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#### **Consultations and discussions regarding peer reviews on competition law and policy, review of the Model Law on Competition and studies related to the provisions of the Set of Principles and Rules**

## **Modalities and procedures for international cooperation in competition cases involving more than one country**

Note by the UNCTAD secretariat

### *Executive summary*

Competition authorities are increasingly being faced with the need to enforce competition policy domestically and to deal with cross-border anticompetitive practices. This study identifies the types of cooperating models and the extent to which cooperation arrangements enhance the capabilities of competition agencies to effectively enforce competition law. The study reviews the challenges in enforcing competition law at the regional and international levels and discusses how different countries have approached cooperation in the area of competition policy and its implication for improved bilateral, regional and international cooperation. The study draws attention to the challenges that young competition agencies face, which makes it difficult for them to cooperate in handling cases and at the same time acknowledges the efforts being made towards better cooperation. The study identifies the gap which exists in the substantive contents of different laws, differences in legal regimes and enforcement capabilities as well as the need to promote better understanding and trust as necessary measures to enhance cooperation. The report concludes with recommended practices for effective cooperation based on the experience gained so far in this area.

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## **Introduction**

1. The Intergovernmental Group of Experts on Competition Law and Policy, in its twelfth session held from 9–11 July 2012, requested the UNCTAD secretariat prepare a report on the modalities and procedures for international cooperation in competition cases involving more than one country.

2. This study reviews the challenges that competition agencies face in dealing with cross-border anticompetitive cases and in putting in place effective cooperation mechanisms. Both developed and developing competition agencies have been searching for ways and means of enhancing the process of enforcement cooperation and the sharing of best practices. The study draws on recent research and international reports, for instance UNCTAD background studies for the eleventh (2011) and twelfth (2012) sessions of the Intergovernmental Group of Experts on Competition Law and Policy, among others, and ongoing and past work published by the main organizations dealing with the subject, such as the European Union, the International Competition Network (ICN), the Organization for Economic Cooperation and Development (OECD) and other scholars in the field.

## **I. Background**

### **A. Definitions of concepts**

#### **Modalities**

3. For the purpose of this study, modalities refers to means and efforts being undertaken by competition authorities to cooperate in dealing with cross-border anticompetitive cases within the framework of formal or non-formal mechanisms. These efforts have evolved over time into many forms.

#### **Procedures**

4. Procedure refers to the methods or the established ways of doing something. In this case, it is the methods being used by competition authorities to cooperate in dealing with cross-border anticompetitive cases.

### **B. Framing the issue**

5. In an increasingly global economy, a growing percentage of transactions have some form of international dimension. Consequently, increased cooperation among competition agencies is necessary for competition law enforcement to be effective and efficient in preventing or halting anticompetitive activities. Moreover, cooperation, like convergence, is an evolutionary process that involves understanding and trust. Assuring confidential treatment of case information is an important goal, but the inability to discuss or share such information with other competition agencies severely limits their ability to cooperate.

6. For example cooperation in cross-border mergers can have benefits for both businesses and competition agencies and would lead to substantive analysis of cases,

appropriate process and timing, and requests for information.<sup>1</sup> Cooperation in combating anticompetitive practices, whether resulting from international cartels or cross-border mergers, has also a number of benefits. An ICN report on cooperation between agencies in cartel investigations identifies the following benefits:<sup>2</sup>

(a) At the pre-investigation stage agencies can notify each other of investigations of cartels that may have an effect in other jurisdictions; various jurisdictions can agree on specific markets and companies to be investigated;

(b) During the investigations stage agencies could coordinate their investigative strategies, for instance, conducting simultaneous raids, issuing summons or interrogating parties;

(c) At the post-investigation stage the agencies could share information about their prosecution strategy or possible settlements and remedies.

7. Efforts to increase cooperation in handling cross-border anticompetitive cases are still being made in order to close the enforcement gap. The proliferation of less formal cooperation arrangements has emerged as an alternative means to address cooperation in addition to formal agreements. International organizations that have been working on these issues include UNCTAD, ICN, OECD and others. This report builds on the findings of an ICN–OECD survey and a consideration of the specific cooperation challenges faced by young competition agencies in addressing cross-border anticompetitive practices..

## II. Forms of cooperation

8. Over the years, cooperation tools for dealing with cross-border anticompetitive cases have evolved, establishing the base for the introduction of different systems. Cooperation in competition cases can be looked at from different angles. Following are some existing avenues and tools that can be used:

(a) Informal cooperation based on the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980);

(b) Informal cooperation based on the 1995 OECD Recommendation on Cooperation,<sup>3</sup> or other similar “soft law” instruments with no particular legal basis;

(c) Cooperation based on waivers;

(d) Cooperation based on provisions in national law;

(e) Cooperation based on non-competition-specific agreements and instruments;

(f) Cooperation based on competition-specific agreements;

(g) Regional cooperation instruments.

9. A recent study by ICN and OECD<sup>4</sup> included a survey which enabled members to share their experiences, views and ways of improving cooperation on competition

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<sup>1</sup> Hansen M (2011). Speech given at UNCTAD’s eleventh session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva, 19–21 July. Available at [www.unctad.org/competition](http://www.unctad.org/competition).

<sup>2</sup> ICN Cartels Working Group (2007). Cooperation between agencies in cartel investigations. Report to the ICN Annual Conference. Moscow, May (see next reference).

<sup>3</sup> ICN Cartels Working Group (2007). Cooperation between competition agencies in cartel investigations. Available at [www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf](http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf).

enforcement. Important points to note are that a good number of competition agencies reported very little or no experience in case-specific cooperation between agencies, and some young agencies reported difficulties while requesting assistance from developed competition agencies. This shows that there are structural, legal and behavioural problems, that need to be addressed in order for cooperation benefits to spread beyond the success story of OECD countries.

