



**Minutes First Substantive Meeting of 2023**  
**Working Group on Cross-border Cartels**  
**28 February 2023**  
**14:00-16:00 (CET)**

The twentieth session of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy, held from 20 to 22 July 2022, decided “to renew the mandate of the working group on cross-border cartels, open to member States on a voluntary basis, without any financial implications for the regular budget of the United Nations, to highlight best practices, facilitate information exchanges, consultations and international cooperation, discuss tools and procedures and undertake other projects as agreed in the future by the working group, with a view to further exploration and deeper understanding of the modalities and principles of cross-border cartel investigations”.

Following the kick-off meeting on 28 October 2022, the first substantive meeting of the Working Group on Cross-border Cartels (WG on CBC) was held virtually on 28 February 2023 at 14:00 CET for 2 hours. This meeting comprised two sets of presentations of case studies and the secretariat’s proposal of the 2023 work plan. The first case was the sugar cartel case by the competition authority of Austria, which included the updated information about their presentation of the last year, and the second case was the Forex cartel case by the competition authority of South Africa.

1. The meeting was opened and moderated by the UNCTAD secretariat.
2. Austrian Federal Competition Authority (AFCA) presented the Sugar cartel case in Austria. In 2019, the Austrian Cartel Court dismissed AFCA’s application in 2010 in the first instance due to the fact that the German Bundeskartellamt imposed fines on the same sugar producers. But in late of 2022, the Austrian Supreme Court made a judgment that this case did not have the issue of double jeopardy (*ne bis in idem* principle) based on the preliminary ruling of CJEU. About the proceedings before the Austrian Supreme Court, both the German Bundeskartellamt and the US Department of Justice (USDOJ) submitted amicus curiae to support AFCA’s legal view. The essence of the amicus curiae was that the German decision is limited to the jurisdiction of Germany and does not address the harm to the Austrian market, and also parallel sanctioning of several competition authorities is lawful. Austria emphasized that this was a very interesting example to show how international cooperation can work in cross-border cartels and even Supreme Court refers to and relies on international cooperation in its judgment.



3. Bangladesh Competition Commission asked a question about how international cooperation contributed to the judgment of the Austrian Supreme Court in this case. AFCA answered it was remarkable that the Austrian Supreme Court actually assessed and explicitly referred to the amicus curiae made by other competition authorities in the court decision, which was quite rare. The USDOJ made a remark that they were very pleased to be helpful in this case, and added that international cooperation could be done in amicus curiae or several other ways, and in some cases where the courts were not so familiar with competition law cases, opinions from other competition authorities could be helpful.
4. AFCA also clarified their experience in requesting amicus curiae, saying that it was helpful to know the details of the US and German authorities' handling of their related cases and the staff in charge, and said that AFCA could not expect the outcome of the documents from the other authorities because the courts were usually not familiar with international cooperation, but they were helpful as a result. The USDOJ pointed out that legislative cooperation would be possible as another type of international cooperation, besides cooperation in case investigation. The USDOJ mentioned a case that the Assistant Attorney General, the head of the USDOJ, testified and gave a presentation about sanctions against cartels before a committee of another country's parliament.
5. Then there was a presentation on the second case. The Competition Commission of South Africa (CCSA) presented the Forex cross-border cartel case. The case was about 28 banks' cartel conduct which fixed foreign exchange rates and divided the market from 2007 to 2013. The main dispute of the case before the court was whether CCSA and/or courts in South Africa have jurisdiction over them or not, because some of the banks resided in the other countries and the banks' conduct were made in other countries outside South Africa. South African competition law stipulates that the law applies to all economic activity within or having an effect in South Africa, so that CCSA has the authority to enforce this conduct. The Competition Appeal Court (CAC) dismissed the banks' arguments and indicated that there were sufficient, substantial, direct, and foreseeable impacts of this conduct in South Africa. However, the question remains whether the court can continue to hear this case when the banks do not participate in the proceedings.
6. The USDOJ asked if the enforcement of fines or penalty is in a difficult situation, and CCSA replied that sanctions on violations of the law have not yet been finalized because trials on substantive issues are currently underway in the Tribunal, the court of first instance.



