

**QUESTIONNAIRE ON COMBATING CROSS BORDER CARTELS**

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

This questionnaire is aimed at Competition Authorities or any other public authorities, empowered to protect economic competition, of developed and developing countries without prejudice if it has experience of combating cross border cartels or not.

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

**Cross border cartel** – tacit or implicit collusion between economic entities (competitors within a specific relevant market), which are registered in different jurisdictions, and restrict competition on the territory of two or more jurisdictions.

**International Cooperation** – any interaction of two or more Competition Authorities or any other public authorities, empowered to protect economic competition, in the process of investigating an antitrust case.

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

Please return this questionnaire to bricscompetition@gmail.com **by August 20, 2020**. All questions related to this questionnaire could be addressed to this e-mail as well.

Replies to this questionnaire will be used for preparation of the research paper to be drafted by the BRICS Competition Law and Policy Center. The findings and results of the research will be circulated to all member States attending the 8th Review Conference in Geneva as a contribution to the Roundtable on Combating Cross Border Cartels and will be presented in the course of the mentioned Roundtable.

 **General Information**

 Title of your Competition Authority *Title*

 Contact person *Name*

 Contact information (phone, e-mail) *Contact information*

1. **Legislative issues**
2. Does your competition legislation establish a definition of a ‘cartel’? If so, please, indicate the provision in your law or cite the exact wording of the relevant provision below.

☐ Yes

☐ No

*Please indicate the relevant provision here*

1. Do you have ‘per se’ prohibition of cartels in your jurisdiction?

☐ Yes

☐ No

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

☐ Yes

☐ No

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

 *Please indicate it here in US dollars*

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

☐ Yes *Please, indicate which one*

☐ No

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

☐ Yes

☐ No

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

*Please indicate it here*

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

☐ Yes

☐ No

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

 *Please indicate it here*

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

☐ Yes, both legal entities and individuals

☐ Yes, just legal entities

☐ No

**II. Enforcement**

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

☐ Yes

☐ No

☐ Other *Please, specify*

1. Is combating cartels a priority for your Competition Authority?[[1]](#footnote-2)

☐ Yes

☐ No

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

☐ Yes

☐ No (Please continue with Part IV of this questionnaire)

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

| **2009** | **2010** | **2011** | **2012** | **2013** | **2014** | **2015** | **2016** | **2017** | **2018** | **2019** |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  |  |  |  |  |  |  |  |  |  |  |

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

☐ Yes

☐ No (Please continue with Part III of this questionnaire)

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

 *Please indicate here*

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

 *Please indicate here*

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

☐ Leniency applications

☐ Market inquiries

☐ Interaction with foreign Competition Authorities

☐ Information from the media[[2]](#footnote-3)

☐ Information obtained from other public authorities in your jurisdiction[[3]](#footnote-4)

☐ Anonymous whistleblower

☐ Other *Please indicate here*

1. Could you say that your experience in combating cross border cartels is successful?

☐ Yes

☐ No

1. If no, why?

*Please indicate here*

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

☐ No difficulties

☐ Legislative restrictions[[4]](#footnote-5)

☐ Difficulties related to evidence gathering

☐ Difficulties related to request for information from economic entities located outside your national jurisdiction

☐ Lack of knowledge and specific skills of the employees of your Competition Authority

☐ Lack of resources (financial restrictions, lack of staff, etc.)

☐ Time limits set for conducting investigation

☐ Difficulties related to communication with foreign Competition Authorities

☐ Difficulties related to translation of requests for information into foreign languages

☐ Difficulties related to presence of the defendants from foreign jurisdiction on case hearings

☐ Difficulties related to bringing foreign entities to liability in your national jurisdiction

☐ Difficulties related to collection of fines imposed on foreign economic entities

☐ Other *Please specify*

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

*Please indicate here*

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

☐ Yes

☐ No

1. If no, please indicate the reason why

*Please indicate here*

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

*Please indicate here*

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

☐ Yes, fines always are fully paid

☐ Sometimes we have challenges in collecting fines

☐ No, our fines were not paid by foreign economic entities

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

☐ Yes

☐ No

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

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

*Please describe here*

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

☐ Yes

☐ No, our Competition Authority has never received a leniency application from a foreign economic entity

☐ No, a foreign economic entity has never been the first in line for immunity

☐ No, a foreign economic entity could not apply for immunity

☐ There is no leniency program in our jurisdiction

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

*Please indicate here*

**III. International Cooperation**

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

☐ Yes

☐ No

☐ Other *Please explain*

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

☐ Yes

☐ No

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

☐ Requests for information

☐ Virtual consultations (via phone, Skype, messengers, etc.)