10. Two legal instruments were identified as commonly used for formal cooperation between agencies: bilateral agreements and confidentiality waivers. Specific provisions contained in national laws are also commonly used according to the survey results. However, confidentiality waivers were found to be the least applied by non-OECD countries. This can be attributed to the fact that while European Union regulations provide an overall cover for confidentiality waivers, many developing countries' regional agreements may not have such provisions or their implementation has not been effected.

11. While comity provisions were reported to be available in many national, bilateral and multilateral agreements, their application has been limited. Very few agencies have used comity provisions, such as case notification or request for investigatory assistance. This could be attributed to the development of enforcement practices with the introduction of open systems, where competition agencies use media (social and/or official) allowing sharing of information on cases with both internal and external audiences. Through networking and technological awareness and advancement, it has become easier to have informal conversations by telephones, e-mails, Skype, and the like, and to obtain information on almost any subject instantly.

#### **A. Multilateral Arrangements - the International Competition Network, the Organization for Economic Cooperation and Development, and UNCTAD**

12. Work on competition policy within the United Nations was initiated at the United Nations Economic and Social Council and has continued under the aegis of UNCTAD since 1964. The negotiations culminated in the unanimous adoption of the United Nations Code on Restrictive Business Practices, which contained a set of recommendations to Member States including cooperation in the enforcement of competition law. Within this framework UNCTAD, through its intergovernmental machinery and capacity-building activities, has provided for the last four decades a forum for UNCTAD member States to exchange information and to discuss current issues, including adoption and enforcement of competition law in developing countries and economies in transition, the exchange of best practices through capacity-building and consultations on international cooperation.

13. Five decades ago, the OECD issued a set of recommendations to its member States on the legislative and administrative treatment of restrictive business practices. These recommendations led directly to the collection and dissemination of information on competition law developments among OECD member States, and twenty years later to the 1986 OECD recommendation that competition enforcement authorities provide government-to-government notification when an enforcement action may directly affect the interests of another member State or its nationals.

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<sup>4</sup> OECD (2013). Working party No. 3 on cooperation and enforcement. DAF/COMP/WP3(2013)2. Paris. 12 February. Available at [http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2013\)2&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2013)2&docLanguage=En).

14. The ICN is another multilateral arrangement with membership from both developed and developing countries' competition agencies that brings its members together to discuss competition issues and creates a forum for the exchange of ideas and best practices. The Network's mission statement includes the following:<sup>5</sup> "is to advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide".

## **B. Regional cooperation models**

15. In the last two decades, cooperation efforts at regional and subregional levels have evolved. There are many bilateral trade agreements with competition provisions between developed countries (North–North), developed and developing countries (North–South), and developing countries (South–South). These efforts exemplify the necessity to cooperate in handling cross-border anticompetitive practices, especially in the area of mergers and acquisitions and cartels.

16. Within this framework, there are formal cooperation agreements that are written, negotiated and signed by the relevant parties. These agreements are usually wider than competition policy and include other aspects of trade. This report reviews competition provisions in such agreements, the cooperation mechanisms contained in them and what is happening on the ground in practical terms of resolving cross-border anticompetitive cases. Such agreements include those established within the European Union, the El Mercado Común del Sur (MERCOSUR) in South America, the Common Market for Eastern and Southern Africa (COMESA), the West African Economic and Monetary Union (WAEMU), the Southern African Development Community (SADC), the Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC), the Caribbean Community (CARICOM) and the Association of Southeast Asian Nations (ASEAN).

17. Most if not all regional groupings are inspired by the European Union competition regime, which is considered to be the most successful in dealing with cross-border anticompetitive practices, including elaborate legal provisions for cooperation under European Union Article 11(3), Council Regulation 1/2003. The outstanding question still remains as to why the success has not been replicated in other regional agreements.

18. The experience in many other jurisdictions irrespective of their geographical location has shown that competition provisions in regional agreements have not been enforced. The central question, which still lingers in the minds of scholars, is put very well in the following quotation: "why do so many countries invest in adopting such agreements in the first place if the obstacles to their successful operation are high?"<sup>6</sup> This brings us to the question of modalities of cooperation and the need to further examine what is actually holding back the process. In the latter cited work, Bakhom et al further point out that the benefits of regional agreements on competition are determined by "the modalities of cooperation" provided in their statutes.

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<sup>5</sup> See <http://www.internationalcompetitionnetwork.org/working-groups/current/agency-effectiveness.aspx>.

<sup>6</sup> Gal MS and Faibish I (2011). Regional agreements of developing jurisdictions: unleashing the potential. In: Bakhom M, Drexl J, Gal MS, Gerber D and Fox E, eds. (2012), *Competition Policy and Regional Integration in Developing Countries*. Social Science Electronic Publishing. Available at <http://ssrn.com/abstract=1920290>.

19. Regional cooperation agreements vary. Joint enforcement regimes can be achieved through an overriding authority, either with exclusive competence (WAEMU) or having parallel powers with National Competition Agencies (NCAs) (COMESA and CARICOM). Such arrangements are acknowledged by scholars as having a high likelihood of accruing benefits to their members. Other arrangements provide for less elaborate cooperation avenues, but can provide for the sharing of information, the exchange of best practices and the building of a competition culture, as in the case of MERCOSUR and ASEAN. These different cooperation regimes are reviewed below.