7. Competition authority of Armenia asked two questions; how CCSA received the first information about the cartel and whether the cooperation with sector regulators took place. CCSA answered the first question that they got the information from their own investigation and cooperation with the USDOJ and answered the second question that CCSA cooperated with sector regulators on the subject of market study. Mr. David Anderson (NGA) shared his experience on a merger case between two South African platinum mining companies, which was assessed by the European Commission. In that case, European Commission decided that it had jurisdiction over that merger and prohibited it.
8. After the presentations and Q&A sessions, the UNCTAD secretariat presented the Proposed Workplan in 2023 WG on CBC (**Annex**). The Proposed Workplan included suggested way forward; the Working Group continues practical case studies provided by Member States in upcoming meetings, takes lessons learnt from those cases, and discusses further dissemination and promotion of the use of the Guiding Policies and Procedures under Section F of the UN Set. There was no objection to the Proposed Workplan from the participants.
9. The UNCTAD secretariat informed that the next meeting will be on 25 April 2023, and closed the meeting.

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| <b>1<sup>st</sup> Substantive Meeting of Working Group on Cross-Border Cartels</b>                     |   |                              |
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| <b>List of Participants</b>  |   |                              |
| Shushan Sargsyan   | Competition Protection Commission                             | Armenia                      |
| Trudie Enks  | Competition and Consumer Commission (ACCC)                    | Australia                    |
| Lukas Cavada<br>Natalie Harsdorf   | Federal Competition Authority (AFCA)                          | Austria                      |
| Pradip Ranjan<br>Chakraborty<br>Adnan Arief<br>Arifur Rahman   | Bangladesh Competition Commission                             | Bangladesh                   |
| Nikita Mayers  | Fair Trading Commission                                       | Barbados                     |
| Andrea Freire<br>Savio da Silva Costa<br>Bruna Queiroz<br>Emmanuel Faria<br>Fernanda Garcia<br>Machado | Administrative Council for Economic Defense (CADE)            | Brazil                       |
| Gustavo Gomes Rocha  | Ministry of Justice   | Brazil                       |
| Hazel Orozco   | Commission to Promote Competition (COPROCOM)                  | Costa Rica                   |
| Michaela Prokopova<br>Marek Sulc<br>Petr Hanak<br>Rene Milich  | Office for the Protection of Competition                      | Czech Republic               |
| Ahmed Hisham   | Egyptian Competition Authority (ECA)                          | Egypt                        |
| Diana Benalcazar<br>Patricio Pozo  | Superintendency for Control of Market Power of Ecuador (SCPM) | Ecuador                      |
| Armine Hakobyan<br>Nadezda Pustovalova   | Eurasian Economic Commission                                  | Eurasian Economic Commission |
| Francois Souty<br>Beatrice Frailoli  | European Commission   | European Union               |
| Mirja Schmitz-Huebsch  | Bundeskartellamt  | Germany                      |
| Ioannis Kalozymis<br>Mary Chamilou   | Hellenic Competition Commission                               | Greece                       |
| Gabriella Szilagyi   | Hungarian Competition Authority (GVH)                         | Hungary                      |
| Michele Pacillo  | Competition Authority (AGCM)                                  | Italy                        |
| Tomohiro Watanabe  | Japan Fair Trade Commission                                   | Japan                        |



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|  | Agency for Protection and Development of Competition (APDC) | Kazakhstan    |
| Maija Busa   | Competition Council   | Latvia        |
| Pedraza Cortes<br>Francisco Alejandro<br>Heidi Sada<br>Claudia Brambilla<br>Alejandro Pedraza  | Federal Economic Competition Commission (COFECE)            | Mexico        |
| Christian Loren B. De Los Santos   | Philippine Competition Commission                           | Philippines   |
| Sofia Kravchenko   | Federal Antimonopoly Service (FAS)                          | Russia        |
| Sergey Ivanov  | Permanent Mission in Geneva                                 | Russia        |
| Maja Dobric  | Commission for Protection of Competition                    | Serbia        |
| Kelebogile Modingoana<br>Khomotso Hlongoane<br>Kgothatso Kgobe<br>Lungile Khoza<br>Maanda Lambani<br>Maria Chipasula<br>Matodzi Sivhaga<br>Mbongiseni Ndlovu<br>Meshack Netshithuthuni<br>Mmapaseka Riba<br>Mulalo Shandukani<br>Pamela Bodlo<br>Ponalo Xinishe<br>Precious Mathibe<br>Relebohile Thabane<br>Seapei Melamu<br>Thabelo Masithulela<br>Thandi Nkabinde-Kuhlase | Competition Commission (CCSA)                               | South Africa  |
| Juan Carlos Morales<br>Alonso  | National Markets and Competition Commission (CNMC)          | Spain         |
| Daniel Muller  | Competition Commission (WEKO)                               | Switzerland   |
| Caldwell Harrop  | Department of Justice                                       | United States |
| David Anderson   | Bryan Cave Leighton Paisner LLP                             |               |
| Joongweon Jeong  | Bae, Kim & Lee LLC  |               |



