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**Consideration of proposals for the improvement and further development
of the Set, including international cooperation in the field of control
of restrictive business practices**

International cooperation in merger cases as a tool for effective enforcement of competition law

Note by the UNCTAD secretariat

Executive summary

This report reviews the evolution of international cooperation in the enforcement of competition laws with a focus on cooperation among competition agencies in merger cases. It explores existing cooperation arrangements, mechanisms and networks as well as the role they play as tools for effective enforcement of competition law in developed and developing countries and in identifying the challenges faced, particularly, by young competition agencies. The report looks at several forms of cooperation, including recent developments and specific cases in different jurisdictions, and provides insights into future trends in bilateral, regional and international cooperation.

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Introduction

1. As part of the continuing UNCTAD discussions on international cooperation in competition policy, the Intergovernmental Group of Experts on Competition Law and Policy, at its fourteenth session from 9 to 11 July 2014, requested UNCTAD secretariat to prepare a report on international cooperation in merger cases as a tool for effective enforcement of competition laws.

2. UNCTAD's work on international cooperation dates back to 1999 when the first secretariat report (TD/B/COM.2/CLP/11) was presented to the Intergovernmental Group of Experts on Competition Law and Policy at its second session, held from 7 to 9 June 1999. By 2007, five revisions had been made to the original document and certain parameters pertaining to cooperation were identified and discussed, including (a) how to ensure compatibility, coexistence, coordination and mutual reinforcement among competition regimes; (b) convergence between substantive, procedural and enforcement aspects of competition; (c) the appropriate balance between convergence and allowing diversity and experimentation in new enforcement methods; (d) how preferential or differential treatment for developing countries could be reflected in competition cooperation agreements; (e) the types of appropriate dispute resolution mechanisms to be applied and how they could be tailored to promote cooperation on competition law and policy; (f) how best to promote exchange of experiences in this area so as to further develop bilateral and regional cooperation mechanisms; (g) confidentiality restrictions and its effects on cooperation efforts; (h) the role of competition authorities and of UNCTAD in fostering enforcement cooperation and implementation of competition-related provisions in regional trade agreements; and (i) minimum standards for substantive and procedural antitrust rules.¹

3. Since that time, there have been significant developments in international cooperation in general and particularly in mergers. Some areas have been slow to change, especially those concerning confidentiality, an area that has been complicated particularly for competition agencies that are not operating under set rules for regional or economic cooperation. Many agencies have discovered that much useful information can be shared without contravening confidentiality provisions. Furthermore, parties have increasingly found it in their interest to waive the protection of those laws to facilitate cooperation and, presumably, more expeditious and consistent remedies in cases that affect multiple jurisdictions. Within the European Union competition network, the provisions that allow for waivers have facilitated exchange of confidential information. Elsewhere, exchange of confidential information that is protected by national legislation has been difficult even within bilateral arrangements covering mature competition agencies. However, there are positive developments within the so-called second-generation agreements such as the one between Switzerland and the European Union. This agreement allows for exchange of confidential information within certain conditions.² Some developments in international cooperation will be explored later in this report.

4. The current report focuses on the evolution of cooperation among young competition agencies in dealing with cross-border merger cases and putting in place effective cooperation mechanisms, which assist with better enforcement of their respective competition laws. Developed and developing country competition agencies alike have been seeking ways and means of enhancing the process of enforcement cooperation and sharing of best practices. The report also focuses on the emergence and evolution of all forms of

¹ See TD/B/COM.2/CLP/21/Rev.5.

² See TD/B/C.I/CLP/21.

enforcement cooperation, including formal and informal methods, and draws on recent research and international reports, such as; UNCTAD background studies for the eleventh (2011), twelfth (2012), thirteenth (2013) and fourteenth (2014) sessions of the Intergovernmental Group of Experts on Competition Law and Policy. It highlights mechanisms that act as drivers of cooperation in merger cases.

I. Cooperation in merger cases: Forms and systems

A. Concepts and definitions

(i) Mergers and acquisitions; definitions

5. The UNCTAD Model Law defines mergers as follows:

“Mergers and acquisitions” refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates.³

6. One dictionary defines mergers and acquisitions as “the management, financing and strategy involved with buying, selling and combining companies.” Furthermore, “a merger is the combination of two similarly sized companies combined to form a new one and an acquisition occurs when one company totally buys off another and becomes a new owner.”⁴

7. The terms mergers and acquisitions are usually used together in many texts, but for the purposes of this report, the word mergers refers to both.

(ii) Why are mergers important to business?

