

**CARTEL WORKING GROUP
Subgroup 2: Enforcement
Techniques**

**ANTI-CARTEL ENFORCEMENT
MANUAL**

**Chapter on International Cooperation
and Information Sharing**

Table of Contents

1. INTRODUCTION	3
2. TYPES OF INFORMATION	4
2.1. DEFINITIONS RELATED TO INFORMATION DISCLOSURE	4
2.2. DEFINITIONS RELATED TO THE NATURE OF INFORMATION.....	5
3. ABILITY TO SHARE INFORMATION	6
3.1 CONFIDENTIALITY	6
3.2 CONFIDENTIALITY EXCEPTIONS	6
3.2.1 <i>Waivers</i>	7
3.3 CONFIDENTIALITY SAFEGUARDS	7
3.4 PROCEDURAL CONSIDERATIONS.....	7
4. TOOLS FOR INTERNATIONAL COOPERATION AND INFORMATION SHARING	9
4.1 INFORMAL.....	9
4.1.1 <i>Bilateral</i>	9
4.1.2 <i>Multilateral</i>	9
4.2 FORMAL	9
4.2.1 <i>State-to-State Cooperation Agreements</i>	10
4.2.2 <i>Agency-to-Agency Cooperation Arrangements</i>	10
4.2.3 <i>Mutual Legal Assistance Treaties</i>	10
4.2.4 <i>Free Trade Agreements, Economic Partnership Agreements, and Regional Trade Agreements</i>	10
4.2.5 <i>Memoranda of Understanding</i>	11
4.2.6 <i>Domestic Provisions</i>	11
4.3 INTERNATIONAL ORGANIZATIONS	11
4.4 TECHNICAL ASSISTANCE	11
5. USES OF INFORMATION	12
5.1 PRE-INVESTIGATION STAGE.....	12
5.2 INVESTIGATION STAGE	13
5.3 POST-INVESTIGATION STAGE	13
6. CHALLENGES	14
6.1 EXCHANGE OF CONFIDENTIAL INFORMATION	14
6.2 DIFFERENT DEFINITIONS OF CONFIDENTIAL INFORMATION.....	14
6.3 CIVIL/ADMINISTRATIVE VERSUS CRIMINAL REGIMES.....	14
6.4 RESOURCE CONSTRAINTS.....	14
6.5 INSTITUTIONAL HURDLES.....	14
6.6 LEGAL FRAMEWORK.....	15
6.7 LACK OF COORDINATION	15
7. EXAMPLES OF COOPERATION	16
7.1 EUROPEAN COMPETITION NETWORK	16
7.1.1 <i>Principle of Parallel Competences</i>	16
7.1.2 <i>Information Exchange</i>	16
7.1.3 <i>Mutual Assistance</i>	16
7.1.4 <i>Fora within the ECN</i>	17
7.2 AFRICAN COMPETITION FORUM	17
7.2.1 <i>Research by the African Competition Forum</i>	17
7.3 REGIONAL COMPETITION CENTER FOR LATIN AMERICA.....	17
8. CONCLUSION.....	18

1. Introduction

In today's global economy, it is essential that competition enforcement transcend national boundaries to protect the benefits of competitive and honest markets. The borderless workplace for competition enforcers has prompted competition agencies to seek out reliable, constructive and innovative means of cooperation and information sharing with other competition agencies.

Many of the issues outlined in this chapter were discussed during the 2012 International Competition Network ("ICN") Annual Conference, the 2012 ICN Cartel Workshop, and at recent Organisation for Economic Cooperation and Development ("OECD") meetings.¹

This chapter is intended to be a reference for competition agencies that are undertaking international cooperation or information sharing in the course of anti-cartel investigations, and is not intended to be a comprehensive guide. The ICN Anti-Cartel Enforcement Manual is a work in progress and all chapters may be updated or revised in the future. This chapter complements existing chapters on searches, raids and inspections, leniency, digital evidence gathering, case initiation, interviewing techniques, investigative strategy, case resolution methods, and cartel awareness, outreach and compliance. Finally, this chapter and the others that form the Anti-Cartel Enforcement Manual must be read in the context of current enforcement laws, policies and practices of each jurisdiction.

