



# **ICN REPORT ON OECD/ICN QUESTIONNAIRE ON INTERNATIONAL ENFORCEMENT COOPERATION**

## **Introduction**

Twenty years ago, international cooperation in competition law enforcement was largely a theoretical concept; today, competition agencies across the globe recognize cooperation as a vital day-to-day tool in ensuring effective competition enforcement. Despite this growing recognition of its value, international enforcement cooperation is, in many ways, still in its formative stages. While there has been explosive growth in the number of new competition laws and agencies over the past two decades, only a relatively small number of agencies participate regularly in international enforcement cooperation.

In April 2012, the International Competition Network (ICN), as an outcome of its Second Decade Project, approved a Steering Group project on international enforcement cooperation. At roughly the same time, the Competition Committee of the Organization for Economic Cooperation and Development (OECD) agreed to begin its own study on cooperation. Under the leadership of the ICN Steering Group and the Competition Committee, the ICN and the OECD committed to an unprecedented comprehensive joint survey to gauge the successes and weaknesses of current cooperation frameworks, and to seek members' view on possible future work. The ICN project leaders (the U.S. Department of Justice and the Turkish Competition Authority) worked closely with the OECD Secretariat to draft a single questionnaire on international enforcement cooperation, which was sent to all OECD and ICN members in July 2012.<sup>1</sup>

It is difficult to do justice to the hard work and thoughtful responses of the 57 ICN members (46 of which are also OECD members or observers) that responded to this Questionnaire.<sup>2</sup> With these insights, the ICN (particularly its enforcement working groups) and OECD will be better positioned to improve on-going cooperation projects, and to propose new projects that better meet the specific and diverse needs of the competition enforcement community. Moreover, by engaging in this exercise, OECD and ICN members will benefit from an assessment of the results that will provide a better understanding of agencies' perceptions of the value of cooperation, the limitations to effective cooperation, and also the needs of agencies in actually implementing more effective international cooperation.

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<sup>1</sup> In the “*Definition of Terms*” portion of the questionnaire, “*international enforcement cooperation*” was defined as “*limited to cooperation between international enforcement agencies in specific enforcement cases, i.e., merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreement cases).*” The instructions further explained that the “*questionnaire does not concern general cooperation on matters of policy, capacity-building, etc.; only international cooperation in the detection, investigation, prosecution and sanctioning of specific anti-competitive behaviour or the investigation or review of mergers is covered.*”

<sup>2</sup> Unless explicitly stated otherwise, the questionnaire results detailed in this report apply equally to OECD members and observers, and ICN members that are neither OECD members nor observers.

This ICN report is separate from, but closely complementary to the report prepared by the OECD Secretariat. The OECD report discusses Questionnaire results on a broad range of topics, examining the experiences and limitations of competition agencies with international cooperation in case-related activities (Questions 1-38 on the Questionnaire), as well as several OECD-specific questions (Questions 39-42). This ICN report, by contrast, focuses specifically on the ICN portion of the Questionnaire (Questions 43-48, respectively). The goal of these six ICN-specific questions was to ascertain ICN members' views on the usefulness of existing ICN cooperation-related work, and, more fundamentally, on ICN members' needs and priorities for future ICN cooperation-related work.

The Questionnaire has yielded a rich repository of data and narrative responses that required significant interpretation and analysis. In drafting our respective reports, the OECD Secretariat and the ICN project team sought a variety of feedback and comments from member agencies. The OECD Secretariat and the ICN project team (U.S. Department of Justice, Turkish Competition Authority, European Commission, UK Office of Fair Trading, U.S. Federal Trade Commission, and the Colombian Superintendency, respectively), also participated in regular calls, and routinely shared drafts.

The ICN-specific questions asked respondents to provide both quantitative data and detailed narrative responses. Fifty-seven (57) respondents answered the survey, though some survey respondents did not respond to every question. The total pool of responses presents a robust ICN data set; the quantitative data provide detailed insights and rank the usefulness of ICN cooperation-related work product, and the narrative questions yield candid answers and direction about the practical experiences and future needs of ICN members in the context of international enforcement cooperation.