8. The rationale behind mergers and acquisitions is the creation of synergies, in anticipation that the value of the new entity will be greater than the sum of the parts of the companies coming together. They can also be considered as a conduit which allows companies to introduce new ideas, shed dead weight in terms of products and/or even personnel, and allow for space to introduce new and better goods and services to the market. A company considering acquiring another company may have a strategy aimed at productivity improvement of the target company through, for example, the consideration of efficiency gains or a risk reduction strategy by buying off a company engaged with unrelated business activity. Overall, most merging companies will have as the immediate objective the growth of profit margins as well as efficiency through a new business outlay, thus increasing assets, shares and market shares. Likewise, the ultimate objective would be that of profit maximization, and achieving and maintaining a competitive leverage against other market players.

9. For cross-border mergers, common strategic goals drive the urge to combine efforts. Such goal may include (a) expansion of market opportunities to other countries; (b) access to raw materials, technology, innovations and cheap labour; (c) to expand a brand name and reputation to other markets; and (d) product diversification and markets, thus spreading out risks etc.

³ See TD/RBP/CONF.7/8.

⁴ <http://www.investinganswers.com/financial-dictionary/economics/mergers-acquisitions-ma-366>.

10. On the other side, in pursuit of government policy coherence, cross-border mergers can play a useful role that greenfield foreign direct investment may not be able to play. UNCTAD has noted, in relation to the outcome of a June 2000 expert meeting, that in times of financial or economic crises mergers may be a way out when countries experience difficulties or face the risk of bankruptcy, and when no alternative foreign direct investment is available.⁵ The same argument applies to the 2008 financial crises and government involvement in mergers. Care should be taken not to relax the application of competition principles and settle for blanket approvals of mergers, which may threaten the building of competitive markets. A 2009 UNCTAD report alluded to the same issue that, in order to promote effective enforcement, “governments should endeavour to minimize any negative impact on competition arising from their interventions and account for the risk of creating adverse consequences in other countries given the global dimension of other markets”.⁶

B. Mergers in one or more jurisdictions

11. Starting from the 1990s, mergers between firms have increasingly taken on an international dimension. This underscores the need for a concerted effort between competition agencies when dealing with cross-border merger cases. In the Intel and McAfee case,⁷ two firms based in the United States of America, the European Commission benefited from close cooperation with United States Federal Trade Commission through exchange of information. The case was resolved through a conditional approval by the European Commission spelling out specific conditions to enforce the merging parties' commitments to ensure that European competitors were not precluded from providing information technology security products, which are compatible with Intel units. This case exemplifies the geographical spread of business transactions and the fact that the international impact of business transactions cannot be ignored in today's globalized market. Competition agencies are therefore faced with new challenges as well as opportunities for innovative ideas on how curb multi-jurisdictional anticompetitive behaviours and promote competition.

12. Divergences in cross-border mergers have been recorded in some of the most famous merger cases, reflecting the challenges thereof. One of the issues that triggered the debate on international cooperation in merger cases was the fact even where legal mechanisms exist, such cooperation has not always made it possible to avoid conflicting views or to reach commonly accepted solutions, due to differences in legislative frameworks and economic doctrines and their effects on each market, including the availability of evidence in each country. A good example is the General Electric/Honeywell merger,⁸ where the European Commission blocked the conglomerate merger, but the United States Department of Justice approved it. While the General Electric/Honeywell case indeed represented a difference in the way the two jurisdictions analysed conglomerate mergers, the fact that two jurisdictions reach different conclusions in the same case does not necessarily mean a conflict exists. It may mean that the market structure is different in the jurisdictions involved, with the merger producing anticompetitive results in one and not in the other.

13. Similarly, the Ciba-Geigy/Sandoz merger was given clearance by the European Commission, but the United States Federal Trade Commission, considering that the

⁵ TD/B/COM.2/29.

⁶ TD/RPB/CONF.7/6.

⁷ See http://ec.europa.eu/competition/mergers/cases/decisions/m5984_20110126_20212_1685278_EN.pdf.

⁸ <http://ec.europa.eu/dgs/competition/economist/honeywell.pdf>.

“innovation market” would be adversely affected, ordered the licensing of gene therapy rights and other technology.⁹

14. Another case worth mentioning is the Boeing/McDonnell Douglas merger,¹⁰ involving two United States aircraft manufacturing companies. The United States Federal Trade Commission cleared the merger, having concluded that McDonnell Douglas was no longer a competitive force in the industry, but the European Commission took a different view and intervened under the belief that the merger would strengthen McDonnell Douglas’ position of dominance in the market for large aircrafts. Nevertheless, in this case, the traditional comity was applied to some extent. The European Commission took into account, to the degree consistent with European Union law, concerns expressed by the Government of the United States relating to its important defence interests and to the desirability for divestiture, and approved the merger subject to a number of conditions, which in any case did not include divestiture.

