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**Combatting Cartels:**

**Empirical Study Prepared by the BRICS Competition Law and Policy Centre**

*Contribution of the BRICS Competition Law and Policy Centre*

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# **COMBATTING CROSS-BORDER CARTELS: EMPIRICAL STUDY**

**PREPARED BY THE BRICS COMPETITION  
LAW AND POLICY CENTRE**

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The BRICS Competition Law and Policy Centre is an academic and expert platform, set in order to provide expertise and methodological support for the BRICS Competition Authorities and to promote BRICS competition law agenda for the global economy. The BRICS Competition Law and Policy Centre is currently based in National Research University 'Higher School of Economics' in Moscow, the Russian Federation.

The Empirical Study is conducted for the support of the discussion during the Roundtable 'Combating Cross-Border Cartels' in course of the Eighth United Nations Conference to Review All Aspects of the Set on Mutually Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices which takes place on 22 October 2020. The current Report serves as a contribution of the Centre to the mentioned Roundtable.

The Study is conducted by Anna Pozdnyakova, Research Fellow at the BRICS Competition Law and Policy Centre. The Report is edited by Megan Cochrane, Expert at the BRICS Competition Law and Policy Centre.

The findings, interpretations and conclusions expressed herein are those of the authors and do not necessarily reflect the views of the BRICS Competition Law and Policy Centre.

All comments and questions regarding the Study should be addressed to [all@bricscompetition.org](mailto:all@bricscompetition.org).

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## I. Introduction

According to the 'Agreed Conclusions of the Eighteenth Session of the Intergovernmental Group of Experts on Competition Law and Policy', which were adopted on 12th July 2019, the topic of combatting cross-border cartels was to be discussed during the Eighth United Nations (henceforth, the 'UN') 'Review Conference of the Set of Mutually Agreed Equitable Principles and Rules for the Control of Restrictive Business Practice' (henceforth, the 'Review Conference')<sup>1</sup>.

The BRICS Competition Law and Policy Centre supports the need for both inclusive discussion with regard to the challenges competition authorities face in the course of investigating cross-border cartels and for in-depth analysis of diverse perspectives and ways by which to overcome such challenges.

Cross-border cartels have long been a pressing issue for competition authorities and, arguably, constitute the most challenging type of anti-competitive behaviour due to complexity inherent in investigating and suppressing them. While more developed and mature competition authorities have experienced success in fighting such cartels, more recently formed and less well-resourced competition law enforcement authorities could face problems in combatting these cartels due to legislative restrictions, lack of knowledge and expertise and other factors.

To support the discussion during the Review Conference, the BRICS Competition Law and Policy Centre volunteered to undertake empirical research (henceforth, the 'Study'). The purpose of this research is to analyse the 'state of play' and experiences of competition authorities from both developed and developing countries with regard to combatting cross-border cartels, identify the key challenges they face and examine the views of various competition agencies across the globe as to how to deal with those challenges.

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1 Agreed conclusions of the Eighteenth Session of the Intergovernmental Group of Experts on Competition Law and Policy. Geneva Switzerland (10-12 July 2019). Available at [https://unctad.org/meetings/en/SessionalDocuments/ciclpd2019\\_agreedconclusions\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/ciclpd2019_agreedconclusions_en.pdf).

## II. Methodology

The Study is premised on the replies received from 37 jurisdictions to the Questionnaire on Combatting Cross-Border Cartels (henceforth, the 'Questionnaire'), the text of which is set out in Annex 1 of this Paper and the list of competition authorities that replied to the Questionnaire is set out in Annex 2.

The Questionnaire consists of four parts. The first part is devoted to general legal aspects concerning the investigation and suppression of cartels. It is important to understand whether jurisdictions are legally empowered to investigate cross-border cartels and, if so, the options available to them to deal with foreign economic entities that violate or could potentially violate national competition legislation. The questions in this part also cover the issue of possible sanctions that can be imposed on participants in the cartel as well as possible ways to avoid such and/or liability, such as filing a leniency application.

The second part of the Questionnaire deals with enforcement practices related to cross-border cartels. The aim of this part is to focus on the experiences of developed and developing jurisdictions in fighting cross-border cartels and identify best practices from experienced jurisdictions on ways and tools by which to investigate and suppress cross-border cartels as well as the difficulties they face in this process.

The third part of the Questionnaire centres on the need for international cooperation in combatting cross-border cartels. The idea underlying this part is to set out the tools and mechanisms by which competition authorities can interact with one another as well as the factors that are crucial for international cooperation to successfully take place in relation to specific cross-border cartel cases.

The fourth part analyses the challenges that competition authorities face in combatting cross-border cartels and ways to overcome such. Special mention is made of the efforts that could be implemented internationally in order to assist developing jurisdictions enhance their enforcement practice in relation to cross-border cartels.

In addition to the Questionnaire, on 22<sup>nd</sup> July 2020, the BRICS Competition Law and Policy Centre hosted its webinar on the subject of 'Fighting Cross-Border Cartels through International Co-operation in Times of Crisis'.<sup>2</sup> Some of the ideas that were expressed during the discussion that took place between the panellists and participants during this webinar are reflected in the Study.

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2 BRICS Competition Law and Policy Centre, "Fighting Cross-Border Cartels: The Perspective of the Young and Small Competition Authorities", ([bricscompetition.org](http://bricscompetition.org), 4 August 2020), Webinar Video, <<http://bricscompetition.org/materials/video/fighting-cross-border-cartels-through-international-cooperation-in-times-of-crisis/>>.

### III. Legislation

The effective investigation and suppression of cross-border cartels is only possible if strong legislative grounds underlying such exist. This includes a general legal framework for investigating cartels and the existence of legislative mechanisms by which to impose sanctions for illegal conduct. In the course of combatting cross-border cartels, specific questions emerge as to the capabilities of competition authorities to take legal action in relation to foreign companies and/or individuals that participate in cartel activity. It is also important to understand whether foreign economic entities can receive immunity for participating in cross-border cartels according to leniency programs in various jurisdictions

The results of the Study show that, in general, all of the 37 jurisdictions that responded have defined the concept of a 'cartel' in their respective competition law regimes. However, the exact wording employed differs significantly between regimes. 'Cartels' have been defined as "concerned practices", "prohibited agreements", "restrictive agreements", "collusive agreements", "anti-competitive agreements", "horizontal agreements", "horizontal collusive practices", "collusive arrangements", etc.

In the majority of the respondent jurisdictions, cartels are prohibited per se. However, three jurisdictions that do not have per se prohibition on cartels are Belgium, Azerbaijan and the Seychelles.

The fact that all jurisdictions, in some way or another, have defined the concept of a 'cartel' raises issues concerning the extraterritorial reach of competition law. However, the universal recognition of the concept of a cartel does make it legally possible to investigate cross-border. For the purposes of the Study, 'extraterritoriality' has been defined as meaning a provision of national competition law that allows the relevant competition authority to investigate cases concerning economic entities that are not residents within that authority's domestic jurisdiction but have implemented restrictions on competition within the territory under said authority's jurisdiction.<sup>3</sup>

The results show that 13 of the 36 participants in the Study have not adopted the extraterritorial principle into their respective competition law regimes.<sup>4</sup> Among them, there are 3 member states of the European Union (henceforth, the 'EU'), that have transferred their competency to deal with extraterritorial cases to the European Commission. The other 10 jurisdictions are developing countries. For them, the absence of the extraterritoriality principle could constitute a serious problem when it comes to dealing with cross-border anti-competitive practices. Another crucial issue that arises in the context of combatting cross-border cartels is that of imposing sanctions on cartel participants. Jurisdictions are very different with regard to this issue: in some countries,

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3 Questionnaire on Combatting Cross-Border Cartels prepared and circulated by the BRICS Competition Law and Policy Centre.

4 Armenia, Belgium, Bulgaria, Kazakhstan, the Kyrgyz Republic, Mongolia, North Macedonia, Panama, the Seychelles, Slovenia, Thailand, Zambia and Zimbabwe.

they may face other types of sanctions, including criminal liability.

In 16 jurisdictions<sup>5</sup>, the imposition of a fine is the only administrative sanction that competition authorities can impose on the participants of a cartel<sup>6</sup>. In 21 jurisdictions<sup>7</sup>, in addition to imposing administrative fines, competition authorities are able to impose other types of administrative sanctions, such as warnings (Armenia and Hungary), the disqualification of individuals from management positions (Australia and Russia), community service orders (Australia), divestitures (Brazil, the Philippines and Vietnam), prohibitions on carrying out trade activity (Brazil), orders requiring the establishment of internal rules that comply with competition law (Hungary), the confiscation of illegal profits (Kazakhstan, the Philippines, Mongolia and Vietnam), corrective measures (South Korea), bans on participation in public procurement (Moldova, Serbia, Spain and the US), compensation orders (Tanzania), corporate probations (the US), etc.

In 26 jurisdictions<sup>8</sup>, cartel participants could face criminal liability. However, the criminal sanctions that may be imposed in relation to cartel behaviour differ greatly across jurisdictions. For example, in some jurisdictions, criminal liability can only be established for bid-rigging practices. These countries are Austria (where the maximum sanction is up to 3 years' imprisonment), Belgium (up to 6 months' imprisonment), Hungary (up to 5 years' imprisonment), Georgia (up to 2 years' imprisonment, but for up to 4 years' for repeat offences) and Panama (up to 2 years' imprisonment).

However, in those jurisdictions in which criminal liability can be imposed for other anti-competitive collusive practices in addition to bid-rigging, such as hard-core cartels, the types of, and mechanisms by which to impose, criminal sanctions vary significantly. One key difference in jurisdictions in which imprisonment exists as a sanction relates to the duration of maximum imprisonment terms. For example, a cartel participant could face up to 2 years' imprisonment in Zimbabwe, up to 3 years in Moldova and Vietnam, up to 5 years in Brazil, Kenya, Serbia and Zambia, up to 7 years in the Kyrgyz Republic, the Philippines and Russia, and up to 10 years in the US.

Competition authorities in most jurisdictions are able to impose criminal fines on cartel participants with the US being able to impose criminal fines on both corporations and individuals<sup>9</sup>. Beyond criminal fines and imprisonment, some other jurisdictions have empowered their respective competition authorities to impose other types of criminal liability for participation in cartels. For example, in Armenia it is possible to sanction cartel participants with imprisonment for 2-3 months as well as the confiscation of property<sup>10</sup>. In Kazakhstan, it is possible to sanction cartel participants by imposing public work requirements, ordering imprisonment for up to 1 year, prohibiting the occupation managerial positions, prohibiting the carrying out of certain types of business activity and/or confiscating property<sup>11</sup>. In Russia, it is possible to sanction

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5 Albania, Algeria, Azerbaijan, Belarus, Bulgaria, Egypt, Georgia, North Macedonia, Panama, Peru, the Seychelles, South Africa, Thailand, Turkey, Zambia and Zimbabwe.

6 The majority of jurisdictions are also able to impose behavioural and/or structural remedies on cartel participants and order them to immediately cease their illegal conduct.

7 Armenia, Australia, Austria, Belgium, Brazil, Hungary, Kazakhstan, Kenya, the Kyrgyz Republic, Mauritius, Moldova, Mongolia, Philippines, Russia, Serbia, Slovenia, South Korea, Spain, Tanzania, Vietnam and the US.

8 Armenia, Australia, Austria, Azerbaijan, Belgium, Brazil, Egypt, Georgia, Hungary, Kazakhstan, Kenya, the Kyrgyz Republic, Moldova, Mongolia, North Macedonia, Panama, Philippines, Russia, Serbia, South Africa, South Korea, Thailand, Vietnam, the US, Zambia and Zimbabwe.