### **Common Market for Eastern and Southern Africa**

20. COMESA established a framework for dealing with cross-border anticompetitive issues through the adoption of its regional competition policy and law in the form of the Competition Rules and Regulations (CRRs) in 2004.<sup>7</sup> Regional integration in trade and investment requires a fair, transparent and predictable framework for doing business under competition regulation and guidance. The COMESA Treaty has one of the most comprehensive competition-related provisions and corresponding institutional framework (UNCTAD 2005,<sup>8</sup> 2009,<sup>9</sup> and 2010<sup>10</sup>). The COMESA CRRs provide for a comprehensive cooperation tool with detailed provisions on institutional arrangements, anticompetitive business practices, abuse of dominant position, mergers and acquisitions, and consumer protection. Part 2 of the CRRs provides for the establishment of the COMESA Competition Commission. The COMESA Competition Commission was established in 2012 and began operation in early 2013. However, conflict over competencies in the area of merger reviews between COMESA and its member NCAs threaten the viability of the new institution as an effective tool for the enforcement of competition law and international cooperation. The need to develop clear guidelines and procedures for evaluating mergers and acquisitions should be a priority so as to avoid tensions between the regional institution and its member agencies and avoid unnecessary costs to business.

21. COMESA CRRs have taken some years to implement. One of the major challenges to have caused the delay is inadequate resources, both human and financial, to operationalize the Competition Commission and other institutions within COMESA. The challenge is how to prioritize the different areas of operation and how much knowledge is available, especially for competition issues and their effect on trade between member States. The COMESA Competition Commission has now been established with key staff having been recruited by the end of 2012. It is envisaged that the Commission will start handling cases in 2013. The outstanding challenge will be for member States to ensure the sustainability of the Commission's operations, build expertise, work together with national agencies and engage in international cooperation.

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<sup>7</sup> See COMESA Competition Regulations and Rules, December 2004.

<sup>8</sup> See chapter 11 "Allocation of competences between national and regional competition authorities: the case for COMESA", in: UNCTAD (2005). *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*. United Nations publication. UNCTAD/DITC/CLP/2005/1. New York and Geneva.

<sup>9</sup> UNCTAD (2008). The attribution of competence to community and national competition authorities in the application of competition rules. TD/B/COM.2/CLP/69. Geneva. 23 May.

<sup>10</sup> UNCTAD (2011). Review of the experience gained so far in enforcement cooperation, including at the regional level document. TD/B/C.I/CLP/10. Geneva. 10 May.

### West African Economic and Monetary Union

22. The WAEMU<sup>11</sup> has a supranational Competition Commission that has exclusive competence over both national and intracommunity competition matters. Current examples of cross-border anticompetitive cases exist in the telecommunications, transport, distribution and construction sectors. At NCA levels, many member States do not have the necessary resources to deal with domestic cases, including regulated sectors.

23. The WAEMU Treaty provides for a common competition law and one regional authority with supranational character and total competence in all competition cases. The UNCTAD voluntary peer review for WAEMU in 2007<sup>12</sup> showed that the Union's competition rules changed the way member States handled competition cases. It pointed out that in Senegal, the exclusive competence of the WAEMU Competition Commission is perceived as "an obstacle to the emerging work in this area of both the Ministry of Trade and the Competition Commission". It further notes that, in Côte d'Ivoire, despite a relatively large number of cases between 1994 and 2001, there have not been any since then.<sup>13</sup>

24. Two factors were identified as impediments to the enforcement of competition laws in WAEMU jurisdiction: first, the "psychological" difficulty to accept the court's opinion rendering exclusive competence to the regional Commission, and, second, the need to adapt national legislations to the regional rules. The exclusive competence of the WAEMU Competition Commission, but with insufficient human or financial resources to enforce the law, coupled with the dismantlement of the powers of NCAs such as in Benin, Côte d'Ivoire and Senegal, meant that the WAEMU became a paradise for cartels and other hard-core cartel activities. Faced with this challenge, WAEMU Competition Commission developed, with assistance from UNCTAD, a three-year programme for the design of a set of guidelines and a capacity-building programme to enforce application of the community competition rules both at the national and regional levels.

### Southern African Development Community

25. The SADC Treaty (1992) does not contain competition provisions. However, under section 25 of the SADC Trade Protocol, member States are required to adopt comprehensive trade development measures within the community which prohibit unfair trade practices and promote competition.<sup>14</sup> Therefore, in 2007, a SADC ministerial conference directed the secretariat to develop cooperation mechanisms between member States in enforcing their competition and consumer protection laws. Member States opted for the soft approach of informal cooperation.

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<sup>11</sup> UNCTAD (2008). The attribution of competence to community and national competition authorities in the application of competition rules. TD/B/COM.2/CLP/69. 23 May.

<sup>12</sup> UNCTAD (2008). *Voluntary Peer Review of Competition Policies of WAEMU, Benin and Senegal*. United Nations publication. UNCTAD/DITC/CLP/2007/1. New York and Geneva.

<sup>13</sup> OECD (2013). Working party No. 3 on cooperation and enforcement. DAF/COMP/WP3(2013)2. Paris. 12 February. Available at [http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2013\)2&docLanguage=En](http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2013)2&docLanguage=En); and UNCTAD (2008). The attribution of competence to community and national competition authorities in the application of competition rules. TD/B/COM.2/CLP/69. Geneva. 23 May.

<sup>14</sup> Mathis J (2005). *The South African Customs Union (SACU): A Regional Cooperation Framework on Competition Policy and Unfair Trade Practices*. United Nations publication. UNCTAD/DITC/CLP/2005/3. New York and Geneva.

26. In 2007, SADC set up the Competition and Consumer Policies Committee for consultation and cooperation on competition and consumer protection issues. The Committee meets once a year and it is attended by all NCAs and other competition officials. It is seen as a forum for gradually formalizing the systems of cooperation agreed by member States. The expectation of the Committee was that member States would bring cases for discussion to the committee meetings, but that has not happened since 2008, due to various challenges. Work on informal cooperation among competition agencies is progressing satisfactorily. For example, SADC launched in 2012 an online data bank on the exchange of non-confidential information on ongoing and closed competition cases (see box 1).

