United Nations TD/B/C.I/CLP/44

United Nations Conference on Trade and Development

Distr.: General
26 April 2017

Original: English

Trade and Development Board
Trade and Development Commission
Intergovernmental Group of Experts on Competition Law and Policy
Sixteenth session
Geneva, 5–7 July 2017
Item 3 of the provisional agenda
Work programme, including capacity-building in and technical assistance on competition law and policy

Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures

Note by the UNCTAD secretariat

Executive summary

Low tariffs and fewer trade barriers have encouraged economic transactions worldwide but may have also facilitated cross-border anti-competitive practices. Competition cases have become increasingly international in nature, calling for increasing international cooperation in investigations and for the rethinking of the appropriate tools and procedures with which to tackle them.

This note takes stock of efforts that have been undertaken to promote international cooperation at national, regional and international levels and the tools and procedures that have been identified and their application in dealing with competition cases. It points out the challenges that are faced by young and small competition authorities and calls for a concerted effort to promote international cooperation in dealing with cross border anti competitive practices.

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Introduction

1. The Intergovernmental Group of Experts on Competition Law and Policy, at its fifteenth session, requested the UNCTAD secretariat to conduct research on tools and procedures to enhance international cooperation in investigations of cross-border competition cases. Despite the significant progress achieved in the last two decades through the development of bilateral, regional and multilateral relationships among competition authorities worldwide, more needs to be done in terms of the spread and coverage of such efforts.[1]

2. UNCTAD is committed to exploring international cooperation as exemplified in the research and discussions held at several sessions of the Intergovernmental Group of Experts since the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 2010. UNCTAD research has addressed international cooperation needed to address cross-border anti-competitive practices and the challenges faced by developing countries and countries with economies in transition. This research underscores the role of informal cooperation while emphasizing the importance of formal agreements in investigating cross-border cases. It further highlights the possibility of setting up intelligence networks to enable exchanges of publicly available information to address cross-border anti-competitive practices.[2]

3. The development of international cooperation in competition enforcement requires competition authorities to overcome challenges faced in cross-border investigations, such as differing legal systems, special procedures for gathering evidence and associated limitations, trust issues and the implementation of leniency and immunity programmes. In the absence of a formal cooperation agreement with other countries, informal cooperation acts as a valuable asset in international cartel investigations, mergers and acquisitions and abuse of dominance cases.

4. With regard to formal cooperation mechanisms, only a selected number of competition authorities are involved in effective cooperation, especially with regard to young and small authorities in particular and developing countries in general. However, European Union member States, for example, present an advanced form of cooperation within their closed framework, under the European Competition Network, which allows for exchanges of all types of information between member State competition authorities and the European Commission. In addition, the 1991 bilateral cooperation agreement between the United States of America and the European Union has been successful in strengthening cooperation between United States antitrust authorities and the European Community.[3]

5. UNCTAD efforts to enhance international cooperation in the investigation of cross-border competition cases have focused on the consolidation of informal cooperation schemes through regional groupings and other arrangements worldwide. Through such efforts, a rise in the number of ad hoc cooperation networks on competition has taken place, such as, among others, the African Competition Forum, the Sofia Competition Forum and the 2013 Lima Declaration.[4]

6. Such networks provide opportunities for competition authorities to meet regularly and exchange views and strategies on the enforcement of competition law in cases of mutual interest and identify potential actions for cross-border enforcement. Such informal cooperation can enhance global efforts for further cooperation in the exchange of publicly available information through intelligence networks. For example, in Africa, under the cooperation network of the Southern African Development Community, member States

[1] A Capobianco and A Nagy, 2016, Developments in international enforcement cooperation in the competition field, *Journal of European Competition Law and Practice*, 7(8):566–583.

[2] See TD/B/C.I/CLP/16, TD/B/C.I/CLP/21, TD/B/C.I/CLP/24/Rev.1, TD/B/C.I/CLP/29 and TD/RBP/CONF.8/4.

[3] Agon Partners Competition Law and Policy, 2016, Enforcement of antitrust laws: Global challenges, working paper No. 10.

[4] Signed by the competition authorities of Chile, Colombia and Peru in 2013, at the Organization for Economic Cooperation and Development (OECD) Latin American Competition Forum.

have established an information sharing platform through which exchanges of non-confidential information can take place.

7. This note draws on responses by member States to an UNCTAD questionnaire sent in December 2016, aimed at giving member States an opportunity to share their experiences in international cooperation, including new approaches, tools and procedures.[5]

8. Chapter II examines the challenges faced by competition authorities in cross-border investigations from a legal and administrative perspective. Chapter III discusses different tools and procedures that can be used for cooperation in the investigation of cross-border competition cases. Chapter IV provides policy options for competition authorities seeking to work together in investigations and discusses how section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices may be activated to enhance related efforts. Chapter V highlights the role of UNCTAD in promoting informal cooperation. Chapter VI considers further areas of research.