15. Researchers have pointed out that Boeing/McDonnell Douglas merger clearly revealed that the existing cooperation frameworks had inherent limitations that might not be resolved in the near future. The 1991 European Commission/United States agreement was applied in the Boeing/McDonnell Douglas case and served as a basis for intensive cooperation between European Union and United States competition agencies. All necessary notifications between the Federal Trade Commission and European Commission were issued and a number of consultations were held. As indicated earlier, there was a consideration of the United States concerns, especially the effects of the merger on the commercial jet aircraft market arising from the merger. Notwithstanding such efforts, divergent interpretation of the evidence by the competition authorities on both sides of the Atlantic made it impossible to reach a common solution to the case.

16. The experience in the Boeing/McDonnell Douglas and General Electric/Honeywell cases led the United States agencies and the European Commission to engage in an intensive effort to improve the nature of their cooperation. A joint working group was created to share and understand each other’s approach to merger analysis, and that group ultimately produced a best practices document that was adopted by both the European and United States agencies. It is worth noting that the United States and European authorities have been enhancing cooperation over 15 years since the General Electric/Honeywell disagreement. The lesson to draw from this case is that cooperation cannot be taken for granted, and that effective cooperation requires engagement and understanding between the agencies involved.

17. The examples above illustrate the fact that competition agencies are continuously faced with new challenges as well as opportunities for innovative ideas on how to curb multi-jurisdictional anticompetitive behaviours and promote competition. This calls for new and innovative ways towards international cooperation and new thinking on how best to harmonize divergent implementation and application of competition rules.

C. Proliferation of multi-jurisdictional mergers

18. Inclusion of merger control provisions in competition laws has been on the increase due to developments that have taken place in many markets, triggered by globalization and opening of markets. During the pre-liberalization days, economies were closed and,

⁹ The concept of an “innovation market” is not used in the European Union, and there are differences in the scope of intellectual property rights in each jurisdiction. See <http://www.ftc.gov/enforcement/cases-proceedings/961-0055/ciba-geigy-limited-sandoz-ltd-novartis-ag-et-al-matter>.

¹⁰ See http://ec.europa.eu/competition/speeches/text/sp1998_004_en.html.

therefore, mergers among multinational companies were not as common as is the case today, due to lack of pressure from competing firms. As competitive pressure mounted due to opening of markets, many jurisdictions instituted merger control statutes and, increasingly, pre-merger notification requirements have been on the rise.

19. Consequently, the debate on how to harmonize cross-border mergers especially those involving multinational corporations and their subsidiaries, spread across many jurisdictions around the globe, have been ongoing among scholars, Governments and multilateral bodies such as International Competition Network, Organization for Economic Cooperation and Development and UNCTAD. For both developed and developing countries, cross-border mergers are a concern due to the nature of markets and their operations.

20. Despite increased focus on international cooperation in merger cases, there are still significant areas of divergence in how different competition agencies process their merger applications. Differences in areas such as review timetables have been evident in high-profile cases requiring multi-jurisdictional notifications, such as the Glencore/Xstrata case.¹¹ This case was notified in Australia, South Africa, the United States and the European Union. The merger was reviewed within different timelines by the various agencies in the jurisdictions mentioned. Glencore acquired Xstrata, forming the largest commodities trader and the fourth largest mining company in the world. The merger was unconditionally cleared in the United States in July 2012, and the European Union gave conditional clearance in August 2012. In Australia and South Africa cleared the merger, but had to wait until the deal was closed by the Ministry of Commerce of China, which occurred in April 2013. At the same time, carefully applied cooperation can yield good results, such as in the recent hard disk mergers, which were reviewed by the authorities in Australia, Canada, China, Japan, Mexico, New Zealand, the Republic of Korea, Singapore, Turkey and the European Union.

II. Specific characteristics of cooperation in merger cases in different countries

A. International cooperation trends

21. Since 2007, UNCTAD reports on international cooperation have emphasized the importance of a concerted effort in dealing with cross-border anticompetitive practices, and how international cooperation among competition authorities can indeed be regarded as a tool for effective enforcement of competition laws. Experience also shows cooperation in merger cases has over the years attained the highest number of instances where agencies worked together, exchanged information and shared ideas on the same case. UNCTAD questionnaire responses from member States in 2013 show that, in most of their jurisdictions, cooperation in merger cases were the most frequently reported category of competition law enforcement.