As discussed in greater detail below, respondents identified varying needs and challenges in implementing international enforcement cooperation, but there was a broad consensus that the ICN has been instrumental in fostering cooperation and strengthening relationships. Nearly all respondents shared the view that continued efforts to foster convergence on common antitrust principles and procedures will promote effective future cooperation.

### **Question 43: Ranking the Usefulness of ICN Work to International Cooperation**

Question 43 asked respondents to complete a table indicating the usefulness of selected existing ICN work product on international cooperation, with classifications of “high”, “medium”, or “low” usefulness. Approximately 80% of survey respondents responded to this question.

Respondents consistently rated two work products as “highly useful”: (1) the ICN Recommended Practices for Merger Notification and Review Procedures, Recommended Practice X, on Interagency Coordination; and (2) the ICN Merger Working Group Model Confidentiality Waiver. With respect to the ICN Cartel Working

Group Charts Summarizing Information Sharing Mechanisms (ranked 3<sup>rd</sup> overall), numerous agencies did not rank this project, but of those respondents that did, over half categorized this work as “highly useful.”

The table below ranks existing ICN work by the number of respondents who categorized each as “highly useful.”<sup>3</sup> Many respondents indicated more than one ICN project as “highly useful.”

<b>Rank</b>	<b># of Respondents Ranking Particular ICN Project as “Highly Useful”</b>	<b>ICN Project</b>
1	21	ICN Recommended Practices for Merger Notification and Review Procedures, Recommended Practice X, Interagency Coordination (2004)
1	21	ICN Merger Working Group Model Confidentiality Waiver (2005)
3	19	ICN Cartel Working Group Charts Summarizing Information Sharing Mechanisms (ongoing)
4	17	ICN Guiding Principles for Merger Notification and Review, Guiding Principle 6, Coordination (2004)
5	15	ICN Cartel Working Group paper, Cooperation Between Competition Agencies in Cartel Investigations (2007)
6	14	ICN Framework for Merger Review Cooperation (ongoing)

<sup>3</sup> Results from Questions 43 and 44 were also tabulated with ordinal scores, in which ratings of “high” were assigned 2 points; ratings of “medium” were assigned 1 point; and ratings of “low” were assigned 0 points. In this ordinal ranking system, the ICN Guiding Principles for Merger Notification and Review, Guiding Principle 6 achieves a somewhat higher ranking, but the results are otherwise largely the same as those in the text box:

1. ICN Recommended Practices for Merger Notification and Review Procedures, Recommended Practice X, on Interagency Co-ordination (59);
2. ICN Merger Working Group Model Confidentiality Waiver (58);
3. ICN Guiding Principles for Merger Notification and Review, Guiding Principle 6, Co-ordination (54);
4. ICN Cartel Working Group Charts Summarizing Information Sharing Mechanisms (53);
5. ICN Cartel Working Group paper, Co-operation Between Competition Agencies in Cartel Investigations (47); and
6. Framework for Merger Review Cooperation (44).
- 7.

#### **Question 44: ICN Future Work**

Question 44 asked respondents to complete a table categorizing potential future work for the ICN for the next 12-24 months as “low,” “medium,” or “high” priority. Approximately 80% of respondents answered this question.

The potential projects for future ICN work with the greatest number of “high priority” ratings were: (1) ICN Recommended Practices with Respect to Cooperation on Cartel, Merger and/or Unilateral Conduct Enforcement Matters; (2) ICN Working Group Reports on Cooperation on Cartel, Merger and/or Unilateral Conduct Enforcement Matters; and (3) ICN Guidance with Respect to Cooperation on Cartel, Merger and/or Unilateral Conduct/Abuse of Dominance Enforcement Matters.