II. Challenges in investigating cross-border anti-competitive practices

9. By 2016, 139 member States of UNCTAD had adopted competition laws. Many of the competition authorities of these States face several challenges, including a lack of sufficient enforcement experience to venture into international cooperation. Few competition authorities can effectively cooperate with each other due to insufficient capacity and the lack of national enforcement experience to deal with cross-border competition cases.[6]

10. UNCTAD research shows that resource and capacity constraints are perhaps among the most significant problems facing competition authorities in developing countries. While the limited resource base is linked to the fiscal crunch that confronts developing countries, in particular the least developed countries, and the need to balance and prioritize competing demands on government budgets, it may also be a reflection of an absence of sufficient political backing for competition law and policy. This affects the ability of developing country competition authorities to cooperate with their counterparts from other countries and complicates their ability to deal with cross-border anti-competitive practices.

11. With regard to cartels, developing country competition authorities are usually informed of a specific cartel through the enforcement reports of other competition authorities and through the media. The authorities need to undertake preliminary investigations to assess whether the international cartel in question affects their own markets. To facilitate such assessments, cooperation with competition authorities from developed countries to obtain more information would be a source of valuable inputs. Some cooperation in such cases has taken place, but the numbers of such instances are not sufficient to be considered a consistent trend.

12. For example, leniency applications facilitate access to evidence in cartel investigations. However, international cartel members rarely choose to apply for leniency in developing countries. In many instances, international firms involved in a cartel have no physical presence in developing countries. This makes it more difficult for competition authorities to investigate a cartel even within a regional economic area since they lack conventional investigation tools, such as the possibility of conducting dawn raids and interrogations or presenting requests for written statements. The situation is more challenging for young and small authorities in developing countries. Cooperation with jurisdictions investigating the same cartel therefore becomes indispensable for an effective enforcement against cartels at the global level.

[5] Responses were received from Albania, Argentina, Austria, Brazil, Bulgaria, Ecuador, the Dominican Republic, India, Italy, Japan, Turkey, Switzerland, Ukraine, the United States and the European Union.

[6] TD/B/C.I/CLP/11/Rev.1.

13. There are some common challenges for both developed and developing country competition authorities with regard to international cooperation while investigating cartels and other anti-competitive practices at a cross-border level.[7] Some such challenges are discussed in the following sections.

A. Information protection in domestic law

14. The sharing of information, especially of a confidential nature, calls for in-depth consideration. Business secrets and sensitive information on business strategies, such as price structure, know-how and customer data, which may be provided voluntarily (for example, by an immunity and amnesty applicant) or under compulsion (for example, under subpoena or during an inspection) are a typical example of confidential information.[8]

15. If such information can be used as evidence to establish the infringement of competition law, it becomes a key element of decision-making in investigating cross-border anti-competitive practices and deciding whether to exchange such information. This is especially vital for competition authorities that do not have sufficient human and/or financial resources and investigation experience and effective tools, such as the power to conduct dawn raids without the consent of the firms involved. Such authorities face difficulties in gathering sufficient evidence to establish a case.

16. In addition, developing country competition authorities that have sufficient resources, experience and tools may still face challenges in receiving cooperation from the firms involved in anti-competitive practices due to the size of the economy concerned. If the share of a firm's turnover achieved in the relevant jurisdiction is a small share of its worldwide turnover, the firm may weigh the risk of being exposed to sanctions and the disadvantage of losing the market of the jurisdiction, and decide to exit from the market.

17. There are no guarantees that cooperation by foreign firms will be forthcoming, even in circumstances that may appear evident, given that there are territorial limitations. For example, in Colombia, at the initial stage of the investigation of an automobile parts cartel whereby several Japanese firms had fixed the price of automobile parts in multiple jurisdictions, the competition authority notified the relevant firms of the initiation of the investigation by e-mail, as most did not have offices or representatives in Colombia, yet did not receive any reply from the firms.[9]

18. Notwithstanding the fact that the sharing of information is key to success in addressing anti-competitive practices, most State legislations, with few exceptions, explicitly prohibit competition authorities from sharing confidential information obtained in the course of an investigation. Domestic laws prohibit the information gathered by competition authorities from being used for purposes other than those deemed necessary to conduct an intended antitrust investigation in the jurisdictions. If the information provided in the process of cooperating with a competition authority's investigation is shared in an unlimited manner with another competition authority, the firms or individuals that submitted the information may be exposed to antitrust liabilities in the requesting jurisdiction, and this will decrease their incentive to cooperate in any future investigation by the authority receiving the request.

19. While they protect the rights of the firms and individuals involved, restrictions on exchanging information limit the degree of cooperation among competition authorities. Public information dissemination may prove harmful to a firm that provided the information, to the future information-gathering efforts of the competition authority and to consumer welfare. Competition authorities face the challenge of promoting better

[7] Some issues are elaborated in OECD Secretariat, 2012, Limitations and constraints to international cooperation, Working Party No. 3 on Cooperation and Enforcement, DAF/COMP/WP3(2012)8.

[8] Ibid.

[9] MC Martinez Beltran, 2013, International cartel investigations in the SIC [Superintendence of Industry and Commerce]: Investigation limitations and possible future solutions, cited in P Horna, 2017, David and Goliath: How young competition agencies can succeed in fighting cross-border cartels, Working Paper No. 45, The University of Oxford Centre for Competition Law and Policy.

understanding of each other's laws and ensuring effective enforcement, while protecting legitimate private and public interests.