22. As noted above, enforcement cooperation has been regarded as a key ingredient to effective enforcement of competition law. This is illustrated by the numerous efforts undertaken by international institutions, such as UNCTAD and the OECD, as well as established networks such as the International Competition Network, and the recent

¹¹ Boardman N and Slaughter and May (London) (2014), Global Update – International cooperation in merger control, XMBA Forum. Available at <http://xbma.org/forum/global-update-international-cooperation-in-merger-control/> (accessed 24 April 2015).

upsurge in other forms of informal cooperation arrangements and forums, which all commit resources to develop the most effective ways of tackling cross-border anticompetitive practices, including mergers. These efforts are increasingly enabling competition agencies to share their resources through the exchange of case information and general exchange of experiences. The forums also act as a capacity-building exercise and a means of on-the-job training and promotes mutual understanding of competition regimes, thereby contributing to building trust.

23. However, the nature of competition cases; including mergers continue to pose enforcement challenges to competition authorities. These challenges include the legislative and structural architecture of formal cooperation agreements; lack of coherence between national and regional frameworks; information access bottlenecks, especially in developing countries; resources constraints; and timing and procedural issues (UNCTAD, 2013).

24. The OECD has been involved in this area over the years. A survey conducted in 2013¹² identified the following constraints and limitations of formal cooperation in competition cases (OECD, 2013): (a) limitations on confidential information sharing; (b) limitations caused by differences in legal frameworks in relation to criminal and civil enforcement; (c) institutional and investigatory impediments: resource constraints and practical difficulties; (d) jurisdictional constraints: differences in legal standards; and (e) lack of trust and confidence in legal systems. Answers to these constraints are yet to be worked out, pointing to the fact that there is still much work to be done in perfecting cooperation efforts between competition agencies, especially those of many developing countries.

25. Notwithstanding that the majority of the responses to the OECD survey were from developed competition agencies, international cooperation the survey pointed to an emerging pattern of cooperation among young competition agencies especially skewed towards informal platforms and networks. UNCTAD work with developing countries in the area of informal arrangements has been documented in its various documents and reports and is worth noting.

B. Cooperation enforcement experiences

26. European Commission and United States competition agencies' cooperation on merger control is well established and well-grounded within the framework of the 1991 European Union-United States competition laws cooperation agreement. The agreement facilitates coordination of enforcement activities and a platform to accommodate competing interests and avoid possible conflicts, while the European Union-United States 2011 best practices on cooperation on merger investigations added clarity to the process by providing specific contact points within the investigative process between the Fair Trade Commission/Department of Justice and the European Commission. A similar agreement was entered between the United States agencies and the Canadian Competition Bureau in 2014.

27. An important addition to the debate is the entry of China as a key player in the world market and also its recent heightened enforcement of merger provisions, as well as other competition provisions in the antimonopoly law. The efforts of China in antimonopoly law enforcement are targeted towards foreign, local and State-owned enterprises. A good example is the price fixing case concerning China's leading State-owned liquor companies,

¹² <http://www.oecd.org/competition/Intern Enforcement Cooperation2013.pdf>.

Wuliang Yibin Group and Kweichow Moutai, which were fined a total of about US\$73 million in February 2013.¹³

28. A good case example of the positive effect of international cooperation is the Rio Tinto and BHP Billiton joint venture proposal. The corporation and coordination between the Australian Competition and Consumer Commission, the European Commission, the German Cartel Office, the Japan Fair Trade Commission and the Korea Fair Trade Commission enabled all agencies to have similar remedies for the joint venture proposal necessitating the applicants to withdraw their application in October 2010. The possible joint venture was found to have anticompetitive effects in the markets of all the countries concerned. Through sharing of information and exchange of opinions, Korea Fair Trade Commission took the lead by sharing its findings with the other authorities, therefore mounting the pressure on the two companies to succumb to the force of the coordinated action and pulled out of the proposed deal. Such is the force of cooperation in handling competition cases.

29. Currently, more cooperation in merger reviews now takes place in mergers outside of United States and European Union competition authorities. For example, Zambian and Zimbabwean competition authorities consulted each other and the Australian competition authorities during their merger assessment of the Coca-Cola/Schweppes merger in 1998. In addition, the Zambian and Zimbabwean authorities engaged in extensive consultations during the Rothmans of Pall Mal/British American Tobacco (1999) merger in order to arrive at appropriate decisions, given their close geographical and economic proximity. According to an UNCTAD survey in 2014,¹⁴ many competition authorities in Africa reported having cooperated in resolving merger cases in their various jurisdictions. Although this kind of cooperation is deemed informal, it has proved to be the most effective form of international cooperation between young competition agencies.

