

**Unclassified****English - Or. English****16 July 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Global Forum on Competition****BENEFITS AND CHALLENGES OF REGIONAL COMPETITION AGREEMENTS****--Summary of Discussion--****29-30 November 2018**

The attached document is a summary of the discussion held during Session III of the 17th meeting of the Global Forum on Competition on 29-30 November 2018.

More documents related to this discussion can be found at:  
<http://www.oecd.org/competition/globalforum/benefits-and-challenges-of-regional-competition-agreements.htm>

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## *Summary of Discussion*

By the Secretariat

1. The **Chair**, Mr. Frederic Jenny, opened the session and briefly set out the focus of the session, namely a discussion of the potential benefits and challenges of regional competition agreements (RCAs), with an emphasis on those that have established a regional competition authority. He mentioned that the idea behind this session was to recognise the fact that very often regional co-operation on competition is quite a powerful way to develop sensitivity and awareness for competition at national level, and to help competition authorities share their resources and/or improve their competition law enforcement system. Through sharing experiences, we can potentially identify why some things do or do not work in some contexts, and when they work, what could be exported to other agreements.
2. The Chair then presented the three expert panellists:
  - Dr. Deniz G. Both, a lawyer specialising in international competition law and trade law with a PhD degree in Law from King's College London, and an LL.M. degree in International Competition Law and Policy from the University of East Anglia;
  - Dr. Mor Bakhom, an affiliated research fellow at the Max Planck Institute for Innovation and Competition in Munich, Germany; and
  - Dr. Mario Umaña, Lead Trade and Competition Specialist of the Integration and Trade Sector at the Inter-American Development Bank (IDB) in Washington, D.C.
3. At this point, the Chair pointed out that the Secretariat had received 16 written contributions and that he would try to call on all 16 countries to speak within the time limit. However, the Chair strongly encouraged spontaneous interventions from the experts and delegations. The Chair then briefly explained that the session was structured around geographic regions, in the order of Europe, Sub-Saharan Africa, Latin America, North America, Asia Pacific, and Eurasia (assuming that time allows to address all regions).
4. Then the Chair gave the floor to the Secretariat for a brief overview of the Background Paper.

### **1. Introduction**

5. The Secretariat highlighted the increased regional integration over the past decades that had led to a significant increase in the number of RCAs. There are many approaches that countries and regions can follow and the Background Paper analyses in depth those (11) RCAs that have adopted regional competition provisions and established a regional competition authority: the Eurasian Economic Union (EAEU), the European Union (EU), the European Free Trade Association (EFTA), the Andean Community (CAN), the Caribbean Community (CARICOM), the Southern Common Market (MERCOSUR), the Central African Economic and Monetary Community (CEMAC), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Union of West African States (ECOWAS) and the West African Economic and Monetary Union (WAEMU). Using regional and national competition authorities'

investigative powers and jurisdiction in national cases and the ability of national agencies to apply regional provisions, the Secretariat grouped the 11 RCAs into four “regional models”: (i) the regional referee model where the national authorities, in principle, conduct the investigation and the regional authority takes the decision (CAN, MERCOSUR), (ii) the two-tier model where the national authorities do the national cases and the regional authorities do the regional cases, including the investigations (CARICOM, CEMAC, EAC, EAEU, ECOWAS), (iii) the joint enforcement model where national agencies can, or must, apply regional provisions, while the investigation is also often more of a joint effort (EU, EFTA, COMESA), and (iv) the one-tier model where the regional authority decides even on national cases, basically leaving the national authorities without any decision power (WAEMU). Within each model, several differences remain as regards the regional approaches, since every individual RCA has its own specificities and nuances. In order to try and capture some of the unique features of the 11 RCAs, the Secretariat has developed an inventory that includes relevant provisions of the regional competition frameworks.

6. After the presentation of the Secretariat, the Chair invited the first expert panellist, **Dr. Deniz Both**, to elaborate on how regional competition policy can contribute to economic integration and development, which allows to better understand the considerations that many countries have dealt with when entering in a RCA.

## 2. The role of regional competition agreements in regional economic integration

7. Dr. Deniz Both first defined a regional competition law regime as a regional competition law enforcement model which is established as a part of a deep economic integration agreement. Accordingly, regional blocks agree on regional competition law, and establish a regional competition agency with law enforcement powers. Secondly, she elaborated on why a deep economic integration model was needed and what its importance is for regional competition policy. She explained that the adoption of a regional competition law regime, in itself, can be perceived by countries as an undesirable loss of control over its own markets, and moreover, regional competition law enforcement could lead to conflicts between the national economic interests of the member states in the absence of a ‘common market’. Dr. Both therefore underlined that regional-wide political and economic support is crucial for successful regional integration to happen and, more specifically, for competition agreements to be used. The success of a regional competition law regime is as such inherently dependent on the success of the relevant broader economic integration agreement. Finally, she proposed two policy choices, which might be relevant to a relatively young regional competition agency with limited human and financial resources: (i) establishing a region-wide research platform and (ii) making regional integration an enforcement priority.