B. Lack of an international definition of confidential information

20. The lack of an international definition of confidential information is another issue that makes the sharing of information between competition authorities difficult. In most jurisdictions, related laws do not have a concrete definition of confidential information. Therefore, a competition authority or court of law needs to examine in each individual case whether the information concerned should be considered confidential.

21. In exchanges of confidential information, if the requesting authority and the authority receiving the request have different views concerning the confidentiality of information, the authorities may need to engage in a time-consuming coordination process to avoid possible accusations from the firms or individuals that provided the information to the authority receiving the request. A lack of definition may hamper smooth and efficient information exchanges between competition authorities.

C. Absence of waivers of confidentiality

22. Although the challenges illustrated in section B may be overcome by obtaining confidentiality waivers from the parties concerned, the willingness of firms to waive the protection of confidentiality laws depends on their confidence in the confidentiality practices of competition authorities. According to the United States antitrust guidelines for international enforcement and cooperation, State conflicts can arise if foreign statutes purport to prevent individuals or entities from disclosing documents or information for use in United States proceedings (see http://www.justice.gov/atr/internationalguidelines/download). Cooperation challenges thus remain even for developed country competition authorities. Efforts therefore need to be directed to this aspect of information exchange.

23. In cartel cases, competition authorities may not expect to obtain confidentiality waivers from the firms concerned unless the cartelists apply for leniency in multiple jurisdictions and expect competition authorities to confirm their position as a leniency applicant based on the shared information. Cartelists generally do not have an incentive to allow competition authorities to share information they have provided with other authorities, as doing so may expose them to further liabilities in other jurisdictions.

24. It is even more difficult to gain a confidentiality waiver from a firm involved in a unilateral conduct case, such as an abuse of dominant market position, in which leniency programmes are not applied. However, in merger cases, the firms involved may have an incentive to grant confidentiality waivers to competition authorities if the firms wish to obtain a prompt approval from the authorities. The exchange of information and subsequent coordination between the competition authorities to which the firms have notified a merger may facilitate merger review procedures in the respective jurisdictions.

25. Efforts have been made to provide for smooth information exchanges between competition authorities. The cooperation agreement on the application of competition laws between Switzerland and the European Union, signed in 2013, allows the competition authorities to exchange information obtained in their respective investigations without the consent of the firms involved, provided that both competition authorities are investigating the same or a related conduct (see http://europa.eu/rapid/press-release_IP-13-444_en.htm). However, this exchange has certain limitations. For example, the information submitted by leniency applicants cannot be exchanged without the consent of the applicants, and information protected by legal privilege cannot be exchanged without a dedicated waiver. The information exchanged can only be used by the receiving authority for the enforcement of its competition law in relation to the same case and for the purpose of the initial request. This is within the framework of second-generation cooperation agreements,[10] of which

[10] Second-generation competition agreements are defined by OECD as bilateral agreements that allow for the exchange of confidential information between competition authorities.

there are few and which are non-applicable to many competition authorities in the developing world.

26. Switzerland has stated that its cooperation with the European Union under the second-generation agreement facilitates cooperation between competition authorities on both sides and also aids enforcement activities and information exchanges.[11] Negotiations between Canada and the European Union for an upgrade of their existing agreement to a second-generation agreement are at an advanced stage.[12]

27. Japan has stated that most of its cooperation efforts are through first-generation agreements,[13] memorandums of understanding and administrative agreements to conduct joint enforcement activities with many competition authorities, both in developed and developing countries. However, in 2015, the Japan Fair Trade Commission concluded a second-generation agreement with the Australian Competition and Consumer Commission. This agreement – part of the implementation of the economic partnership agreement between the two countries – allows for the exchange of information obtained during the course of an investigation based on the provisions in their respective competition laws. In addition, in March 2016, the Japan Fair Trade Commission and the European Union initiated preparatory work to amend the agreement between Japan and the European Community on anti-competitive activities to a second-generation agreement.[14]

28. Finally, reciprocal sharing of information on specific cases and investigative assistance is provided for under the second-generation agreement between the United States and Australia, according to the International Antitrust Enforcement Assistance Act of the United States. Such sharing could be a new trend for countries with close economic and trading ties.

D. Limitations in admissibility of information

29. Another challenge in sharing information between competition authorities may emanate from differences in enforcement procedures, as some jurisdictions adopt criminal procedures in addressing anti-competitive practices, while other jurisdictions adopt civil and/or administrative procedures.

30. Generally, the level of due process in jurisdictions that adopt criminal procedures is stricter than that in jurisdictions that adopt civil and/or administrative procedures. Unlike the latter, which mainly deal with firms, in the former, due process rights, such as attorney-client privilege, privilege against compelled self-incrimination and right to cross-examine adverse witnesses, are granted to individuals involved in anti-competitive practices who are prosecuted by competition authorities.[15]

31. The differences in legal standards applied by competition authorities that derive from differences in enforcement procedures limit a meaningful exchange of information between competition authorities. This is because authorities in jurisdictions that adopt criminal procedures cannot use the information provided by authorities in jurisdictions that adopt civil and/or administrative procedures against individuals involved in anti-competitive practices, unless the gathering of information by the latter authorities respects a similar level of protection rights as that provided in jurisdictions that adopt criminal procedures.[16]

[11] Contribution from the Government of Switzerland.