9 Questionnaire: Reply by the US Department of Justice (henceforth, the 'DoJ'), 3.

10 Questionnaire: Reply by the State Commission for the Protection of Economic Competition of Republic of Armenia (henceforth, the 'SCPEC RA'), 3.

11 Questionnaire: Reply by the Committee for Protection and Development of Competition of the Republic of Kazakhstan, 4-5.

cartel participants by imposing compulsory labour, prohibiting the occupation of managerial positions and prohibiting the carrying out of certain types of business activity<sup>12</sup>.

In jurisdictions in which leniency programmes have been properly developed, it may be possible for cartel participants to avoid liability for their participation in anti-competitive and collusive conduct. Leniency programmes and the opportunity to apply for such operate as an important tool when it comes to identifying cartels, including cross-border cartels. Leniency programmes exist in 30 of the jurisdictions that responded to the Questionnaire<sup>13</sup>. In 26 of these jurisdictions, foreign economic entities can file an application for leniency. In 16 of these jurisdictions, foreign individuals are able to ask for immunity<sup>14</sup>. However, 7 of the jurisdictions that responded to the Questionnaire have not yet developed their own leniency programmes<sup>15</sup>.

The results of the Study show that national competition law regimes across the 37 respondent jurisdictions vary substantially. In general, the respondents have adopted the same definition of the 'cartel' concept and introduced provisions concerning such, with the majority prohibiting cartels per se and all of them having established liability for participation in a cartel. This is crucial for the effective suppression of cross-border cartels.

Analysis of the replies supplied by competition authorities enables one to identify certain problems related to the legislative aspects of fighting cross-border cartels. The first crucial problem is that for many developing jurisdictions the principle of extraterritoriality is absent from their respective competition law regimes. This renders it near impossible for competition authorities in these jurisdictions to investigate cross-border cartels.

The second is that the sanctions for participating in cartels differ greatly across jurisdictions, especially in the context of criminal liability. This could present a legal problem for both competition authorities investigating cross-border cartels and participants in cartels, as the latter group could face administrative fines in one jurisdiction but significant prison sentences in another.

The third problem relates to the capacity of developing jurisdictions to establish their own leniency programmes and gain experience that can help them improve their enforcement practice. Leniency is an effective tool when it comes to detecting cartels, including cross-border ones. The existence of such programmes in both developed and developing jurisdictions may encourage cartel participants to file applications not only to enforcement authorities in mature jurisdictions but also to those in developing jurisdictions in order to seek immunity. The receipt by competition authorities in developing jurisdictions would greatly contribute to improving their enforcement practices.

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12 Questionnaire: Reply by the Federal Antimonopoly Service of the Russian Federation (henceforth, the 'FAS'), 4.

13 Albania, Armenia, Australia, Austria, Azerbaijan (only for criminal cases), Belgium, Brazil, Bulgaria, Egypt, Georgia, Hungary, Kazakhstan, Kenya, Mauritius, Moldova, Mongolia, North Macedonia, Panama, Peru, Philippines, Russia, Serbia, Slovenia, South Africa, South Korea, Spain, Turkey, Vietnam, the US and Zambia.

14 Armenia, Australia, Belgium, Brazil, Egypt, Kenya, Panama, Peru, Philippines, Serbia, Slovenia, South Africa, Spain, Vietnam, the US and Zambia.

15 Algeria, Belarus, the Kyrgyz Republic, the Seychelles, Tanzania, Thailand and Zimbabwe.

## IV. Enforcement

Cartel enforcement is a crucial function of competition authorities worldwide. Combatting cartels is a high priority for almost all of the competition authorities that participated in the Study. Currently, all of the national competition authorities, except for those in Azerbaijan and Zimbabwe, have some experience in investigating cartel cases<sup>16</sup>.

Analysing the total number of cartel cases that have been investigated by different competition authorities in the period from 2009 to 2019 allows one to conclude that the scope of cartel enforcement activity remains different across jurisdictions.

The number of cartel cases investigated by major competition law enforcement authorities in the period from 2015 to 2019 increased significantly in comparison to the period from 2010 to 2014. However, this trend is the opposite for competition authorities in Armenia, Hungary, North Macedonia, Slovenia, Spain, Vietnam, the US and Zambia. On average, most of the jurisdictions, that participated in the Study investigated between 1-4 cases or less than 1 cartel case per year in the period from 2015 to 2019 (see Table 1). This low number of investigations is common for young and developing competition authorities that have expressed certain difficulties when it comes to combatting cartels.

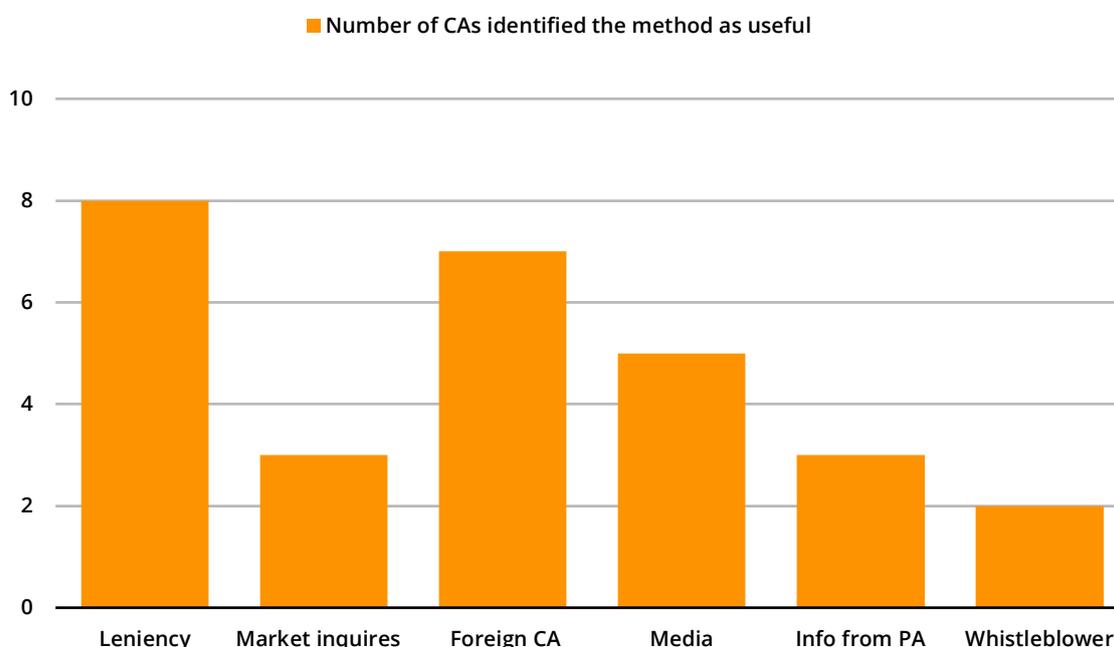
Table 1<sup>17</sup>

Average Cartel Cases per Year (2015-2019)	Jurisdiction (Average Number of Cases)
30	Russia (307.4) South Korea (66) USA (35.8)
10-29	Brazil (17.2) Kazakhstan (13.8)
5-9	Austria (7.8) Belgium (7.5) Albania (6.8) Australia (6.8) Spain (6.4)
1-4	Moldova (3.6) Egypt (3.4) Peru (3.2) Mongolia (2.6) Serbia (2.6) Bulgaria (2.4) Hungary (2) Georgia (1.6) North Macedonia (1.6) Panama (1.6) Algeria (1.4) Kenya (1.4) Slovenia (1.4) Mauritius (1.25)
<1	Zambia (0.8) Thailand (0.8) Turkey (0.8) Belarus (0.4) Tanzania (0.4) Kyrgyz Republic (0.2) Armenia (0) Vietnam (0)

<sup>16</sup> The Philippines and the Seychelles have experience in cartel enforcement but did not provide statistical data on such.

<sup>17</sup> On the basis of the statistics provided by the respondent jurisdictions, it was possible to calculate the average number of cartel cases per year that each competition authority investigated annually in the period from 2015 to 2019.

32 jurisdictions have expressed that cross-border cartels constitute a significant threat to their economies<sup>18</sup>. Only 12 of the 36 competition authorities that responded to the Questionnaire have some experience of investigating and suppressing cross-border cartels, 4 of which (Australia, Brazil, South Korea and the US) have succeeded in investigating criminal cross-border cases (see Annex 3 for stories of these jurisdictions' successes)<sup>19</sup>. 10 of these 12 authorities expressed that their experience of investigating cross-border cartels has been successful, while the Federal Antimonopoly Service of Russia (henceforth, the 'FAS') and the Turkish Competition Authority (henceforth, the 'TCA') stated that they considered there to be room for them to improve their enforcement practice in relation to cross-border cartels. The TCA stated that it had previously relied on international co-operation but after having failed to gain specific information from its foreign counterparts while investigating cross-border cartel cases, it has changed its strategy towards international co-operation<sup>20</sup>. The FAS outlined that in the course of investigating cross-border cartels, it had identified serious gaps in regard to international regulation of this issue, particularly in relation to the process of exchanging information with foreign counterparts.<sup>21</sup>



Leniency is the most frequently used method for identifying cross-border cartels. 8 competition agencies noted that they used leniency programmes in their enforcement practices<sup>22</sup>. For example, Australia has granted 36 applications for immunity to companies on cross-border cases, with 8 of these being granted by the Commonwealth Department of Public Prosecutions<sup>23</sup>. Brazil has issued 37 applications for immunity to foreign economic entities<sup>23</sup>, Spain has granted 6<sup>25</sup> and Turkey has granted 1<sup>26</sup>. The US

18 Algeria, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Brazil, Egypt, Georgia, Kazakhstan, Kenya, the Kyrgyz Republic, Mauritius, Moldova, Mongolia, North Macedonia, Panama, Peru, the Philippines, Russia, the Seychelles, Slovenia, Spain, South Africa, South Korea, Tanzania, Thailand, Vietnam, the US, Zambia and Zimbabwe.

19 Australia, Austria, Belgium (within the EU), Brazil, Egypt, the Kyrgyz Republic, Russia, South Africa, South Korea, Spain, Turkey and the US.

20 Questionnaire: Reply by the Turkish Competition Authority (henceforth, the 'TCA'), 5.

21 Questionnaire: Reply by the FAS, (12), 6.

22 Australia, Austria, Brazil, South Africa, South Korea, Spain, Turkey and the US.

23 Questionnaire: Reply the Australian Competition and Consumer Commission (henceforth, the 'ACCC'), 9.

24 Questionnaire: Reply the Administrative Council for Economic Defence of Brazil (henceforth, the 'CADE'), 10.

25 Questionnaire: Reply the National Commission of Markets and Competition of Spain (henceforth, the 'CNMC'), 7.

26 Questionnaire: Reply the Turkish Competition Authority, 7.

Department of Justice (henceforth, the 'DoJ') does not disclose information about the exact number of applications for immunity that it has granted but it does report its experience in regard to such. Egypt and Russia reported that they have never received applications for leniency from foreign economic entities, while Austria reported that foreign economic entities has never been the first applying for leniency, so they were not be able to obtain full immunity.

7 competition agencies reported that they used interaction with foreign competition agencies as a method for detecting cross-border cartels<sup>27</sup>. 5 competition authorities stated considered media to be an important source of information on the existence of cross-border cartels<sup>28</sup>. Australia, Brazil and the US identified the method of cooperating with other national public authorities as a tool for detecting cross-border anti-competitive agreements. Australia, the Kyrgyz Republic and Russia have said that market analysis can be used for identifying cross-border cartels, while in Egypt and the US, competition authorities have relied on information from anonymous whistle-blowers.

