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Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

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**Implementation of the United Nations guidelines for consumer protection
and the Set of Multilaterally Agreed Equitable Principles and Rules for
the Control of Restrictive Business Practices**

Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

Note by the UNCTAD secretariat

Summary

This note reviews the major developments that have taken place at the national and regional levels in the field of competition law and policy, in particular since the Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, held in July 2015. The note reviews developments in the implementation of the Set, focusing on activities at the regional level, which have recently intensified, then introduces recent developments in facilitating international cooperation that were the outcome of discussions between member States in this period. Finally, it outlines possible new areas of focus in the field of competition policy, which the Eighth United Nations Conference to Review All Aspects of the Set may wish to recommend.



I. Introduction

1. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was adopted by the General Assembly of the United Nations in resolution 35/63 of 5 December 1980 and has since been the only internationally agreed instrument on competition; 2020 marks its fortieth anniversary. Competition law and policy continues to attract the attention of developing countries and countries with economies in transition at the national, regional and multilateral levels. Some jurisdictions have enacted and strengthened their competition law frameworks and improved their law enforcement, recognizing the importance of competition policy throughout this 40-year period. Until 1979, only 24 countries had competition laws, and most of these were developed countries.¹ A significant increase in the adoption of competition law occurred in the late 1980s and early 1990s. At present, almost 140 countries across all continents, including developing countries and countries with economies in transition, have adopted competition laws.²

2. The Set recommends equitable rules for the control of anticompetitive practices; establishes objectives, principles and rules for regulating anticompetitive practices and the enforcement rules of member States; and creates a framework for international cooperation and the exchange of best practices. The Set also includes the development dimension, stating that States should take into account the development, financial and trade needs of developing countries (section C, paragraph 7). Accordingly, developing countries should be able, if needed, to adopt competition legislation in a progressive or more flexible manner, that is, by taking into account their development objectives, exemptions for certain sectors and coherence with other economic policies.

3. UNCTAD is the custodian of the Set and the focal point for competition law and policy within the United Nations system, facilitating the annual sessions of the Intergovernmental Group of Experts on Competition Law and Policy and the United Nations Conference to Review All Aspects of the Set, held every five years. The Set states: “subject to the approval of the General Assembly, five years after the adoption of the Set of Principles and Rules, a United Nations Conference shall be convened by the Secretary-General of the United Nations under the auspices of UNCTAD for the purpose of reviewing all the aspects of the Set of Principles and Rules. Towards this end, the Intergovernmental Group shall make proposals to the Conference for the improvement and further development of the Set of Principles and Rules” (section G, paragraph 6). The Conferences assess the execution of the UNCTAD mandate on competition policy and the implementation of the Set, on the basis of proposals for improvement and further development, which comprises discussing other topics of common interest, such as voluntary peer reviews of competition law and policy and technical cooperation and capacity-building.

4. The Intergovernmental Group of Experts on Competition Law and Policy, at its eighteenth session, held from 10 to 12 July 2019, which acted as the preparatory body for the Conference, reaffirmed “the fundamental role of competition law and policy for sound economic development and the need to further promote the implementation of the Set”, and requested the UNCTAD secretariat to prepare reports and studies on the implementation of the Set as background documentation for the Eighth Review Conference.³ Chapter II of the present note reviews the major developments in the implementation of the Set since the Seventh United Nations Conference to Review All Aspects of the Set and chapter III focuses on activities at the regional level, which have recently intensified. Chapter IV introduces recent developments in facilitating international cooperation, which were the

¹ Australia, Austria, Belgium, Canada, Chile, Denmark, Finland, France, Germany, Greece, India, Ireland, Israel, Japan, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, South Africa, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America.

² See <https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide>. Note: All websites referred to in footnotes were accessed in June 2020.

³ TD/B/C.I/CLP/55.

outcome of discussions between member States in this period. Chapter V outlines possible topics to be addressed at sessions of the Intergovernmental Group of Experts over the next five years.

II. Major developments since the Seventh United Nations Conference to Review All Aspects of the Set

A. Competition laws at the national level

5. The objectives of the Set are to promote the benefits that arise from competition law and policy and to strengthen enforcement against anticompetitive practices worldwide. With a special focus on developing countries, the five objectives are to: ensure that anticompetitive practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade; attain greater efficiency in international trade and development, such as through the creation, encouragement and protection of competition; protect and promote social welfare in general and the interests of consumers; eliminate the disadvantages to trade and development which may result from anticompetitive practices and thus help to maximize benefits to international trade; and facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels (section A).