**Box 1. SADC online competition case management data base**

One recent development within SADC, which is aimed at enhancing cooperation and exchange of case information, is the establishment of an online competition case management data base. This system is aimed at facilitating exchange of information on cases between member States' NCAs. The new system allows member States to post case information for the benefit of other members through the SADC portal. The system is up and running and countries have already started posting case information. Exchange of confidential information is a challenge, but this initiative is a positive step towards cooperation in handling cross-border cases.

*Source:* SADC Secretariat.

27. The SADC secretariat does not have a large competition office and has depended on the commitment of member States to support the work. The greatest bottleneck for creating cooperation mechanisms within SADC has been to identify areas of common concern and to establish procedures, to find a common ground and ways and means of cooperating in order to address their concerns. Capacity constraints vary between different countries. For example, only South Africa has managed to deal effectively with cartel cases, especially after the introduction of a leniency programme. Other countries that have managed to include leniency programmes in their laws are constrained by insufficient human and financial resources to fully implement these provisions.

28. Within SADC only South Africa has been able to tackle cartel cases. Examples of such cartel cases handled by South Africa and suspected to be involved in other SADC member States include the sectors of fertilizer, maize seed, the construction industry, among others. Most other SADC members do not have adequate resources to deal with cartels. Moreover, their laws do not provide for adequate powers to organize dawn raids, nor do they have leniency programmes or provisions on the exchange of information in cartel cases. These differences in scope and powers further undermine regional cooperation within SADC.

29. Another major challenge facing the SADC region is the question of merger cases, which predominantly involve companies from South Africa and have spill-over effects in other SADC member States. A good example is the Walmart/Massmart merger, which affected many, if not all, SADC countries. A further issue concerns the different and sometimes conflicting remedies designed by different agencies. This makes harmonization and cooperation very difficult.

### **Caribbean Community**

30. The 2001 revised Treaty of Chaguaramas established CARICOM and the CARICOM Single Market Economy.<sup>15</sup> Chapter VIII part I of the Treaty incorporated competition provisions as part of the effort to create a competition culture and contribute to the growth of CARICOM States under the single market arrangement. The CARICOM Competition Commission (CCC) is mandated to handle cross-border anticompetitive practices within CARICOM. There are legal and structural challenges hindering the effective operation of the CCC.

31. The main challenges facing the CCC relate to the shortcomings in the legal framework, which is too generic and very broad. For these provisions to be operational and enforceable, the CCC needs to develop guidelines through a process of refinement and definition taking into account the current economic, political and social circumstances of the region.

32. An additional legal challenge affecting the operations of the CCC is the difference between the legal systems of CARICOM member States. While most States embrace the common law system, Haiti and Suriname follow the civil law based on continental European law. The two legal systems have to be taken into account by the CCC in its attempt to design rules and procedures for the implementation of community competition rules.

33. As in the case of the WAEMU, the CCC faces issues relating to the allocation of competence between itself, the Council for Trade and Economic Development, the Caribbean Court of Justice and NCAs. For example, Barbados, Belize and Guyana have designated the Court of Justice as their highest court of appeal, while under the treaty, this Court of Justice is the court of original jurisdiction and has the exclusive authority to interpret the Treaty provisions.<sup>16</sup> Another overriding question is how the CCC cooperates with the small island economies of the Organization of Eastern Caribbean States competition secretariat in matters relating to anticompetitive conduct.<sup>17</sup>

### **Latin America**

34. With regards to Latin America, the regional groupings cited in this study are the Andean Community and MERCOSUR. These groupings have had very little activities towards enforcing regional competition provisions. The Andean Community, under Article 608, deals with anticompetitive practices where two or more member States are affected, and all other cases would fall under the jurisdiction of NCAs. The implementation of Article 608 has encountered various difficulties, including the challenge of national authorities to implement the decisions of the Andean Community secretariat, due in part to institutional shortcomings such as lack of a proper structure invested with adequate and specialized human resources and providing for coordination with national authorities.

35. Within MERCOSUR the existing competition provisions have not been implemented because the treaty provisions do not clearly define whether competition rules apply to domestic prohibited anticompetitive practices or cross-border regions.

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<sup>15</sup> UNCTAD (2008). The attribution of competence to community and national competition authorities in the application of competition rules. TD/B/COM.2/CLP/69. Geneva. 23 May.

<sup>16</sup> Menns KL and Eversley D (2011). The appropriate design of the CARICOM Competition Commission. Paper presented at the Australian Conference on Lutheran Education Conference. Amsterdam, 20 May.

<sup>17</sup> UNCTAD (2008). The attribution of competence to community and national competition authorities in the application of competition rules. TD/B/COM.2/CLP/69. Geneva. 23 May.

Furthermore, differences in national competition legislation and disagreement on the relationship between competition law and anti-dumping are contentious issues within MERCOSUR.

### **East and South-East Asia**

36. There are regional arrangements in East and South-East Asia, namely ASEAN, the ASEAN Free Trade Area and the Asia–Pacific Economic Cooperation. These groups do not include competition provisions in trade agreements, and hence allocation of competence is not an issue at the moment. However, the Asia–Pacific Economic Cooperation is very active in the field of competition and established the Competition Policy and Deregulation Group in 1996 to improve the region’s competitive environment and to develop an understanding of regional competition laws and policies. Training courses and experience sharing are some of the activities of the Asia–Pacific Economic Cooperation.

37. Another major area of concern in dealing with cooperation issues relating to the investigation of cross-border anticompetitive cases is the area of actual execution of cases. One of the major challenges is the availability of adequate resources to handle cases effectively and efficiently.