All of the competition authorities that have experience in investigating and suppressing cross-border cartels say that they have encountered difficulties when investigating such cases. 10 of 12 competition authorities identified evidence gathering to be a problem when it comes to combatting cross-border cartels, with the US, Turkey, South Africa, South Korea and Australia identifying it as the major difficulty<sup>29</sup>.

9 competition authorities stated that they have faced difficulties when it comes to requesting information from economic entities located outside of their national jurisdictions<sup>30</sup>.

5 jurisdictions reported that one of the difficulties they face is a lack of time for investigating cross-border cartel cases<sup>31</sup>, with Australia, the Kyrgyz Republic and South Korea reporting that they lacked resources. Indeed, cross-border cartel cases are usually difficult to investigate because of the need to obtain information and evidence from multiple jurisdictions as well as the need for time and resources in order for competition authorities to conduct all the necessary enforcement actions.

4 competition authorities identified legal restrictions as being a key difficulty when it comes to successfully suppressing cross-border cartels<sup>32</sup>. For example, Austria outlined that restrictions are often imposed when it comes to exchanging confidential information with foreign competition authorities located outside of the EU<sup>33</sup>.

Australia, Brazil and South Africa noted that they faced difficulty when it comes to getting foreign companies to appear in hearings. Australia also added that it faces difficulties with regard to interviewing witnesses from other jurisdictions. However, the Australian Competition and Consumer Commission (henceforth, the 'ACCC') did state that one successful strategy it had found was to combine witness interviews with interviews in a neighbouring jurisdiction so that the witness did not have to make

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27 Australia, Austria, Brazil, the Kyrgyz Republic, South Africa, Spain and the US.

28 Australia, Brazil, Egypt, South Korea and Turkey.

29 Australia, Austria, Brazil, the Kyrgyz Republic, Russia, South Africa, South Korea, Spain, Turkey and the US.

30 Australia, Austria, Brazil, the Kyrgyz Republic, South Korea, South Africa, Turkey and the US.

31 Brazil, Egypt, the Kyrgyz Republic, South Korea and Turkey.

32 Austria, the Kyrgyz Republic, Russia and South Africa.

33 Questionnaire: Reply by the Federal Competition Authority of Austria, 6.

separate trips<sup>34</sup>.

Difficulties concerning communication with foreign competition authorities have also been highlighted by the Kyrgyz Republic, Russia and Turkey despite the fact that cooperation between competition authorities on cross-border cases can prove to be crucial for the success of the investigation. Brazil outlined that “cooperation, from the early stages and even only through the sharing of non-confidential information, could help authorities to identify the actual effects of a cross-border conspiracy in their respective jurisdiction, avoid double counting on fines or the replication of investigation when there is only a slight indirect effect. Moreover, cooperation at an early stage could help authorities to identify if there is also a national conspiracy in the same market and, thus, allow for integrated investigative techniques”<sup>35</sup>.

The US Doj also reported difficulties with regard to securing the presence of an individual defendant, target or subject of the investigation who is outside of its territorial jurisdiction<sup>36</sup>. The Doj also stressed that one of the common challenges it faces in cross-border investigations relates to coordinating its activities with other competition agencies when there is a leniency applicant who has made applications in parallel in multiple jurisdictions during the course of cross-border cartel investigations<sup>37</sup>.

The FAS also identified serious international regulatory gaps when it comes to combatting cross-border cartels as tools and methods by which to enable cooperation between competition authorities have not been properly elaborated on the international level<sup>38</sup>.

Another crucial question related to the investigation of cross-border cartels concerns the possibility of actually imposing sanction on companies and/or individuals that participate in such. Among the experienced competition agencies that responded to the Questionnaire, only the Kyrgyz Republic stated that it had not managed to hold the participants of a cross-border cartel liable for anti-competitive conduct. This was because in the only cross-border cartel case that the competition authority investigated, and the case was closed because of the voluntary elimination of infringement by a violator<sup>39</sup>.

As was mentioned by the ACCC, “the collection of fines imposed on foreign economic entities is critically important for effective enforcement, as it sends a strong deterrent message to other international entities considering engaging in the same or similar conduct”<sup>40</sup>. However, the issue of collecting fines imposed on foreign business entities could present a challenge for competition authorities<sup>41</sup>. This because there is no competition law mechanism that obliges companies to pay fines in jurisdictions in which they do not have any physical presence. Austria, South Africa, South Korea, Spain and the US reported that they have successfully collected fines from foreign economic entities, whilst Australia and Brazil have reported that they only able to sometimes

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34 Questionnaire: Reply by the ACCC, (23), 7.

35 Questionnaire: Reply by the 'CADE' (24), 9.

36 Questionnaire: Reply by the US Doj, (9), 5.

37 Ibid, 6.

38 Questionnaire: Reply by the FAS, (12), 7.

39 Questionnaire: Reply by the State Agency of Anti-monopoly Regulation under the Government of the Kyrgyz Republic, 4-5.  
Questionnaire: Reply by the ACCC, (23), 7.

40 Australia, Brazil, Russia, South Africa and Turkey identified the issue of collecting fines from foreign economic entities as

41 one of the key difficulties they faced in the course of combatting cross-border cartels.

collect such fines.

Thus, analysis of enforcement practices shows that the competition authorities that have experience in dealing with cross-border cartel investigations are primarily those in mature and developed competition law jurisdictions. Competition authorities that are only in the relatively early stages of their development and/or are lacking in resources, even if they do have some experience in combatting national cartels, do not have experience of successfully enforcing their respective competition law regimes against cross-border cartels. This may indicate that more work needs to be done in the international arena to strengthen the capacity of such agencies and clarify the tools and mechanism that can be used in cross-border investigations.

## V. International Cooperation

In the modern world, international cooperation is becoming more important than ever before. International co-operation between competition authorities in different jurisdictions is crucial for the purposes of investigating cross-border cartels, whether these authorities be in the jurisdictions affected by the alleged violation of competition law or in those in which the alleged perpetrators are located. By working together, competition authorities will be able to exchange information, gather evidence and potentially undertake joint enforcement actions. All of the competition authorities that have experience in investigating cross-border cartel cases agree, either wholly or partially, that international co-operation is an important element when it comes to efficient enforcement.

However, many of the legal and practical issues raised concerning international cooperation in specific cases remain unsolved<sup>42</sup>. Finding solutions for these issues is especially crucial for developing competition agencies that do not have extensive enforcement practice when it comes to cross-border cartel cases.

14 of the respondents to the Questionnaire reported that they do not have practical experience of international cooperation in the field cartel enforcement and the majority of these respondents are developing competition authorities<sup>43</sup>. The reasons for the absence of such experience will be set out in Section VI of this Study. However, in the meantime, these competition authorities would likely benefit from learning from more experienced authorities, which use different tools of cooperation when investigating cartel cases (see Diagram 2).

Most of the jurisdictions that have experience in international cooperation reported that they usually use non-binding tools of cooperation ranging from requests for information<sup>44</sup>, to exchanges of opinions on investigative methods<sup>45</sup>, exchanges of opinions on the absence or existence of a violation of competition law<sup>46</sup>, virtual consultations via the telephone, email or communications platforms like Skype, Zoom, etc.<sup>47</sup> and in-person consultations<sup>48</sup>.

However, a key obstacle to international co-operation when it comes to cross-border cartel cases centres on the exchange of confidential information and documents.

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42 The list of obstacles to international co-operation was set out in the United Nations Conference on Trade and Development (henceforth, 'UNCTAD'), "Obstacles to International Co-operation in Specific Cases", (2018), Survey.

43 Albania, Algeria, Armenia, Kenya, Moldova, Mongolia, North Macedonia, Panama, the Philippines, Slovenia, Tanzania, Thailand, Turkey and Zimbabwe.

44 Australia, Austria, Brazil, Bulgaria, Hungary, Kazakhstan, Mauritius, Russia, the Seychelles, South Africa, South Korea, Spain, the US and Zambia.

45 Australia, Austria, Belarus, Brazil, Bulgaria, Georgia, Hungary, the Kyrgyz Republic, Mauritius, Mongolia, Peru, the Seychelles, South Africa, Spain, the US and Zambia.

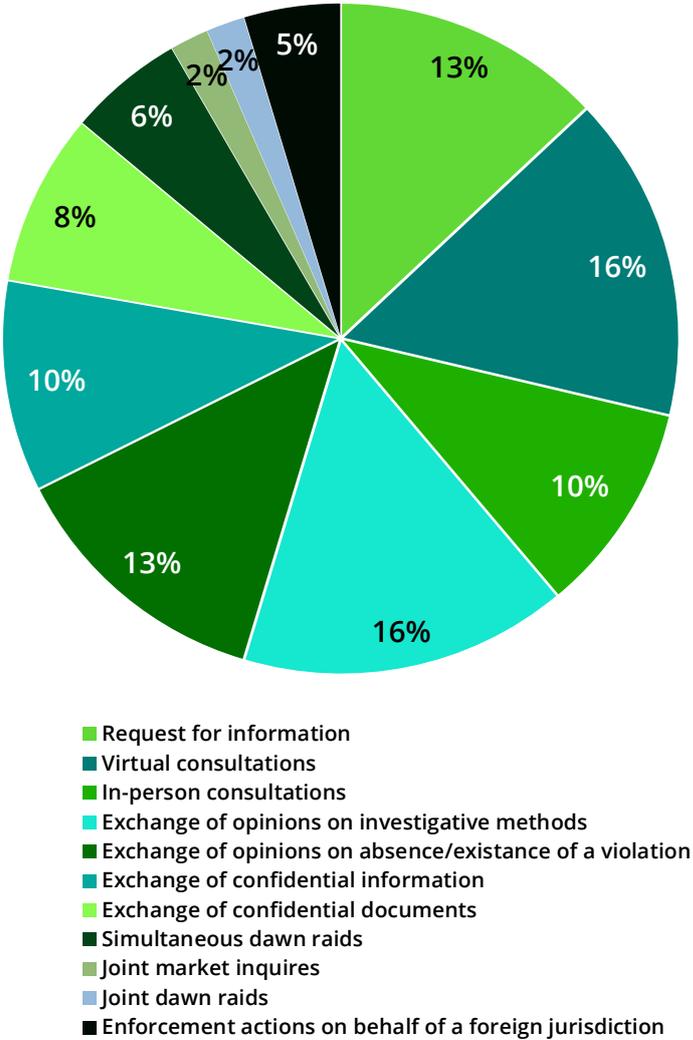
46 Austria, Belarus, Brazil, Egypt, Kazakhstan, the Kyrgyz Republic, Mauritius, Mongolia, Serbia, the Seychelles, South Africa, Spain, Vietnam, the US and Zambia.

47 Australia, Austria, Brazil, Bulgaria, Egypt, Hungary, the Kyrgyz Republic, Mauritius, Peru, Russia, Serbia, the Seychelles, South Korea, Spain, Vietnam, the US and Zambia.