C. What drives international cooperation in mergers?

30. In recent times, the proliferation of multi-jurisdictional mergers is evident in many cases, thus leading to more attention being accorded to international cooperation efforts, especially through informal cooperation networks in many regions. This is a reflection of the international dimension of merger cases and likewise strengthens the need for a concerted effort between competition agencies in dealing with cross-border mergers. An important instrument for information exchange in merger cases is confidentiality waivers. Waivers allow competition agencies to share confidential information across borders.

31. While agencies can often exchange limited information with each other without impinging on their confidentiality laws, the use of waivers remains one of the most effective tools to facilitate effective cooperation. When parties believe that it is in their interest for firms reviewing their mergers to cooperate, they may waive the protection of national confidentiality laws that would otherwise prevent agencies from sharing their analysis and thoughts about remedies with each other. Firms often have incentives to do so when they believe that cooperation will promote consistent analysis, consistent remedies and collaborative timing. The decision to waive is always with the parties. There are fewer incentives to waive if they have doubts about whether their information will be kept in

¹³ A similar article on the China case is available at <http://www.mayerbrown.com/files/Publication/99754ab8-7bb9-4f09-a54a-5859fe360fef/Presentation/PublicationAttachment/fad48a22-b9a3-437b-a4cf-49eebdbd03b1/130305-PRC-AntitrustCompetition.pdf>.

¹⁴ TD/B/C.I/CLP/29.

confidence. While waivers were once used primarily among developed countries, they are increasingly being seen in younger authorities.

32. Brazil has engaged successfully with advanced competition authorities in the world such as the United States Department of Justice and the European Union Commission (DG Competition) in merger cases. An example is coordination of remedies in the merger cases including Syniverse/MACH,¹⁵ Munksjö/Ahlstrom.¹⁶ In the Munksjö/Ahlstrom merger, a waiver of confidentiality model was developed to grant both parts full access to relevant information. Before the waivers were granted, the authorities entered into discussions on previous cases, market conditions and methodology used to study specific markets. After the waivers were granted, concerns about the merger were shared, as well as market findings and information given by the parties and the case was finally cleared with conditions.

33. The cooperation effort, such as that mentioned in the previous examples, was essential to effective enforcement of the respective competition laws, since the company assets were in Europe and the United States. Both the United States and European Union authorities therefore had access to information, such as number of competitors and number of clients, and had to cooperate in order to share the information. When designing the remedies, communication focused on coherence in both countries, addressing competition concerns found by both authorities.

34. In the Latin America region, Brazil has reported (in response to a 2013 UNCTAD questionnaire) the use of general informal cooperation in many cases, including benchmarking studies, seeking assistance from other agencies such the United States Department of Justice, Federal Trade Commission, FAS Russian Federation, European Commission, Directorate General of Competition (DG Comp) to deal with specific cases. Cooperation has taken place in the following sectors: airline, shopping malls and pharmaceuticals, among others. This form of international cooperation has proved to be an effective way of enhancing Brazil's enforcement efforts.

35. Furthermore, Brazil and Chile have engaged in a number of landmark cases such as the LAN/TAM merger case, since the two agencies had developed sufficient trust between them and the fact that the two companies operations were in both jurisdictions. Informal cooperation was also the main mechanism in this case. Between 2010 and 2011, different competition authorities in Latin America were handling the LAN/TAM merger case. However, greater impact of the merger was felt in the Brazil and Chile markets. The two authorities cooperated during the first stage of analysis. The Chilean Competition Authority (Fiscalía Nacional Económica) received information on the definition of the relevant market in the air transport sector from Brazil. At the second stage, the Chilean authority exchanged views with other authorities, notably from the United States and European Union, on the remedies that could take place in order to mitigate the new market structure as a result of the merger.

36. Another example is the Nestlè-Pfizer merger, where Chile consulted and held a number of meetings with foreign authorities, mainly from Latin America, in order to identify the relevant market, the economic analysis applied in each country and the measures implemented to mitigate the problem. Chile evaluated the implications of the merger and concluded that the transaction would result in a significant concentration in the nutritional market in Chile, in particular the baby dairy products segment. In this regard, Chile found informal cooperation with the Mexican Federal Competition Commission very

¹⁵ See http://europa.eu/rapid/press-release_IP-13-481_en.htm.

¹⁶ See http://europa.eu/rapid/press-release_IP-13-461_en.htm.

relevant as it significantly facilitated the analysis of the case. This was largely because one of the producing factories of Pfizer was located in Mexico and the sale of this asset was of particular relevance to the remedies proposed in Chile.