6. Some jurisdictions, including developing countries and countries with economies in transition, have enacted legislation since the Seventh United Nations Conference to Review All Aspects of the Set and some have modified their laws following technical cooperation with UNCTAD. For example, Algeria carried out legislative reforms in 2016.⁴ Angola and Nigeria adopted their first national competition laws, in 2018 and 2019, respectively.⁵ Argentina and Botswana reformed their laws following peer review recommendations, in 2017 and 2018, respectively.⁶ In Cambodia, a competition law is expected to be enacted in 2020, following which all member States of the Association of Southeast Asian Nations will have comprehensive competition laws.⁷ Ghana is in the approval process of its first general competition law.⁸ In Peru, UNCTAD contributed to the process of the approval of merger legislation in 2019.⁹ In Zimbabwe, the competition law, established since 1996, is being amended and awaiting approval.

7. Some jurisdictions substantially revised their competition laws during this period, aiming to strengthen and improve competition law frameworks and enforcement, such as through the increase of sanctions against anticompetitive practices, the introduction of leniency programmes and other detection tools, the reinforcement of the independence of competition authorities and the removal of exemptions.¹⁰ Some competition authorities

⁴ See www.conseil-concurrence.dz/wp-content/uploads/2017/01/modif.pdf.

⁵ See <https://globalcompetitionreview.com/insight/europe-middle-east-and-africa-antitrust-review-2020/1195070/angola-overview>; and <http://fccpc.gov.ng/news-events/releases/2019/02/06/federal-competition-and-consumer-protection-bill/>.

⁶ See <https://www.argentina.gob.ar/noticias/el-congreso-sanciona-la-nueva-ley-de-defensa-de-la-competencia-0>; and <https://www.competitionauthority.co.bw/competition-act-2018>.

⁷ See <https://asean.org/cambodia-hosts-8th-asean-competition-conference/>.

⁸ See <https://globalcompetitionreview.com/chapter/1196724/ghana-plans-to-create-a-competition-authority>.

⁹ See <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2090>.

¹⁰ Such jurisdictions include the following, based on inputs from member States (and the latest year of amendment): Armenia (2018; www.competition.am/uploads/resources/orenk_eng.pdf); Australia (2017; <https://www.accc.gov.au/media-release/accc-welcomes-new-era-in-competition-law>); Austria (2017; https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/2-_Federal_Cartel_Act_final.pdf); https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/1-_Federal_Competition_Act_final.pdf); Azerbaijan (2018); Belgium (2019; https://www.belgiancompetition.be/sites/default/files/content/download/files/20190606_notice.pdf); Bulgaria (2019; www.cpc.bg/storage/file/Protection_of_Competition_Act.pdf); Chile (2016; <https://www.fne.gob.cl/congreso-aprueba-reformas-al-dl-211/>); Germany (2018; www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.pdf); Japan (2019;

renewed or clarified their competition policies and approaches to new markets with digital features. For example, in 2017, a new merger control threshold was introduced into the competition law of Germany, based on the value of the transaction and detailing the criteria, including direct and indirect network effects, to be taken into account in assessing market power for abuse of a dominant position and Austria also adopted a similar transaction value threshold.¹¹ Japan has published revised guidelines on mergers that clarify the legal view on digital economy-related issues such as non-price competition, research and development and data collection.¹² Other jurisdictions, including Australia, Canada, the United Kingdom and the European Commission, have released reports summarizing their views on competition laws and policies in dealing with the emerging digital economy.¹³ Such issues have also been addressed in developing countries. For example, in 2019, a report on digital era competition law was released by Brazil, China, India, the Russian Federation and South Africa.¹⁴

8. The Set includes principles and rules for prohibiting anticompetitive practices and conducting enforcement against such practices, as follows: Section C provides general principles for the control of anticompetitive practices, including the development dimension; section D details the core anticompetitive practices that companies “engaged on the market in rival or potentially rival activities, should refrain from” as well as the acts they should refrain from when “through an abuse or acquisition and abuse of a dominant position of market power, they limit access to markets or otherwise unduly restrain competition” (paragraphs 3 and 4); and section E addresses national and regional levels, stating that member States should “adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures” (paragraph 1). The UNCTAD Model Law on Competition also provides further, more concrete guidance by compiling substantive possible elements for a competition law. Part 1 serves as a permanent guide, including model competition law provisions, and part 2 provides commentaries on relevant chapters, and is periodically revised in the light of legislative developments and comments made by member States. Since the Seventh United Nations Conference to Review All Aspects of the Set, chapters II, V, VI, VII, IX and X of part 2 have been revised. Revisions to chapters III and IV will be presented to the Eighth United Nations Conference to Review All Aspects of the Set. Part 1 of the Model Law has remained unchanged since its adoption in the early 1990s and most jurisdictions worldwide already have competition laws. It may therefore be timely to examine its recommended provisions and consider either a possible revision, taking into account the needs of more effective competition law enforcement in the digital era, or explore other recommended instruments to assist less experienced competition authorities.