48 Austria, Brazil, Hungary, Mauritius, Russia, the Seychelles, South Africa, South Korea, Spain, the US and Zambia.

For such to occur, there usually needs to be certain level of trust between the relevant authorities as well as specific legal guarantees that the information shared will not be disclosed for any other purpose. This need for trust and the protection of confidential information is the primary reason why this mechanism of cooperation is mostly used by developed competition authorities. 11 competition authorities have exchanged confidential information with other competition authorities in the course of their investigations into cross-border cartels<sup>49</sup>, while 9 competition authorities have exchanged confidential documentation<sup>50</sup>. Austria, South Korea and the US noted that such exchanges are common practice for them, however, for other jurisdictions, the exchanging of confidential information in the context of cartel enforcement is not a common practice. Some jurisdictions, for example, the US, have stressed that such type of cooperation is exercised on the grounds of waivers of confidentiality received from the economic entities under investigation<sup>51</sup>.

Diagram 2: Tools Employed by Competition Authorities for Purposes of Cooperation during Cartel Investigations



49 Australia, Austria, Brazil, Hungary, Kazakhstan, the Kyrgyz Republic, the Seychelles, South Africa, South Korea, Spain and the US.  
 50 Austria, Brazil, Hungary, Kazakhstan, the Kyrgyz Republic, the Seychelles, South Africa, Spain and the US.  
 51 Questionnaire: Reply by the US DoJ, (9), 8.

Developed competition agencies are sometimes able to use more advanced methods of international co-operation when dealing with cross-border cartel cases. 6 competition authorities, including Austria and Hungary, reported having experience in conducting simultaneous dawn raids with other foreign competition authorities<sup>52</sup>. The concept of 'dawn raids' refers to the situation in which different national competition authorities agree to simultaneously conduct raids of the homes/ offices/ properties of possible cartel participants in their respective jurisdictions. 5 respondents to the Questionnaire reported that they had conducted enforcement actions on behalf of a foreign competition authority<sup>53</sup>. The Seychelles and the Kyrgyz Republic also reported their experience of conducting joint market inquiries with foreign competition authorities.

Many factors are crucial for the establishment of effective cooperation between competition authorities when investigating cross-border cartel cases. Some of these factors are legal in nature. These range from the extent of similarities between the investigative proceedings undertaken in different jurisdictions, to the extent of similarities regarding the conceptual definition of 'confidential information', the extent to which a person, legal or natural, can be held liable for the disclosure of confidential information, if such exists in the relevant jurisdictions, and the extent to which similar forms of punishment, equitable or otherwise, exist in the relevant jurisdictions. Other factors are more practical in nature, such as the absence of language barriers, the ability to conduct dawn raids and/or other enforcement actions simultaneously and/or on behalf the other jurisdictions. Other factors exhibiting a more emotional and/or cognitive dimension are also key, such as trust, openness to dialogue and/or previous positive experience(s) of cooperating with a particular competition authority.

In course of the Study, the respondents were asked to evaluate factors as to how crucial they consider them to be for international cooperation to take place successfully when investigating cross-border cartel cases. The respondents were then asked to rank these factors from 0 to 10, with 0 being 'absolutely no importance whatsoever', to 10 being of 'fundamental importance'. Analysis of these responses enables one to make certain observations regarding international cooperation.

The results of the Study show that there is very little difference between developed and developing competition authorities as to the importance of various factors when it comes to the degree of success enjoyed by international cooperation.

Both developed and developing competition authorities consider trust<sup>54</sup>, as well as openness to dialogue to be key factors in determining the success of international cooperation efforts<sup>55</sup>. For more developed competition authorities, previous positive experiences of cooperating with other particular competition authorities takes on more importance than it does for less developed authorities<sup>56</sup>.

Legal factors are also crucial for competition authorities when it comes to establishing international cooperation. Competition authorities that do not have much experience of international cooperation in cross-border cartel cases admitted that the adoption

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53 Australia, Austria, Brazil, Hungary, Spain and the US.

54 Austria, Hungary, Kazakhstan, the Kyrgyz Republic and Spain.

55 The average value of trust based on the replies from all of the respondents is 9.25.

56 The average value of openness to dialogue based on the replies from all of the respondents is 9.21.

of a similar definition of the concept of 'confidential information'<sup>57</sup> is important for them when deciding whether or not to cooperate with their foreign counterparts, as is the extent to which a person, natural or legal, can be held liable for disclosing confidential information<sup>58</sup>. Both developed and developing competition authorities placed the same level of importance on the jurisdictions with which they are cooperating having the same sort of investigatory powers<sup>59</sup>; this includes, for example, both authorities being able to conduct dawn raids. However, both developed and developing competition authorities placed less importance on the extent to which similarities exist between the cartel investigation proceedings in the relevant jurisdictions and the existence of similar forms of punishment, equitable or otherwise, for participating in a cartel<sup>60</sup>.

Based on the responses provided to the Questionnaire, practical factors are less crucial when it comes to successfully investigating cross-border cartel cases. However, for developing competition authorities, the absence of any language barriers is of more importance than it is for developed competition agencies<sup>61</sup>. For developed competition authorities, the ability of a foreign counterpart to conduct enforcement actions on its behalf takes on more importance than it does for those authorities that are still in the process of developing<sup>62</sup>.

The challenges inherent in undertaking cross-border investigations into cartels could be overcome, *inter alia*, through capacity building and technical assistance. These potential solutions are especially relevant for developing competition authorities, which, sometimes, lack the requisite skills and/or knowledge for detecting and investigating cross-border cartel cases. In furtherance of this, regional and/or international organisations could specifically focus on these issues and provide technical assistance as well as seek to, more generally, become platforms through which authorities could consult with each other on specific cases.

Only 7 respondents have sought assistance from regional or international organisations in the course of cross-border cartel investigations: Belgium from the European Competition Network (henceforth, the 'ECN'), Kenya and the Seychelles from the Common Market for Eastern and Southern Africa (henceforth, 'COMESA'), the Kyrgyz Republic from the Eurasian Economic Commission (henceforth, the 'EEC'), South Africa from the Southern African Development Community (henceforth, the 'SADC') and cooperation within BRICS, and Zambia from the SADC.

Despite the fact that the majority of national competition law authorities have not sought assistance from regional and/or international organisations when investigating specific cross-border cartel cases, 32 respondents stated that, in future, they would consider doing so<sup>63</sup>.

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57 The average value of 'confidential information' in both jurisdictions stands at 7.89, meanwhile for developed competition authorities this figure stands at 7.55 and for developing competition authorities it stands at 8.

58 The average value of 'existence of liability for disclosure of confidential information in the partner jurisdiction' stands at 7.88, meanwhile for developed competition authorities it stands at 7.33 and for developing competition authorities it stands at 8.08.

59 The average value of 'both competition authorities having the same investigative powers' stands at 7.88.

60 The average value of 'similarities of cartel investigation proceedings' stands at 6.5 and 'the other jurisdiction has similar or equitable punishment for cartel violation as your jurisdiction' stands at 6.18.

61 The average value of the following factor, 'the absence of language barriers or translation problems', stands at 6.78 for developing competition authorities, meanwhile for developed competition authorities it stands at 6.13.

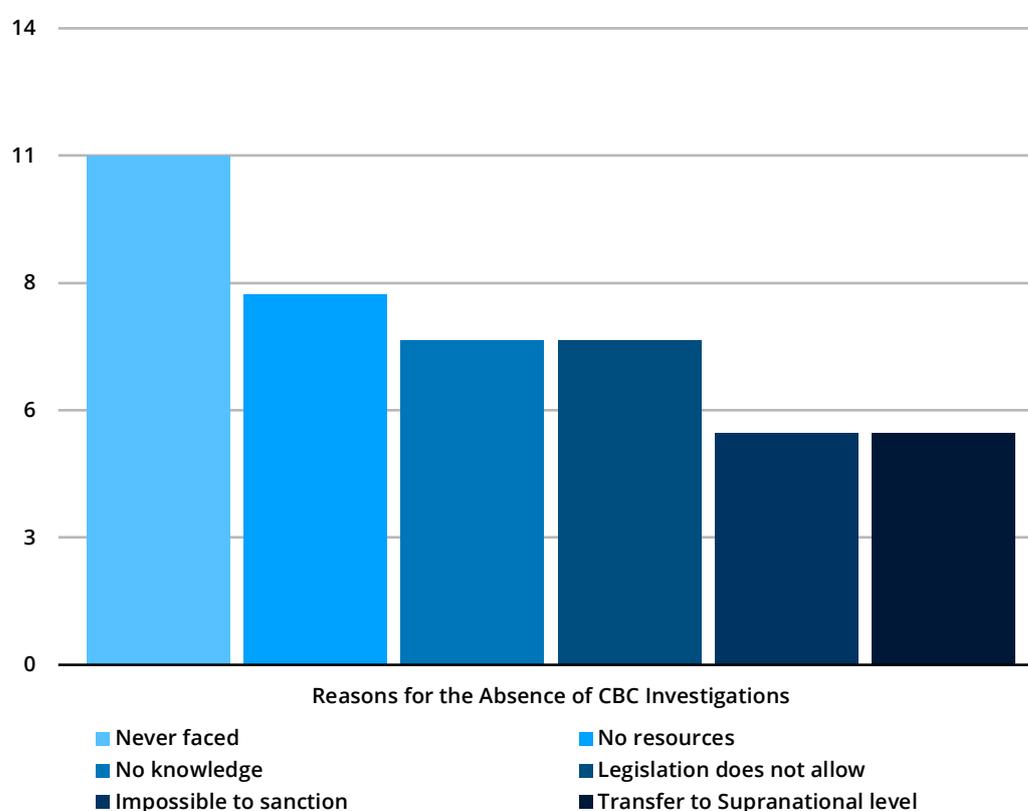
62 The average value of the following factor, 'the foreign competition authority is able to conduct enforcement actions on behalf of your jurisdiction', stands at 7.11 for developed competition authorities, meanwhile it stands at 5.25 for developing competition authorities.

63 Albania, Algeria, Armenia, Australia, Belarus, Belgium, Brazil, Bulgaria, Egypt, Georgia, Hungary, Kazakhstan, Kenya, the Kyrgyz Republic, Mauritius, Moldova, Mongolia, Panama, Peru, the Philippines, Russia, Serbia, the Seychelles, Slovenia, South Africa, South Korea, Spain, Tanzania, Thailand, Turkey, Vietnam, Zambia and Zimbabwe.

## VI. Ways Forward

The analysis conducted in the course of the current Study shows that a lot still needs to be done when it comes to detecting, investigating and suppressing cross-border cartels. One of the main problems centres on the lack of experience of certain jurisdictions when it comes to investigating and combatting cross-border cartels and the reasons for this are set out below (see Diagram 3).

Diagram 3: Reasons for Jurisdictions Not Combatting Cross-Border Cartels



Some jurisdictions with little or no experience of combatting cross-border cartels reported that they have never faced this type of violation of competition law in respective enforcement practices<sup>64</sup>. This could mean that either cross-border cartels have never operated in these authorities' respective jurisdictions or that these authorities have not been able to detect them and are, thus, not aware of their existence. Many competition authorities reported that they lack the requisite resources<sup>65</sup> and/or knowledge to conduct cross-border investigations into cartels<sup>66</sup>. Some jurisdictions lack the necessary legal grounds, including the extraterritoriality principle, to conduct cross-border investigations and/or impose sanctions on foreign

<sup>64</sup> Bulgaria, Georgia, Kazakhstan, Kenya, Mauritius, Moldova, Serbia, Slovenia, Thailand, Vietnam and Zambia.

<sup>65</sup> Algeria, Belarus, Kazakhstan, North Macedonia, Slovenia, Tanzania, Thailand and Zimbabwe.

<sup>66</sup> Algeria, Belarus, Kazakhstan, Moldova, Tanzania, Thailand and Zimbabwe.

companies or individuals<sup>67</sup>.