[12] Contribution from the European Union. See also http://ec.europa.eu/competition/international/bilateral/index.html.

[13] First-generation bilateral competition agreements include a clause allowing a competition authority to decline to share information protected by confidentiality provisions in national law.

[14] Contribution from the Government of Japan.

[15] OECD Secretariat, 2012.

[16] A Capobianco and A Nagy, 2016.

E. Limitations in implementing leniency programmes at the cross-border level

32. Leniency programmes are the most effective and essential cartel investigation tool. Without leniency applications, competition authorities attempting to prosecute international cartels face a number of obstacles and will most likely fail despite lengthy and daunting investigations as, for example, the experience in Japan with regard to the vitamin cartel case.[17] Although the cartel had already been prosecuted in the United States and the European Union, and two of the cartelists were Japanese firms, the competition authority in Japan did not prove the existence of the cartel, and only issued an administrative warning without imposing a fine. It did not take legal measures due to the lack of a leniency programme, which caused its limited ability to obtain information from the cartelists.[18]

33. Leniency programmes need to be well designed in order to function effectively. Elements such as transparency, certainty, high probability of being uncovered and strong sanctions are key to a successful leniency programme. Leniency programmes lacking such a framework may receive few applications from cartelists. For example, under the competition law of Peru and its enforcement, the leniency regulation is not entirely clear (for example, fine reduction rates are not specified in the law), dawn raids are rarely conducted and sanctions may not be strong enough.

34. Further, as shown in many international cartel investigations, leniency serves as an effective tool for international cooperation. Combined with waivers obtained from leniency applicants in instances of simultaneous applications in multiple jurisdictions, leniency promotes the exchange of information between competition authorities, including confidential evidence where allowed by law. Leniency also allows authorities to closely coordinate their investigations during early stages, including the conduct of simultaneous dawn raids, which in turn helps each jurisdiction's proceedings. There is a growing tendency towards international cooperation being confined among authorities that receive leniency applications. Given the advantages of leniency applications, the establishment of an effective leniency programme should be considered a leading policy priority.

35. Although the application of leniency is the most effective and efficient means to tackle cross-border anti-competitive practices, most developing countries with leniency programmes still face difficulties obtaining applications from international cartelists. Follow-on investigations by developing countries against an international cartel that has already been prosecuted by developed countries – whose existence is thus publicly known – do not necessarily guarantee leniency applications from the cartelists.

36. International cartelists seldom choose to apply for leniency in developing countries. Cartelists make strategic choices in selecting jurisdictions in which to apply for leniency programmes and have little incentive to apply in a small jurisdiction where they face low exposure regarding the detection of cartels or time-consuming procedures. For example, in the graphite electrode cartel case,[19] although the Republic of Korea had a leniency programme in place at the time, none of the cartelists opted for leniency applications

[17] Between 1989 and February 1999, there was a cartel agreement between eight vitamin companies that accounted for a 90 per cent market share in the world bulk vitamin market. The companies agreed to allocate the sales volume and coordinated the price of bulk vitamins in the global market. In 2001, the European Commission imposed a fine of €855.22 million (see http://europa.eu/rapid/press-release_IP-01-1625_en.htm?locale=en).

[18] H Yamashita, 2011, Key issues in detecting and investigating cross-border cartels, presented at Association of Southeast Asian Nations (ASEAN) Experts Group on Competition capacity-building workshop, Jakarta, 20–21 September, available at http://cb-asec-project.de/material-and-publications/archive-2008-2013/regional-economic-integration-archive/ (accessed 20 April 2017).

[19] In 1992, manufacturers from Germany, Japan and the United States fixed prices and collaborated to implement them through concerted practices, an arrangement that lasted until 1998. Cartel members used different methods to execute the arrangement. In 2001, United Stated authorities imposed fines of up to approximately $424.8 million on companies in Germany, Japan and the United States, and the European Commission imposed a fine of €219 million on eight companies from these States (see http://www.jftc.go.jp/eacpf/05/APECTrainingProgramMarch2004/KE.experience.Jand.pdf).

throughout the proceedings, which caused difficulties in the investigations of the competition authority of the Republic of Korea.

37. Developing countries must generally proceed with investigations without the help of this instrument and will therefore encounter obstacles in investigating international cartels.

F. Lack of mutual understanding, trust and interaction between competition authorities

38. Apart from the above-mentioned challenges arising from legal restraints, a lack of mutual understanding and interaction between competition authorities may be an obstacle for successful international cooperation in the investigation of competition cases, including cartels. Exchanges of information, the coordination of investigative tools such as dawn raids and discussions on general investigative strategies for cross-border anti-competitive practices remain a challenge. This arises mainly from a situation in which the authorities concerned have not attained a level of trust that enables them to freely share information.[20]

39. Recognizing the importance of such elements, efforts have been made in various regions to foster international cooperation between competition authorities. For example, the Competition Policy and Law Group in Asia and the Pacific was formed in 1996 to improve the region's competitive environment and develop an understanding of competition laws and policies in the region. The forum has brought together countries in the region to engage in capacity-building and training activities. Another regional forum, initiated in 2005 by the Japan Fair Trade Commission, is the East Asia Top-Level Officials' Meeting on Competition Policy, which creates an opportunity for discussions and exchanges of experiences between competition authorities in the region.