The table below ranks future work proposals by the number of “high priority” ratings given to each proposal by respondents:<sup>4</sup>

<b>Rank</b>	<b># of “High Priority” Ratings by Respondents</b>	<b>Project<sup>5</sup></b>
1	20	ICN Recommended Practices with Respect to Cooperation on Cartel, Merger and/or Unilateral Conduct Enforcement Matters
2	16	ICN Working Group Reports on Cooperation on Cartel, Merger and/or Unilateral Conduct Enforcement Matters, Comparing Cooperation Practices, Rules and Experiences
3	15	ICN Guidance with Respect to Cooperation on Cartel, Merger and/or Unilateral Conduct/Abuse of Dominance Enforcement Matters
4	13	Model Bilateral Cooperation Agreement
5	12	Model Confidentiality Waivers for Cartel, Merger and/or Unilateral Conduct Enforcement Matters
6	10	Broaden/Replicate ICN Cartel Working Group Charts Summarizing Information Sharing Mechanisms for Other Enforcement Areas
7	9	Revision of Cooperation-related Provisions of ICN Recommended Practices on Merger Notification and

<sup>4</sup> The Definition Section in the Questionnaire did not define or distinguish between recommended practices and guidance, so there may be some blending or overlap between the two categories in respondents’ answers. As it happens, respondents to Question 44 gave more “high priority” rankings to ICN Recommended Practices projects (a form of guidance) than to ICN Guidance projects.

<sup>5</sup> These sample project ideas were created for the Questionnaire and did not reflect specific proposals of any Working Group at the time.

		Procedure
8	6	Broaden/Replicate Framework for Merger Review Cooperation for Other Enforcement Areas

Question 44 also asked respondents to provide narrative information about areas in which they would like to see future work in the next 12-24 months. Responses to this qualitative question varied considerably, and yielded a greater range of answers than those reflected in the chart above. Respondents asked to see more cooperation-related work undertaken on a broad range of competition topics, including with respect to merger review, waivers, cartels, and remedies. Three general areas emerged as leaders for priority future work. They are discussed in greater detail below, with related quotations from respondents' answers.

### Priority Topics for Future ICN Work Related to Cooperation

*(Topic 1)* Fourteen (14) respondents<sup>6</sup> suggested addressing consistency in competition law, policy, and process related to international cooperation.

- Seven (7) of these respondents expressed interest in work addressing the exchange of confidential information, including limitations created by different definitions of confidentiality.
  - These respondents indicated interest in developing work product addressing information sharing, and options for exchanging confidential information.
  - One (1) respondent also recommended increased legislative advocacy demonstrating the benefits of a *“better system of confidential information sharing.”*<sup>7</sup>
  - Four (4) respondents indicated they wish to see the ICN continue work on waiver issues. One of these respondents suggested an “ICN International Cooperation Template” in which *“members [would] describe their confidentiality protections and how they co-operate with counterparts, including use of waivers and model waivers.”*
- Five (5) respondents suggested future work on addressing challenges related to different legal codes in cartel investigations.
  - For example, one respondent suggested greater discussion of *“elimination of obstacles in cartel investigation caused by different criminal codes,”* and

<sup>6</sup> For Topic 1, many of the 14 respondents expressed interest in more than one future work project related to enhancing consistency.

<sup>7</sup> This respondent stated: *“It is often difficult to make the case for better cooperation to governments or business without having an overview of the facts or an assessment of the benefits of more cooperation, so ICN advocacy on a better system of confidential information sharing between agencies would also be desirable. ICN is in a unique position to make the assessment of the benefits upon which the case for better international cooperation could be made.”*

another commented that future work should “*be grounded on the proven virtues of [a] results-oriented approach aiming at convergence worldwide on common principles of competition policy. In the field of cartels, it is hoped that the [Cartel Working Group’s] activities over the next 12-24 months may contribute to greater convergence of leniency programs and lead to a new chapter on ‘international cooperation and information sharing.’*”