<https://www.jftc.go.jp/en/pressreleases/yearly-2019/June/19061907.html>); Kenya (2016; https://www.cak.go.ke/sites/default/files/Competition_Act_No._2012_of_2010.pdf); Lithuania (2019; <https://kt.gov.lt/en/administrative-information/annual-reports-1>); Luxembourg (2016; <https://concurrency.public.lu/dam-assets/fr/legislation/loi-du-23-octobre-2011-relative-a-la-concurrency-version-coordonnee-du-4-avril-2017.pdf>); Portugal (2018; law 23/2018; concorrenca.pt/vPT/A_AdC/legislacao/Paginas/Legislacao.aspx); South Africa (2018; <https://www.gov.za/documents/competition-amendment-act-18-2018-englishafrikaans-14-feb-2019-0000>); Spain (2017; <https://www.boe.es/buscar/pdf/2007/BOE-A-2007-12946-consolidado.pdf>); Sweden (2018; www.konkurrensverket.se/konkurrens/lagar-och-forordningar/); Thailand (2017; https://otcc.or.th/wp-content/uploads/2020/02/TRADE-COMPETITION-ACT-B.E.-2560-EN-article_20190221100346.pdf).

¹¹ See

https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=6; and https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/2-_Federal_Cartel_Act_final.pdf.

¹² See <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217.html>.

¹³ See <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>;

<https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html>;

<https://www.gov.uk/government/>

[publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel](https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel); and

<https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en>.

¹⁴ See <http://bricscompetition.org/research-digital-markets/>.

B. Discussions at the Intergovernmental Group of Experts on Competition Law and Policy

9. The Set states: “The Intergovernmental Group shall have the following functions: “to provide a forum and modalities for multilateral consultations, discussion and exchange of views between States on matters related to the Set of Principles and Rules, in particular its operation and the experience arising therefrom; to undertake and disseminate periodically studies and research on restrictive business practices related to the provisions of the Set of Principles and Rules, with a view to increasing exchange of experience and giving greater effect to the Set of Principles and Rules; [and] to collect and disseminate information on matters relating to the Set of Principles and Rules to the overall attainment of its goals and to the appropriate steps States have taken at the national or regional levels to promote an effective Set of Principles and Rules, including its objectives and principles” (section G, paragraph 3).

10. Following the Seventh United Nations Conference to Review All Aspects of the Set, four sessions of the Intergovernmental Group of Experts were held, as well as one ad hoc expert group meeting. Topics at round-table consultations held during sessions of the Intergovernmental Group of Experts have included capacity-building in competition law and policy and competition issues in the health sector, as well as other topics related to the challenges faced by competition authorities in developing countries and to competition issues in specific sectors or areas, including issues related to digitalization, as well as international cooperation in cross-border anticompetitive cases (see chapter IV).¹⁵ Such discussions are beneficial for all competition authorities, in particular those in developing countries, with a view to enhancing competition laws and policies and implementing them more effectively. The conclusions of the discussions and exchanges of information and experience among experts on these informative topics are recorded in the publicly available reports of the sessions and disseminated by UNCTAD through its capacity-building activities.¹⁶

C. Technical cooperation

11. Technical cooperation, one of the three pillars of the work of UNCTAD, is mentioned in section F of the Set (paragraph 6). UNCTAD has a wide range of technical cooperation activities, at the national and regional levels, such as assisting in the preparation, adoption, revision and/or implementation of competition and consumer protection laws and policies; helping to build institutional capacity for the effective enforcement of competition and consumer protection laws; and raising consumer protection awareness among a wide range of stakeholders, including through competition advocacy.

12. Since their launch in 2005, the voluntary peer reviews of competition law and policy have been a useful tool in enhancing the quality and effectiveness of the competition policy enforcement framework in member States. The voluntary peer reviews involve the scrutiny of competition law and policy as embodied in the legal framework of a State and consideration the effectiveness of institutions and institutional arrangements in enforcing competition law. Competition climates have improved in 10 countries following the peer review processes facilitated by UNCTAD and the peer review reports have been used in amending legislation, for advocacy and in establishing a new training agenda for staff.¹⁷ Since the Seventh United Nations Conference to Review All Aspects of the Set, voluntary

¹⁵ See examining the interface between the objectives of competition policy and intellectual property (TD/B/C.I/CLP/36); enforcement of competition policy in the retail sector (TD/B/C.I/CLP/38); enhancing international cooperation in the investigation of cross-border cases (TD/B/C.I/CLP/44); challenges in the design of a merger control regime for young and small competition authorities (TD/B/C.I/CLP/45); challenges faced by developing countries in competition and regulation in the maritime transport sector (TD/B/C.I/CLP/49); competition issues in the sale of audiovisual rights for major sporting events (TD/B/C.I/CLP/50); and competition issues in the digital economy (TD/B/C.I/CLP/54).

¹⁶ TD/B/C.I/CLP/40; TD/B/C.I/CLP/47; TD/B/C.I/CLP/52; TD/B/C.I/CLP/55.