Practices which work well in the jurisdiction(s) where they are applied may or may not work well in the legal context of another jurisdiction and, therefore, cannot necessarily be recommended for adoption by other ICN members. This compilation does not purport to present all of the possible practices, nor does it necessarily recommend these practices over others, as the appropriate choice of approach will depend on the circumstances of each particular situation. The relevance and therefore likely adoption by jurisdictions of particular practices outlined in this chapter will be influenced by their competition policy and law environment. In some cases, certain practices will not be available due to legal, legislative or political regimes in which those competition agencies operate.

This chapter addresses international cooperation and information sharing in the context of cartels. It does not address international cooperation or information sharing outside of the cartel context. The information contained in this chapter may not always correspond to other competition enforcement topics.

¹ In particular, the OECD and ICN recently conducted a joint questionnaire on International Enforcement Cooperation: Status Quo and Areas for Improvement, and the OECD held a roundtable discussion on Limitations and Constraints on International Cooperation in October 2012, available online at: http://ec.europa.eu/competition/international/multilateral/2012_oct_limitations_en.pdf.

2. Types of Information

This chapter uses the same set of definitions as those used in the ICN Cartel Working Group's Charts Summarizing Information Sharing Mechanisms (the "Charts").²

For the purposes of the Charts and this chapter, two categories of definitions related to information are used: the first category includes definitions related to information disclosure, while the second category includes definitions related to the nature of information. Both categories of definitions can be applied to the same information at the same time. For example, information provided to a competition agency by a leniency applicant can be both confidential and factual.

References to the sources of the terms taken from ICN and OECD publications are provided in footnotes, as appropriate.³

2.1. Definitions related to information disclosure

Information – for the purposes of this chapter, information is limited to information relating in some form to cartels, cartel investigations or cartel regulation.

Publicly available information – information that is already in the public domain, i.e. the information that can be found in the open sources and obtained by any interested party without any legal restrictions.

Agency internal information – information competition agencies are permitted, but not required by law, to limit access to, e.g. the nature or status of their investigations, their investigation theories, or their preliminary conclusions.

Privileged information – information that is subject to a legal right to keep some very limited kinds of communications confidential and exempt from disclosure in civil and criminal law proceedings, such as some kinds of communications between solicitor and client. Please note that this definition is quite general and may differ across jurisdictions.

Confidential information – information which is defined as such by national law. For example, information could be defined as confidential if it constitutes business secrets of a company or if its disclosure in normal circumstances could prejudice the commercial interests of a company.⁴

² The Charts were prepared for the purposes of facilitating international cooperation with respect to anti-cartel enforcement by providing ICN Members with a practical summary of the ways in which they can share cartel-related information with each other. The Charts are available online at: <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/ism.aspx>.

³ The terms and definitions used in the Charts and this chapter were mostly taken from dictionaries of legal terms and ICN or OECD publications, particularly:

- ICN Cartel Working Group SG 1 Report on Cooperation Between Competition Agencies in Cartel Investigations, available online at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf>;
- OECD Global Forum on Competition. Information Sharing in Cartel Cases – Suggested Issues for Discussion and Background Material. Note by the Secretariat (under Session IV B), available online at: <http://www.oecd.org/dataoecd/9/38/1828095.pdf>; and
- OECD Global Forum on Competition. Information Sharing in Cartel Investigations. Note by the Secretariat (Session IV), available online at: <http://www.oecd.org/dataoecd/57/40/1820435.pdf>.

Note: some jurisdictions treat “agency internal information” and “confidential information” as synonyms.

2.2. Definitions related to the nature of information

Evidence – evidence in a broad sense refers to something that furnishes proof of a matter. In the legal context, it is something legally submitted to a court or another decision-making body to ascertain the truth of a matter.

Factual information – information on facts, i.e. on something done or performed or something that has occurred for sure, as well as on statements that are held to be the truth or reality.

Legal information – information on legal rules used for consideration of the case.

Information on sanctions – information on financial and other penalties imposed on a party found guilty of a competition violation.

Information on timing of the case – information on activities to be undertaken throughout the investigation and consideration of a case with indication of their chronological order.