D. Main features of international cooperation today

37. While discussing international cooperation both formal and informal in anticompetitive cases in general and specifically in merger cases, the work carried out by multilateral organizations (UNCTAD, International Competition Network and OECD) and at the regional level (European Competition Network, the Andean Community, APEC, ASEAN, COMESA, CARICOM, SADC and WAEMU) cannot be ignored. In addition, there are other arrangements mentioned in this report, which takes place at the bilateral level, which have raised the bar for international cooperation. In many developing countries, informal cooperation efforts are taking centre stage in all regions and have proved to be the way forward for developing countries, which may not have established formal mechanisms for cooperation. One may wonder what drives cooperation efforts outside of the established bilateral or subregional/regional agreements. The answer to this question lies in the work that has been developed over the years by international organizations mentioned above through creation of awareness of the need to cooperate, provision of a platform for exchange of experiences, and to build understanding between agencies and confidence in each other as enforcement partners.

38. The experience of UNCTAD in this regard has been developing in many areas including its capacity-building programmes, intergovernmental machinery in terms of its annual Group of Experts and the five-year Conference to review the United Nations Set on competition. The 2013 UNCTAD report on informal cooperation points out that there are two types of informal cooperation continuously taking place between competition authorities: (a) general informal cooperation and (b) case-specific informal cooperation. Based on the responses to the 2013 UNCTAD questionnaire, many of the cases relate to merger control. This is due to the fact that in merger cases, information is readily shared due to the fact that in many instances, parties believe it is in their interest to encourage sharing of case information because it is more likely to lead to agencies in different countries reaching consistent conclusions, applying consistent remedies and approving transactions more efficiently. Exchange of information on cartels and in some cases abuse of dominance is more sensitive and more difficult to share.

39. The case of the Zimbabwe examples shows cooperation taking place mostly with the competition authority of Zambia. In two examples of merger transactions notified separately to the two authorities, they exchanged information during case examination involving major soft drink companies and tobacco companies. This exchange of information enabled the two competition authorities to make well-informed determinations on the transactions. Moreover, Zimbabwe and Zambia collaborated informally while assessing the takeover of a South African company by an Indian company. As the COMESA Competition Commission develops its case law, it is expected that increased both formal and informal cooperation will take place between its member States based on the provisions of the COMESA Treaty and the Competition Rules and Regulations.¹⁷

40. Looking overall to the potential benefits of competition, the demand for cooperation is driven by the increasing interconnectedness of global economic activities (trade, investment, cross-border mergers and acquisitions) and the rise in numbers in jurisdictions enforcing competition law (from 9 in 1970 to 23 in 1990, and currently rising to over 200).

¹⁷ <http://www.comesacompetition.org/>.

This increase has led to the expansion of what is referred to in UNCTAD as the “competition family”. The OECD report further indicates that according to the Private International Carters database between 1990 and 1994, there was a significant increase in European Union cross-border enforcement both in mergers and cartels, as shown by the analysis from DG Comp and the United States Department of Justice.

41. According to the UNCTAD 2013 survey, many young agencies responding to the questionnaire indicated that they had devoted their scarce resources to strengthen informal cooperation with other agencies, particularly with those of neighbouring countries. In this context, informal cooperation is considered to augment their capability to resolve case queries and enhance effective enforcement of competition laws.

42. Evidently, the effort that international organizations have made to boost international cooperation over the years has tremendously eased the isolation of young competition agencies. It has enabled them to gain knowledge of how to cooperate with their counterparts and the importance of it. The very forums, which bring competition practitioners from both developed and developing countries together, create the platform for future cooperation and networking. The discussions enlighten participants and allow them to share general and case examples and challenges thereof. Though costly, these efforts have been the baseline of making international cooperation to all agencies.

43. Furthermore, certain networks, which have emerged over time, have opened new horizons of sharing information and cooperation on many aspects of competition law enforcement. Capacity-building opportunities have been born from such interaction, thus sharing the costs of cooperation within the competition family.

III. International cooperation as a tool for agency effectiveness

A. Challenges of international cooperation

44. For developing countries, the use of informal cooperation mechanisms between peer competition agencies has been a great source of encouragement for many competition authorities. While there is a limited amount of cooperation between competition agencies between North and South, as competition authorities in developing countries become exposed to the methods and means of cooperation, there are efforts now to exchange information between relatively well-developed competition authorities and developed Examples of this include countries such as the United States/Brazil, Canada/Chile and China/ European Commission, among others. These exchanges are mostly based on bilateral agreements or memorandums of understanding.

45. UNCTAD programmes, such as advisory services, peer reviews, capacity-building programmes, round-table discussions on relevant topics on international cooperation, intergovernmental expert meetings and ad hoc expert meetings, have enriched these efforts and enabled member States to talk to each other and share ideas on how to better the enforcement of their respective competition laws.