¹⁷ UNCTAD, 2018a, *UNCTAD Toolbox: Delivering Results* (Geneva).

peer reviews of competition law and policy have been undertaken by seven countries, namely Albania (2015), Fiji and Papua New Guinea (2015), Uruguay (2016), Argentina (2017) and Botswana (2018). In 2019, in response to requests, UNCTAD undertook legal assessments of the national competition law of Belarus and the regional competition law of the Eurasian Economic Commission based on the Model Law on Competition and international best practices from more experienced jurisdictions. These assessments provided recommendations that might improve both competition frameworks.

13. As a follow-up to the voluntary peer reviews, UNCTAD has been providing technical cooperation and capacity-building through workshops and seminars, to assist in the dissemination and implementation of the recommendations of the peer review reports. Such activities contribute to the success of the voluntary peer reviews. For example, the voluntary peer review of Botswana in 2018 was followed by dissemination events in 2019. Following the peer reviews of competition law and policy, UNCTAD organized advocacy seminars and workshops in Zimbabwe (2015) and Uruguay (2017), targeting parliamentarians, sectoral regulators, the judiciary, business representatives, lawyers and academics, to create awareness and understanding of the benefits of competition and facilitate the adoption of new competition laws and policies by the legislative bodies in both States. Both countries are expected to approve their revised legislation. In the United Republic of Tanzania, in 2017 and 2018, training workshops were organized as follow-ups to the implementation of the recommendations of the peer review report, targeting judges, competition officials and commissioners and members of the competition tribunal.

III. Regional activities

14. Alongside the major developments in the implementation of the Set at the national level, some regional organizations, in particular among developing countries, have begun to adopt or implement regional competition rules and/or engage in cooperation agreements for more effective competition law enforcement. Common approaches and the harmonization of legislation are increasing, largely as a result of constructive exchanges of experience and consultations that take place in bilateral, regional and multilateral forums, such as the Intergovernmental Group of Experts on Competition Law and Policy. To date, at least 11 regional economic organizations have established regional competition laws and authorities, as follows: Andean Community (regional competition law and authority, 2005);¹⁸ Caribbean Community (2008);¹⁹ Central African Economic and Monetary Community (2005);²⁰ Common Market for Eastern and Southern Africa (competition regulations and competition rules, 2004); East African Community (regional competition law, 2014, and regional competition authority, operational in 2018);²¹ Economic Community of West African States (regional competition law, 2008, and regional competition authority, 2019);²² Eurasian Economic Union (2015);²³ European Union (1957);²⁴ Southern Common Market (protocol of the defence of competition, 1996); and West African Economic and Monetary Union (2002).²⁵ In 2017–2019, UNCTAD implemented a technical cooperation programme in the Central African Economic and Monetary Community that led to the adoption of new regulations on competition and consumer protection by the Council of Ministers in April 2019.

¹⁸ Decision 608 on the rules for the protection and promotion of competition.

¹⁹ Treaty of Chaguaramas, revised, 2001, chapter 8, articles 168–183.

²⁰ Regulation No. 12/05-UEAC-639 U-CM-SE.

²¹ See J Karanja-Ng'ang'a, 2017, East African Community competition law, in: E Ugirashebuja, JE Ruhangisa, T Ottervanger and A Cuyvers, eds., *East African Community Law: Institutional, Substantive and Comparative European Union Aspects* (Brill Nijhoff, Boston, United States).

²² Supplementary Act A/SA.1/06/08; Supplementary Act A/SA.2/06/08.

²³ Treaty on the Eurasian Economic Union, section XVIII and annex 19.

²⁴ Treaty Establishing the European Economic Community; Council regulation No. 17/62 of 6 February 1962.

²⁵ Treaty of the West African Monetary and Economic Union, articles 88–90; regulation No. 2/2002/CM/UEMOA; Regulation No. 3/2002/CM/UEMOA.

15. With the progress of globalization and the development of the digital economy, anticompetitive conduct and mergers have increasingly become cross-border operations. Digital companies can expand their business activities worldwide without a physical presence, which can be a challenge in enforcing competition laws. This requires more enhanced enforcement cooperation among competition authorities. In particular, young competition authorities may require assistance in dealing with international cases, as they often have resource constraints in detecting anticompetitive practices and gathering the necessary information and evidence. Such international cooperation is more easily initiated at the regional level compared with at the global level, given that countries in the same region may have similar backgrounds and legal frameworks, common interests, mutual areas of benefit and better understanding of each other's needs, which may be prerequisites for effective cooperation.²⁶ In particular, exchanges of information, necessary for effective cooperation, occur among competition authorities with the same level of protection as in handling confidential information. Such regional cooperation among competition authorities, resulting in more efficient investigation procedures and coherent outcomes, would also be beneficial from the viewpoint of companies, which often operate their businesses within certain regions rather than globally. Therefore, it may be time for an overview of the significance of this trend, as provided in this note. This section describes the progress of regional activities since 2015 and examines the benefits and challenges of regional competition frameworks and law enforcement, based on inputs from member States and regional organizations.

