



# CROSS BORDER CARTELS (CBCs)

## Chasing Transnational Cross-Border Cartels: Challenges For Young And Small Competition Authorities

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# OUTLINE

1. The Problem – Cross Border Cartels
2. The Response of the International Community to CBCs
3. Problems in investigating transnational cross-border cartels by young and small competition authorities
4. Novel Proposals

# PROPOSED CLASSIFICATION OF CBCs

	Number of jurisdictions investigating	Country of origin of the cartelists	Geographical coverage	Typical duration	Likelihood of prosecution & deterrence
<b>Multinational CBCs</b>	A multiple number of "usual suspects" of mature and large competition authorities being able to investigate these CBCs	Large multinational companies whereby its market share can only be measured at the global level. A leader will deal with dissimilar business cultures and environments	Global or quasi-global effects in all jurisdictions with little choice for consumers to opt for a substitute in other regions	Between 3 to 10 years	Only major jurisdictions can create a meaningful deterrent effect. Instability of the cartel is high due to changing economic conditions.
<b>Transnational CBCs</b>	<b>Selected jurisdictions from mature/large but also young/large and young/small competition authorities</b>	<b>Selected number of countries where there are interrelated business links.</b>	<b>One foreign market or two markets or even regions but not with worldwide coverage</b>	<b>Often less than 5 years</b>	<b>Emerging jurisdictions can also prosecute with relevant deterrent effect. Instability of cartel is very high.</b>
<b>Regional CBCs</b>	National jurisdictions comprise within a regional economic grouping.	EU-type cartel companies operate within a region that can be a single market or custom union and supply capacity cannot go beyond regional borders	One region only. A domestic cartel with parallel investigations can also be deemed as regional cartel	Variable	Supranational regional authorities are best equipped to prosecute these cartels. i.e. the EU Commission, Andean Community, CARICOM,
<b>Export CBCs</b>	Two jurisdictions: exporting and importing jurisdictions	Companies are solely exporters within one country. "Pure export cartels" and is based on political-industrial considerations	One foreign market only	Variable	Difficult to prosecute by foreign competition authorities where the applicable law is the originating country. Extraterritoriality principle may apply in some cases
<b>Import CBCs</b>	One jurisdiction: the importing country.	Only domestic importing companies with clear incentives to restrict import foreign competition	One domestic market only	Variable	Easy to prosecute but politically is supported by the importing country's competition authority

# THE PROBLEM: TRANSNATIONAL CBCs

A sample of recent Transnational CBC cases:

- The Asia Fine Paper cartel (2000-2004)
- The Bearing Automotive Cartel (1999-2011)
- The Gas-Insulated Switchgear Cartel (1988-2004)
- Auto-Parts Cartel cases (2000-2010)
- The Ocean Shipping/Roll-on, Roll-off Cargo cartel (2011-...)

# RESPONSE OF THE INTERNATIONAL COMMUNITY TO CBCS

- Massive enactment of competition laws and institutions in the emerging economies and countries in transition across continents, by 2017, almost 140 jurisdictions count with competition laws and institutions.
- Signing of cooperation agreements, MOUs, MLTAs, agency-to-agency arrangements between competition authorities
- Informal cooperation arrangements to “coordinate” simultaneous enforcement actions at the beginning of the cartel investigation (eg. Marine hoses cartel, etc)
- Unilateral application of competition laws (extraterritoriality principle of competition laws), particularly mature & large competition regimes (US & EU)

## WHAT ABOUT YOUNG AND SMALL COMPETITION REGIMES?

- Young and small competition regimes have an “endogenous factor”: inability to optimally deter **Multinational CBCs**
- A great level of understanding of public international laws and its interface with competition law enforcement not only by courts but also adjudicative administrative competition authorities. Young competition regimes lack this high level of competition culture.
- Better to focus on **transnational or regional CBCs**.

# MAIN PROBLEMS IN INVESTIGATING TRANSNATIONAL CROSS-BORDER CARTELS BY YOUNG AND SMALL COMPETITION AUTHORITIES

1. Differences in leniency regimes between mature and young competition authorities' jurisdictions
  - (a) Lack of effective implementation of leniency programmes in young competition authorities
  - (b) Lack of trust by the leniency applicants in providing a confidentiality waiver to young competition authorities
  - (c) Lack of specific cooperation arrangements of mutual recognition in leniency and immunity issues
2. Lack of an international definition of confidential information
3. Lack of physical presence

# **NOVEL PROPOSALS FOR TRANSNATIONAL CBC INVESTIGATIONS: TRUST, INFORMATION AND PLATFORM**

1. Introducing calculus-based trust activities between competition authorities
  - The role of technical assistance and capacity building in creating trust between mature and young competition authorities
2. Setting up an international benchmark for the definition of “sharable information”
3. Strengthening the ICN Framework for promotion of sharing non-confidential information for cartel enforcement



# 1. INTRODUCING CALCULUS-BASED TRUST (CBT) ACTIVITIES BETWEEN COMPETITION AUTHORITIES

- CBT, KBT and IBT are different types of trust that can be found in cross-border consultations that are held between competition authorities
- CBT governs the relations between mature and young competition authorities based on the rationale that a scarce level of knowledge of each other is a constant factor between these institutions

## 2. SETTING UP AN INTERNATIONAL BENCHMARK FOR THE DEFINITION OF “SHARABLE INFORMATION”

Most common benchmark for confidential information:

- (1) the information is NOT publically available;
- (2) requested by the entity that provides the information;
- (3) the information needs to be justified, i.e. industrial secrets on prices, and the like;
- (4) summary of the non-confidential information must be provided

### **Proposed benchmark:**

- (1) existence of a formal and open investigation;
- (2) theories of harm, markets or remedies;
- (3) industry background.
- (4) **the formation of the cartel**



### **3. STRENGTHENING THE ICN FRAMEWORK FOR PROMOTION OF SHARING NON-CONFIDENTIAL INFORMATION FOR CARTEL ENFORCEMENT**

- Weaving the UN mechanism into the ICN
  - Work with young and small competition regimes
  - Wider membership

## TESTING THE NOVEL SOLUTIONS WITH ENFORCERS: RESULTS OF THE INTERVIEWS MADE AT THE LATEST ICN PORTO 2017

- **Trust Development:** measures to develop the first stage of trust (CBT) is to suggest activities that would close the gap between these authorities such as technical assistance and capacity building in selected beneficiary jurisdictions
- **“sharable” information:** should be provided on the basis of trust and leniency waivers. In the absence of that, “conditional information gateways”.
- **Platform (ICN & UN) :** can complement each other without additional costs to cooperation. Moving towards multilateral platforms.

# THANKS FOR YOUR ATTENTION

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