Note: some jurisdictions treat “evidence” and “factual information” as synonyms.

⁴ ICN Cartel Working Group SG 1 Report on Cooperation Between Competition Agencies in Cartel Investigations, available online at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf>.

3. Ability to Share Information

In many jurisdictions, competition legislation provides the legal basis for cooperation and information sharing with foreign competition agencies. In other jurisdictions, a mandate for limited international cooperation and information sharing is derived through other legal instruments. This section provides an overview of the legal bases for international cooperation and information sharing, specifically for the purposes of cartel investigations.

Enabling legislation for international cooperation can take various forms. Provisions in national competition laws generally support such cooperation, particularly with respect to cartel investigations. Some competition agencies have a clear mandate for cooperation with explicit provisions enabling, under certain conditions, the sharing of confidential information. Other jurisdictions allow cooperation among competition agencies if necessary, but do not lay out specific guidelines as to how such cooperation is to take place.

Several jurisdictions have amended their competition laws, in line with the 2005 OECD best practice guidelines⁵, to enable the sharing of confidential information with foreign competition agencies. While each country's approach is shaped by domestic legislative and political considerations, there are a number of common features. These include maintaining the requested competition agency's discretion to refuse a request, and ensuring that the requested competition agency's staff bear responsibility for improper disclosure of confidential information.

More information regarding the legal framework of various jurisdictions can be found in the Charts, as well as the Anti-Cartel Enforcement Templates found on the ICN's website.⁶

3.1 Confidentiality

Most jurisdictions have legal barriers in place, limiting competition agencies' ability to share confidential information. The definition of "confidential information" varies by jurisdiction, and in some jurisdictions, it is not precisely defined by content, but rather by the means used to obtain the information. Restrictions on communicating confidential information largely depend on how and from whom the information was obtained.

Many competition agencies have guidelines in place that permit the communication of some confidential information with their foreign counterparts in order to advance their investigations. In some jurisdictions these allowances are legislated, while in others, they are set out in formal cooperation agreements or arrangements.

3.2 Confidentiality Exceptions

In most jurisdictions there are some exceptions to the rules governing confidentiality. For example, the majority of competition agencies are permitted to disclose confidential information if the provider of the information has authorized the disclosure of the information (as in the form of a waiver), the disclosure is required pursuant to a court order or national freedom of information

⁵ *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations*. OECD Competition Committee, 2005, available online at: <http://www.oecd.org/competition/cartels/35590548.pdf>.

⁶ Anti Cartel Templates, available online at: <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/templates.aspx>.

laws, or the disclosure is pursuant to a formal international cooperation treaty between competition agencies.

3.2.1 Waivers

The providers of confidential information may, in some cases, voluntarily provide a waiver of confidentiality. Waivers are particularly important with respect to cooperating parties, as competition agencies generally do not disclose the identity of or information provided by immunity or leniency applicants without a waiver. In many jurisdictions, cooperating parties are encouraged to, and routinely do, provide waivers.

Waivers in some jurisdictions are classified into two categories: procedural and full/substantive. Procedural waivers relate to the timing of key investigative events and the nature of cooperation, and do not permit the discussion between competition agencies of any substantive issues related to the application for immunity or leniency. Full waivers, on the other hand, allow for the discussion between competition agencies of the content of information, evidence, records or statements provided by cooperating parties.

3.3 Confidentiality Safeguards

When competition agencies exchange confidential information, it is essential for certain confidentiality safeguards to be in place. As such, it is important for competition agencies to establish and maintain an effective and credible system of handling confidential information provided to them by foreign competition agencies. The major elements of such a system might include:

- a) Agreement to oppose, to the fullest extent possible, consistent with laws, any application by a third party for disclosure.
- b) Agreement that communication of the information provided is subject to acceptability of assurances given by the competition agency providing the information.
- c) Unless otherwise agreed, information provided by the competition agency is used only for the purpose for which it was communicated.