A. Progress in regional competition law and policy frameworks since 2015

16. There are different ways in which regional organizations can establish competition law and policy frameworks. In some cases, regional economic treaties or agreements include competition provisions and in other cases, jurisdictions within the same region conclude treaties or agreements specifically on competition. In addition, national competition authorities can develop and strengthen cooperative relationships with neighbouring authorities in the same region by concluding, either formally or informally, bilateral or multilateral cooperation agreements among them, without creating regional bodies. The latter type may be seen as the regional integration of competition law, policy and enforcement, and is therefore also included in this discussion.

1. Regional competition laws and authorities

17. The Association of Southeast Asian Nations does not have a regional competition law or authority but there is an initiative for the integration of competition law and policy among the member States, which are implementing a number of activities with regard to the commitments in the Economic Community Blueprint 2015, Economic Community Blueprint 2025 and the Competition Action Plan 2016–2025.²⁷ Such activities include the following: enhancement of competition law and policy, taking into account international best practices and agreed Association guidelines; establishment of a competition enforcers' network to facilitate cooperation on competition cases in the region and serve as a platform to handle cross-border cases; and development of a regional cooperation framework, involving a set of guidelines for cooperation in interregional competition cases and stating that such cooperation will be founded on mutual respect, transparency, goodwill, flexibility and the availability of resources.²⁸ Nine of the 10 member States have competition laws in place; Cambodia expects to enact a competition law in 2020.

²⁶ UNCTAD, 2018b, Agenda item 3 (e): Report of the discussion group on international cooperation, presented at the seventeenth session of the Intergovernmental Group of Experts on Competition Law and Policy, 11–13 July, available at <https://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1675>.

²⁷ See https://asean.org/?static_post=asean-economic-community-blueprint-2025; and <https://asean-competition.org/read-publication-asean-competition-action-plan-acap-2016-2025>.

²⁸ See <https://asean.org/asean-establishes-competition-enforcers-network-regional-cooperation-framework-virtual-research-centre/>.

18. The association agreement between States in Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) and the European Union has deadlines for the adoption of national competition laws in those States that have not yet done so and for establishing a regional competition law and independent regional competition authority.

19. The East African Community competition authority became operational in 2018.²⁹

20. The Economic Community of West African States, in 2008, adopted a regional competition law that includes provisions on restrictive business practices, the abuse of dominant position, mergers and acquisitions and State aid and, in 2019, launched the regional competition authority. Significantly, the authority can fill the gap of national competition frameworks in the region, as many member States do not yet have effective national competition laws and authorities.³⁰

21. The Treaty on the Eurasian Economic Union, which entered into force in 2015, includes general principles and rules on competition that include prohibitions on anticompetitive agreements, abuse of a dominant position and unfair competition, which have effects on competition in cross-border markets in member States. The treaty also established the regional competition authority, the Eurasian Economic Commission, which has exclusive authority to enforce the regional competition law.

22. The European Union and the European Competition Network are the eldest and most advanced framework for the regional integration of competition law, policy and practice worldwide. Competition authorities in member States of the European Union have, along with the European Commission, the authority to apply articles 101 (prohibition against anticompetitive agreements) and 102 (prohibition against abuse of a dominant position) of the Treaty on the Functioning of the European Union. One of the important roles of the European Competition Network, established in 2004, is to ensure that these provisions are applied effectively and consistently throughout the European Union. In 2019, the national competition authorities of the member States adopted the European Competition Network+ directive, to ensure that national competition authorities have a complete set of investigative and decision-making tools, including with regard to requests for information, which is expected to be implemented in each member State by February 2021. This is a significant improvement of the European Competition Network, given that the competition authorities currently follow different, national rules. Neighbouring States such as Albania, Serbia and Switzerland work together with and harmonize their competition laws and practices with those of the European Union, resulting in greater cooperation in the region.³¹

23. The main objectives of the Southern African Development Community, which has 16 member States, are to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.³² The Declaration on Cooperation in Competition and Consumer Policies is not a regional competition law but provides a cooperation framework in the implementation of the national competition laws of the member States.³³ The Competition and Consumer Policy and Law Committee was set up to foster cooperation and dialogue aimed at encouraging the convergence of competition laws,

²⁹ See <https://www.theeastafrican.co.ke/business/East-Africa-competition-watchdog-operations-market-studies/2560-4361580-1rqaquz/index.html>.

³⁰ See <https://www.africanlawbusiness.com/news/9770-ecowas-introduces-competition-regulator>.

³¹ Competition-related agreements concluded by the European Union increasingly include clauses related to cooperation and some agreements, mainly those with potential candidates for accession to the European Union, ensure the compatibility of States' competition legislation with European Union competition law (RD Anderson, WE Kovacic, AC Müller and N Sporysheva, 2018, Competition policy, trade and the global economy: Existing World Trade Organization elements, commitments in regional trade agreements, current challenges and issues for reflection, Staff working paper No. ERS-D-2018-12, World Trade Organization).