## 3. Europe

8. The Chair thanked Dr. Both for her presentation and at this point solicited the European Union to intervene about its written contribution, and in particular, what it considers as success factors of the well working European Competition Network (ECN) and what could potentially be duplicable in other regions.

9. The EU recalled that the ECN is a regional competition agreement that was created in 2004 when the EU reformed the European competition framework to increase resource

effectiveness, improve the allocation of cases and improve the enforcement dynamic. Up to now, 85% of the decisions applying articles 101 and 102 of the Treaty on the Functioning of the European Union has been adopted by the national competition authorities. The European Union provided three reflections that could be useful for other regional competition agreements. Firstly, the exchange of, and communication between, staff in national and regional competition authorities is crucial and should therefore be stimulated. Secondly, convergence of competition law in the EU has been facilitated by several factors, including the fact that national competition authorities must apply both national and regional competition law, the mechanism in Council Regulation (EC) No 1/2003 (EC Regulation 1/2013) that national competition authorities communicate for discussion purposes a draft decision one month before the deadline, and the adoption of the ECN+ directive that will come into effect in December 2018. Thirdly, there is a need to have consistent review by courts on the substance of the law, and this is ensured through courts having the power to make preliminary references to the European Court of Justice and the national courts also increasingly taking into account case law of other countries.

10. After the intervention by the EU, the Chair invited **Belgium** to intervene. Belgium specified that it participates approximately twice a week in one format or another in a meeting of the ECN. Furthermore, it underlined that it considered the Commission's own powers to enforce competition rules (rather than being a co-ordinator only) a key differential success factor. Finally, it provided a tip that exchanging "leads" between neighbouring countries may assist the identification and development of cases at a country's own initiative.

11. At this point, the Chair turned to **Sweden** to speak for the Nordic Alliance, which establishes close co-operation between the Nordic countries within the European Economic Area (EEA).

12. Sweden informed that today marks an important day for them as a revised Nordic co-operation agreement enters into force today between at least Finland and Sweden. The revised agreement provides three additional tools for improved Nordic co-operation: (i) it clarifies the requirements for an (previously already possible) exchange of confidential information,; (ii) it provides the power to carry out requests for information on behalf and for the account of the requesting competition authority and (iii) provides the power to carry out inspections in its own territory on behalf of another competition authority that is party to the agreement. The two last tools are new additions and are the equivalent of article 22 of EC Regulation 1/2003. Unlike EC Regulation 1/2003, these new tools will also be available for merger cases and only purely national cases that have no effect on cross-border trade.

#### 4. Sub-Saharan Africa

13. The Chair then invited **Dr. Mor Bakhom** to give his presentation and discuss the (five) different regional competition agreements in Sub-Saharan Africa, including its different designs, achievements and challenges.

14. Dr. Bakhom highlighted that Sub-Saharan Africa has a multitude of RCAs with overlapping memberships, different institutional designs, enforcement powers, scope, effectiveness, etc. This diversity creates several challenges, including conflicting obligations of countries that are member of multiple and overlapping regional approaches, conflicting powers between national and regional authorities as well as potentially

conflicting decision between authorities. Other challenges that are specific to the Sub-Saharan region are anticompetitive practices by governments as a result protectionism, shortcomings of national competition authorities (e.g. limited resources) that are replicated at regional level, difficulties with allocating powers of enforcement between national and regional competition authorities and the very limited enforcement through competition cases. Dr. Bakhoun underlined that in Sub-Saharan Africa a better coordination between trade policies and regional competition policies is needed. In this light, he discussed the new African Continental Free Trade Agreement (CFTA), which for instance deals with the challenges of multiple and overlapping memberships as well as can expedite the regional and continental integration processes. However, it is still unclear what the institutional design will look like and how this continental approach will relate to the current national and regional designs.

15. After his presentation, the Chair asked Dr. Bakhoun if he could comment on why he thinks COMESA works relatively well in Sub-Saharan Africa. He indicated that the relative success of COMESA can probably be attributed to the existing political will at regional level to have a commission with a strong leadership and the means to do its job properly, as well as a fairly good institutional design. The Chair added that the high charges for merger reviews during the early stages – although controversial – also (potentially) aided in that it provided financial means to build the required resources.

16. Subsequently, the Chair invited **Kenya** to elaborate on its written contribution. It explained that prior to 2016, mergers with cross-border dimensions had to be notified both in Kenya and with COMESA, which led to many delays and additional costs because of the dual notification requirement. In 2015, Kenya entered into a formal agreement with COMESA, which allowed Kenya and COMESA to co-operate better, in particular with regards to merger cases where cross-border cases are now notified with COMESA only. As a result, merger cases are completed faster, costs for companies are lower and there is a common understanding about enforcement of the competition-related issues.