38. As stated previously, the WAEMU Competition Commission is a supranational body with total competence to handle competition cases. Capacity shortfall at both NCA- and regional-body level is very real. In addition, case handling becomes a big limitation for the regional Competition Commission; transport costs within the region are prohibitive and absorb a large part of the Commission budget. This affects the number and duration of cases handled.

39. Companies prefer working with the regional body and this leads to frustration at NCA level. WAEMU has made efforts to address this shortcoming through discussions with specific officials within the NCAs. Burkina Faso, Côte d’Ivoire and Senegal have independent NCAs, but their mandate vis-à-vis the regional body is not clear. The will is there, but other challenges, for example lack of operational independence of NCAs (Benin and Senegal) limit their ability to initiate investigation without the cooperation of ministries responsible for this task.

40. In other cases, no specific staff members are assigned to deal with competition issues, making it very difficult to coordinate at WAEMU level. Some countries such as Guinea Bissau and Togo have no competition policy unit, meaning that all competition issues must be handled at the regional level. One of the tools being applied by WAEMU to address the issue of coordination is networking with staff at NCAs. In countries where a minister is in charge of competition, WAEMU has held discussions with the relevant officials and has requested for specific officers to be assigned to handle competition issues on a full time basis.

41. Other efforts that have been undertaken include sending delegations to NCAs from WAEMU in order to promote consensus building and introducing a regional consultative committee comprised of officials from both regional and NCAs. This latter committee will be meeting twice a year from 2013. Case decisions will be discussed by this committee before final decisions are made. WAEMU is also working on procedural rules, which will allow NCAs to deal with all cases except those of a cross-border nature.

### **C. North–South agreements**

42. Strengthening competition law regimes is a key component of the regulatory reforms in many developing countries and economies in transition. In order to attain this goal countries have negotiated new forms of cooperation agreements. For example the European

Union inserted competition rules in the Association Agreements signed between the European Union and the Mediterranean Partners, and the Africa, Caribbean and Pacific countries. However, these provisions currently do not provide adequate protection against anticompetitive practices affecting domestic commerce and trade between these blocks. None of the bilateral cooperation agreements on competition policy between the European Union and the Mediterranean Partners mentioned above have so far been implemented.

43. The same applies to the European Union–Central America Association Agreement, concluded in 2010, and other economic partnership agreements. The competition law regimes adopted by the many developing partners are generally poorly enforced, with the consequence that many domestic anticompetitive practices remain unchallenged. Effective cooperation on competition issues should include an implementation plan of the respective agreements. To this end, it is important to put in place a time frame backed by a comprehensive implementation programme and capacity-building so that all parties can meet their international obligations

#### **D. Bilateral cooperation agreements**

44. There are many competition-related bilateral agreements, their number having increased greatly over the last two decades. One common feature is that they all aim at assisting each other in dealing with cross-border cases. Some examples are those between the European Union and South Africa, Canada and Costa Rica, Australia and Thailand, Australia and Singapore, and Mexico and Japan, among others.

45. The United States of America entered into a series of bilateral cooperation agreements with Australia, Canada, and Germany. These agreements provided for cooperation and they were designed largely to avoid conflicts arising out of competition law enforcement, particularly extraterritorial cases. The agreements were limited mainly to notifications of enforcement activities, consultations to resolve differences, and sharing of information that can be disclosed under confidentiality laws. In 2000, the United States of America also signed bilateral agreements with Brazil and Israel.

46. The Republic of Korea has also signed a bilateral cooperation agreement with the European Union and Japan has similar agreements with Indonesia and Malaysia. Canada signed a cooperation agreement with Costa Rica.<sup>18</sup> All these agreements have competition-related provisions that are aimed at facilitating exchange of information and best practices in order to effectively deal with anticompetitive cases, especially those of cross-border nature.

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<sup>18</sup> Other noteworthy agreements include: United States of America–Australia Cooperation Agreement (June 1982); United States of America–Australian Mutual Antitrust Enforcement Assistance Agreement; United States of America–Brazil Cooperation Agreement (October 1999); United States of America–Canada Cooperation Agreement (August 1995); United States of America–Chile Agreement on Antitrust Cooperation (March, 2011); United States of America–China Memorandum of Understanding on Antitrust and Antimonopoly Cooperation (July 2011); United States of America–Germany Cooperation Agreement (June 1976); United States of America–Commission of the European Communities Cooperation Agreement (September 1991); United States of America–European Union Merger Working Group, Best Practices on Cooperation in Merger Investigations (October 2002); United States of America–Israel Cooperation Agreement (March 1999); United States of America–Japan Cooperation Agreement (October 1999), United States of America–Mexico Agreement (July 2000); United States of America–OECD Recommendation on Cooperation Between Member Countries (July 1995). See UNCTAD (2006). The experience gained so far with bilateral, regional and international cooperation. TD/B/COM.2/CLP/21/Rev.4. 6 September.

47. In 1991, the signing of a United States of America–European Commission agreement marked a new turn in cooperation in competition policy. Although these agreements contain notification provisions that serve to avoid conflicts, it places more emphasis on cooperation to make enforcement more efficient and effective. The most significant innovation in the agreement was its “positive comity” provision, under which one party is able to ask the other to conduct an investigation. Although the provision has not yet been formally invoked, it stands as an important feature of cooperation in the enforcement of competition law.

## E. Non-formal cooperation mechanisms

48. Non-formal international cooperation modalities exist in many jurisdictions. They are usually constituted as networks or other forms of ad hoc collaboration. In the recent years, non-formal cooperation mechanisms dealing with competition issues have emerged in many parts of the world. Different tools have been applied in an attempt to look for ways and means of exchanging information and best practices, the most crucial being case-related information. These tools range from memorandums of understanding at bilateral level, including country to country (for example, between Japan and Indonesia), to networking forums and the like.