³² See <https://www.sadc.int/about-sadc/overview/sadc-objectiv/>.

³³ See https://www.sadc.int/documents-publications/show/SADC_Declaration_on_Competition_and_Consumer_Policies.pdf.

analysis and common understanding.³⁴ In 2016, pursuant to the Declaration, member States signed a memorandum of understanding on inter-agency cooperation in competition policy, law and enforcement, towards closer cooperation in national competition law enforcement to effectively address national and cross-border competition cases, providing for information sharing and the coordination of investigations on cases and envisaging the harmonization of rules and procedures for handling cases and of joint capacity-building and research activities.³⁵ The African Continental Free Trade Agreement will include a protocol on competition policy. As with competition frameworks in other developing countries, a challenge is that many members do not have competition laws or authorities. Negotiations on the protocol on competition policy have not yet been completed; competition policy may be enforced through a supranational African Continental Free Trade Area competition authority, a competition cooperation framework or a sequential approach in which a supranational authority follows a competition network.³⁶

2. Regional integration among competition authorities through bilateral and multilateral agreements

24. Competition authorities often use bilateral and multilateral agreements to develop cooperation in the same way as with regard to the process of regional organization, that is, they tend to conclude agreements among competition authorities in the same region that have reciprocity, areas of mutual benefit and similar rules concerning information confidentiality and investigative procedures.

25. The African Competition Forum, an informal network of competition authorities, including national and regional authorities, was established in 2011 to promote the adoption of competition principles in countries in Africa by encouraging and assisting them to adopt competition laws, building the capacities of competition authorities and raising competition awareness in countries. This is not a formal regional framework in which competition authorities cooperate in actual case investigations and enforcement, as some members still do not have national competition laws. However, it has been engaged in various activities, including capacity-building and competition advocacy, encouraging the adoption of competition law and conducting studies through research and workshops. Since the establishment of the African Competition Forum, the number of members has increased from 11 to 35 and includes regional competition authorities such as the East African Community and the Economic Community of West African States.

26. A planned regional comprehensive economic partnership between 10 member States of the Association of Southeast Asian Nations and six other countries in Asia and the Pacific will be a free trade agreement that includes competition provisions. Negotiations started in 2012, and the agreement is expected to be concluded in the next few years and to create a new regional initiative for competition law and policy.

27. There is substantive integration among competition authorities with advanced enforcement and cooperation experience. For example, under a cooperation agreement originally concluded among the authorities of Denmark, Finland, Iceland, Norway, Sweden and Greenland, national competition authorities in the region assisted each other in applying their respective rules. The agreement enabled them to exchange information related to competition law enforcement, including confidential information, and to advocacy initiatives and agency effectiveness, at all staff levels. This cooperation framework is based on a history of close collaboration in the region, with shared traditions, mutual trust and markets with common characteristics. In 2017, this cooperation was strengthened by a new cooperation agreement between Denmark, Finland, Norway and Sweden, which allows authorities to carry out dawn raids on behalf of one another in competition cases and to issue requests for information on behalf of one another in antitrust and merger cases.

³⁴ See <https://www.sadc.int/themes/economic-development/trade/competition-policy/>.

³⁵ See <https://www.sadc.int/news-events/news/competition-authorities-sadc-member-states-signed-memorandum/>.

³⁶ United Nations Economic Commission for Africa, 2019, *Assessing Regional Integration in Africa: Next Steps for the African Continental Free Trade Area* (Addis Ababa).

28. The Sofia Competition Forum was founded by UNCTAD and the competition authority of Bulgaria in 2012 as an active platform for technical cooperation, exchanges of experience and consultations in the field of competition law and policy among participants. It is not a framework for enforcement cooperation in actual cases, but the participants meet and develop various projects for comparative overviews of the competition laws of their jurisdictions. For example, in 2017, the topics of sanctions and leniency programmes relevant to effective law enforcement were discussed. Four meetings have been held since 2015.

3. Features of recent regional activities

29. The discussion in the above sections shows that regional activities can be a driving force for enhancing competition law and policy at the national level and that there is a continuous need for regional competition frameworks in the field of competition worldwide.

30. Regional competition provisions and enforcement bodies have been progressing in terms of both their number and the level of cooperation. The following features are seen in the recent activities described above: integration and collaboration, both bilateral and multilateral, are more likely to happen among competition authorities with similar legal frameworks, mutual areas of benefit and a better understanding of each other's laws and practices (this generally occurs among neighbouring countries and countries in the same region) and some competition authorities emphasize that cooperation frameworks are based on equity and mutual interests; and regional competition frameworks among members with shared goals and interests can lead to closer and stronger cooperation.