- Respondents also expressed interest in focusing future efforts on improving procedural and outcome convergence in merger and unilateral conduct cases.
  - Five (5) respondents commented on the need to solve the practical challenges of joint investigations and try to enhance consistency on process and outcomes. For example, one respondent stated “*consistency of outcomes [has grown] increasingly important*” and new “*authorities face a rising need for close co-operation with existing counterparts before and after a M&A review.*”
  - Another respondent recommended “*development of a framework facilitating the adoption of pragmatic solutions, on a case-by-case basis, to overcome the major obstacle to effective cooperation that results from divergences in timing and procedures, so that fruitful co-operation can take place not only on remedies, but also on substantive issues from an early stage of the process.*”

**(Topic 2)** Ten (10) respondents suggested new work on guidance and best practices documents. (In traditional ICN parlance, “guidance” could include recommended practices, best practices, or something else.)

- Six (6) of these respondents expressed interest in additional work on guidance documents for merger enforcement. Two (2) of these same respondents also suggested development of guidance documents for unilateral conduct/dominance cases.
- Three (3) of these respondents suggested development of guidance documents for cartel enforcement.

**(Topic 3)** Six (6) respondents suggested future work in developing model cooperation agreements to promote future cooperation and information sharing.

- These respondents expressed interest in multilateral frameworks or the creation of model agreements on international cooperation. More specifically, one of these respondents suggested development of a “*multilateral framework through which countries with standing in a matter would be able to request co-operation.*” Another respondent recommended more work reviewing agencies’ actual experiences with the Framework for Merger Review Cooperation, and future discussion of improvements to the Framework.<sup>8</sup>

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<sup>8</sup> One agency also suggested development of mechanisms for formalizing cooperation between agencies that already cooperate informally. Three agencies also recommended development of ways agencies can inform each other of cases under review.

In addition to the three future work topics listed above, seven (7) respondents suggested increased coordination of ICN projects with OECD projects, and focusing projects on the specific needs of member agencies. Three (3) of these respondents wish to ensure implementation of existing ICN work product.

- For example, one respondent indicated it might be “*valuable to re-evaluate[] ICN instruments and integrate them into fewer documents to provide a more clear and consistent basis*” for cooperation, and two other agencies suggested prioritizing “*greater implementation of existing ICN work products*” or conducting surveys within working groups to enhance understanding of agencies’ experiences with ICN work.
- Six (6) respondents discussed avoiding overlap between OECD and ICN projects.
  - These respondents indicated concern with duplication of efforts and wanted the ICN “*to ensure that its work is coordinated with similar work*” from the OECD and other agencies.
  - Two (2) of these respondents cited resource limitations within their agencies, and suggested better prioritization or coordination of future projects.

#### **Question 45: Aspects of ICN Most Helpful in Fostering International Cooperation**

Question 45 asked respondents to identify aspects of ICN networking, work product and other events that have been most helpful in fostering international cooperation, either in a specific case or in a broader sense. Approximately 80% of survey respondents answered this question.

Overall, most respondents cited ICN meetings, both in-person and virtual, (*i.e.*, annual conferences, workshops, working group calls, and teleseminars) as among the most helpful in fostering cooperation and facilitating the exchange of information at both senior and staff levels.

Respondents identified the following ICN events and work product as being the most useful in fostering international cooperation:

- (1) Guidance documents, such as best practices and recommended practices (21 respondents);
- (2) Workshops coordinated by the working groups (18 respondents), teleseminars (6 respondents), and the Cartel Working Group’s workshops and work products (10 respondents); and
- (3) ICN annual conferences (15 respondents).