49. Some of these instruments have specific case-cooperation mechanisms, while others are general in nature. Some NCAs have developed informal networking relationships and have built a level of trust, where competition officials can pick up the telephone and request case information without basing it on any formal agreement. Networking forums are also emerging in many regions, such as, for example, the Euro Mediterranean Competition Network and the African Competition Forum.

50. It is worth noting that non-formal types of cooperation have proved to be of increasing importance in the last decade, especially in regions where formal agreements exist but have not yet been enforced or where they do not exist. In cases where procedures are not much formalized, it leaves room for planning and manoeuvre, allowing greater flexibility in designing the mode of cooperation and implementation. This can explain the recent proliferation of alternative methods of cooperation in handling competition cases.

51. UNCTAD, through its voluntary peer review process has contributed to non-formal cooperation efforts among competition agencies, including cross pollination between young and mature competition agencies. One appreciated feature of the UNCTAD Voluntary Peer Reviews is the reviews of the regional competition arrangements such as that for WAEMU and its member States,<sup>19</sup> and the tripartite review for the United Republic of Tanzania, Zambia and Zimbabwe.<sup>20</sup> The two peer review reports and their respective recommendations highlighted appropriate areas where inter-agency cooperation can be most useful and proposed reforms and the adoption of best practices. Peer reviewed agencies that agree with UNCTAD’s recommendations benefit from capacity-building for up to three years.

52. Two other cooperation initiatives launched by UNCTAD are the UNCTAD–Latin American Economic System (SELA) Working Group on Trade and Competition,<sup>21</sup> and

<sup>19</sup> UNCTAD (2008). *Voluntary Peer Review of Competition Policies of WAEMU, Benin and Senegal*. United Nations publication. UNCTAD/DITC/CLP/2007/1. New York and Geneva.

<sup>20</sup> UNCTAD (2012). *Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania–Zambia–Zimbabwe*. United Nations publication. UNCTAD/DITC/CLP/2012/1. New York and Geneva.

<sup>21</sup> UNCTAD-SELA Working Group on Trade and Competition, established in 2008, is comprised of

most recently the UNCTAD Collaborative Information Platform.<sup>22</sup> The work of the UNCTAD–SELA Working Group has focused on the exchange of information, experiences and best practices in order to enhance cooperation efforts in dealing with trade and competition issues. The eCollaborative Information Platform is envisaged to be an online data bank-cum-virtual forum for competition agencies to share non-confidential information on cases. The platform will allow competition agencies to post and access information on cases handled by other agencies and hopefully use this information to handle similar cases in their jurisdictions.

## **F. Effective mechanisms for cooperation: the new generation United States of America cooperation agreements and the European Competition Network**

53. Over the last two decades, the United States of America and the European Union have exchanged notifications and shared extensive public information to help each other define product and geographic markets and to consider remedial approaches during parallel investigations. The cooperation also involves daily contact between the authorities to discuss issues of common concern, and this contributes to a better understanding of each other’s laws and what constitute the other party’s “significant interests”.

54. The new generation of United States of America cooperation agreements is complex. According to Ms. Varney, Commissioner to the United States Federal Trade Commission (1995) “the essence of the Act is that the usual ban on sharing confidential information does not apply if we enter into an agreement with a foreign antitrust authority or government that provides for the reciprocal sharing of antitrust evidence, contains adequate guarantees of confidential treatment, and permits the requested agency to deny any request for assistance that it considers contrary to its public interest”.<sup>23</sup> Once such an agreement is in place, and after the necessary public interest check is made, the Federal Trade Commission and the Department of Justice are authorized to share confidential information in their files and to use their own investigatory powers to collect confidential information that a foreign antitrust authority desires. There are three controlling principles of the Act and the agreement contemplates: (a) reciprocity; (b) protection of confidential information; (c) case-by-case public interest determinations.

55. The European Competition Network (ECN) is one of the most successful arrangements in dealing with cross-border anticompetitive practices. It operates under the mandate of the European Union Treaty Articles 101 and 102 on the Functioning of the European Union. The Treaty establishes the bases for cooperation between the European Community and NCAs for effective application of the Community competition rules. Under the ECN framework, the European Commission and NCAs of member States cooperate in the area of notification of new cases, coordination of investigations, assisting each other in investigations, and exchange of information/evidence, among other issues. Regulation 1/2003 imposes an obligation to the courts and NCAs to apply the European

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trade and competition experts from 25 countries in Latin America and the Caribbean.

<sup>22</sup> Azrachi HA and Qaqaya H (2012). UNCTAD’s Collaborative information platform. *Concurrences*. 4-2012:204–207.

<sup>23</sup> Varney CA (1995). Cooperation between enforcement agencies: building upon the past. Prepared remarks of the Commissioner, United States Federal Trade Commission, before the APEC Committee on Trade and Investment

Conference on Competition Policy and Law. Auckland. 25 July. Available at <http://www.ftc.gov/speeches/varney/newz.shtm> (accessed 17 April 2013).

Union competition law against cross-border business practices by companies that restrict competition and by extension are detrimental to consumer welfare.

56. The ECN also serves as a forum where experts from various sectors meet and exchange ideas, experiences and best practices. The experts are organized in sectoral working groups in the areas of financial services, energy, insurance, food, pharmaceuticals, telecommunications, health care, information and communications technology services, environment, among others.

57. One important aspect of the European model is that all 26 NCAs are in operation and apply both European Union and national competition laws. The ECN is another layer in the enforcement of the European Union Treaty and its regulations, which set out clear guidelines of operations for the network. The European Union is a good example of how such systems can be effectively implemented and there are many lessons to learn from it for other regions.

