large countries, such as those of India and China, are likely to become more active and more willing to impose remedies with global consequences. For example, China's MOFCOM has largely applied behavioural remedies in its first years, a way to carve out a national remedy by dealing with national effects. If MOFCOM experiences the same difficulties with behavioural remedies as longer established authorities have encountered, perhaps it will use them less in the future. In 2013, India crossed the threshold of issuing decisions for 100 merger reviews. The increased activity of newer competition authorities is a natural and desirable outcome in itself, as competition law applies to more economies and covers a greater percentage of the world's population. The side-effect of such beneficial developments, though, is increasing complexity in cooperation.

More non-OECD economies will become important players in the international antitrust community, as their economies come to represent larger shares of world GDP (see Figure 13) and as their competition authorities start enforcing competition rules more vigorously. In 1995, the US, EU and Japan accounted for about two-thirds of world GDP – and about 95% of the GDP of countries with competition law. Consequently, cooperation among just these three jurisdictions would have covered almost all significant international antitrust matters. In 2014 that same trilateral cooperation would cover less than half of world GDP. By 2030 on reasonable projections, those three economies will account for only 35% of world GDP. Beyond 2030, at least five jurisdictions would have to cooperate to reach the proportion of world GDP which could be achieved with just trilateral cooperation in 1995. Of course to reach 95% of those covered by competition law, one would need to include probably a hundred jurisdictions. This will pose a new and unprecedented challenge: how to coordinate with more jurisdictions, including newer ones.

Fourthly, the number of cross-border mergers is likely to increase in the future, as is the number of cartels uncovered. As trade increases, and GDP increases, companies are likely to become more interested in cross-border mergers. Cartel formation is largely related to the existence of international trade. The growth rate in cross-border merger activity can be forecast based on OECD forecasts of future trade growth.<sup>48</sup> If cross-border mergers and acquisitions increase in proportion to the worldwide trade increases predicted by the OECD, there would be 66%<sup>49</sup> more cross-border M&A deals in 2030 than in 2011. Assuming the number of active competition authorities remains at least constant,<sup>50</sup> the cooperation complexity index would increase by 66% between 2011 and 2030.

Cartel investigations and prosecutions have the potential to increase substantially in the future, much like mergers. In particular, given that international trade can serve as a source that would displace a domestic cartel, it is plausible to believe that a large increase in international trade would be followed by a large increase in cross-border cartel

creation and, ultimately, a comparably large increase in law enforcement against cross-border cartels. In the past, cartel prosecutions increased faster than world trade, growing by 527% in the period 2007–11 as compared with 1990–4, while trade in the 50 countries in our sample increased about 300% over the same period. If cross-border cartel enforcement increases at the same rate, in the future as in the past, there could be a 162% increase in cartel prosecutions between 2011 and 2030.<sup>51</sup>

## SOLVING INTERNATIONAL COORDINATION PROBLEMS: SOME POLICY OPTIONS

We suggest some policy options for solving these coordination problems below. There is unlikely to be one single solution to the problems identified in this paper. Some of the options can be implemented by competition authorities themselves but most would require some enabling legislative change. Not all of them will be 'politically' feasible just now. Different countries have different attitudes to collective international action, in competition policy as in other policy areas. Just as is the case now, therefore, some countries will go further and faster than others in deepening their cooperation. Multilateral efforts do not have to be global or complete in scope to be effective.

Some of the steps below would represent significant changes in the way competition authorities conduct individual cases, and we would not expect that many jurisdictions would be ready to take them even on a bilateral basis between trusted partners very soon. However, the logic of business globalisation is compelling, and such bilateral mechanisms might develop from the need to ensure greater consistency (in the face of business or political criticism if there are high-profile inconsistent decisions) or just to create an efficient process for dealing with a multi-jurisdictional matter. At that point – likely to be many years off – it could make sense to

48 | See Nicoletti, 'OECD@100: Policies for a Shifting World'.