Some jurisdictions, primarily EU member states or members of the Eurasian Economic Union (henceforth, the 'EAEU') reported that were legally obliged to transfer cross-border cartel cases up to institutions on the supra-national level<sup>68</sup>.

Certain competition authorities outlined other reasons for them not having undertaken investigations into cross-border cartels. For example, the State Commission for the Protection of Economic Competition of the Republic of Armenia (henceforth, the 'SCPEC RA') reported that it does not have the power to conduct dawn raids and only has limited powers with regard to inspections<sup>69</sup>. The Philippines' Competition Commission (henceforth, the 'PCC') remarked that as it was only formed relatively recently and has limited resources, it prioritises cases that (are likely to) have a significant impact on the local economy. However, as the PCC matures, it will be able to take on bigger and more complex cross-border cartel cases<sup>71</sup>. The FAS highlighted problems linked to the complexity inherent in analysing markets and the limited timelines that are set for investigating and considering cross-border cartel cases. The TAC reported that it has not been able to obtain assistance from other foreign competition authorities.<sup>72</sup>

Another important question for the purposes of the Study centres on the factors that have the potential to help national competition authorities to enhance their enforcement practices with regard to cross-border cartels. 27 jurisdictions, including almost all of the developing competition authorities that participated in the Study, stated the main ways by which to overcome challenges associated with cross-border investigations are to conduct capacity-building activities and undertake training in order to provide officials with the specific knowledge and skills they require.<sup>73</sup>

23 competition agencies noted that the existence of unified international guidelines espousing tools and methods by which to combat cross-border cartels would help them develop their respective enforcement practices with regard to cross-border cartels.<sup>74</sup> The ACCC reported that "guidelines provide a common benchmark and practical steps to assist in global enforcement efforts".<sup>75</sup> The Competition Authority of Egypt (henceforth, the 'CAE'), expressed a similar opinion: "the creation of international guidelines and capacity-building activities are essential for effective enforcement of cross-border cartel rules as they will explain, in more detail, the policy that should be undertaken by different countries and this will ensure that different competition authorities have the same level of knowledge".<sup>76</sup>

22 respondents considered that there was immense value to be gained from signing bilateral and/or multi-lateral co-operation agreements with foreign competition authorities.<sup>77</sup> 16 competition enforcers stressed necessity to expand the working

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67 Kazakhstan, the Kyrgyz Republic, Mongolia and the Seychelles.

68 Armenia, Belarus, Hungary, Kazakhstan and the Kyrgyz Republic.

69 Questionnaire: Reply by the SCPEC RA, (10), 12.

70 Questionnaire: Reply by the Philippines Competition Commission (henceforth, the 'PCC'), 10.

71 Questionnaire: Reply by the FAS, (12), 12.

72 Questionnaire: Reply by the TAC, (20), 10.

73 Albania, Algeria, Armenia, Belarus, Brazil, Bulgaria, Egypt, Georgia, Kazakhstan, the Kyrgyz Republic, Mauritius, Moldova, Mongolia, North Macedonia, Panama, Peru, the Philippines, Russia, the Seychelles, Slovenia, South Africa, South Korea, Tanzania, Thailand, Vietnam, Zambia and Zimbabwe.

74 Albania, Algeria, Armenia, Australia, Belarus, Brazil, Bulgaria, Egypt, Georgia, Hungary, Kazakhstan, Kenya, the Kyrgyz Republic, Mauritius, Moldova, Panama, Russia, Serbia, Spain, Tanzania, Thailand, Turkey and Zimbabwe.

75 Questionnaire: Reply by the ACCC, (23), 13.

76 Questionnaire: Reply by the Egyptian Competition Authority, 12.

77 Albania, Algeria, Armenia, Australia, Belarus, Bulgaria, Georgia, Hungary, Kazakhstan, Kenya, the Kyrgyz Republic, Mauritius, Moldova, Panama, Russia, Serbia, the Seychelles, South Africa, Tanzania, Thailand, the US, Zambia and Zimbabwe.

contacts with colleagues in foreign jurisdictions<sup>78</sup> 20 competition authorities reported that receiving technical assistance from regional and/or international organisations when investigating specific cases is important.<sup>79</sup>

Many competition authorities have repeatedly raised concerns regarding the lack of resources they face when it comes to cross-border cartel investigations. 21 competition agencies reported that increased resources would help improve their cross-border cartel enforcement practices.<sup>80</sup>

15 jurisdictions,<sup>81</sup> almost all of which have developing competition law regimes, remarked on the importance of the consultation mechanism provided by the UN Set of Principles on Competition.<sup>82</sup> The Guiding Principles and Procedures under Section F of the aforementioned document, which has been developed by the United Nations Conference on Trade and Development (henceforth, 'UNCTAD'), could prove vital for many developing jurisdictions when it comes to combatting cross-border cartels.

14 competition authorities, most of which are in the process of developing and/or do not have extensive experience in dealing with this form of violation of competition law, stated that they consider the creation of internal guidelines on cross-border cartels to be important.<sup>83</sup>

Another important aspect that was commented upon by 12 competition authorities relates to broadening the powers of competition authorities in to effectively suppress cross-border cartels.<sup>84</sup> For example, the Ministry for Antimonopoly Regulation and Trade of the Republic of Belarus reported that, currently, it does not have the power to conduct dawn raid.<sup>85</sup> The absence of such powers may prove to be a significant obstacle when it comes to cartel enforcement and could render cross-border cartel investigations even more difficult.

One of the ways by which to overcome those challenges, as was indicated by 12 competition authorities, could involve strengthening national competition laws on combatting cartels.<sup>86</sup> 9 authorities stated that it would be beneficial for them to either create or amend their existing leniency programmes,<sup>87</sup> while 9 reported that the introduction of the extraterritoriality principle into their respective competition law regimes could serve to bolster their cross-border investigations,<sup>8</sup> and 9 reported that the introduction of strict liability for participants could also prove beneficial.<sup>89</sup>

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78 Albania, Algeria, Australia, Bulgaria, Georgia, Kazakhstan, Mauritius, Moldova, South Africa, South Korea, Spain, Tanzania, Thailand, Turkey, Vietnam and Zimbabwe.

79 Albania, Algeria, Armenia, Australia, Hungary, Kazakhstan, the Kyrgyz Republic, Mauritius, Moldova, North Macedonia, Panama, the Philippines, Serbia, the Seychelles, Slovenia, South Africa, Tanzania, Thailand, Zambia and Zimbabwe.

80 Algeria, Armenia, Australia, Austria, Brazil, Egypt, Georgia, Kazakhstan, the Kyrgyz Republic, Moldova, North Macedonia, Panama, the Philippines, Russia, the Seychelles, Slovenia, South Korea, Spain, Thailand, Vietnam and Zimbabwe.

81 Albania, Algeria, Armenia, Belarus, Brazil, Georgia, Hungary, Kazakhstan, the Kyrgyz Republic, Moldova, Panama, Russia, Tanzania, Thailand and Zambia.

82 The consultation mechanism is set out in Section F of the UN Set of Principles on Competition and is further detailed in the Guiding Policies and Procedures under this Section.

83 Algeria, Armenia, Kazakhstan, Mauritius, Moldova, Mongolia, Panama, Russia, the Seychelles, South Africa, Tanzania, Thailand, Vietnam and Zimbabwe.

84 Algeria, Armenia, Belarus, Georgia, Kazakhstan, the Kyrgyz Republic, Mauritius, Panama, the Seychelles, South Korea, Vietnam and Zimbabwe.

85 Questionnaire: Reply by the Ministry for Antimonopoly Regulation and Trade of the Republic of Belarus, 11.

86 Algeria, Austria, Georgia, Kazakhstan, the Kyrgyz Republic, Mongolia, Russia, the Seychelles, Spain, Tanzania, Vietnam and Zimbabwe.

87 Algeria, Belarus, Kazakhstan, the Kyrgyz Republic, Panama, the Seychelles, Tanzania, Thailand and Zimbabwe.

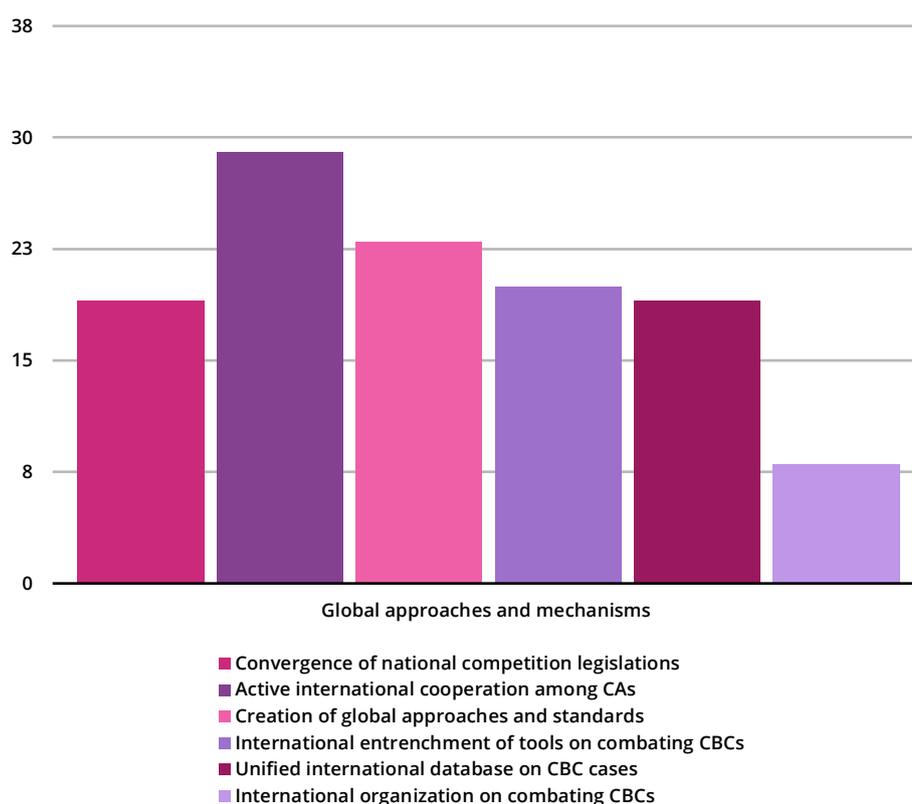
88 Algeria, Armenia, the Kyrgyz Republic, Panama, the Seychelles, Thailand, Zambia, Vietnam and Zimbabwe.

89 Albania, Algeria, Armenia, Egypt, Kazakhstan, the Kyrgyz Republic, Tanzania, Thailand and Zimbabwe.

To overcome the challenges presented by cross-border cartels, some competition authorities have advocated for the adoption of a multi-layered approach. For example, the SCPEC RA noted that “given the difficulties of identifying cartels and their members, especially in cases in which foreign companies are involved, the factors mentioned [...] are important tools for increasing the effectiveness of identifying cartels and ensuring the effective protection of competition”.<sup>90</sup>

The challenges presented by cross-border cartel investigations, it is submitted, could be overcome by implementing certain measures on an international level (see Diagram 4).

Diagram 4: International Measures on Combatting Cross-Border Cartels



Given the previous statements from different competition authorities on the crucial importance of international cooperation when combatting cross-border cartels, 29 jurisdictions reported that deeper and more active forms of co-operation between competition authorities across the world would strengthen their position in the fight against cross-border cartels.<sup>91</sup>

23 competition authorities identified the establishment and implementation of global approaches and standards as a necessary measure by which to overcome the challenges inherent in combatting cross-border cartels.<sup>92</sup> 20 jurisdictions have voiced their support for the international entrenchment of tools that would help to fight cross-border cartels.<sup>93</sup>

90 Questionnaire: Reply by the SCPEC RA, (10), 13.

91 Albania, Algeria, Armenia, Australia, Austria, Brazil, Bulgaria, Egypt, Georgia, Hungary, Kazakhstan, Kenya, the Kyrgyz Republic, Mauritius, Moldova, Mongolia, North Macedonia, Panama, Russia, South Africa, South Korea, Spain, Tanzania, Thailand, Turkey, Vietnam, the US, Zambia and Zimbabwe.