46. In this regard, for developing countries to enjoy the full benefits of international cooperation in mergers and other cases, it may be prudent to build on the systems already in place in regional groupings such as COMESA, WAEMU, CARICOM and EAC etc. This is because, as much as informal cooperation in mergers and other cases has been occurring, these authorities have yet to reach the level of cooperation taking place between those competition authorities operating within the framework of signed agreements and because of the likelihood that particular mergers will have effects within each region.

47. Recent research by the OECD highlights some elements, which create scope for cooperation and certain challenges in cross-border mergers. This could be as a result of different enforcement rules, conditions of competition and assessment criteria, leading to differences in evaluation.

48. One challenge that still lingers as far as enforcement cooperation is concerned is confidentiality. Publicizing documents containing legitimate business secrets can result in possible damage to the affected company and risks for one or more authorities of violating laws protecting confidential information or business secrets. While this can be overcome in many countries through the use of waivers, firms' willingness to waive the protection of confidentiality laws depends heavily on their confidence in the agencies' confidentiality practices. More efforts need to be directed towards this aspect of information exchange.

B. The cost of cooperation

49. The OECD 2014 report points out that providing co-operation in a specific matter is not costless. It can be both time and resource intensive. The main idea is that each competition authority should be ready to give and take in this effort. In order for this to happen, a key ingredient for effective cooperation between respective competition authorities is to have a relationship of trust and good understanding of each other's legislation. Achieving this trust is time-consuming and resource intensive, particularly for smaller agencies. This cost is however advantageous in the long term when cooperation is ongoing. It appears that this investment in time and other reasons has streamlined implementation hiccups and made it possible for less resource endowed authorities to be able to resolve their merger cases.

C. New generation of international cooperation among young agencies

50. As a response to challenges posed by cross-border anticompetitive practices, it was proposed during the thirteenth session of the Intergovernmental Group of Experts that enforcement capabilities be aggregated. One way to achieve this could be through the creation of a focused multinational information-sharing platform. An initial step was undertaken towards creating a platform. Key features of the platform include the pooling of resources to create a visible flow of non-confidential information and in order to enhance enforcement capabilities, especially for young competition agencies in developing countries.

51. Under this platform, which was designed by UNCTAD in 2013, each jurisdiction would log information, for example on past and ongoing cartel and merger investigations, and market studies. Such a platform would enable information gathering and sharing and would facilitate collaboration in ongoing investigations. The benefits of the platform would include reduced enforcement fragmentation, enhanced agency effectiveness and deterrence. The databank would also contribute to capacity-building, learning and informal ad hoc collaboration, thus reducing costs associated with international cooperation.

52. In July 2013, the UNCTAD secretariat launched the database on competition cases during a COMPAL meeting in Lima. This initiative was praised by various regional groupings and member States, notably Chile, Colombia and Peru, and WAEMU and CIS countries expressed the intention to use it.

53. In addition, the recent initiative on international cooperation in Latin America was the adoption of the Lima Declaration, termed as a new generation of informal cooperation among young agencies. The three countries that signed this declaration were Chile,

Colombia and Peru. This commitment will deepen collaboration and knowledge of each other's laws, practices and ongoing cases.

54. Bilateral and multilateral agreements that facilitate international cooperation tend to be of two types: so called "soft" agreements that facilitate and encourage cooperation under existing national laws, and "hard" agreements that permit the exchange of confidential information without the permission of the parties. Most agreements, such as the Lima Declaration, are of the former type. A handful of agreements, such as the European Competition Network, an agreement among the Nordic countries, the Australia-New Zealand agreement, the European Union/Swiss agreement and a rarely-used agreement between the United States and Australia, are of the latter type. One of the major challenges of reaching such agreements is achieving domestic political consensus that confidentiality concerns will not be compromised.

55. As indicated earlier in this report, the European Union and Switzerland¹⁸ signed a historic cooperation agreement in competition matters, which falls into the category of a "second-generation cooperation agreement". The milestone for this agreement is that it pushes the confidentiality debate to another level. It provides for broad possibilities for exchange of both protected and confidential information obtained during case investigations. This exchange could happen in the absence of consent from the investigated companies.