40. Such initiatives are a way of promoting informal cooperation within regions. They also provide a platform to build networks among authorities, which in turn lower barriers to trust. In instances where such relationships for exchanges of information do not exist, competition authorities cannot begin to cooperate in an investigation of cross-border anti-competitive practices. However, other methods – such as exchanges of staff and detachments of advisors, participation in multilateral, regional and bilateral meetings organized by international organizations such as OECD and UNCTAD and other informal international networks – may be an effective way for competition authorities to establish constructive relationships with peer authorities.

41. The lack of cooperation between competition authorities was noted, for example, following requests for information by the authority of Colombia from foreign authorities during its investigation of the automobile parts cartel. The authority had recognized that it was essential to initiate cooperation at the initial stage of the investigation with, for example, the United States authority, to which the firms involved had already pled guilty. However, exchanges of information proved difficult, possibly due to the fact that established mechanisms, either formal or informal, that would allow such exchanges to occur, were not in place.

42. In 2013, case handlers from seven jurisdictions met in Quito to discuss the impact of a regional cartel on liquid oxygen that affected Latin America in 2000–2010. Despite the existence of informal contacts between enforcers, the coordination of enforcement actions and cooperation with respect to the sharing of non-confidential information did not occur when the concerned Latin American competition authorities investigated these recurrent anti-competitive business practices.

[20] The recommendation of the OECD Council concerning international cooperation on competition investigations and proceedings recognizes that "cooperation based on mutual trust and good faith between adherents plays a significant role in ensuring effective and efficient enforcement against anti-competitive practices and mergers with anti-competitive effects" (see http://www.oecd.org/competition/international-coop-competition-2014-recommendation.htm).

III. Review of tools and procedures available to enhance international cooperation in the investigation of cross-border competition cases

43. Modalities refer to means and efforts undertaken by competition authorities to cooperate in dealing with cross-border competition cases within the framework of formal or non-formal mechanisms. These efforts have evolved over time into many forms. Procedures refer to the methods or established ways of doing something. In this case, it is the methods used by competition authorities to cooperate in dealing with cross-border competition cases.[21]

44. In order to accomplish an enforcement procedure identified for a specific action, tools or instruments are required. An UNCTAD study in 2013 identified the following main tools and procedures available to enhance international cooperation: multilateral arrangements (under the International Competition Network (ICN), OECD and UNCTAD); regional cooperation models; North–South agreements; bilateral cooperation agreements; non-formal cooperation mechanisms; and effective mechanisms for cooperation under the new generation of United States cooperation agreements and the European Competition Network.[22]

45. Recent trends have shown that global private international cartels continue to flourish, thereby impacting developing country economies markedly without a sufficient response from the majority of new and emerging competition regimes.[23] It is therefore crucial to review the tools and procedures that are available in order to further address the challenges mentioned above. The UNCTAD study recommended furthering cooperation among young and small competition authorities throughout the developing world.

46. Table 1 examines developments that have taken place since the UNCTAD study in 2013. Cooperation in competition law enforcement has not significantly changed, but continuous efforts are observable.

Table 1
Developments and experiences based on best practices recommended by UNCTAD

Practice	*Tools and procedures*
Promote better understanding of laws, assessment criteria and design of remedies and sanctions	UNCTAD worldwide capacity-building programmes and regional projects (such as the regional programme for Competition and Consumer Protection for Latin America (COMPAL) and the programme for regional economic integration, gender equality and anti-corruption through consumer protection policies in the Middle East and North African region), bilateral national projects, annual sessions of the Intergovernmental Group of Experts on Competition Law and Policy and the five-year United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices OECD Global Forum on Competition ICN anti-cartel templates (see http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/templates.aspx) Competition Policy and Law Group in Asia and the Pacific exchanges

[21] TD/B/C.I/CLP/21.
[22] Ibid.
[23] JM Connor, 2014, The private international cartels data set: Guide and summary statistics, 1990–2013, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478271 (accessed 20 April 2017).

Practice	*Tools and procedures*
	of information through regional database (see http://www.apeccp.org.tw/)
	Joint investigations on infringements of competition legislation in countries in the Commonwealth of Independent States (see http://en.fas.gov.ru/international-cooperation/icap/icap-headquarters.html)
Build human and technical enforcement capacities of young competition authorities	Ongoing capacity-building activities by ICN, OECD, UNCTAD and the World Bank
	Bilateral engagements between mature competition authorities and young and small authorities, such as United States programmes with small authorities and Japan and Kenya capacity-building programmes
Develop guidelines and best practices for cooperation agreements	Eurasian Competition Commission model law
	Examples of joint investigation guidelines provided by the Russian Federation to countries in the Commonwealth of Independent States
	European Union guidelines on commitment decisions through the European Competition Network
	ICN framework for exchanging non-confidential information (2015)
	United States antitrust guidelines for enforcement and cooperation (2017)
Exchange staff and detach resident advisors to promote mutual understanding and trust	Actions by mature competition authorities addressed to young authorities, such as the resident advisor provided by Japan to Indonesia (2016)
	Exchange of European Commission staff to European Union member States (Lithuania and United Kingdom of Great Britain and Northern Ireland)
Promote transparency in procedures, processes and design	Japan, Republic of Korea, United States and European Union guidelines (2017)
Develop similar leniency policies to promote the granting of waivers to leniency applicants	Competition guidelines on leniency adopted under regional capacity-building programme in the Middle East and North Africa
	United States Department of Justice model leniency letters (2017)
Establish and implement clear safeguards for due process and the protection of confidential information	Second-generation agreement between Switzerland and the European Union (2013)
	Advanced negotiations for enhancing the agreement between Canada and the European Union to second-generation status
	Second-generation agreement between Japan and Australia (2015)