☐ In-person consultations

☐ Exchange of opinions and ideas on investigative methods

☐ Exchange of opinions on existence/absence of antitrust violation on the territory of a certain jurisdiction

☐ Exchange of confidential information

☐ Exchange of confidential documents

☐ Conducting simultaneous dawn raids[[5]](#footnote-6)

☐ Conducting joint market inquires

☐ Conducting joint dawn raids[[6]](#footnote-7)

☐ Enforcement actions on behalf of a foreign Competition Authority

☐ Other *Please specify*

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

☐ Yes, exchange of confidential information is usual practice in our jurisdiction

☐ Yes, we have some experience, but it is not common in our cartel enforcement

☐ No

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

☐ Yes, strongly agree

☐ Partially yes, depends on the concrete case

☐ No, Competition Authority can effectively enforce cross-border cartel by itself

☐ Other *Please specify*

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

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

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

☐ Yes

☐ No

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

*Please indicate here*

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

☐ Yes

☐ No

☐ Other *Please specify*

**IV Challenges and Ways to Overcome Them**

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

☐ You have never faced such violations in your practice

☐ Your Competition Authority has no resources to investigate a cross-border cartel

☐ Your Competition Authority has no knowledge how to investigate cross-border cartels

☐ Your Competition Authority initiated an investigation of a cross-border cartel but was not able to prove the existence of a violation

☐ Your competition legislation does not allow you to investigate cross-border cases[[7]](#footnote-8)

☐ Your competition legislation does not allow you to bring foreign economic entities to liability for antitrust violations

☐ You had to transfer your cross border cartel case to the supra-national level[[8]](#footnote-9)

☐ Other *Please specify*

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

☐ Broadening of functions of your Competition Authority (for example, ability to conduct dawn raids, etc.)

☐ Enhancing competition legislation in the course of combating cartels

☐ Introduction of extraterritoriality into your competition legislation

☐ Creation of internal guidelines on combating cross-border cartels

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

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

☐ Increasing resources of your Competition Authority

☐ Creation or amendment of the leniency program in your jurisdiction

☐ Tightening liability for participation in cross-border cartels

☐ Expansion of work contacts with foreign Competition Authorities

* Initialization of international cooperation through signing bilateral and/or multilateral cooperation agreements with a foreign Competition Authority
* Use of the consultation mechanism provided by the UN Set of Principles on Competition[[9]](#footnote-10)

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

☐ Other *Please specify*

1. Please explain your opinion.

*Please explain here*

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

☐ Convergence of national competition legislations in the course of combating cartels

☐ Existence of active international cooperation between Competition Authorities

☐ Creation of global approaches and standards of combating cross-border cartels

☐ International entrenchment of tools of combating cross-border cartels

☐ Creation of a unified database of cartel case investigation worldwide

☐ Creation of international an organization or supranational authority entrusted with combating cross border cartels

☐ Other *Please specify*

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

☐ Developed

☐ Developing

☐ Uncertain

THANK YOU FOR YOUR TIME

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

1. Priorities could be set in the program documents of a Competition Authority (for example, strategy, ‘road maps’, etc.) or could be not officially set but commonly recognized by management and officials of a Competition Authority. [↑](#footnote-ref-2)
2. It means, for example, news media concerning cartel investigation in another jurisdiction [↑](#footnote-ref-3)
3. For example, in the course of cooperation with the police, prosecutor office, etc. [↑](#footnote-ref-4)
4. For example, if according to national legislation a competition authority is not able to bring a foreign economic entity to liability for antitrust violations [↑](#footnote-ref-5)
5. Simultaneous down raid means the situation when different Competition Authority agree to conduct down raids of possible cartel participants in their national jurisdictions at the same time [↑](#footnote-ref-6)
6. Joint dawn raid means conducting a dawn raid with participation of officials from a foreign Competition Authority [↑](#footnote-ref-7)
7. For example, your competition legislation do not have extraterritorial reach, etc. [↑](#footnote-ref-8)
8. In some territorial unions supra-national Competition Authorities exist which are empowered to investigate antitrust cases related to the whole territory or the territories of several states of the union (for example, the European Commission, the Eurasian Economic Commission, etc.) [↑](#footnote-ref-9)
9. the consultation mechanism is set in Section F of the UN Set of Principles on Competition. It is further detailed in the Guiding Policies and Procedures under Section F of the UN Set. [↑](#footnote-ref-10)