31. The European Union has a high-level cooperation scheme, namely, the European Competition Network and the European Competition Network+ directive. Some bilateral and multilateral agreements between competition authorities with strong relationships grant member authorities the power to conduct investigations on behalf of one another, such as under the cooperation agreement between Denmark, Finland, Norway and Sweden. Further, regional competition frameworks are strengthened and deepened gradually, in stages. Some recently established frameworks do not yet provide for full authority, for example, a merger control regime in interregional markets may be absent (such as in the Eurasian Economic Union) or a regional competition law may only cover competition advocacy. By contrast, the European Competition Network has confidential information exchanges and common instruments for enforcement in all member States. A higher level of cooperation thus requires stronger relationships. Member authorities can develop mutual understanding through dialogue and collaboration in cases, which can lead to deeper cooperation arrangements in future.

B. Benefits and challenges of regional competition frameworks

1. Benefits

32. The main objectives of regional organizations are to improve regional integration, economic growth, trade and/or development. Enhancing competition law, policy and enforcement within the region, namely, through collaborative formal or informal arrangements (cooperation agreements; memorandums of understanding), is instrumental in achieving the goals. Some regional organizations have competition frameworks, along with agreements between their national competition authorities to achieve closer cooperation. The fact that regional competition frameworks have emerged and evolved worldwide shows that they can yield significant benefits to competition authorities, particularly young and small authorities, as follows:

(a) Ensuring effective and efficient competition law enforcement. It is commonly understood that regional competition frameworks deal more effectively and efficiently with intraregional cross-border anticompetitive practices. National competition authorities, particularly young and small authorities, are often constrained in their autonomy to enforce national competition laws with regard to cases beyond their own jurisdictions. Regional authorities have advantages in collecting evidence within the region, imposing adequate

sanctions regionwide and increasing deterrence effects. National authorities benefit from regional competition frameworks as a platform through which to share views and information on anticompetitive cases, discuss current issues and cooperate in investigations. Some agreements enable member authorities to exchange confidential investigative information or conduct investigations on behalf of one another, an invaluable method of assistance;

(b) Filling the gap of national competition frameworks. This relates to the previously noted issues of enforcement effectiveness and resources. For example, under regional organizations with developing country members, such as the Common Market for Eastern and Southern Africa and the Economic Community of West African States, the national competition frameworks of some member States face enforcement-related challenges, or have not yet established an enforcement authority and others have not yet adopted relevant laws. In such cases, regional competition legislation can be implemented and enforced in member States that lack domestic frameworks, thereby filling the gap;

(c) Strengthening national competition regimes. The examples from the Association of Southeast Asian Nations and Central America show that regional activities can assist in the introduction and enhancement of competition law and policy at the national level through the development of regional standards for legal instruments. The European Competition Network+ directive ensures that all member States in the European Union, including those with smaller competition authorities, are granted appropriate enforcement tools, which increases and levels the investigative and sanctioning powers of national competition authorities and provides for better coordinated law enforcement. Further, competition awareness, often lacking in less-experienced jurisdictions, can be spurred by regional competition law enforcement;

(d) Reducing human resources-related and financial constraints. Regional competition frameworks can significantly overcome national constraints by merging resources and achieving economies of scale. Some member States lack legislation, enforcement institutions or the resources needed to enforce the law and this can be mitigated by the creation of regional competition laws and authorities;

(e) Providing technical cooperation and capacity-building. Some regional competition frameworks provide for capacity-building training among competition officials from member States, such as workshops and seminars on case handling and enforcement practices and strategies and for sharing experiences. Staff exchanges can take place within regional competition frameworks to promote mutual learning and deepen cooperative relationships.

2. Challenges

33. Current regional competition frameworks continue to face challenges and obstacles, such as the following:

(a) Difficulties in implementing regional competition frameworks at the national level. This is particularly observed under large regional organizations, whose degree of development in the field of competition varies. Regional competition frameworks often require member States to proceed with legal amendments to be fully functional, which could be difficult and burdensome for some that have resource constraints and lack competition awareness;

(b) Asymmetrical interests of member States. The objectives of regional competition frameworks may conflict with those of national frameworks. Competition provisions and enforcement decisions at the regional level do not always bring about the desired outcomes at the national level, interfering with regional-level enforcement. In addition, some competition authorities are more advanced with regard to existing legislation, resources and capacities, affecting the necessary focal points in cross-border cases. Further, already established national authorities are expected to support young and small national authorities, leading to some imbalance within regional frameworks;

(c) Case allocation among national and regional competition authorities. This is a major challenge. Regional competition laws may include criteria for the division of work.

In some cases, the regional authority has exclusive authority to handle region-wide anticompetitive practices; in other cases, the authority of the member State whose market is more affected by an anticompetitive practice may claim to be the responsible authority, following the criterion of better-placed authority. In this regard, some regional organizations are equipped with coordination systems to determine which authority is responsible in the event of a conflict. The criteria for assignment are usually based on the effects in a geographical market, which may need to be adjusted according to the characteristics of the digital economy.