3.4 Procedural Considerations

Clear procedures for the exchange of confidential information between competition agencies contribute to the efficiency of cross-border cartel investigations. The list below covers some procedural elements that might be important for certain competition agencies to consider:

- a) Requesting information
All requests for information and data should be in writing, except in exceptional circumstances, in which the requested competition agency may entertain a request otherwise. However, if a request is not made in writing, it should be confirmed in writing as soon as possible.
- b) Content/format of the request
The request for information should include all of the details of the requesting competition agency and it should clearly identify the requested material. It should include the following:
 - a. The name of the competition agency initiating the investigation;

- b. A brief description of the subject matter and nature of the investigation;
 - c. A description of the evidence, information, and data sought; and
 - d. A statement of the purpose for which the evidence, information, data or other assistance is sought.
- c) Deciding on the request
The requested competition agency should decide on the extent it intends to respond to the request in a timely manner and make arrangements accordingly. In this regard, the requesting competition agency should keep in mind that most jurisdictions will have to exercise some kind of discretion when making this decision.
- d) Confidentiality
The competition agency providing the information should ensure the confidentiality of the request made and its contents. If the request necessitates a breach of confidentiality, it should only be executed with the consent of the requesting competition agency.
- e) Denial or delay in request
If a request is denied or delayed for any reason, the requested competition agency should inform the requesting competition agency of the reasons for denial or delay of the request.
- f) Costs
Often, the competition agency providing the information bears the cost associated with responding to a request for information. The issue of who should bear the cost associated with responding to the request should be discussed and decided before the request is responded to.
- g) Limitations on the use of requested information
The information provided by the competition agency should not be used for any other purpose. Requesting competition agencies can ask to deviate from this principle and may do so, but only with prior approval/consent from the competition agencies providing the information. If consent is provided, the requesting competition agency should comply with the conditions specified by the requested competition agency.

4. Tools for International Cooperation and Information Sharing

4.1 Informal

Informal information sharing is an important tool that many competition agencies utilize as an enforcement strategy. As a general rule, informal exchanges do not involve highly sensitive information, unless there are exemptions, such as waivers, given by the parties. This type of information sharing can be done at the working level or the management level, and can involve discussions between competition agencies relating to cases that are common between two or more competition agencies, or the sharing of best practices. This type of information sharing can be done in a bilateral format between two competition agencies, or in a multilateral forum involving multiple agencies.

4.1.1 Bilateral

The primary means in which information is shared informally between competition agencies involves bilateral contact at the working level. This contact can take a variety of forms, including in-person meetings, e-mail exchanges, and telephone calls between individuals or case teams. Bilateral contact can occur at all stages of an investigation, and involves the sharing of many different types of information. For example, bilateral contact could include a discussion of background information about the industry and relevant actors, the sharing of case theories or the disclosure of investigative or analytical findings.

In addition to informal information sharing at the working level, many competition agencies also engage in extensive cooperation with foreign counterparts through bilateral meetings at the management level. These meetings can take place in-person or over the telephone, and often occur on a regular basis. Bilateral meetings at the management level generally involve high-level discussions of common cases, including the status of the investigation and other case-related information. In addition, bilateral meetings are also a good forum to discuss policy issues, or to seek guidance from another competition agency on a specific issue or concern.

4.1.2 Multilateral

In addition to bilateral contact at the working level or management level, many competition agencies engage in case-specific multilateral contact with two or more competition agencies. This form of contact normally occurs when multiple competition agencies are investigating the same or similar conduct in their respective jurisdictions. The contact can occur through in-person meetings, by e-mail, or by telephone. However, in-person meetings are rare due to logistical difficulties with arranging these meetings between several competition agencies. Multilateral contacts typically include discussions of investigative and analytical findings, the sharing of case theories and the coordination of formal powers.

4.2 Formal

Generally speaking, when competition agencies wish to exchange more sensitive information, or wish to use information formally in their proceedings, they must exchange such information through formal avenues.

There are several formal tools available to competition agencies to assist in the sharing of information. These formal tools can include State-to-State cooperation agreements (“Agreements”), Agency-to-Agency cooperation arrangements (“Arrangements”), Mutual Legal Assistance Treaties (“MLATs”), Free Trade Agreements (“FTAs”), Economic Partnership Agreements (“EPAs”), Regional Trade Agreements (“RTAs”), and Memoranda of Understanding (“MOUs”) and domestic provisions. Each of these formal tools provides competition agencies with unique ways to share information with their foreign counterparts.

