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**Agenda Item 3e. Report of the discussion group on
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International Cooperation Among Competition Agencies in Competition Enforcement Cases

– Mexican Federal Economic Competition Commission –

Background

1. In May 2017, the Federal Antimonopoly Service of the Russian Federation (hereafter “FAS Russia”) published a document through its official website entitled “Toolkit on International Cooperation of Competition Authorities on Combating Restrictive Business Practices of Transnational Corporations and Trans boarder Violations of Rules on Competition” (hereinafter “the Russian Toolkit”) and requested the international community to comment on the document.
2. In July 2017, the Head of the FAS Russia officially submitted the Russian Toolkit to the 16th session of the UNCTAD Intergovernmental Group of Experts (IGE) on Competition Law and Policy, expecting the experts of the IGE to comment on this document.
3. At the same meeting, the Competition IGE 2017 requested the UNCTAD Secretariat to set up a Discussion Group (DG) on International Cooperation so as to provide a forum for interested members to freely talk about how to improve international cooperation in view of the UN Set on Competition, in particular, Section F of the Set.
4. During the second half of 2017, UNCTAD launched a comprehensive survey to identify potential obstacles in international cooperation processes, with a particular focus on the challenges that younger agencies face in this regard.
5. In February 2018, The DG circulated a document entitled “UNCTAD preliminary comments to the document entitled ‘Toolkit on International Cooperation of Competition Authorities on Combating Restrictive Business Practices of Transnational Corporations and Trans boarder Violations of Rules on Competition,’” through which specific commentaries on the proposals comprised in the Russian Toolkit were shared.
6. In May 2018, the Mexican Federal Economic Competition Commission (COFECE for its Spanish acronym) undertook the task of carrying out a literature review on what the International Competition Network (ICN), the OECD Competition Committee and the UNCTAD IGE have agreed on, regarding international cooperation in competition enforcement in order to draft the present counterproposal.

Scope and Objective

1. The main objective of this proposal is to assist competition authorities in the implementation of Section F “International Measures” of the United Nations Set of Principles and Rules on Competition (hereafter UN Set of Principles), recognizing the importance of cooperation between competition agencies to better enforce competition policy within its jurisdictions and the different approaches to cooperation, particularly with developing countries and young competition authorities.
2. As has been discussed in different fora, international cooperation in competition enforcement faces various challenges, including different legal systems, institutional and investigatory impediments, differences in leniency regimes and lack of trust. Several instruments, such as best practices, recommendations and reports, have been developed by the ICN, the OECD, and UNCTAD to facilitate cooperation between competition agencies. This proposal builds on these instruments, with a particular emphasis on informal cooperation.¹
3. The present proposal seeks to continue strengthening and expanding communication channels and promoting fruitful dialogue through specialized fora and organizations such as the ICN, the OECD Competition Committee, the UNCTAD and others, in order to gradually achieve policy and enforcement consensus. Implementation of Section F of the UN Set of Principles should be carried out by avoiding adhering to binding mechanisms that could potentially be overlapping and/or mutually-exclusive with existing agreements and overall practices.
4. Building trust and establishing communication channels between experienced and young competition authorities in emerging and developing countries, are the first step towards effective and efficient international cooperation. Experience shows that there are greater incentives for cooperation between competition agencies in enforcement cases when trust is built through regular communications and mutual understanding of each other’s competition regimes.

¹ The present proposal is not intended to be a comprehensive compilation of all the best practices and policies agreed upon at international forums regarding all aspects of international cooperation on competition enforcement. However, this effort is a selection of principles and policies previously agreed upon and published by the international community of competition authorities and non-governmental experts within the framework of the ICN, the OECD Competition Committee and the UNCTAD IGE on the matter; whose purpose is to help competition agencies to implement Section F of the UN Set of Principles.