92 Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Georgia, Hungary, Kazakhstan, the Kyrgyz Republic, Mauritius, Moldova, Panama, the Philippines, Russia, Serbia, Slovenia, Spain, Tanzania, Thailand, Turkey, Vietnam and Zimbabwe. Albania, Armenia, Austria, Belarus, Brazil, Bulgaria, Egypt, Georgia, Kazakhstan, the Kyrgyz Republic, Moldova, North Macedonia, Panama, the Philippines, South Africa, Thailand, Turkey, Vietnam, Zambia and Zimbabwe.

As stated previously, legal restrictions on cross-border investigations present a significant obstacle to successfully suppressing cross-border cartels. 19 jurisdictions stated that they considered the global convergence of diverse national competition regimes to be important.<sup>94</sup>

Furthermore, it is arguably essential for a competition authority to be aware of the existence of certain cross-border cartel cases in foreign jurisdictions in order for it to be able to evaluate the possibility of the same anti-competitive practice taking place in its own national economy. The development and continual updating of a global database on cross-border cartel cases could help to build such awareness, especially, in developing jurisdictions. 19 competition authorities expressed the view that the creation of a unified database concerning current cartel case investigations being undertake across the globe would be useful<sup>95</sup>, while 8 authorities agreed on the creation of a specific international/ supra-national organisation with the power to investigate and prosecute cross-border cartels.<sup>96</sup>

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94 Albania, Armenia, Austria, Belarus, Georgia, Hungary, Kazakhstan, the Kyrgyz Republic, Mauritius, Panama, Serbia, the Seychelles, Slovenia, South Korea, Spain, Tanzania, Thailand, Vietnam and Zimbabwe.

95 Albania, Algeria, Armenia, Belarus, Brazil, Egypt, Georgia, Kazakhstan, Mauritius, Moldova, Mongolia, Panama, the Seychelles, Slovenia, Tanzania, Thailand, Vietnam, Zambia and Zimbabwe.

96 Algeria, Brazil, Mongolia, Panama, Russia, Tanzania, Vietnam and Zimbabwe.

## VII. Conclusion

Cross-border cartels represent a significant threat to national economies, especially to developing ones. The operation of cartels across multiple borders and continents renders them, in effect, 'uncatchable' for national competition law regimes. Recent trends linked to the increased globalisation of the world economy, the growing complexity of international trade relations and the appearance of the new players in global value chains leads one to reasonably conclude that, in future, more economic sectors could witness an increase in the number of cross-border cartels.

The Study has been conducted on the basis of data that has been directly obtained from competition authorities in both developing and developed jurisdictions. This data has enabled the authors of this Study to identify several major problems that are likely to be more relevant for developing competition authorities than developed ones but will nonetheless be a cause of concern for developed competition authorities. It has also helped to identify possible ways by which to overcome those problems.

The first group of problems inherent in investigating cross-border cartels are legal in nature. They encompass both substantive and procedural matters. The first substantive issue in this regard, which is of crucial importance, is the absence of the extraterritoriality principle in national competition law regimes in developing countries. Such makes it impossible for them to conduct any sort of investigation into alleged cross-border infringements, even where such has had a significant negative impact on their national economy.

The second issue relates to the fact that some developing jurisdictions have not yet been able to develop effective leniency programmes, which are effective tools for detecting the existence of cartels, including cross-border ones. Evidence from developed competition authorities shows that cooperation between them when they have received applications for leniency from participants in cartels can prove fundamental to the effective prosecution of cross-border cartels.

The third issue centres on the existence and imposition of sanctions for participation in cartels, including cross-border ones, varies significantly from jurisdiction to jurisdiction. While in one jurisdiction, a cartel participant may face a relatively small administrative fine, in others, for the same infringement, it may face substantial jail time. This high degree of variation between regimes represents a key obstacle to the establishment of cooperation between national competition authorities.

The first procedural issue relates to the fact that procedural aspects of cartel investigations can differ greatly across both developed and developing jurisdictions. For example, in regard to the time permitted for investigations into cartels: in some jurisdictions, competition authorities can investigate cross-border cartels for years, while in other jurisdictions, much shorter and stricter time limits are set out for the investigative and enforcement stages.

The second issue centres on the differences between competition authorities in terms of their investigatory and enforcement powers. For example, competition authorities in several jurisdictions do not have the power and/or resources to conduct dawn raids.

The second group of problems inherent in investigating cross-border cartels are practical in nature. Although almost all of the competition authorities that participated in the Study do have some degree of experience in investigating cartels investigations, the first issue that falls within this group centres on the fact that data from developing countries shows that cross-border cartel enforcement is terra incognita for many of them. The lack of requisite skills, knowledge and/or resources as to how to detect and investigate cross-border cartel cases remains an alarming issue in developing countries and is one that needs to be addressed.

The second issue concerns the difficulties in gathering and securing evidence on cross-border cartels. This encompasses interviewing economic entities based in foreign jurisdictions, ensuring their (or their representatives') presence at case hearings, etc. Developing jurisdictions have even less capacity to secure evidence from abroad and/or make foreign business entities that have no physical presence in their jurisdiction pay administrative fines.

The third group of problems centres on the fact that in order for international co-operation between competition authorities to be successful when it comes to investigating and suppressing cross-border cartels, mutual trust needs to be established and the authorities need to be open to dialogue. Competition authorities that have experience in combatting cross-border cartels agree that interaction between competition agencies in cross-border investigations is crucially important.

Given the legal restrictions and practical difficulties that exist for competition authorities, particularly developing ones, when it comes to cross-border investigations, many have little or no experience of undertaking international cooperation on specific cross-border cartel cases. Authorities in jurisdictions that do have such experience generally use simple and non-binding tools, like sending requests for information or organising consultations that do not involve the exchange of confidential information. Only a very small number of competition authorities in the world have experience of utilising more developed mechanisms of cooperation, such as enforcement actions that can be conducted either jointly or on the behalf of one's foreign counterparts.

The obstacles to cross-border cartel investigations that have been presented by this Study highlight the need to develop ways by which to overcome these challenges. When it comes to cross-border enforcement against cartels, a substantial amount of work can be done on the international level.

As stated previously, developing competition authorities need the capacity building activities and technical assistance. Such could be provided by experienced competition authorities and/or international organisations. The knowledge and skills gained from such could, in turn, serve to contribute to the modification of national competition laws in those jurisdictions in which legal restrictions exist in relation to investigations into cross-border cartels.

Many developing countries have voiced their support for the establishment and implementation of a unified global approach to cross-border cartel investigations.

This could involve the creation of a unified international document which would espouse the basic mechanisms and tools by which to detect and investigate cross-border cartels and set out specific cooperation mechanisms that could be employed by competition authorities in specific cases.

In this regard, it is worth mentioning the efforts that have been made by various international organisations, like the Organisation for Economic Cooperation and Development (the 'OECD') and the International Competition Network (henceforth, the 'ICN') in generating and advancing relevant work products and guidelines<sup>97</sup>. However, these documents are of most use for those jurisdictions that already have strong competition law enforcement bodies and, often, for these authorities, co-operation mechanisms have already been established. For less developed and less well-resourced competition authorities, they are less able to benefit from these documents as they have, typically, not yet been able to establish and maintain cooperative relationships with their more developed counterparts.

Therefore, the adoption and promotion of specific methods and mechanisms by which to investigate cross-border cartels on the international level is becoming increasingly important. Such mechanisms will contribute to the convergence of approaches adopted with regard to cross-border cartel investigations and will serve to improve enforcement practices in jurisdictions with developing competition law regimes and authorities.

The UNCTAD, following the long and successful history of elaborating the guides and setting the mechanisms of competition policy and enforcement for the benefit of all the nations around the globe with a special focus on developing countries, could further lead the process on establishing unified approaches, tools and mechanisms on combating cross border cartels.

The 'Declaration on International Economic Co-operation, in Particular the Revitalisation of Economic Growth and Development of the Developing Countries', which was adopted by the UN General Assembly in Resolution S-18/3 on 1 May 1990, espouses a "strong commitment to a global consensus to promote international economic co-operation for sustained growth of the world economy and... [for] the economic growth and development of developing countries. ... Reactivation of economic growth and development in developing countries will require a concerted and committed efforts by all countries". Given the potential for cross-border cartels to significantly impact developing countries and their economies in a negative way, it is submitted that the time for all the competition community to make these efforts is now.

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<sup>97</sup> See e.g. OECD Recommendation of the Council concerning Effective Action against Hard Core Cartels; ICN Anti-Cartel Enforcement Manual; ICN Report on Setting of Fines for Cartels in ICN Jurisdictions; etc.

## Annex 1: QUESTIONNAIRE ON COMBATting CROSS-BORDER CARTELS

This questionnaire has been prepared by the BRICS Competition Law and Policy Centre for the purposes of discussion between member states attending the panel session on combatting cross-border cartels, which will take place during the Eighth United Nations Conference to Review All Aspects of the Set on Mutually Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (6-10 July 2020, Geneva, Switzerland).

This questionnaire is aimed at Competition Authorities and/or any other public authorities entrusted with the role of protecting economic competition in both developed and developing countries without prejudice regardless of whether it has experience of combatting cross-border cartels or not.

The following definitions are used for the purposes of this Questionnaire:

**Cross-Border Cartel** – tacit or implicit collusion between economic entities (competitors within a specific relevant market), which are registered in different jurisdictions, that results in the restriction of competition on the territory of two or more jurisdictions.

**International Cooperation** – any interaction of two or more Competition Authorities and/or any other public authorities entrusted with the role of protecting economic competition that are in the process of investigating an antitrust case.

**Exterritoriality** – a provision of national competition legislation that allows a Competition Authority to investigate cases in relation to economic entities that are not residents within its national jurisdiction but that restrict competition within the territory of this jurisdiction.

Please return this questionnaire to [bricscompetition@gmail.com](mailto:bricscompetition@gmail.com) **by 20 March 2020**. All questions related to this questionnaire should be addressed to this e-mail as well.

Replies to this Questionnaire will be used for preparation of the research paper that is to be drafted by the BRICS Competition Law and Policy Centre. The findings and results of the research will be circulated to all member States attending the Eighth Review Conference in Geneva as a contribution to the Roundtable on Combatting Cross-Border Cartels and will be presented in the course of the aforementioned Roundtable.

## General Information

Title of your Competition Authority Title

Contact person Name

Contact information (phone, e-mail) Contact information

### I. Legislative Issues

1. Does your competition legislation establish a definition of a 'cartel'? If so, please, indicate the provision in your law or cite the exact wording of the relevant provision below.

Yes

No

*Please indicate the relevant provision here*

2. Do you have 'per se' prohibition of cartels in your jurisdiction?

Yes

No

3. Does your competition legislation include a provision on its extraterritorial reach?

Yes

No

4. What maximum fine does your competition legislation impose on a cartel participant?

*Please indicate it here in US dollars*

5. Does your competition legislation establish any other sanctions (except for a fine) for a cartel participant?

Yes *Please, indicate which one*

No

6. Does criminal liability for participation in a cartel exist in your jurisdiction?

Yes

No

7. If so, please, indicate the maximum criminal sanction which could be imposed on a cartel participant?

*Please indicate it here*

8. Do you have a leniency program in your jurisdiction?

Yes

No

9. If so, please indicate a link to an openly available source, where the relevant information on your leniency program could be found.