4.2.1 State-to-State Cooperation Agreements

Agreements are concluded between countries and may apply to important domestic interests that go beyond competition law enforcement interests. Agreements are typically comprehensive in nature, favouring the exchange of information and formal notifications; however, parties are generally not compelled to communicate any information. Agreements foster a culture of cooperation among participating competition agencies, enhancing coordination with regard to related matters, positive comity and avoidance of conflicts, consultation, periodic meetings, and confidentiality.

In the Charts, twenty-five out of twenty-six ICN Cartel Working Group member agencies reported that they maintained cooperation agreements relating to information sharing at either the bilateral or multilateral level. Twenty-three of the twenty-five members indicated that cooperation agreements include a specific section on information exchanges, and twenty-one of the twenty-five members stated that their respective cooperation agreements include a general section on cooperation in enforcement.

4.2.2 Agency-to-Agency Cooperation Arrangements

Arrangements are concluded between competition agencies and the interests implicated under such Arrangements are limited to competition law enforcement. Although they are somewhat less comprehensive in scope than Agreements, they are typically structured similarly. Like Agreements, arrangements typically provide for notification, cooperation and coordination, avoidance of conflicts, meetings, and protection of confidential information. Arrangements generally do not contain provisions on positive comity, nor do they provide for formal consultations or formal notifications. In some circumstances, a suitable cooperation Arrangement may be a pre-condition of providing confidential information under certain domestic provisions.

4.2.3 Mutual Legal Assistance Treaties

Competition agencies may also rely on MLATs to seek evidence of cartel activity located in other jurisdictions. MLATs permit law enforcers, including competition agencies, to request formal assistance in obtaining and transmitting evidence relating to criminal matters, for example, by providing documents or executing requests for search and seizure. MLATs can be either bilateral or multilateral, and they are a useful tool when evidence is located abroad and/or foreign counterparts are unable to share information under less formal mechanisms.

4.2.4 Free Trade Agreements, Economic Partnership Agreements, and Regional Trade Agreements

FTAs, EPAs and RTAs are other mechanisms used to encourage international cooperation. They are bilateral or multilateral agreements between countries pursuant to which duties and other restrictive regulations of commerce are eliminated on substantially all of the trade between the

respective countries in products originating in these nations.⁷ Although FTAs, EPAs and RTAs are broad in nature, they often contain provisions on competition policy and encourage international cooperation.

4.2.5 Memoranda of Understanding

MOUs are another formal tool of international cooperation and information sharing. MOUs describe a bilateral or multilateral agreement between competition agencies, rather than countries, and express a convergence of will between the competition agencies, indicating an intended common line of action. However, unlike other formal tools of international cooperation and information sharing, MOUs are not legally enforceable. Nevertheless, they are an important formal tool of cooperation between competition agencies, particularly in instances where they cannot create a legally enforceable agreement.

4.2.6 Domestic Provisions

Domestic legislation permitting the disclosure of confidential information to foreign law enforcement bodies is one of the key formal information sharing mechanisms available in some jurisdictions. These provisions allow for the disclosure of “protected information” to a foreign government body in certain circumstances if the competition agency decides that such disclosure will enable or assist the body to perform its functions, or exercise its powers.

4.3 International Organizations

The ICN and OECD, among other international organizations, have helped foster international cooperation and enhanced the global effort to investigate and bring competition offenders to justice. These multilateral fora also help facilitate relationship building between competition agencies.

4.4 Technical Assistance

Many competition agencies also build relationships with foreign counterparts by providing or receiving technical assistance. Technical assistance is the process by which a newer competition agency can take advantage of the experience of others as it develops that experience and judgment on its own.⁸ Competition agencies with the expertise to provide technical assistance often have a greater understanding of the challenges and consequences of competition law and policy, and can share their knowledge and experiences with newer competition agencies. Examples of technical assistance include: short-term missions; national, regional, and international seminars; teleseminars; legislative drafting help; and academic studies. However, a single model of technical assistance does not fit all circumstances, and successful technical assistance programs must be designed flexibly around the needs and circumstances of each recipient.

⁷ GATT 1994: Article XXIV, par. 8(b), available online at: http://www.wto.org/english/tratop_e/region_e/regatt_e.htm.