Source: UNCTAD secretariat compilation based on questionnaire responses and TD/B/C.I/CLP/16, TD/B/C.I/CLP/21, TD/B/C.I/CLP/24/Rev.1, TD/B/C.I/CLP/29 and TD/RBP/CONF.8/4.

A. Progress in applying identified tools and procedures

47. As shown in table 1, there have been several developments in recent years that have supported competition authorities in dealing with cross-border anti-competitive practices. The two most common developments are the internationalization of leniency programmes and international cooperation through formal or informal arrangements. The latter have been instrumental in the coordination of the timing of dawn raids, sharing some information in the course of investigations and establishing specific cooperation agreements (see http://www.jftc.go.jp/en/pressreleases/yearly-2017/January/170110.html and http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=1282).

48. As discussed in chapter II, the tools to fight cross-border cartels have been used by a number of mature competition authorities with established and effective coordination mechanisms for enforcement and have thus been strengthened over time. Despite efforts by the international community,[24] leniency programmes in young competition regimes have not been implemented successfully due to cultural and business factors and sociological considerations.[25]

B. Review of formal cooperation agreements

49. Tools and procedures offered through formal cooperation have been instrumental but not sufficient to further enhance international cooperation. Given the challenges regarding the limits imposed in exchanges of confidential information, such exchanges should focus on non-confidential information and authority intelligence. Exchanges of confidential information under specific circumstances already take place, but in a restricted manner.

50. With the exception of the European Union, regional competition authorities such as those of the Caribbean Community, the Common Market for Eastern and Southern Africa (COMESA) and the West African Economic and Monetary Union have experienced challenges in enforcing regional competition rules. However, COMESA has progressed in dealing with cross-border merger cases, as detailed in box 1.

Box 1

Cross-border merger review: Experience of the competition commission of the Common Market for Eastern and Southern Africa

The COMESA Competition Commission is charged with the administration and enforcement of the COMESA Competition Regulations. Since the Commission commenced operations in January 2013, the most active provisions of the Regulations have been those on merger control. As a consequence, the Commission developed merger assessment guidelines in 2014 to clarify and provide guidance on merger enforcement policies and practices.

The guidelines define mergers and state when they are notifiable or non-notifiable. Mergers that have a regional dimension and are above a specified threshold must be notified to the Commission. Mergers with a regional dimension may be notified to the Commission if both the acquiring firm and the target firm or either the acquiring firm or target firm operates in two or more member States of COMESA.

Since 2013, COMESA has handled 104 cross-border merger cases from member States covering, among others, the mining, pharmaceuticals, banking and financial services, agriculture, information and communications technology and telecommunications, insurance, energy and construction sectors (see http://www.comesacompetition.org/). There has thus been noticeable progress in dealing with cross-border cases in the COMESA region.

[24] OECD Secretariat, 2015, Use of markers in leniency programmes, Working Party No. 3 on Cooperation and Enforcement, DAF/COMP/WP3(2014)9.

[25] TD/RBP/CONF.7/4.

51. In some instances, no enforcement has taken place. The central question raised by UNCTAD in 2013 – "why do so many countries invest in adopting such agreements in the first place if the obstacles to their successful operation are high?" – remains valid. Modalities of cooperation need to be further analysed and there is a need to further examine what may be holding back the process.[26]

52. Benefits of regional agreements on competition are determined by the modalities of cooperation provided in various statues. For example, in many formal cooperation agreements such as economic partnership agreements and free trade agreements, although the signatory parties agree to coordinate enforcement activities, the coordination clauses require only the coordination of enforcement to be considered, and actual coordination between competition authorities may not be achieved.

53. Regional economic communities that do not have competition rules in place take a more cautious approach in order to avoid repeating the experiences of authorities that have enacted regional competition rules but have limited enforcement. For example, under the Central American group of competition authorities and in ASEAN member States, the strategy is to strengthen domestic enforcement before moving to a regional level.

54. Mature authorities have a different record of cooperation, and young competition authorities need to implement already signed agreements, rather than entering into new agreements that may take time to effectively implement.[27] For example, the European Union currently has a limited number of first-generation cooperation agreements with its most important trading partners (United States, Japan, the Republic of Korea and Canada). This situation might change following the withdrawal of the United Kingdom from the European Union if the Commission no longer has jurisdiction to carry out dawn raids in the United Kingdom or ask its Competition and Markets Authority to do so on its behalf.[28]

55. The European Union has noted that besides the second-generation cooperation agreement concluded with Switzerland in 2013, negotiations with Canada for an upgrade of the existing agreement to second-generation status are at an advanced stage. In addition, the Directorate General for Competition has concluded a number of memorandums of understanding with third-country authorities in China, Brazil, India, the Russian Federation and South Africa.[29]

C. Whether informal cooperation can be strengthened

56. UNCTAD research suggests that informal cooperation is taking place in many jurisdictions worldwide. However, in order to unlock the full potential of informal cooperation in case-specific cooperation, competition authorities need to overcome a number of challenges (see box 2).