*Please indicate it here*

10. Does a foreign economic entity have a right to fill a leniency application in your jurisdiction?

- Yes, both legal entities and individuals
- Yes, just legal entities
- No

## II. Enforcement

11. Do you consider cross-border cartels to be a significant threat to your economy?

- Yes
- No
- Other *Please, specify*

12. Is combatting cartels a priority for your Competition Authority<sup>98</sup>?

- Yes
- No

13. Does your Competition Authority have experience of cartel investigation?

- Yes, just legal entities
- No (*Please continue with Part IV of this questionnaire*)

14. How many decisions on cartel cases has your Competition Authority made in the period from 2009 to 2019?

2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019

15. Does your Competition Authority have experience of cross-border cartel investigation?

- Yes
- No (*Please continue with Part III of this questionnaire*)

16. If so, how many cross-border cartels (in total) have been investigated by your Competition Authority for the period from 2009 to 2019?

*Please indicate here*

\_\_\_\_\_

98 Priorities could be set out in documents produced by a competition authority, such as a strategy, 'road map', etc., or they may not be officially set out but are, instead, collectively recognised by the management and officials working for a competition authority.

17. Please provide us with examples of the most interesting cross-border cartel cases (or indicate a link to an openly available source where the relevant information on such cases could be found).

*Please indicate here*

18. What methods of detection of cross-border cartels have been used in your enforcement?

- Leniency applications
- Market inquiries
- Interaction with foreign Competition Authorities
- Information from the media<sup>99</sup>
- Information obtained from other public authorities in your jurisdiction<sup>100</sup>
- Anonymous whistle-blower
- Other Please indicate here

19. Could you say that your experience in combatting cross-border cartels is successful?

- Yes
- No

20. If no, why?

*Please indicate here*

21. What kind of difficulties, if any, have you met when investigating cross-border cartels (you could choose more than one item)?

- No difficulties
- Legislative restrictions<sup>101</sup>
- Difficulties related to evidence gathering
- Difficulties related to request for information from economic entities located outside your national jurisdiction
- Lack of knowledge and specific skills of the employees of your Competition Authority
- Lack of resources (financial restrictions, lack of staff, etc.)
- Time limits set for conducting investigation
- Difficulties related to communication with foreign Competition Authorities
- Difficulties related to translation of requests for information into foreign languages
- Difficulties related to presence of the defendants from foreign jurisdiction on case hearings
- Difficulties related to bringing foreign entities to liability in your national jurisdiction

99 It means, for example, news media concerning a cartel investigation in another jurisdiction.

100 For example, in the course of co-operating with the police, prosecutor's office, etc.

101 For example, if, according to national law, a competition authority is not able to hold a foreign economic entity liable for antitrust violations.

- Difficulties related to collection of fines imposed on foreign economic entities
- Other Please specify

22. Taking into account your answers to the previous question, which challenges, in your opinion, had the critical importance for effective enforcement of cross-border cartels by your Competition Authority (please, indicate 2-3 challenges)?

*Please indicate here*

23. Did you manage to bring a foreign economic entity to liability for participation in a cross-border cartel?

- Yes
- No

24. If no, please indicate the reason why.

*Please indicate here*

25. If yes, which maximum administrative sanction was imposed on a foreign economic entity for participation in a cross-border cartel (if possible, please provide a brief description of the relevant case or indicate a link to an openly available source where relevant information could be found)?

*Please indicate here*

26. Do you usually successfully collect fines imposed on a foreign economic entity for participation in a cross-border cartel?

- Yes, fines always are fully paid
- Sometimes we have challenges in collecting fines
- No, our fines were not paid by foreign economic entities
- Other Please specify

27. If your jurisdiction asserts criminal liability for participation in a cartel, do you have any experience in bringing a foreign economic entity to criminal liability for participation in a cross-border cartel?

- Yes
- No
- No, there is no criminal liability for participation in a cartel in your jurisdiction

28. If so, please, briefly describe such a case (or, if you have several cases, describe the most interesting one)

*Please describe here*

29. Do you have experience in granting a foreign economic entity immunity for participation in a cross-border cartel in accordance with your leniency program?

- Yes
- No, our Competition Authority has never received a leniency application from a foreign economic entity
- No, a foreign economic entity has never been the first in line for immunity
- No, a foreign economic entity could not apply for immunity
- There is no leniency program in our jurisdiction

30. If you have relevant experience, please indicate how many foreign economic entities were granted immunity in the period from 2009 to 2019 for participation in cross-border cartels

*Please indicate here*

### III. International Cooperation

31. In your opinion, is cooperation with foreign Competition Authorities of critical importance for effective cartel enforcement?

- Yes
- No
- Other Please explain

32. Do you have experience of international cooperation in cartel enforcement (not only cross-border ones)?

- Yes
- No

33. If so, which tools of cooperation did you use (you could choose more than one item)?

- Requests for information
- Virtual consultations (via phone, Skype, messengers, etc.)
- In-person consultations
- Exchange of opinions and ideas on investigative methods
- Exchange of opinions on existence/absence of antitrust violation on the territory of a certain jurisdiction
- Exchange of confidential information
- Exchange of confidential documents
- Conducting simultaneous dawn raids<sup>102</sup>
- Conducting joint market inquiries
- Conducting joint dawn raids<sup>103</sup>
- Enforcement actions on behalf of a foreign Competition Authority
- Other Please specify

102 The concept of a 'simultaneous dawn raid' refers to the situation in which different competition authorities agree to conduct dawn raids of possible cartel participants in their national jurisdictions simultaneously.

103 The concept of a 'joint dawn raid' refers to the conducting of a dawn raid with the participation of officials from a foreign competition authority.

34. Do you have experience of exchange of confidential information with foreign Competition Authorities in cartel investigations?

- Yes, exchange of confidential information is usual practice in our jurisdiction
- Yes, we have some experience, but it is not common in our cartel enforcement
- No

35. If you have experience of investigation of cross-border cartels, do you agree that international cooperation is an important element of efficient enforcement of such cases?

- Yes, strongly agree
- Partially yes, depends on the concrete case
- No, Competition Authority can effectively enforce cross-border cartel by itself
- Other Please specify

36. In your opinion, which of the following factors are crucial for international cooperation in investigation of cross-border cartels? Please rate them from 0 to 10 where 0 – absolutely not important, 10 – very important) (you can answer this question even if you have not had experience of cross-border cartel enforcement yet)

Factor	Rate from 0 to 10
Trust between Competition Authorities	
Openness of Competition Authorities to intensive dialogue (to dedicate time, staff, resources to that)	
Previous positive experience of cooperation with a particular Competition Authority	
Similarities of cartel investigation proceedings	
Similar definition of 'confidential information' in legislation of both jurisdictions	
Existence of liability for disclosure of confidential information in the partner jurisdiction	
Both Competition Authorities have the same investigative powers (for example, both Authorities are able to conduct dawn raids)	
The other jurisdiction has similar or equitable punishment for cartel violation as your jurisdiction	
Absence of language barriers or translation problems	
The Foreign Competition Authority is able to conduct enforcement actions on behalf of your jurisdiction	
The Foreign Competition Authority is able to conduct joint dawn raids with your Competition Authority	

37. Have you ever used the assistance of regional or international organizations in cross-border cartel investigations?

- Yes
- No

38. If so, please specify, which regional or international organizations you addressed and what kind of assistance you were provided with.

*Please indicate here*

Do you think it is an option for you to ask for assistance of regional or international organisations in the future?

- Yes
- No
- Other *Please specify*

#### **IV. Challenges and Ways to Overcome Them**

40. If you do not have experience of cross-border cartel investigations or your experience is not extensive, in your opinion, what is the reason for that (you could choose more than one item)?

- You have never faced such violations in your practice
- Your Competition Authority has no resources to investigate a cross-border cartel
- Your Competition Authority has no knowledge how to investigate cross-border cartels
- Your Competition Authority initiated an investigation of a cross-border cartel but was not able to prove the existence of a violation
- Your competition legislation does not allow you to investigate cross-border cases<sup>104</sup>
- Your competition legislation does not allow you to bring foreign economic entities to liability for antitrust violations
- You had to transfer your cross-border cartel case to the supra-national level<sup>105</sup>
- Other *Please specify*

41. Which of the following factors could help you to effectively enforce cross-border cartels in your jurisdiction (you could choose more than one item)?

- Broadening of functions of your Competition Authority (for example, ability to conduct dawn raids, etc.)
- Enhancing competition legislation in the course of combatting cartels
- Introduction of extraterritoriality into your competition legislation
- Creation of internal guidelines on combatting cross-border cartels

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<sup>104</sup> For example, your respective competition law regime does not have extraterritorial reach, etc.

<sup>105</sup> In some territorial unions, supra-national competition authorities exist that have the power to investigate antitrust cases related to the whole territory or territories of each/several states of the union (for example, the European Commission for the EU, or the Eurasian Economic Commission for the EEA, etc.)

Capacity-building activities and training in order to provide officials of your Competition Authority with specific knowledge and skills on combatting cross-border cartels

Existence of unified international guidelines containing tools and methods for combatting cross-border cartels

Increasing resources of your Competition Authority

Creation or amendment of the leniency program in your jurisdiction

Tightening liability for participation in cross-border cartels

Expansion of work contacts with foreign Competition Authorities

Initialization of international cooperation through signing bilateral and/or multilateral cooperation agreements with a foreign Competition Authority

Use of the consultation mechanism provided by the UN Set of Principles on Competition<sup>106</sup>

Technical Assistance of regional or international organizations in the investigation of specific cases

Other *Please specify*

42. Please explain your opinion.

*Please explain here*

43. In your opinion, which global approaches and mechanism(s) are necessary for effective cross-border cartel enforcement (you could choose several options)?

Convergence of national competition legislations in the course of combatting cartels

Existence of active international cooperation between Competition Authorities

Creation of global approaches and standards of combatting cross-border cartels

International entrenchment of tools of combatting cross-border cartels

Creation of a unified database of cartel case investigation worldwide

Creation of international an organization or supranational authority entrusted with combatting cross-border cartels

Other Please specify

44. In your opinion, does your Competition Authority mostly relate to developed or developing ones?

Developed

Developing

Uncertain

THANK YOU FOR YOUR TIME

Please return this questionnaire to the BRICS Competition Centre  
(bricscompetition@gmail.com)

106 The consultation mechanism is set out in Section F of the United Nations' Set of Principles on Competition. Further detail on this mechanism can be found in the Guiding Policies and Procedures under Section F of the aforementioned United Nations' Set of Principles.