⁸ International Competition Network, “Findings Related to Technical Assistance for Newer Competition Agencies,” (May 2007), International Competition Network, available online at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc366.pdf>.

5. Uses of Information

Generally, competition agencies may request information from foreign counterparts at any stage of a cartel investigation. For purposes of discussion in this section, cartel investigations have been broken down into three stages: pre-investigation stage, investigation stage, and post-investigation stage. This precise structure may not be applicable to all jurisdictions.

5.1 Pre-investigation Stage

At the pre-investigation stage, a requesting competition agency is likely to need information in situations where it does not have sufficient indications of cartel behaviour, such as a leniency application or a complaint from a party that was affected by the alleged conduct. Additionally, a requesting competition agency may seek information if the information provided by an applicant or complainant is not sufficient for the competition agency to make a decision on opening an investigation. At this stage, the information most needed is likely to be as follows:

- a) A notification of the commenced investigation;
- b) Information on what triggered the investigation of the particular case by the foreign competition agency;
- c) Which companies are involved in the alleged conduct and how these companies behave in international markets;
- d) Where the evidence for the alleged conduct is situated;
- e) The practices of the companies that may invoke a suspicion of collusive behavior, such as price fixing, market allocation, a “soft” cartel/collective upstream boycott or other types of anticompetitive abuses;
- f) The theory of the case and how the alleged conduct can be legally classified;
- g) The actual or potential effects/harm of the conduct in question; and,
- h) Whether the alleged conduct affects the national market of the requesting competition agency.

More detailed information on these issues would assist the requesting competition agency in making a decision on opening an investigation pursuant to a leniency application, complaint or *ex-officio* detection. Moreover, based on the information provided and their respective timing, the cooperating competition agencies might decide to coordinate their future investigatory efforts.

Cross-border cooperation at the pre-investigation stage will essentially relate to the timing and scope of initial investigative actions. This cooperation can include the preparation and coordination of simultaneous searches and informal discussions on the scope of such searches, such as targets and relevant product and geographic areas. Such coordinated actions offer the advantage of maintaining the element of surprise and thus increasing the likelihood of a successful outcome.

5.2 Investigation Stage

At the investigation stage, there are several types of information that may be requested from a foreign competition agency. It is important for requesting competition agencies to be able to obtain factual information that can serve as evidence of anticompetitive behaviour in their respective jurisdictions, especially when such evidence cannot be obtained from the parties under investigation in the national territory of the requesting competition agency. This evidence can include documents demonstrating collusion, evidence of meetings between the participants to the cartel, audio and video records of negotiations between parties of the cartel, and forensic evidence.⁹ Of course, the exchange of information between competition agencies is subject to the confidentiality limitations applicable to each jurisdiction. It should also be noted that some competition agencies do not exchange information at all.

In addition, at the investigation stage, informal discussions can be held on the “state of play” and timing of investigations, the scope of a case and possible remedies. Other aspects of investigations, such as the coordination of interviews, may also be discussed. This information may be necessary for exploring the possibility of coordination of a requesting competition agency’s enforcement efforts with that of a requested competition agency, depending on legal arrangements. Further, competition agencies can share intelligence and substantive theories of violation and harm, as well as their views regarding the timing of review and decision. International cooperation between competition agencies may also be useful in obtaining information from non-competition agencies, such as tax or company registers.

A requesting competition agency may also wish to ask another competition agency to compulsorily obtain such evidence on its behalf. However, this type of information may be legally protected in the jurisdiction of the requested competition agency and, therefore, it may be that this information cannot be provided unless requested pursuant to an MLAT.

The need for many types of information that may be requested at the pre-investigation stage may also occur at the investigation stage. This information could include methodological issues, such as the theory of harm, the definition of the relevant market, and the results of market studies and more general market information that may be available from a foreign competition agency. In cases where investigatory efforts are being coordinated by more than one competition agency, arriving at a common understanding of methodological issues is important to ensure successful coordination.

5.3 Post-Investigation Stage

The post-investigation stage can also be called the “end of the investigation stage”, and can be characterized as a phase where the evidence of a violation has been collected and analyzed, and the investigation is completed. Depending on the jurisdiction, this stage can occur after the formal closing of an investigation, or while the investigation is still formally open.