56. The Vice-President of the European Commission in charge of competition policy put it squarely: "Many anticompetitive practices have cross border effects on the European Union and the Swiss markets. This strengthening of our cooperation is unprecedented and goes beyond the European Union's existing agreements with other third countries. It will make our competition authorities more effective, to the benefit of companies and consumers on both sides."¹⁹

57. The agreement does enhance the coordination and cooperation of enforcement activities between the European Commission and the Swiss competition agencies. It provides for policy issues discussions and regular contacts to augment enforcement efforts and priorities, in line with constant changes in market operations. Mutual notification of enforcement activities, affecting the other party is also covered as well as leeway for both agencies to request each other to start enforcement actions against anticompetitive behaviour happening in the territory of either party. Both sides have to bear in mind the interests of the other party.

58. The European Union-Swiss bilateral cooperation agreements provides for exchange of evidence obtained by the competition authorities when investigating the same a case, a feature that is not present in other bilateral cooperation agreement. Such a provision is subject to trust and very strict conditions aimed at protecting business secrets and personal data, including a shield from using such evidence to impose sanctions on natural persons. That said, this development is a big leap and an innovation in a bilateral cooperation agreement.

59. Other regional cooperation efforts exist in different regions of the world. Such frameworks include the African Competition Forum and the Sofia Forum, the Lima Declaration between Chile, Colombia and Peru. Most of these arrangements exhibit informal cooperation mechanisms, which allow them to collaborate in dealing with cross-border anticompetitive practices and also in general cooperation activities including training for capacity-building and exchange of staff. In the absence of formal agreements,

¹⁸ http://ec.europa.eu/competition/international/bilateral/agreement_eu_ch_en.pdf.

¹⁹ http://europa.eu/rapid/press-release_IP-13-444_en.htm.

or where agreements exist but are not operational, ad hoc cooperation networks have been emerging rather rapidly in the last decade.

60. International and regional organizations such as UNCTAD, OECD, International Competition Network and SADC have provided other mechanisms for general cooperation and exchange of information, capacity-building and trust building which promote informal cooperation. An UNCTAD report²⁰ on informal cooperation discusses these frameworks in detail.

IV. The future of international cooperation in merger cases

61. The cross-border aspect of competition law enforcement especially on mergers remains a challenge, especially to young competition agencies, which often face financial and human resource constraints. These challenges clearly underscore the need for collaborative enforcement between competition agencies to ensure that anticompetitive mergers do not undermine the benefits of well-functioning markets.

62. The development of international cooperation is mostly hindered by the gap in governance, when different authorities impose different remedies, based on jurisdictional procedures. An example highlighting this gap is the different decision taken by the British and French competition authorities over the 2013 Eurotunnel merger.²¹ The trend is that there are likely to be fewer problems on cooperation as new forms of cooperation develop. On the other hand, in the absence of better methods of coordination, even in cases where formal cooperation mechanisms exists, challenges are likely to persist.

63. During the fourteenth session of the Intergovernmental Group of Experts meeting, a number of best practices to strengthen informal cooperation among competition agencies were suggested based on the experiences of member countries and institutions. Informal cooperation is still the best option towards cooperation in many developing countries. If one compares the one milestone in formal cooperation in terms of the European Commission/Swiss agreement on competition matters with the mushrooming of ad hoc cooperation arrangements all over the world, it is evident that the formal agreement sphere tends to be more legalistic and not easy to develop and implement in comparison with informal agreements. That being the case then, it is worth noting that informal cooperation efforts are driving international cooperation outside of the European Union and other bilateral agreements governing the operations of mature competition agencies, and a few others with upcoming agencies. These practices are still valid today and action still needs to focus on the following:

- (a) Promoting better understanding of each other's laws, assessment criteria and design of remedies and sanctions so as to promote transparency in procedures, processes and design. UNCTAD work in developing countries including the Lima Declaration, which could lead to the development of appropriate solutions to legal limitations, particularly for young competition agencies;
- (b) Building human and technical capacities of young competition agencies to enforce competition law by:
 - (i) Developing capacity-building programmes such as the establishment of regional training centres in Hungary, Mexico and the Republic of Korea; and

²⁰ TD/B/C.I/CLP/13.

²¹ <http://globalcompetitionreview.com/reviews/62/sections/210/chapters/2529/united-kingdom-merger-control/>.

information-sharing networks such as the African Competition Forum and the activities of other regional integration groupings;

(ii) Exchanging staff and/or detaching resident advisers to promote mutual understanding and trust;

(c) Developing guidelines and best practices for cooperation agreements based on what works and what does not;

(d) Ensuring the inclusion of provisions in national laws allowing for cooperation and exchange of information for enforcement purposes;

(e) Establishing and implementing clear safeguards for due process and the protection of confidential information under the auspices of regional groupings such as COMESA, SADC, ASEAN Working Group on Competition, CARICOM, WAEMU, CIS and the Euro-Asia Platform.

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