#### **Question 46: Areas in which the ICN Should Focus Efforts to Foster International Cooperation**

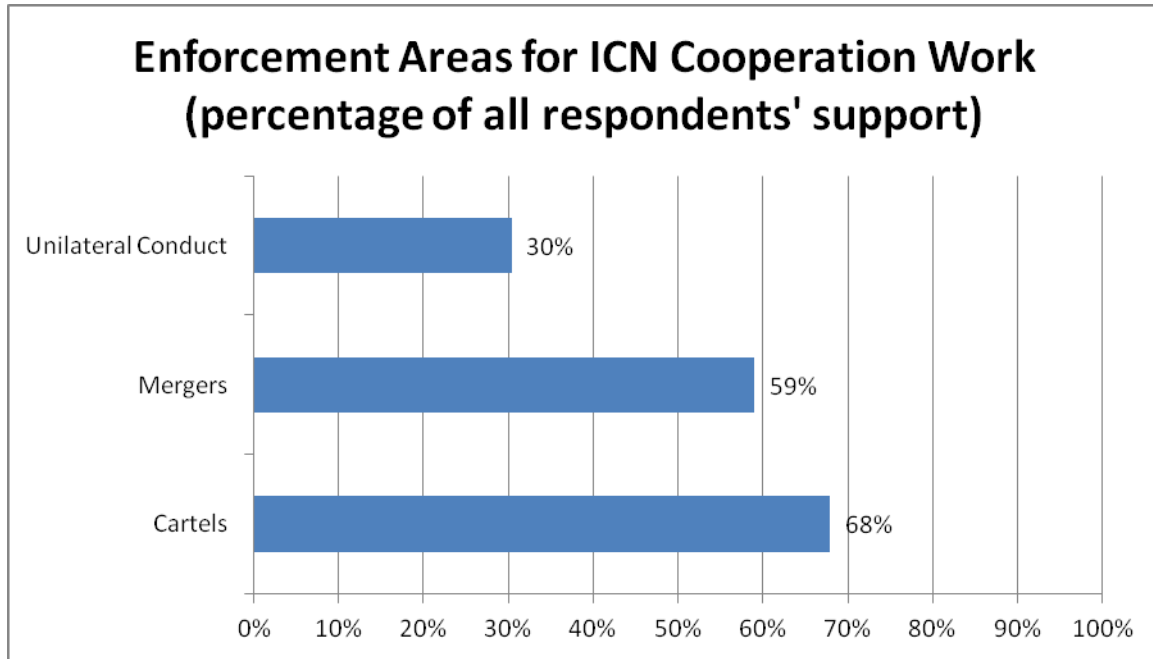
Question 46 asked respondents to identify enforcement areas (mergers, cartels, unilateral conduct) where the ICN should focus its international cooperation efforts. Approximately 86% of survey respondents answered this question. Many respondents



identified more than one enforcement area as a target for ICN focus; nine respondents listed all three enforcement areas.

Overall, respondents ranked cartels, closely followed by mergers, as enforcement areas on which to focus ICN's near-term efforts to foster international cooperation.<sup>9</sup>

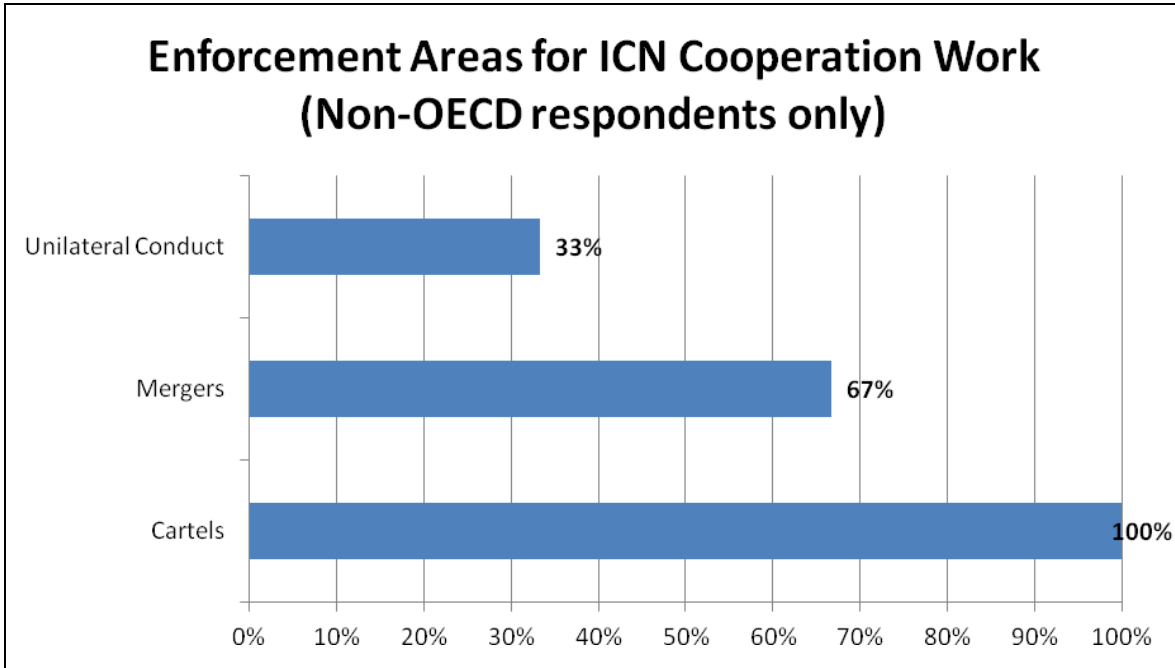
The bar graph below depicts the prioritization of enforcement areas by respondents:



The order of preferences was the same for non-OECD members: cartels, followed by mergers and by unilateral conduct. All of the non-OECD member respondents to this question selected cartels as an enforcement area for focus of cooperation-related work.

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<sup>9</sup> One-third of respondents identified unilateral conduct future work as a priority. One respondent commented that there is less scope for joint enforcement in unilateral conduct cases, and another indicated the Unilateral Conduct Working Group will consider examining the benefits and barriers to cooperation in unilateral conduct cases.



**Question 47: Other Valuable Aspects of Cooperation**

Question 47 asked respondents to identify additional aspects of cooperation not limited to enforcement cooperation and not previously covered by the Questionnaire that have proven valuable in enforcement work. Approximately 68% of survey respondents answered this question. The respondents that answered identified several aspects of cooperation that can be grouped into four general categories:

<b>Additional Aspects of Cooperation Identified as Valuable to Enforcement Work by Respondents</b>	<b>Number of Respondents</b>
Building Relationships and Networking	13 respondents
Development of Guidelines and Best Practices	9 respondents
Capacity-building Exercises	9 respondents
Informal Information Sharing	7 respondents

Approximately 20% of survey respondents (13 respondents) indicated that networking and building relationships with other agencies had proven valuable in enforcement work. These respondents stated that the development of personal contacts and “pick-up-the-phone” relationships, including within specific ICN working groups, was important in facilitating enforcement cooperation, and these contacts contribute to

cooperation in specific cases. As one respondent stated, “*personal contacts within each working group have facilitated the informal exchange of information . . . regarding working methods, techniques in law enforcement, and advocacy efforts/policy.*”

Approximately 16% of survey respondents (9 respondents) indicated the development of guidance and exchange of best practices had been valuable in enforcement work. These respondents stated sharing best practices had helped them become more efficient and avoid “*reinventing the wheel*” when confronting new issues or challenges.

An equal number of survey respondents indicated that capacity-building exercises had proven valuable. The support for capacity-building exercises was particularly evident amongst non-OECD members. Four (4) of the five (5) non-OECD respondents that answered Question 47 highlighted the importance of capacity-building exercises, including workshops, conferences, and formal and informal technical assistance programs, which facilitate the transfer of experience and knowledge to newer agencies.

Approximately 13% of survey respondents (7 respondents) highlighted the value of informal information sharing regarding general working methods, techniques, and policy issues that arise across investigations. One respondent indicated the “*exchange and dissemination of knowledge with respect to particular cases or issues have proved to be a valuable contribution to international cooperation,*” and others stated that informal discussions about procedures and general approaches between agencies helped to improve efficiency and enhance understanding in the context of specific investigations.