At the post-investigation stage, the most demanded information relates to issues such as determining remedies and imposing sanctions, particularly the calculation of fines, and the development of case settlement approaches. For competition agencies requesting information, the information can have either pure methodological value in the absence of coordination and cooperation in the course of investigation, or may serve as a means to avoid dual punishment for the same violation for the same legal and/or physical persons. Achieving cohesion in approaches to sanctions and remedies is important in situations where cartels affect multiple jurisdictions.

⁹ See the ICN Cartel Working Group Anti-Cartel Enforcement Manual, available online at: <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx>.

6. Challenges

Although potentially very beneficial to competition agencies, there are many challenges associated with international cooperation and information sharing. Some of the most common problems faced by competition agencies in cooperating internationally and sharing information in the cartel investigation process are as follows:

6.1 Exchange of Confidential Information

The exchange of confidential information and data among competition agencies is perhaps the most important concern as far as the investigation of cartel cases is concerned. The main reason for this constraint is that the laws of most countries do not support the sharing of confidential information with other competition agencies, and some countries even prohibit the exchange of information for the purpose of maintaining confidentiality. It should be noted, however, that “without confidentiality protections, there would be no information to share.”¹⁰

6.2 Different Definitions of Confidential Information

Different definitions of confidential information in varying jurisdictions can lead to problems when competition agencies seek to cooperate while investigating cartel cases of an international nature.

6.3 Civil/Administrative versus Criminal Regimes

Cartel cases are prosecuted criminally in some jurisdictions, but not in others. This difference in approach may create a limitation on the ability of some competition agencies to share information with other jurisdictions that may have a different anti-cartel enforcement regime.

6.4 Resource Constraints

Many competition agencies face resource constraints. The investigation process can be significantly hindered by a lack of experience and skilled personnel. In addition, funding is also a source of concern for many competition agencies. Resources that a competition agency may need to use for making or responding to requests for information may be more efficiently utilized in other matters requiring more immediate action.

6.5 Institutional Hurdles

Most emerging competition agencies operate in jurisdictions that have only recently adopted competition regimes. As a result, there are very few cartel cases that have been investigated by these competition agencies. Many of these competition agencies also lack investigatory powers, such as leniency programs, the ability to conduct raids, etc.

¹⁰ Report on the OECD/ICN Survey on International Enforcement Cooperation (February 2013), which concludes “without confidentiality protections, there would be no information to share,” available online at: <http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3%282013%292&docLanguage=En>.

6.6 Legal Framework

Differences in legal framework can lead to a lack of understanding among competition agencies and insufficient transparency, which is required by competition agencies seeking information. As in the case of many developing and emerging economies, where the legal framework is not fully advanced, a mature competition agency may demonstrate a lack of confidence in the quality of information provided by a newer competition agency in a developing jurisdiction.

6.7 Lack of Coordination

A lack of coordination that could arise within a competition agency may lead to delays in the investigation process. In some cases, language barriers and practical difficulties, such as different time zones, cause difficulties as well.

7. Examples of Cooperation

7.1 European Competition Network

The European Competition Network (“ECN”)¹¹ is composed of the European Commission and the National Competition Agencies (“NCAs”) of European Union (“EU”) Member States. The ECN was established in 2004, and ensures an effective and coherent application of EU competition law throughout the EU. The ECN also provides a framework for the cooperation between the European Commission and NCAs. The ECN is a forum in which the competition agencies can exchange information, share experiences, and assist one another in fact-findings and investigations.

7.1.1 Principle of Parallel Competences

EU competition rules are applied in cases where a cartel significantly affects trade between EU Member States. The principle of parallel competences is applied within the EU, meaning that a cartel case will be dealt with either by a single NCA (possibly with the assistance of other NCAs); several NCAs acting in parallel; or the Commission. The ECN member agencies apply EU competition law in close cooperation, providing for an allocation of cases according to the principle of “well-placed” agency. An NCA is considered to be well placed to deal with a case if the agreement or practice substantially affects competition mainly within its territory, or where the NCA is able to effectively bring the infringement to an end. Parallel action of two or more NCAs is appropriate only where one NCA would not be sufficient to bring the infringement to an end. The Commission is particularly well placed in cases where the agreement or practice has effects on competition in more than three EU Member States.