58. Other European arrangements include the Nordic Alliance for Nordic NCAs, which is aimed at exchanging litigation experiences between member States and in particular the Nordic Cartel Network, established in 2000. Another initiative is the Central Competition Initiative for Eastern European countries.

59. Outside the ECN cooperation mechanisms, the European Union had entered into bilateral cooperation agreements with countries outside of its territory. These so-called first generation agreements were concluded with the United States of America (1991), Canada (1999), Japan (2003) and the Republic of Korea (2009). This framework has contributed to a better dialogue and a structured framework, which has advanced competition enforcement of cross boarder anticompetitive practices. However, these agreements did not allow the exchange of confidential or protected information. The only avenue through which such information could be shared was that of consent or waivers obtained from concerned companies. The experience of the European Union has shown that exchange of confidential information is not forthcoming, especially in cartel investigations.

60. As a consequence, the European Union has been negotiating a new type of competition enforcement agreement, now known as “second generation” agreements, with other jurisdictions, namely Switzerland and Canada. This new effort provides a legal framework that allows exchange of confidential information gathered in the course of a specific case investigation that affects both parties. The exchange will be subject to certain conditions, especially data protection rules, which will apply at all times. Looking specifically at the European Union and Switzerland, the agreement contains provisions already existing in the first generation agreements – notification of enforcement activities, practical aspects of cooperation, and negative and positive comity.

61. Aspects of the second generation agreements include the modalities for discussion and transmission of information between the European Commission and the Swiss Competition Commission and exchange of information on a specific case or related transaction being investigated by the two authorities. Information received under their respective leniency or settlement procedures is excluded from the list, unless the concerned parties agree to allow it to happen. The agreement also safeguards the exchange of information, which is prohibited by their respective laws under procedural rights and privileges guarantee. This agreement also contains provisions on the protection of the information discussed or transmitted. This was facilitated by the fact that the European Union and Switzerland were satisfied that their rules on confidentiality are comparable and that business secrets and other confidential information transmitted by either authority are safe.

### **III. Challenges faced by young competition agencies in enforcing competition laws**

62. The forgoing sections show that cooperation within the context of the European Union and its member States as well as the United States of America and its partners have been successful in dealing with cross-border anticompetitive cases, and to some extent the North–North cooperation arrangements. This is not, however, the case for many other young jurisdictions even when there are bilateral agreements with well-established competition agencies. The picture becomes even less clear when one looks at what is happening in developing countries.

63. This section looks into the challenges competition agencies in developing countries face in their attempt to cooperate in competition law enforcement. Based on experiences by some regional groupings, especially in Africa, there are some concerns and challenges in their operationalization and the need to improve them.<sup>24</sup> These challenges have been identified as the major hindrances to effective cooperation in dealing with cross-border anticompetitive cases.

#### **A. Allocation of competence**

64. The scope and depth of commitments in the area of competition law and policy differ from one regional arrangement to the other. This is also the case for the degree of competence attributed to regional bodies in the area of implementing competition rules and regulations. The competence of the regional institution might affect the depth of cooperation in implementing competition rules as well.

#### **B. Challenges in dealing with cross-border mergers and cartels**

65. While developed countries have been very successful in dealing with cross-border anticompetitive practices, the majority of developing countries are lagging behind, with the exception of the more advanced competition authorities in emerging economies that entered into cooperation agreement with the United States of America and the European Union. The UNCTAD 2012 study<sup>25</sup> reviewed the experiences of several selected countries with sound records of cross-border cartel enforcement and merger control and identified specific challenges faced by developing countries in dealing with international cartels and mergers.

66. It is well documented that international cartels adversely affect consumers, but cross-border mergers may also have impact on the structure of the market, with a possibility of exposure to anticompetitive practices, such as abuse of market power. UNCTAD study<sup>26</sup> also demonstrates that in times of economic downturn, cooperation is a key ingredient in countering the pressure and temptation to succumb to calls for the relaxation of merger rules in a bid to achieve other goals.

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<sup>24</sup> Information on the experiences in regional cooperation was obtained from personal interviews with Alex Kububa, Chairman, COMESA Competition Commission; Gladmore Mamhare, Competition Expert, SADC Secretariat (November 2012); and Amadou Dieng, Chief Executive Officer, WAEMU Competition Commission (December 2012).

<sup>25</sup> UNCTAD (2012). Cross-border anticompetitive practices: the challenges for developing countries and economies in transition. TD/B/C.I/CLP/16. Geneva. 19 April.

<sup>26</sup> UNCTAD (2010). The role of competition advocacy, merger control and the effective enforcement of law in times of economic trouble. TD/RBP/CONF.7/6. Geneva. 26 August.

67. It is also a fact that cooperation in dealing with cross-border anticompetitive cases has yielded positive results. Two examples of this are outlined in box 2.

**Box 2: Examples of cooperation in investigations into cases of joint venture and bid rigging**

An example of the positive effect of international cooperation is the case of the Rio Tinto and BHP Billiton joint venture proposal.<sup>27</sup> The cooperation and coordination between the Australian Competition and Consumer Commission, the European Commission, the German Cartel Office, the Japanese Fair Trade Commission and the Republic of Korea Fair Trade Commission (KFTC) enabled all agencies to have the same remedy for the joint venture proposal, obliging the applicants to withdraw their application in October 2010. The proposed joint venture was found to have anticompetitive effects in the markets of all countries concerned. KFTC took the lead by sharing its findings with the other authorities, mounting the pressure on the two companies to succumb to the force of coordinated action and pull out of the proposed deal. The example demonstrates the force of cooperation in handling competition cases.