IV. International cooperation

34. Cooperation among competition authorities is an essential tool in addressing anticompetitive practices in the global economy. Section F of the Set provides for cooperation at the international level in eliminating or dealing with anticompetitive practices. The Seventh United Nations Conference to Review All Aspects of the Set reaffirmed that future sessions of the Intergovernmental Group of Experts should include four clusters of issues for informal consultations, including international cooperation and networking.³⁷

35. Competition authorities employ various tools in cooperating with each other, ranging from formal agreements to informal communications. International organizations, including the International Competition Network and the Organization for Economic Cooperation and Development, have promoted understanding of the importance of international cooperation and have developed tools such as recommendations and best practices to assist competition authorities. There has been an increase in informal cooperation in international cartel cases and mergers, given the difficulties in engaging in formal cooperation arrangements.³⁸

36. Despite the availability of multiple tools for competition authorities, international cooperation still does not take place frequently, in particular when authorities in developing countries must deal with international cases.³⁹ Member States recognized that an effective enabling environment for competition and development should include international cooperation to deal with cross-border anticompetitive practices, in an increasingly globalized and digitalized world.

37. The Federal Antimonopoly Service of the Russian Federation suggested a new tool for enhancing international cooperation under section F and, in 2017, UNCTAD established a discussion group on international cooperation to discuss ways and means of improving international cooperation under section F.⁴⁰ Guiding policies and procedures in implementing international measures under section F were endorsed by member States at the eighteenth session of the Intergovernmental Group of Experts and UNCTAD was asked to disseminate them across regions, involving business and academia, during the preparatory year before the Eighth United Nations Conference to Review All Aspects of the Set.⁴¹ In this way, the guiding policies and procedures may become more widely known and recognized among member States and relevant stakeholders, and can serve as a comprehensive and practical guidance instrument on, and to trigger and assist, cooperation among competition authorities worldwide, particularly between young and experienced authorities. Importantly, the guiding policies and procedures should be used in actual cases in practice, so that young authorities can more effectively tackle the impact and harmful effects of cross-border anticompetitive practices in their jurisdictions.

³⁷ TD/RBP/CONF.8/11, chapter I, paragraph 19.

³⁸ TD/RBP/CONF.8/2. Informal cooperation among competition authorities should not be underestimated (TD/B/C.I/CLP/16).

³⁹ TD/B/C.I/CLP/44; UNCTAD, 2018b.

⁴⁰ TD/B/C.I/CLP/40.

⁴¹ TD/B/C.I/CLP/55, chapter I, paragraphs 6 and 7.

V. Topics for future consideration

38. Delegates at the Eighth United Nations Conference to Review All Aspects of the Set may wish to reflect on possible topics in the area of competition law and policy that UNCTAD should focus on over the next five years, taking into account the guidance in the resolution of the Seventh United Nations Conference to Review All Aspects of the Set and the items addressed at the sessions of the Intergovernmental Group of Experts on Competition Law and Policy since that Conference.

39. Member States may wish to consider the following in determining possible topics to be addressed at sessions of the Intergovernmental Group of Experts over the next five years:

(a) Reflection on the Model Law on Competition. Some jurisdictions have newly adopted competition laws and the Model Law contributed to these developments.⁴² Around 140 jurisdictions have already adopted competition laws, yet legal and institutional frameworks and their enforcement may need strengthening or improving through new tools such as leniency programmes. The need to adjust frameworks and instruments to challenges related to the digital economy has been noted and an analysis of the Model Law is therefore necessary in the light of recent developments, to consider its revision or the adoption of other, complementary tools or instruments following recent changes;

(b) Assessment and feedback following technical cooperation. Technical cooperation, one of the three pillars of the work of UNCTAD, is addressed in section F of the Set. Technical cooperation activities should target cost-effectiveness, complementarity and collaboration among providers and recipients and identify priority areas and issues. In this regard, more effective and targeted technical cooperation activities can be achieved by focusing on recipient needs and through closer cooperation and coordination with other international organizations, seeking to further develop joint work whenever possible and avoiding duplication. It is important to request and gather beneficiary country assessment and feedback on technical cooperation activities, including the voluntary peer reviews of competition law and policy, in cooperation with other organizations and donors;

(c) Impact assessment of competition legislation in developing countries. Forty years have passed since the adoption of the Set and competition law and policy has been attracting significant attention worldwide. Competition law and policy contribute to economic efficiency and inclusive and sustainable development, vibrant economies and consumer welfare. However, it is important to assess and measure the impact of the implementation of competition frameworks in developing countries and countries with economies in transition. The concrete demonstration of the benefits brought by competition law and policy would clearly support competition advocacy and the awareness of various stakeholders including politicians, sectoral regulators and the public. One possible focus of future impact assessment exercises could be regulated markets that have undergone reviews from the viewpoint of competition policy.

⁴² Some member States, particularly developing countries, have emphasized the importance of the Model Law and stated that it helped in drafting appropriate competition legislation and verifying whether the provisions in their competition laws corresponded to those in the Model Law (TD/RBP/CONF.4/15; TD/RBP/CONF.5/16).