A number of mechanisms have been put in place to ensure a coherent and consistent application of EU competition rules which are being applied in parallel by the Commission and the NCAs within the ECN.

7.1.2 Information Exchange

A key element of the functioning of the ECN is information exchange. The Commission and NCAs have the power to provide one another with information regarding any matter of fact or of law, including confidential information. This provision takes precedence over any contrary law of an EU Member State.

7.1.3 Mutual Assistance

Another pillar of cooperation within the ECN is mutual assistance with investigations. An NCA may ask another NCA for assistance in order to collect information on its behalf. An NCA can also ask another NCA to carry out fact-finding missions on its behalf. Where an NCA acts on behalf of another NCA, it acts pursuant to its own rules of procedure. The Commission can ask an NCA to carry out inspections on its behalf and agents of the Commission may assist the NCA during such inspections.

¹¹ Further information on the ECN is available online at: http://ec.europa.eu/competition/ecn/index_en.html.

7.1.4 Fora within the ECN

Multilateral work within the ECN takes place at different levels: the meetings of the Director Generals or heads of the competition agencies; Plenary Meetings; horizontal working groups; and sector-specific subgroups. Furthermore, an Advisory Committee has been established to discuss individual cases.

7.2 African Competition Forum

The African Competition Forum (ACF) was launched in Nairobi, Kenya on March 3, 2011. The principal objective of the ACF is to promote the adoption of competition principles in the implementation of national and regional economic policies within African countries, in order to alleviate poverty and enhance inclusive economic growth, development and consumer welfare by fostering competitive markets, thereby increasing investment, productivity, innovation and entrepreneurship. Specifically, the ACF works to assist in building the capacities of competition agencies in the region, and to promote awareness and appreciation of competition principles among government and other stakeholders. This Forum is significant because it promotes networking among ACF competition agencies and experts, as well as between them and regional and international experts on competition enforcement matters. The ACF also provides a platform for mobilizing and harnessing experiences and ideas in competition regulation within African countries. This is necessary for improving the management of competition policy and law in order to deepen gains from local, regional and international liberalized markets.

7.2.1 Research by the African Competition Forum

Research forms a key part of the work of the ACF. ACF research projects are based on regional research needs, and undertaken by collaborating competition agencies from a particular region. This cross-country focus aids in entrenching collaboration across countries, with research that has benefits or consequences for multiple nations or competition agencies. It is anticipated that collaborative research between competition agencies and members of the broader research community will yield significant evidence-based analysis in competition regulation in Africa. ACF workshops and research create greater awareness about competition principles, greater detection and eradication of anti-competitive behaviour in markets.

7.3 Regional Competition Center for Latin America

The Regional Competition Center for Latin America (“CRCAL”) is a multilateral initiative developed by thirteen competition agencies belonging to Latin America and the Caribbean. The principal objective of the CRCAL is to enhance competition agencies’ technical capacities. The CRCAL has commissioned guidelines on exchanges of information among competitors based on best international practices. These guidelines are designed to serve two purposes. First, they are intended to provide competition agencies of member countries with guiding principles and a general framework for analyzing horizontal collaborations among competitors. Second, they provide guidance to businesses and their legal advisors on how competition agencies may wish to assess the legality of these formal and informal agreements.

8. Conclusion

Due to the increasingly borderless nature of hardcore cartels, international cooperation and information sharing among competition agencies around the world is essential in order to effectively prevent, detect, and punish these cartels. Although there remain challenges to international cooperation and information sharing, particularly given the sensitive and confidential nature of much of the information being shared among competition agencies, continued cooperation between competition agencies is vital.

Competition agencies should continue to support and promote cooperation and information sharing by encouraging both formal and informal mechanisms at both the working level, and the management level. Although this chapter has laid out many of the methods currently being used to share information and cooperate at the international level, the list is not exhaustive, and the anti-cartel community continues to develop and encourage new, innovative tools and mechanisms of international cooperation and information sharing.