49 | The calculation is that  $(2.14/3.00)*0.92=0.66$ .

50 | This assumption of constant activity is conservative, as the paper has previously argued that the number of active authorities is likely to increase, as younger authorities enforce the law more vigorously.

51 | The calculation is that  $(5.35/3.00)*0.92$ .

rationalise and simplify the bilateral cooperation through a voluntary multilateral agreement. This would be a truly international enforcement regime, allowing for example for lead authorities to be appointed and their decisions recognised by a growing group of participating countries.

We note this possibility as a logical development of the need for increased cooperation that we have identified here. We do not expect to see it happen imminently: before it can, there is a need for more convergence, practice in cooperation and building of trust between competition authorities. We believe that it is important at least to start the conversation: not merely about how competition authorities can cooperate better within the existing framework, but also about how that framework can evolve. This E15 project can be an important part of that conversation as well, and we welcome the debate that this paper and others will bring about.

*Improved bilateral cooperation: more communication*

Bilateral cooperation between competition authorities is the only mechanism for international coordination at present, outside a few regional agreements. Discussants in the OECD's Competition Committee have repeatedly emphasised that effective cooperation depends not only on good procedures but also on experience and trust, which come from working together. As we noted earlier, some long-established

competition authorities do cooperate frequently, and they are less likely to end up with the inconsistent outcomes we have highlighted here. Consequently, as more competition authorities mature and become more experienced, some of the dangers we have warned of will become less likely.

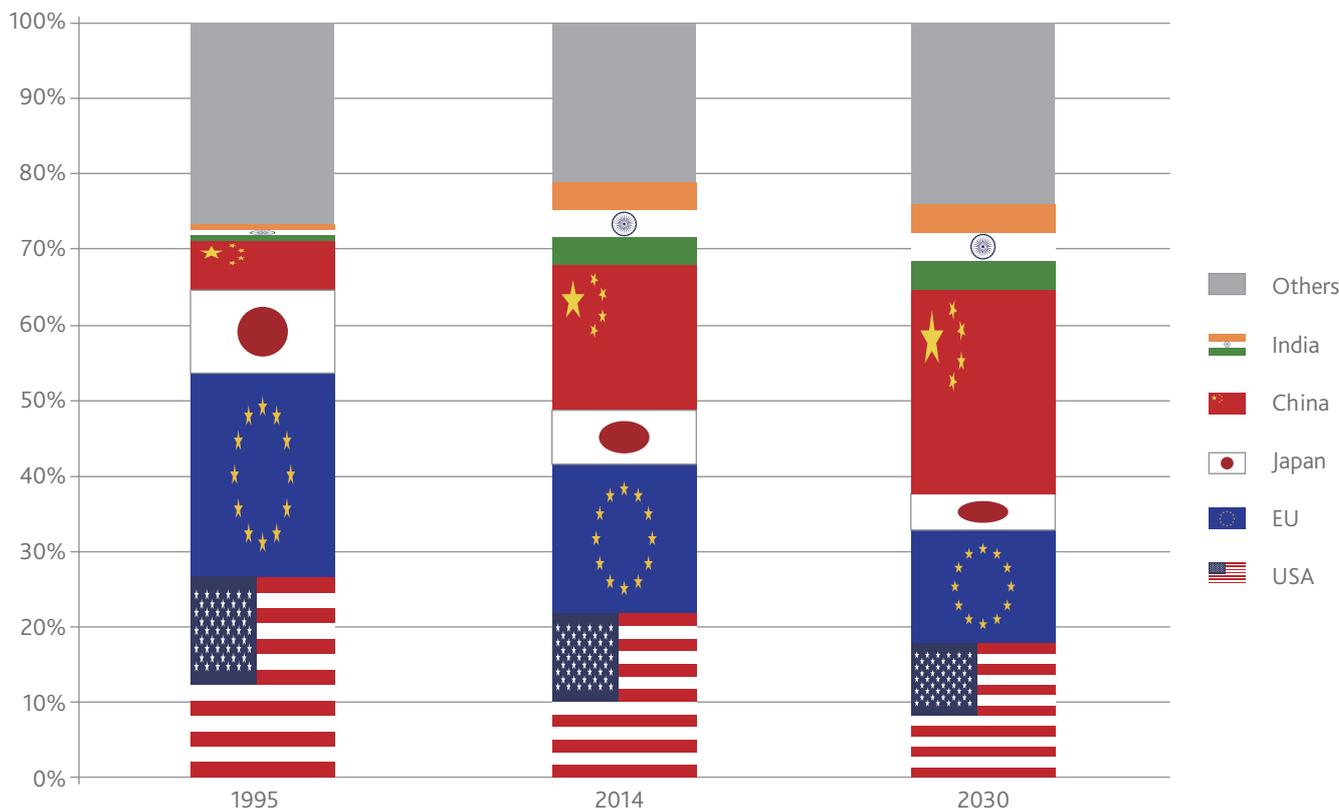
However, more frequent communication between investigating authorities is not enough in the long term, for three reasons:

- First, as we discuss below, there are some constraints on what can be discussed, in most jurisdictions, because of legal restrictions on sharing confidential information.
- Secondly, although the dangers of accidental disagreement might diminish as competition authorities talk to one another more, the complexity caused by the number of conversations increases. It is easier to hold frequent and deep conversations with a small group of well-known counterparts than with a larger group.
- Thirdly, as we have emphasised, communication alone is not enough. Competition authorities will disagree – for good or bad reasons – and have no mechanism to resolve or even mediate any such disagreements.

FIGURE 13:

GDP in world's largest 50 economies, 1995 to 2030 (forecast)

Source: OECD Economics Department forecast.



*Developing standards for legislative/regulatory frameworks that would enable sharing of information and include legislative protections for information received from counterpart competition authorities*

Legislation often prevents sharing information essential to a full discussion of a case if it is designated as confidential by a party to that case. Some jurisdictions possess mechanisms for sharing information under those circumstances, even without a waiver from the parties, as we discussed in section 2. Of course, those same mechanisms include stringent conditions for the use of the information gateway and provide strong protection for information received in this way.

The OECD Council passed a Recommendation in 2014, including the following:

*Exchange of confidential information through 'information gateways' and appropriate safeguards*

*10. Adherents should consider promoting the adoption of legal provisions allowing for the exchange of confidential information between competition authorities without the need to obtain prior consent from the source of the information ('information gateways').*

The Recommendation then goes on to set out some core principles for such provisions, particularly the safeguards to protect the confidentiality of information so exchanged.

*Developing common forms to facilitate the use of confidentiality waivers*

Voluntary waivers to permit the transmission of confidential information remain important, and will still be important even if 'gateway' legislation is widely adopted, because the procedures and safeguards to ensure confidentiality in such legislation are necessarily cumbersome. Common form waivers can help, as can greater consistency for good practices in protecting confidentiality across competition authorities. Many firms are reluctant to sign waivers that would allow transmission of information to newer competition authorities, which need to establish their reputations for probity and care. Building an institutional reputation takes time, but common standards can help.

*Adopting multilateral instruments that address the most pressing needs for cooperation*

Multilateral instruments are an obvious next development: if jurisdictions can adopt common approaches both to enforcement itself but also to cooperation, then it makes sense to embed these in a multilateral instrument rather than a plethora of bilateral agreements. Other papers in this E15 process comment in much more detail on the role that – for example – multilateral trade agreements can play. We note there that the OECD itself provides one example of such a multilateral set of standards, and this might be a good place to start. However, to be most useful such agreements should be deeper (more prescriptive) and wider, in that they should be

negotiated among the emerging economies as well as OECD members. As discussed below, these could relate, for example, to sharing information, to deference to others' enforcement actions, to recognition of final decisions of other competition authorities, and to one-stop shops for filings (e.g. markers, leniency or even merger filings).