Box 2
Informal cooperation: UNCTAD perspective

Another way of encouraging young competition authorities to engage in more informal cooperation is by sharing knowledge of and expertise in how to manage their respective administrative procedures to improve efficiency and allow access to tools applied by other competition authorities in the investigation of cases. Young competition authorities can move from general informal cooperation to more sophisticated case-specific

[26] TD/B/C.I/CLP/21. See also MS Gal and I Faibish, 2011, Regional agreements of developing jurisdictions: Unleashing the potential, in M Bakhoum, J Drexl, MS Gal, D Gerber and E Fox, eds., *Competition Policy and Regional Integration in Developing Countries*, available at http://ssrn.com/abstract=1920290 (accessed 20 April 2017).

[27] This situation refers to formal competition agreements, either bilateral or regional, signed between developing countries, which in most cases are implemented over a long time.

[28] P Willis and R Eccles, 2017, Brexit: Competition law implications, available at http://www.twobirds.com/en/news/articles/2016/uk/competition-law-implications-of-a-brexit (accessed 20 April 2017).

[29] Contribution from the European Union.

cooperation by exchanging case intelligence between them as they develop experience and expertise. One of the recommendations of the Intergovernmental Group of Experts aimed at enhancing informal cooperation between young competition authorities and those in developed countries was the establishment of an international intelligence network built on the trust and knowledge of peer competition authorities.

Sources: TD/B/C.I/CLP/29 and TD/B/C.I/CLP/34.

57. UNCTAD work related to international cooperation in 2012–2014 shows that in developing countries, informal cooperation has been increasing compared with formal cooperation, but this needs to be further analysed As young authorities become involved in informal cooperation promotion forums such as those under ICN, OECD and UNCTAD, among others, the networking opportunities provided may foster a better understanding of legal systems, trust and other outcomes, to allow for better exchanges of information between authorities.

58. Responses from member States to the UNCTAD questionnaire uphold the importance of informal cooperation, as shown in the following examples:[30]

(a) Brazil emphasizes the usefulness of peer authorities in investigating transnational anti-competitive practices through formal agreement provisions or informal contacts regarding non-confidential information with antitrust authorities.

(b) Italy states that informal cooperation is as important as formal cooperation, adding that "informal cooperation works well and is effective as long as the cooperating authorities have established a relationship of mutual trust and a network of contacts that ensures a mutual understanding of each other's competition policy and practices". The issue of mutual trust and understanding of each other's law and policy is important for fostering informal cooperation.

(c) Turkey states that informal cooperation among competition authorities can be an important asset in investigating cross-border competition cases.

IV. Exploring policy options for competition authorities

A. Proposals for the next level of cooperation in cross-border cases

59. Five options have been identified for competition authorities seeking to further foster international cooperation in the investigation of cross-border anti-competitive practices, namely the recognition of decisions made by authorities or courts in other jurisdictions; one-stop shop models; the appointment of one or more lead jurisdictions in cross-border cases; joint investigative teams and cross-appointments; and cooperation at the court level.[31]

60. These options may be feasible for mature authorities, but may be a challenge for competition authorities in developing countries and countries with economies in transition due to several constraints. Some such obstacles and proposals to address them are provided in table 2.

[30] Contributions from the Governments of Brazil, Italy and Turkey.
[31] A Capobianco and A Nagy, 2016.

Table 2
Policy options for international cooperation for young and small competition authorities

Option	*Application to young and small competition authorities*
Recognition of decisions by courts of other jurisdictions	Differences in legal systems may hamper the extent of recognition of foreign courts' decisions and evidence admissibility (for example, civil versus criminal sanctions)
One-stop shop model	Lack of a binding multilateral framework on competition limits the operation of such a model and existing systems remain polarized
Appointment of one or more lead jurisdictions in cross-border cases	A challenge facing various jurisdictions but possible in jurisdictions that share cultures, businesses and harmonized substantive and procedural rules, for example the cooperation for competition law enforcement in Nordic countries Sovereignty issues may crowd out the lead jurisdiction idea, which may be misinterpreted as superiority over others.[32]
Joint investigative teams and cross-appointments	Trust and mutual understanding is a concern in cooperation on open investigations

Sources: UNCTAD secretariat compilation and A Capobianco and A Nagy, 2016.

61. Competition authorities continue to struggle to identify the best options to foster international cooperation in investigations of cross-border cases. In this regard, the first step for authorities is to explore information sources available within their jurisdictions. If key information is located outside a jurisdiction, information requests may be sent to another authority and the firms concerned, but there are no guarantees that a response will be obtained. Informal contacts between authorities may yield better results, through email, telephone calls or other means.

62. Formal contacts with foreign competition authorities may not be necessary if voluntary cooperation from the firm that may or may not have subsidiaries in the jurisdiction of the requesting authority is relied on. As noted earlier, firms are not bound to reply to an authority that has jurisdiction to enforce requests of information.

B. Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, section F: Operationalization

63. Member States have proposed the operationalization of this multilateral instrument to foster cooperation in dealing with cross-border anti-competitive practices. During the Sixth United Nations Conference to Review All Aspects of the Set, one delegate proposed specific modalities for the implementation of the voluntary consultations provided for in section F 4, including a number of requirements for application and envisaged elements to be included in response to the request and the possible extension of participation by the UNCTAD secretariat in the process.[33]

64. At the fifteenth session of the Intergovernmental Group of Experts, one delegate expressed the need to further enhance the usefulness of section F with regard to the investigation of cross-border competition cases.[34]

65. Given the soft law and non-binding nature of the Set, section F provides very limited obligations on member States. The modalities proposed the delegate at the Sixth United Nations Conference to Review All Aspects of the Set were a cooperative mechanism, not a conflict resolution instrument. If member States agreed to enter into consultations, it is possible they might not find a mutually agreeable solution on the subject matter. In this regard, there remain issues to be addressed to find an effective way to carry out

[32] Contribution from Berwin Leighton Paisner, Brussels.
[33] TD/RBP/CONF.7/11.
[34] TD/B/C.I/CLP/40.

consultations under section F 4, either through the proposed modalities or an alternative procedure. This would entail dealing with the limitation imposed by most systems to share confidential information, identifying the relevant institutions from each member State to participate in the consultations – including the notification formalities – and the possible role of UNCTAD in facilitating the process.

66. During the Sixth United Nations Conference to Review All Aspects of the Set, member States agreed that there were benefits to having a default set of procedural rules to implement the consultations pursuant to section F 4. The reasoning was that the consultations would offer member States another mechanism for cooperation, in addition to formal and informal networks and technical assistance; having such rules would provide predictability for member States; and UNCTAD could facilitate by providing conference facilities, technical assistance and monitoring agreements, if requested to do so by the parties. Several delegates stated that the participation of UNCTAD as an impartial third party would add value to the mechanism and assist member States in securing the necessary authorization from the relevant authorities to attend and participate in the consultations.

C. International Competition Network framework for promotion of sharing of non-confidential information for enforcement in cartel cases

67. In 2015, ICN proposed setting up a framework to facilitate information-sharing when investigating cartels. The framework requires ICN member authorities to register a liaison officer to facilitate the flow of communications between the investigation teams. In this instance, there is a level of trust between the cooperating authorities that needs to be achieved and an internal trust between case officers and international unit officers within an authority.

68. Should the framework be implemented, it would require a number of incentives for both authorities to cooperate in a specific matter. Such incentives could be interpreted as trade-offs that might be achieved if both authorities cooperate. In this regard, the idea of similarity in maturity levels among competition regimes may be the solution needed to move forward. This calls for a peer authority relationship that enables authorities of similar levels of development and enforcement experience to cooperate. Following a proposal by one delegate, 33 authorities have registered in the framework.

69. This tool is available for competition authorities to use to cooperate with their peers and share relevant information related to intelligence in open investigations. ICN members are provided with an avenue under the proposed framework yet there remain issues that need to be addressed for authorities to fully buy into the framework and make it beneficial to them. Further work needs to be done in order to examine whether there are benefits in fostering international cooperation in cross-border investigations as provided for in this proposal.

V. The role of UNCTAD in international cooperation

70. The traditional role of UNCTAD in enhancing international cooperation in many areas of competition enforcement has taken place as reported in many of its meetings and other technical cooperation activities with competition authorities in developing countries and countries with economies in transition. Such activities fall under the following categories: promoting better understanding of each other’s laws, assessment criteria and designs of remedies and sanctions; developing guidelines and best practices for cooperation agreements; building human and technical capacities of young competition authorities to enforce competition law through bilateral and regional initiatives. In the recent past, such efforts have been conducted through national project activities in Albania, Ethiopia and Zimbabwe and regional project activities through COMPAL, ASEAN member States and States in the Middle East and North African region.

71. However, given the complexity of the subject matter, and taking into account current trends and the proposals provided by emerging competition authorities and international organizations, the global membership of UNCTAD could be an asset in expanding the

activities carried out to date since the adoption of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 1980.

72. In this regard, provided a specific request is issued by member States, a possible role for UNCTAD could be to facilitate the following initiatives: UNCTAD mechanisms for voluntary consultations for coordinated enforcement between two competition authorities of similar institutional setting and enforcement experience; and enhancing the position of UNCTAD to facilitate consultations and exchanges of experience between developing countries and countries with economies in transition on how to operationalize such mechanisms.

VI. Further areas of research and discussion questions

73. International cooperation in dealing with cross-border anti-competitive practices has been discussed at various international meetings and cited in various studies and discussion papers. There are outstanding issues to be resolved in order for authorities of developing countries and countries with economies in transition to engage in effective international cooperation.

74. In order to identify areas of interest for further research, member States and other experts may wish to consider the following questions for discussion:

(a) What are the necessary tools for developing national competition authorities to enable them to benefit from international cooperation in cross-border competition cases?

(b) What measures might developing country authorities undertake to facilitate international cooperation with peers and with developed country authorities?

(c) What measures could be put in place to facilitate consultations under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in order to enhance further cooperation between member States?

(d) How can UNCTAD work together with other international organizations and international networks to promote international cooperation in the framework of section F?