#### **Question 48: ICN’s Mission to Foster Cooperation**

Question 48 asked respondents to identify what ICN can do to foster cooperation in a broader sense. Approximately 70% of survey respondents answered this question.

While narrative responses to this question varied widely, almost all respondents that answered this question indicated strong support for continued ICN work on cooperation and “*sustain[ing] and maintain[ing] the networks that already exist.*” A majority of respondents indicated they wish to see continued development of cooperation-related projects within the working groups, and continued work on meetings and webinars.<sup>10</sup>

Numerous respondents also commented on the importance of the ICN in providing a “*platform*” for interaction. These respondents noted that the networks

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<sup>10</sup> For example, one respondent stated “*ICN teleseminars and workshops on various issues are a very useful means of experience sharing and facilitating cohesion between jurisdictions in the matters related to competition policies and antitrust law enforcement.*”

created by ICN “*help agencies build better relationships*” and “*build trust*” which, in turn, foster increased international cooperation.

A large number of respondents from newer competition agencies commented on the importance of the ICN in capacity-building. One agency stated the ICN has proven “*of major value for younger agencies for developing policy and law grounded on sound principles,*” and another stated that ICN workshops allow newer agencies to learn from the experiences of others. These respondents indicated they wish to see continued capacity-building exercises and increased emphasis on technical assistance. Two respondents specifically mentioned staff exchanges between experienced and newer agencies.

## **Conclusion**

The OECD-ICN Questionnaire on International Enforcement Cooperation represents an unprecedented joint effort by OECD and ICN members to understand the day-to-day experiences of competition agencies implementing international cooperation. Respondents to this Questionnaire spent much time and effort drafting thoughtful responses, and the results provide useful insights into the varying needs and challenges for agencies.

Although respondents’ experiences and answers varied considerably, there was near-consensus on some basic issues. Virtually all respondents expressed appreciation for the ICN’s role in promoting international cooperation. For newer agencies, past ICN efforts have facilitated the transfer of information from more experienced agencies, and have helped them learn investigative techniques or “*enhanced thinking*” in regards to specific issues or cases. For others, ICN work on best practices and guidelines have helped their agencies to avoid “*re-inventing the wheel*” when confronting new issues.

Nearly all respondents also cited the importance of the ICN in serving as a platform for interaction. Engagement in ICN workshops and working groups has strengthened the development of personal contacts between and among agencies, and has helped members gain familiarity and trust. Numerous respondents stated that ICN has encouraged the development of “*pick up the phone*” relationships with other agencies, which facilitate formal and informal information sharing in investigations.

Respondents’ views and preferences on future cooperation-related work varied considerably, but there are robust common themes. A majority of respondents indicated that they wish to see additional future work related to cooperation on cartels and mergers; significantly fewer respondents wish to prioritize additional cooperation-related work on unilateral conduct at this time. More particularly, a majority of respondents wish to see the ICN develop new recommended practices or other guidance on cooperation. A handful of respondents specifically requested increased work on waiver issues, and a similar number suggested developing model agreements or multilateral frameworks on international cooperation. Virtually all respondents want the ICN to enhance cooperation

by improving consistency in competition law processes amongst agencies, though suggestions on how to do so differed.

Taken as a whole, ICN members' responses to the ICN-specific portion of the Questionnaire demonstrate that the ICN's success in building relationships, facilitating the transfer of knowledge between agencies, and beginning to move the competition enforcement community from a patchwork of agencies towards greater convergence and cooperation, stand as remarkable achievements.

The Questionnaire results also show that it is too early to rest. As the British poet Percy B. Shelley once wrote nearly two centuries ago, "Nothing wilts faster than laurels that have been rested upon." Markets and economies are becoming increasingly internationalized, and the international competition enforcement community will need to keep pace. Questionnaire respondents have been clear that differing standards and policies among the competition enforcement community continue at times to impede international cooperation. The detailed responses provided by ICN members in response to this Questionnaire will be immensely useful in designing future cooperation-related work to confront these challenges.