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| Amira El-Saeed  |  |  |
| Gabriel Vasquez |  |  |
| Yehia Romeih    |  |  |

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## **Annex: Proposed Workplan in 2023 Working Group on Cross Border Cartels**

This document contains UNCTAD Secretariat's work plan proposal for the Working Group on Cross-Border Cartels (WG on CBCs) in 2023, to be discussed and decided at the first substantive meeting of the Working Group on 28 February 2023.

### **Background**

The twentieth session of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy, held from 20 to 22 July 2022, decided "to renew the mandate of the working group on cross-border cartels, open to member States on a voluntary basis, without any financial implications for the regular budget of the United Nations, to highlight best practices, facilitate information exchanges, consultations and international cooperation, discuss tools and procedures and undertake other projects as agreed in the future by the working group, with a view to further exploration and deeper understanding of the modalities and principles of cross-border cartel investigations, and to report to the twenty-first session of the Intergovernmental Group of Experts on Competition Law and Policy" that will take place from 5 to 7 July 2023, in Geneva.

Also, the UNCTAD Secretariat reported to the twentieth session of the IGE on Competition Law and Policy as follows:

"12. At the first year of the WG on CBCs, the Secretariat reported to the members that "the lessons learnt from the practical case studies and active ensuing discussions should be disseminated through advocacy work". This recommendation remains valid and should be strengthened with the new cases discussed during 2022.

13. Another recommendation coming from the same report of 2021 suggested that "Further advocacy work should be carried out to disseminate and raise awareness of the newly implemented GPP, notably through case studies and practical guidelines." Pursuant to the recommendations provided by the Secretariat report submitted to the IGE 2022 on the implementation of the GPP, this recommendation remains valid particularly to replicate the successful experience between Austria and the US (DOJ) to cooperate (through the Amicus letters) without the signing of a specific cooperation agreement.

14. Furthermore, and based on the outcome of the 29th March 2022 meeting, it seems a relevant activity for the members to develop a guidance document to share tools during the initial stages of investigation (and address issue such as notification as discussed on 30 January 2022) and benefit authorities, especially young ones. Regarding the enhancement of informal cooperation, more workshops and advocacy activities should carry out under the auspices of the Secretariat.

15. Based on the European Commission's presentation of its report on pharmaceutical sector and anti-competitive behaviors pre COVID, a note on this sector could be drafted by interested members of the WG together with the DGCOMP to benefit authorities in assessing the level of anti-competitive behavior in this sector in the post COVID economic recovery."



Based on this background, the Working Group held its kick-off meeting on 28 October 2022, which discussed the way forward and possible outcomes.

### **Suggested way forward**

- Continue practical case studies provided by member States in upcoming meetings
- Assess the previous case studies and compile lessons learnt for in order to provide a clearer guidance especially for younger competition authorities
- Discuss further dissemination and promotion of the use of the Guiding Policies and Procedures under Section F of the UN Set (GPP)

### **Regularity of meetings**

After having the kick-off meeting on 28 October 2022, the UNCTAD Secretariat suggests the following meetings before the twenty-first session of the IGE on Competition Law and Policy, as follows:

**28 February 2023**

**25 April 2023**

More meetings may be called, if needed, upon request from the Working Group participants.

### **Possible outcomes**

The discussions of the Working Group will be reported orally to the twenty-first session of the IGE on Competition Law and Policy, including possible work products.

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