Benefits of International Cooperation

1. Benefits of carrying out informal methods of international cooperation in cases of competition enforcement were identified. This section details some of the main challenges that competition authorities may face, as well as potential solution alternatives.
2. As has been noted by international experiences in case analysis, international cooperation is often based on mutual interest and is conducted within a framework of good will that brings benefits and results with or without a binding regulatory framework.²
3. As stated in Chapter II of the ICN Anti-Cartel Enforcement Manual, and in the ICN International Enforcement Cooperation Project, some challenges may arise by conducting joint investigations.³ Namely the following:⁴
 - a) Investigation procedures. Differences in investigation timeframes and, more generally, in investigation procedures may arise between competition authorities. It is important to consider the needs and faculties of the other competition authorities involved and –as far as possible, and according to the needs of each case– notify the authorities that may become involved. Early notifications help coordinate efforts, define deadlines (if applicable) and address the needs of each jurisdiction in a timely manner.
 - b) Information exchange. Asymmetries in publicly-available / sharable information on investigations and actions in other jurisdictions might differ among jurisdictions. Legal rules on protection and exchange of confidential/statutorily protected information (as well as legal rules on privilege) is one of the most common barriers for information exchange.⁵ Reviewing good practices on information exchange mechanisms such as party and third-party waivers in relation to confidential/statutorily protected information and widening the number and scope of cooperation agreements are important mechanisms that competition authorities should seek to overcome these challenges.
 - c) Legal framework. Particularly in cartel cases, there might be differences on how legal frameworks treat certain anticompetitive conducts (civil/administrative vs criminal regimes). In order to overcome this challenge, it is important to foster the familiarity with contacts, practices, procedures and governing rules at other jurisdictions.

² Russell Damtoft, *Mechanisms for Cooperation: Informal Cooperation*, 2014, available at:

http://unctad.org/meetings/en/Presentation/CCPB_IGE2014_RTPRESInfCoop_USFTC_en.pdf

³ It is important to state that solutions' nuances for these potential conflicts should be addressed on a case-by-case basis, and with the understanding that competition authorities involved have agreed to cooperate voluntarily and with the objective of finding suitable and joint solutions.

⁴ *ICN Anti-Cartel Enforcement Manual*, Chapter II: "International Cooperation and Information Sharing," available at:

http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/icn_chapter_on_international_cooperation_and_information_sharing.pdf

⁵ *Report on the OECD/ICN Survey on International Enforcement Cooperation*, 2013, which concludes that "(...) without confidentiality protections, there would be no information to share (...)", available at:

<http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3%282013%292&docLanguage=En>.

- d) Resources constraints. No agency has unlimited resources; therefore, it is important to be aware of the fact that, commonly younger agencies have more-restricted resources to devote to international enforcement cooperation.⁶ In cooperating with authorities abroad, it is advisable to recognize the potential to save investigative resources and avoid duplication of efforts/work.⁷
 - e) Cultural challenges. Some of the challenges of this sort are the language barrier, time zone differences and recognizing / disseminate the incentives of the parties to facilitate cooperation. Challenges on benefits and concerns about the treatment of confidential/statutorily protected information have also been expressed. In this regard, it is important to provide – to the extent possible – technical assistance and to better-communicate the benefits of promoting cooperation culture in competition enforcement at the regional and international levels.⁸
4. The aforementioned –and other– potential international cooperation conflicts can be further complicated if the competition agencies adhere to a rigid binding instrument, especially if it is mutually exclusive with the regulatory framework and international treaties of one of the parties, or if one of the parties is not attached to said binding instrument.
 5. The benefits of engaging in informal methods of international cooperation lie in the retention of the ability to adopt good international practices and meet the needs of a case of competition enforcement without unnecessary restrictions that could potentially slow down or constrict the processes in an unnecessary manner.
 6. It is important that competition authorities engage in international cooperation efforts in a structured manner, but also with sufficient flexibility to decide on a case-by-case basis, with complete autonomy in their decision-making processes. Cooperation on competition enforcement is often carried out with or without formal instruments that facilitate information exchange, and building upon the groundworks of good will and trust.⁹

⁶ *ICN Second Decade Project*, 2010, available at:

<http://www.internationalcompetitionnetwork.org/second-decade.aspx>

⁷ To the extent that competition authorities undertake efforts to cooperate and get involved in regional and international fora, trust among authorities only tend to grow. As recognized in the ICN Vision for its Second Decade. Available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf>

⁸ In this respect, the ICN has extensive material on solutions to communicate the benefits of competition to different governmental and non-governmental entities, e.g. the *ICN Benefits Project*. Available at:

<http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy/benefits.aspx>

⁹ As stated in the 2011 ICN Roundtable report on Enforcement Cooperation, “(...) almost all respondents have experience with informal cooperation: (i) informal contacts with another agency; (ii) sharing information regarding the status of the investigation; and, (iii) sharing of substantive theories of harm (...)”; moreover, some respondents stated that “(...) the informal exchange of information often is sufficient to foster effective cooperation (...)” Report available at:

<http://www.internationalcompetitionnetwork.org/uploads/library/doc793.pdf>

International Cooperation Mechanisms: UNCTAD Role

1. Being consistent with the role that the UNCTAD has undertaken so far, it should continue to serve as an *ad-hoc* forum for high-level discussions in order to develop and set agreeable standards, policies and good practices, as well as to provide assistance in to those jurisdictions that so require it.
2. The following mechanisms are intended as a basis for discussion on how to foster international cooperation among competition agencies, particularly young competition authorities in developing countries, using the existing cooperation instruments and addressing concerns identified in a preliminary report of the survey released by UNCTAD in 2017. The role of UNCTAD in implementing the UN Set of Principles can be interpreted in three main areas: Forging Relationships, Knowledge Management and Fostering Networking.

I. Forging Relationships

1. To involve more competition authorities into international cooperation, establish staff level communication and initiate contact between peers in other jurisdictions (to exchange for example the generalities of a case or to understand the procedural phases of other jurisdictions), UNCTAD might put together a contact list, expanding the list to those countries that do not actively participate or enjoy membership of the ICN or the OECD.
2. Effective cooperation and information exchange between competition agencies requires trust, good will, and a desire to work together to enforce competition for the mutual benefit of their jurisdictions. It is important to understand each other's needs and the types of sharable information each one is able to submit. But previously, it is necessary to know who to talk with.
3. UNCTAD should periodically undertake actions and lead efforts to coordinate communications, discussions, calls and specialized events and fora that aim to advance the discussions on the implementation of increasingly-solid cooperation mechanisms, and practices.
4. To the extent of its capabilities, UNCTAD should appoint a liaison / contact point with the OECD and the ICN. Frequent and organized communication between these points of contact should periodically- seek cooperation opportunities, joint and complementary projects, as well as to avoid duplication of efforts between these and other competition forums.
5. UNCTAD may also serve as a first point of contact for younger agencies that wish to approach good practices documents, discussions and reports on international cooperation or require contacting a competition agency for a particular cooperation opportunity on competition enforcement.

II. Knowledge management

1. The UNCTAD shall develop work plans and undertake action to disseminate knowledge, documents and good practices on international cooperation to all the agencies that so require, particularly, it should focus its efforts in working with younger agencies in order to enhance their day-to-day practices in terms of international cooperation. To facilitate dissemination of existing instruments, UNCTAD might assist in improving awareness

within competition agencies about best practices, recommendations, and formal cooperation instruments in force, through knowledge-sharing processes.

2. Developing, maintaining and making publicly available a repository of relevant products on international cooperation work done by UNCTAD and other international organizations, and fresh new content, might represent a first effort to develop a comprehensive strategy to foster international cooperation. Information made available in the repository might include relevant national legislation and formal cooperation mechanisms in force.
3. The UNCTAD shall draft and implement practical and feasible knowledge-gathering and dissemination strategies based on existing evidence and reports, particularly the OECD/ICN survey on International Cooperation,¹⁰ and the results of the Survey on challenges faces by Young Competition Agencies that was launched in the second half of 2017; with the aim of distributing good practices on international cooperation, drafted by the OECD, the ICN and other international specialized fora.
4. Actions and strategies that UNCTAD undertakes in this regard should consider evaluation metrics and criteria that can be reported periodically to both the Secretariat and the international community of competition authorities, as each case may require, e.g., number of events carried out on this regard, number of projects carried out (surveys, reports, among others), number of competition authorities that responded launched surveys, number of documents disseminated / gathered, among others.

III. Fostering Networking

1. To promote mutual understanding and enhance dialogue between competition authorities in smaller and developing countries, UNCTAD might use the existing regional networks or promote the development of new networks.
2. This approach would meet two objectives: i) bring officials from developing country competition authorities in contact and ii) further identify the needs and obstacles for international cooperation and find projects of common interest for developing countries that would enable them to engage in greater international cooperation.
3. Development of communications through these regional networks that address of international cooperation in economic competition can facilitate information exchange, development of fruitful discussions, deepen the culture of competition and overall, enhancing international cooperation on competition enforcement.
4. UNCTAD can serve as a point of contact between these regional networks and suggest topics for discussion at regional events, actively participate (by invitation) in virtual or face-to-face conferences / forums, and recommend specialized literature on topics in which regional networks show interest.

¹⁰ *Report on the OECD/ICN Survey on International Enforcement Cooperation*, 2013, available at: <http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3%282013%292&docLanguage=En>.