## **Annex 2: Competition Authorities that Participated in the Study**

1. Albanian Competition Authority;
2. Competition Council of Algeria;
3. State Commission for the Protection of Economic Competition of Republic of Armenia (SCPEC RA);
4. Australian Competition and Consumer Commission;
5. Federal Competition Authority of Austria (Bundeswettbewerbsbehörde - BWB);
6. Ministry of Economy of the Republic of Azerbaijan;
7. Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus;
8. Belgian Competition Authority;
9. Administrative Council for Economic Defence of Brazil (CADE);
10. Commission on Protection of Competition of Bulgaria;
11. Competition Authority of Egypt;
12. Competition Agency of Georgia;
13. Hungarian Competition Authority ('GVH');
14. Committee for protection and development of competition of the Republic of Kazakhstan;
15. Competition Authority of Kenya;
16. State Agency of Antimonopoly Regulation under the Government of the Kyrgyz Republic;
17. Competition Commission of Mauritius;
18. Competition Council of Moldova;
19. Authority for Fair Competition and Consumer Protection of Mongolia;
20. Commission for Protection of Competition of the North Macedonia;
21. Authority for Consumer Protection and Competition Defence of Panama;
22. The National Institute for the Defence of Free Competition and the Protection of Intellectual Property of Peru (INDECOPI);
23. Philippine Competition Commission;
24. Federal Antimonopoly Service of the Russian Federation (FAS Russia);
25. Commission for Protection of Competition of the Republic of Serbia (CPC);
26. Fair Trading Commission of Seychelles;
27. Slovenian Competition Protection Agency (CPA);
28. Competition Commission of South Africa;
29. Korean Fair-Trade Commission (KFTC);
30. National Commission of Markets and Competition of Spain (CNMC);
31. Fair Competition Commission of Tanzania;
32. Office of Trade Competition Commission of Thailand;
33. Turkish Competition Authority;
34. United States Department of Justice, Antitrust Division;
35. Vietnam Competition and Consumer Authority
36. Competition and Consumer Protection Commission of Zambia;
37. Competition and Tariff Commission of Zimbabwe.

## Annex 3: Examples of cross border cartel cases

### Australia

In 2012 the Australian Competition and Consumer Commission (ACCC) instituted civil proceedings in the Adelaide Registry of the Federal Court of Australia against Yazaki Corporation, a Japanese company, and its Australian subsidiary, Australian Arrow Pty Ltd.

The ACCC alleged that Yazaki and Australian Arrow engaged in cartel conduct, market sharing and price fixing, in relation to the supply of wire harnesses to Toyota Motor Corporation and its related entities in Australia. Wire harnesses are electrical systems that facilitate the distribution of power and the sending of electrical signals to various components of a motor vehicle. The ACCC's action followed similar enforcement action against Yazaki and other cartel participants by competition regulators in the US and Japan which involved the supply of wire harnesses and other automotive components to a number of automobile manufacturers.

In November 2015 the Federal Court found that, in 2003 and 2008, Yazaki made and gave effect to arrangements with a competitor, which included the coordination of quotes to Toyota for the supply of wire harnesses used in the manufacture of the Toyota Camry. The Court found that Yazaki's conduct was subject to the Act and the Code because Yazaki was carrying on business in Australia, notwithstanding that much of the conduct occurred in Japan. However, the Court held that because the price fixing conduct by Yazaki did not occur in a market in Australia as required by the Act at the time of the conduct, it did not contravene the price fixing provisions.

On 9 May 2017, Justice Besanko ordered Yazaki to pay penalties totalling \$9.5 million. On 30 May 2017, the ACCC lodged an appeal in relation to the penalties imposed. Yazaki cross appealed against the finding it had engaged in cartel conduct.

In 2018, the Full Federal Court ordered Yazaki Corporation to pay increased penalties of USD\$32,227,600 for cartel conduct, following an appeal by the ACCC. This is the highest penalty ever handed down under the Competition and Consumer Act of Australia.

*Source:*

<https://www.accc.gov.au/media-release/accc-commences-legal-proceedings-against-yazaki-corporation-and-australian-arrow-pty>,  
<https://www.accc.gov.au/media-release/record-46-million-in-penalties-for-yazaki-cartel>

### Brazil

In 2013 In the public trial session CADE's Tribunal condemned airlines ABSA Aerolineas Brasileiras S.A., Varig Logistica SA, American Airlines Inc., and Alitalia Linee Aeree Italiane S.P.A., plus seven individuals for cartel formation in the international air cargo sector. The fines sum more than BRL 293 million.

The four airlines and the employees involved were condemned for fixing the price and the date for application of additional fuel charge in international air cargo in Brazil. The cartel participants engaged into the exchange of information, which aimed not only at coordinating the implementation of fuel charge, but also at coordinating the final price of air freight, because the fuel charge value was a substantial part of the full price. The cartel had resulted in international condemnation and agreements in various jurisdictions such as the European Commission, the United States, Canada, South Korea and Australia.

In Brazil, collusion occurred between 2003 and 2005 and participating companies came to control about 60% of the market during that period. The price cartel generated abusive prices that were passed on to consumers and to the supply chain.

The investigation of air cargo cartel began in 2006 following the signing of a leniency agreement between CADE and airlines Deutsche Lufthansa AG, Lufthansa Cargo AG, Swiss International Airlines, plus five individuals who denounced the illegal activity. In 2007, a dawn raid was held at the headquarters of the investigated companies. The evidence obtained confirmed the existence of collusion.

In February, 2013, the airlines Societé Air France, KLM, and two individuals signed a Cease and Desist Agreement (TCC, for its acronym in Portuguese) with Cade, whereby they confessed involvement in collusion and pledged to cease the practice and pay about BRL 14 million of cash contribution. The contribution will be collected by the Brazilian Diffused Rights Fund ("FDD" for its acronym in Portuguese), which entrusts the money to public agencies and civil nonprofit projects that aim at the recovery of assets and protection of diffuse rights like those entrenched within the ambit of environment protection, historical and cultural heritage or consumer rights.

*Source:*

<http://en.cade.gov.br/press-releases/cade-imposed-a-brl-300-million-fine-against-international-air-cargo-cartel>

## **Russia**

In 2017 the FAS Russia ended the case in relation to international shipping lines A.P.Moller-Maersk A/S, CMA CGM SA, Hyundai Merchant Marine Co., LTD, Orient Overseas Container Line Limited, which were recognised as violators of the Russian Law on Protection of Competition by exercising concerted actions which led to setting freight charges on liner shipping services on routes Far East/ South East Asia - the Russian Federation.

FAS Russia and above mentioned companies concluded settlement agreement in the Arbitration Court, according to which total fines amounted at 19 mln RUB.

The case resulted in adoption by the Presidium of FAS of the Instructions 'On Publication of Freight Charges by International Shipping Lines'.

*Source:*

<http://en.fas.gov.ru/documents/documentdetails.html?id=15298>

## South Africa

Since 2015 the Competition Commission of South Africa has been investigating the case in relation to 23 local and foreign banks, including Bank of America Merrill Lynch, JP Morgan, and Credit Suisse that it has alleged colluded when giving quotes to customers buying or selling the rand and the dollar. The investigation found that from at least 2007, the respondents had a general agreement to collude on prices for bids, offers and bid-offer spreads for the spot trades in relation to currency trading involving US Dollar / Rand currency pair.

The Commission found that the respondents manipulated the price of bids and offers through agreements to refrain from trading and creating fictitious bids and offers at particular times. They assisted each other to reach the desired prices by coordinating trading times. They reached agreements to refrain from trading, taking turns in transacting and by either pulling or holding trading activities on the Reuters currency trading platform.

On 12 June 2019, the Competition Tribunal issued a decision dismissing the exception applications brought by various respondent banks in the currency manipulation case. Some of the respondents, namely, Bank of America Merrill Lynch International Limited, JP Morgan Chase and Co., JP Morgan Chase Bank N.A , Australia and New Zealand Banking Group Limited, Macquarie Bank Limited, HSBC Bank USA, National Association Inc and Smith Inc and Credit Suisse Securities (USA) LLC have since filed notices of appeal with the Competition Appeal Court against the decision of the Tribunal, noticing that their actions could be declared anti-competitive because they have no presence in South Africa.

In addition to filing notices of appeal JP Morgan Chase and Co., JP Morgan Chase Bank N.A, Australia and New Zealand Banking Group Limited and Credit Suisse Securities (USA) LLC filed review applications against the decision of the Tribunal.

In September 2020 the South Africa's Competition Appeal Court has overturned a decision that a host of international banks cannot be fined if found guilty for alleged exchange rate rigging.

*Source:*

<http://www.compcom.co.za/wp-content/uploads/2020/03/COMPETITION-APPEAL-COURT-DISMISSES-THE-BANKS-FOREX-APPEAL-WITH-COSTS.pdf>.

## South Korea

The air cargo cartel of 21 carriers was the first case that domestic and overseas airline companies admitted a conspiracy to restrict competition in the air cargo market by introducing and raising fuel surcharges in collusion. The KFTC imposed corrective measures against multiple carriers that illegally raised their rates by introducing and increasing fuel surcharges for outbound shipments from Korea and inbound shipments to Korea from Europe, Japan and Hong Kong.

The air cargo cartel case is the largest case ever handled by the Korean Fair Trade Commission (KFTC), involving 21 companies from 16 jurisdictions and resulting in total fines of KRW 124.3 bln. The duration of a cartel scheme exceeded 7 years. According to the KFTC, the damage from the cartel was enormous with affected sales estimated in

KRW 6.7 trillion, equivalent to about 25% of Korea's volume of export cargo in 2009. The investigation started with a leniency application.

The investigation required a considerable amount of time: it took 3 years to analyse vast amounts of evidences and written documents obtained from submissions by respondents and in course of dawn raids. The KFTC summoned 54 executives and employees of the carriers involved including 13 foreigners to take their statements.

The KFTC exceeded cooperation with foreign competition agencies, which also investigated the similar cases. In course of investigation the KFTC cooperated with competition authorities of the US and EU through coordinated raids and bilateral discussions, which, according to the Commission, contributed to strengthening its enforcement capabilities by developing various investigative techniques.

*Source:*

[http://www.ftc.go.kr/solution/skin/doc.html?fn=d6940ef21948a1b7e7d820b62eb1934aea51df9889eaeae7e85db8790c32990c&rs=/fileupload/data/result/BBSMSTR\\_00000002408/](http://www.ftc.go.kr/solution/skin/doc.html?fn=d6940ef21948a1b7e7d820b62eb1934aea51df9889eaeae7e85db8790c32990c&rs=/fileupload/data/result/BBSMSTR_00000002408/)

## **Turkey**

In 2011, Turkish Competition Board decided that two airline companies (Sunexpress and Condor) breached the Competition rules through some agreements between the undertakings regarding the flights between Turkey and Germany. This case came to the attention of the board by a leniency application of Sunexpress. Since Sunexpress earned immunity, only Condor was fined. In this case, effect doctrine and calculation of turn-over in cross border commercial activity were discussed.

*Source:*

Questionnaire: Reply by the Turkish Competition Authority

## **The United States**

Many of the Antitrust Division's most prominent and reported-on cases in the past decade involve cartels that operated internationally across borders. These include DoJ investigations into auto parts manufacturers, air cargo carriers, DRAM and LCD suppliers, deep-sea ocean shipping carriers (roll-on, roll-off carriers), and bank manipulation of the LIBOR interest rate and foreign currency exchange markets.

Documents relating to the cases filed in these investigations are available at <https://www.justice.gov/atr/antitrust-case-filings>

One of the example of a large cross border cartels investigated by many jurisdictions, including the US, is a cartel involving most large suppliers of liquid crystal displays (LCD), which was brought to the fore in 2006.

The DoJ filed charges against the major suppliers of LCD for their attempts to fix global LCD prices in 2006 after Samsung notified the US DoJ about it under the DoJ's leniency programme. The similar charges were filed by the European Commission. None of the suppliers under investigation were American or European companies.

The cartel participants faced significant fines across jurisdictions, along with criminal indictments of many senior executives involving prison sentences and criminal fines. The cartel members have paid more than \$1.3 billion in criminal fines in the US.

*Sources:*

Questionnaire: Reply by the US DoJ; [justice.gov](https://www.justice.gov)