17. At this point, both ECOWAS and COMESA requested to make an intervention. ECOWAS confirmed the challenges with regards to the contradicting regimes in West Africa (ECOWAS and WAEMU), but mentioned that this had not escaped policy makers. ECOWAS builds on WAEMU legislation, provides a sufficient level of centralisation, continues to improve its flexibility in applying competition law nationally and regionally, and aims to create a mechanism of collaboration between national authorities.

18. COMESA highlighted that the benefits of the COMESA competition regime were that (i) it emanated from established national competition authorities in the region, and (ii) these authorities recognised that co-operation between national competition authorities was required for successfully tackling cross-border competition cases. COMESA consequently became a one-stop shop for mergers and acquisitions, improving the ease of doing business for (potential) investors. Challenges for the COMESA Competition Commission include the diverse level of competition regimes at a national level and resistance within member states with a more established competition regime to the jurisdiction of the regional competition authority.

## 5. Latin America and Caribbean

19. At this point, the Chair moved on to the Latin America and the Caribbean regions and invited the third panellist, **Dr. Mario Umaña**, to give his presentation.

20. Dr. Mario Umaña provided insights into the (three) regional competition agreements in Latin America and the Caribbean, focusing on the challenges of these RCAs. He also briefly addressed a fourth regional block, the Central America Common Market, although it currently does not yet have a regional competition agreement in place (despite a mandate from foundational treaty (1961), an agreement to establish a Customs Union (2012) and an Association Agreement with EU). All four regional blocks are born from the foundational treaties to become common markets, but none of them is an actual common market or a working common market. Moreover, challenges related to competition in Latin America and the Caribbean include poor and/or dated institutions, sclerotic regional normative frameworks, a severe lack of enforcement and tensions between on the one hand national and supranational authorities and on the other hand authorities responsible for competition or trade. Dr. Umaña also provided some ideas to move forward. To overcome the challenges, Mr. Umaña recommended to review and update the regional legal frameworks, increase their resources, and increase the focus on enforcement (competition cases). Possibly, new Regional Trade Agreements (e.g. the Pacific Alliance or the USMCAN) could consider enhanced frameworks for the cooperation and joint action of national level competition authorities in actual cases.

## 6. Eurasia

21. At this point, the Chair invited **Mr. Kussainov**, Member of the Board of the Eurasian Economic Commission and Minister in charge of competition and antitrust regulation to make a brief intervention.

22. Mr. Kussainov underlined that the Eurasia Economic Union was only established in 2015. However, the legal framework is in place and the Eurasian Economic Commission (EEC) has started its enforcement activities (in 2017-2018, the EEC considered 25 applications for a violation of the common competition rules in cross-border markets, started 15 investigations, initiated four cases, two of which were completed and have final decisions). Furthermore, actively advocating for competition is a priority for the EEC and it will introduce this year a warning mechanism similar to the European commitments, aimed at correcting behaviours. Challenges include identified shortcomings in the law, namely that the EEC does not yet have the power to address anticompetitive behaviours of foreign businesses. However, once the common market created, foreign companies will have to change their behaviour (e.g., discrimination between market participants and market sharing across the whole region will be no longer possible). The Commission is planning to conduct awareness-raising activities for foreign companies, also in cooperation with OECD competition authorities.

23. The Chair mentioned that all RCAs with a regional competition authority have been covered, which was the initial objective of the session. The Chair subsequently passed the floor to first the Dominican Republic and then the Philippines, who requested to make an intervention. The **Dominican Republic** pointed out that there is another important agreement in the area of the Caribbean and Central American, which is the Dominican Republic-Central America FTA (CAFTA-DR). This agreement, which is very important for the economics of the area, includes a competition law, since one condition to sign this agreement was that the country developed its competition law.

24. The **Philippines** flagged the necessity to address SOEs and subsidies in current and new regional trade agreements.

25. Finally, the Chair turned to **Japan**, explained the East Asia Top Level meeting it organises annually for top-level officers in the East-Asia region. It pointed out that, apart from discussing different topics, the meeting supports agencies with addressing challenges around cross-border anticompetitive practises through information sharing, law enforcement experience and building trust among agencies. Moreover, the East Asia Top Level meeting provides an opportunity for agencies to start negotiations on more formal co-operation frameworks.

26. The Chair thanked Japan, indicating that it was indeed right to point out there are other ways in which regions can promote convergence and co-operation, and this type of meetings provides for a good example.

27. The Chair summarised the main points of the discussion. He noted that some main factors of success for a RCA include a political will to integrate economically, creating a strong regional institution and pursuing convergence of national laws – often driven by the presence of a regional institution. He concluded that trade tensions between national and regional level also need to be solved before entering into a regional competition regime.

28. The Chair thanked the experts and the participants for their contributions and formally closed the session.