*Developing international standards for formal comity*

An increasing number of domestic investigations have cross-border implications: often individuals, information, evidence or assets are located outside the jurisdictional reach of the authority. The effectiveness of domestic enforcement often rests on agencies' ability to request another enforcer to take an action to help its own investigation (so called positive comity). While this principle has long been recognised, it has had very little practical application because of a lack of agreed criteria and standards for when a positive comity request should be made and on how it should be assessed and followed up by the recipient.

The OECD Council passed a Recommendation in 2014, including the following:

*Investigative Assistance to another Competition Authority*

VIII. RECOMMENDS [...] competition authorities [...] should support each other on a voluntary basis in their enforcement activity by providing each other with investigative assistance as appropriate and practicable, taking into account available resources and priorities.

Developing international standards for formal comity, such as a legal instrument defining criteria for requesting an enforcement action in or assistance to another authority, and clarifying participating authorities' comity obligations will allow competition authorities to work together more seamlessly and will ensure that investigations and proceedings are more efficient and effective in cross-border contexts.

*Allowing authorities to choose to recognise the decisions of other competition authorities in the investigation of cross-border matters*

A more significant change than any of the above would be to provide for recognition of other competition authorities' decisions. At present, this is common in cases with an international dimension, but the evidential basis of such decisions is not clear. If – for example – a competition authority had reason to believe that the effects of a merger within its own jurisdiction were very similar to those in another jurisdiction that had already agreed remedies, could it then move directly to assessing those remedies? This would be a sensible way to proceed, but it is at least possible that some party could challenge the grounds for cutting out the middle stage of an investigation in this way. If smaller authorities especially could simply take the decision of an established authority – on a purely voluntary basis if they choose to do so – they could focus their limited resources on cases and effects

that are specific to their own jurisdiction. In many cases, legislative change would be needed to enable them to do so.

*An agreement for giving non-binding deference to one 'lead authority'?*

If authorities can recognise one another's decisions, then they might also decide to do so in advance. That is, in a multi-jurisdictional case, a competition authority could decide that it will make use of the investigation led by another – effectively appointing that authority as a 'lead authority' for the case. The lead authority could carry out any or all of the stages: (a) information gathering, (b) analysis, and (c) decision. Obviously, this would become more sensitive the further down that list the authority's leadership extended. Such a system would surely have to remain purely voluntary, entered into by a pair or group of competition authorities, with the deferring authority retaining the right to conduct its own investigation if it saw fit.

This is not a new idea. The ICPAC report from 2000 mentioned in section 2 contained several options for 'work sharing' between jurisdictions for multi-jurisdictional mergers. These proposals ranged from joint work to coordinate information-gathering or remedies to a single authority being designated as the lead for the merger review.

*Continued convergence of objectives and basic principles is a prerequisite for coherence in international competition law enforcement*

Finally, although our focus in this paper is on cooperation, not convergence, we recognise that convergence towards international consensus on the objectives and basic principles of competition law needs to continue. Our proposals assume that authorities are attempting to achieve much the same purpose. This reflects our view that there has been convergence towards a common approach. Differences in substantial approaches do remain, most prominently between the EU and the US on 'abuse of dominance/monopolisation' and between established and some emerging jurisdictions. However, these differences are actually rather minor compared to the gulf that existed just 20 years ago. We therefore expect substantive convergence will continue, so that jurisdictions enforce a shared 'economic' understanding of competition. However, if this does not happen – if jurisdictions actually diverge and follow their own paths so there is no multilateral understanding of competition – then of course no mechanism for coordinating authority actions can bring coherence to international enforcement.



Implemented jointly by ICTSD and the World Economic Forum, the E15 Initiative convenes world-class experts and institutions to generate strategic analysis and recommendations for government, business, and civil society geared towards strengthening the global trade and investment system for sustainable development.



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