Another useful case example is that of a marine hose cartel<sup>28</sup> that was dismantled through a collaborative effort of the Australian Competition and Consumer Commission, the European Commission, the Japanese Fair Trade Commission, the United Kingdom of Great Britain and Northern Ireland Office of Fair Trading and the United States Department of Justice. This case involved price setting, bid rigging and allocation of market shares between four suppliers of marine hoses between 2001 and 2006. The said jurisdictions were able to share information, which allowed the Australian Commission to prosecute the international cartel in 2007. This case shows that international cooperation is a good method of dealing with international cartels affecting both developed and developing countries.

68. However, many competition agencies face several challenges that include lack of sufficient enforcement experience within NCAs. In the case of cartels, developing countries' NCAs are usually informed about the cartel through enforcement reports and the press. They need to undertake preliminary investigations to assess whether the international cartel in question affects their own markets. To facilitate such assessment, cooperation with developed countries to obtain more information would be a valuable input. In this way, they could ascertain whether their market was included in the global market allocation among the cartel members.

69. For example, leniency applications facilitate obtaining evidence in cartel investigations. However, international cartelists rarely choose to apply for leniency in developing countries. Furthermore, in many cases international cartelists have no physical presence in developing countries. This makes it even more difficult for NCAs to investigate the cartel within the regional grouping since they cannot use conventional investigation tools, such as dawn raids, interrogation or requests for written statements. Hence, cooperation with jurisdictions investigating the same cartel becomes indispensable.

70. In the case of mergers, young competition agencies also face various challenges. A failure to notify or late submission is a major problem for many agencies. In jurisdictions

<sup>27</sup> UNCTAD (2012). Cross-border anticompetitive practices: the challenges for developing countries and economies in transition. TD/B/C.I/CLP/16. Geneva. 19 April.

<sup>28</sup> OECD (2012). Discussion on limitations and constraints to international cooperation. Working party No. 3 on cooperation and enforcement. DAF/COMP/WP3/WD(2012)41. Paris. 18 October. p. 33.

with voluntary merger notification systems, the risk is even higher. It becomes even more challenging to manage the timing of the filing of the application. When applications are filed late, this exerts pressure on already stretched resources. Jurisdictions with post-merger notification provisions face even greater challenges. When such mergers have been approved in other jurisdictions, competition agencies are often under pressure to approve them, despite the fact that they may have potential anticompetitive effects.

71. Another challenge is access to information in the case that small competition agencies do not have the capacity to gather the information required to effectively evaluate the merger. This is more difficult in cases where the merging parties are from different jurisdictions and sometimes with no local physical presence. There is an option of cooperation with foreign competition authorities but this is not always forthcoming. Confidentiality of business information comes into play. Related to information access is the issue of language barriers between jurisdictions. Information exchanged in a language not being understood by the recipient is as good as not having been given at all.

72. UNCTAD research<sup>29</sup> points out that resource and capacity constraints are perhaps among the most significant problems facing competition authorities in developing economies. While the limited resource base is linked to the fiscal crunch that confronts least developed countries and the need to balance and prioritize competing demands on the government budget, it is also a reflection of an absence of political backing for competition policy and law. This also affects the ability of developing countries NCAs to cooperate with their counterparts from other countries and complicates their ability to deal with cross-border anticompetitive cases.

#### **IV. Policy issues and recommended practices**

73. All of the current forms of cooperation reviewed in this study are important but also have significant limitations. With few exceptions,<sup>30</sup> most countries prohibit their competition agencies from sharing confidential information they obtain in the course of an investigation. This prohibition, while protecting the rights of the parties, also constrains the degree of cooperation among competition agencies. Public dissemination of such information could be harmful to the firm that provided it, to the future information-gathering efforts of the agency, and to consumer welfare. The cooperation challenges facing competition agencies is how to promote better understanding of each other's laws and ensure effective enforcement, while protecting legitimate private and public interest.

74. In addition to the constraints on the exchange of confidential information, the discussion above demonstrates the limitations to cooperation arising from differences in competition laws, differences in procedures, legal regimes, efficiency of the court system and the level of mutual trust and understanding. However, the recent set of agreements between advanced and emerging economies indicates that cooperation is an evolutionary process that involves gradual adaptation of rules and procedures and mutual trust. Moreover, informal cooperation through capacity-building and exchange of experiences and views on how different competition cases have handled closed cases can be a valuable source for upgrading skills and "closing the gap" between different agencies. It is this gap

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<sup>29</sup> UNCTAD (2011). Effectiveness of capacity-building and technical assistance extended to young competition agencies. TD/B/C.I/CLP/11/Rev.1. Geneva. 29 June.

<sup>30</sup> Australia has a statute under which confidential information can be shared with foreign competition agencies for use in civil cases (the Mutual Assistance in Business Regulation Act of 1992). The Canadian competition authorities have conducted a consultation process on a legislative proposal that includes an amendment to permit the sharing of confidential information in some circumstances.

in technical capacity, legal regimes and mutual trust that requires attention if cooperation in the area of competition policy is to be enhanced and expanded.

75. Some of the best practices that can be drawn from the experiences reviewed above include the following:

- (a) Promoting better understanding of each other's law, assessment criteria and design of remedies and sanctions;
  - (b) Building human and technical capacities of young competition agencies to enforce competition law;
  - (c) Developing guidelines and best practices for cooperation agreements based on what works well and what does not work;
  - (d) Putting in place work plans and capacity-building programmes to implement and report on the competition provisions contained in bilateral, regional and international agreements;
  - (e) Exchanging staff and detaching resident advisors to promote mutual understanding and trust;
  - (f) Promoting transparency in procedures, processes and design;
  - (g) Developing leniency policies that are similar, as differences in this area may discourage the granting of waivers to leniency applicants;
  - (h) Assuring the inclusion of provisions in national laws allowing for cooperation and for exchange of information for enforcement purposes;
  - (i) Establishing and implementing clear safeguards for due process and the protection of confidential information.
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