

Report on the working group on cross-border cartels to the twenty-second session of the Intergovernmental Group of Experts on Competition Law and Policy

A. Background

The twenty-first session of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy, held from 5 to 7 July 2023 in Geneva, decided the following: “welcomes the information exchanges and discussions on best practices to promote cooperation between competition authorities in dealing with cross-border cartel cases and common issues in the fight against bid rigging; and decides to renew the mandate of the informal 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, and to report to the twenty-second session of the Intergovernmental Group of Experts on Competition Law and Policy.”

The working group on cross-border cartels (WG on CBCs) is open to representatives of member States’ competition authorities and other relevant stakeholders, such as representatives of international and regional organizations and networks, academia, civil society organizations and practitioners.

B. Discussions in the WG on CBCs

Since the twentieth session of the IGE on Competition Law and Policy, UN Trade and Development (UNCTAD) held three virtual meetings on 30 November 2023, 29 February 2024 and 25 April 2024. The minutes of these meetings were circulated to the participants after each of the sessions and made available on the dedicated UN Trade and Development webpage.

The meeting on 30 November 2023 was to kick-off the activities of the WG on CBCs and set the way forward for the next substantive meetings. Members of the WG on CBCs agreed to disseminate the information from the practical case studies of competition authorities in dealing with cross-border cartels and bid rigging and to promote cooperation between competition authorities. Uzbekistan suggested that member States needed to draft guidelines for dealing with cross-border cartel investigations and to conduct joint analysis on mergers in the digital markets. While some countries agreed on the need for such guidelines, other countries expressed that these proposals were not included in the WG’s mandate and that other similar guidelines already existed.

The first substantive meeting on 29 February 2024 discussed two practical cases. Austria presented a case of uncovering large-scale bid rigging in the constructions field and highlighted procedural legitimacy issues regarding whether leniency data can be used in criminal proceedings. Egypt presented a case of detecting bid rigging in the public

transportation sector showing that, even if not through direct evidence, various indirect indicators such as identical financial offers, identical mistakes and the presence of bid rotation can prove the existence of collusion.

At the second substantive meeting on 25 April 2024, four agenda items were addressed. El Salvador presented on inter-agency cooperation for planning and executing dawn raids against bid rigging on public construction. The competition authority successfully conducted dawn raids and investigations with technical assistance not only from the General Attorney and national police but also from the competition authority of Mexico. Switzerland introduced a statistical tool based on publicly available data aiming to capture the difference in the distribution of bids to uncover bid rigging. The competition authority of Switzerland sanctioned a bid rigging in the road construction sector in 2020 using this method.

The United States (US) presented a case of cross-border cartel involving fuel supply to the US military forces in the Republic of Korea (Korea). The US Department of Justice was able to complete the investigation quickly, despite the evidence being in Korea, thanks to close cooperation with the competition authority in Korea. Armenia gave a presentation on detection of bid rigging in food procurement. In that case, the digital platform of the competition authority of Armenia enables to integrate all electronic procurement data from other government agencies enhancing the efficiency of the evidence gathering process.

C. Lessons Learnt

At the WG meetings, member States showed great interest in sharing the cartel detection and investigation methods developed by each authority, including for bid rigging. The case of Switzerland, presented at the 25 April meeting, highlighted that digital databases can be used in various ways to effectively detect bid rigging. The case of Armenia, presented at the same meeting, showed that building a platform to integrate and analyse digital information across various organizations can be very helpful for cartel investigations.

The meetings have also emphasized the importance of cooperation between authorities and countries to effectively counter cartels. The case of El Salvador, presented at the 25 April, demonstrated that technical assistance from other competition authority, along with cooperation from other national agencies such as prosecutors' office and police, can help in successfully conducting bid rigging investigations. The case of the United States, presented at the same meeting, also clearly showed that cooperation with other competition authorities is essential for effective evidence collection and investigation when dealing with cross-border cartels.

The cases of Austria and Egypt illustrated several procedural problems that can arise in bid rigging investigations. These include the relationship between competition

authorities' investigations and criminal proceedings, and whether collusion can be proven through indirect indicators such as identical financial offers and identical mistakes. Although approaches to these problems may vary depending on each country's legal system, these cases highlight the need to for further global consensus through formal and informal international cooperation.

D. Recommendations

Based on the recommendations in the previous reports on the WG on CBCs in 2021¹, 2022², 2023³, as well as the discussions held in the meetings mentioned above, the Secretariat suggests requesting the 22nd session of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy to renew its mandate to continue work on the following issues:

1. Continue discussions on practical case studies provided by member States, not only cross-border cartels but bid rigging cases and disseminate the lessons learnt from those cases.
2. Further disseminate and raise awareness of the UNCTAD Guiding policies and procedures under section F of the United Nations Set on Competition (GPP).
3. Enhance international cooperation to deal with cross-border cartels and bid rigging cases, including formal and informal cooperation between competition authorities, through consensus building and advocacy activities carried out under the auspices of UNCTAD in collaboration with member States' competition authorities.

The Secretariat has received requests from several member States to ask the IGE on Competition Law and Policy to renew the mandate of the WG on CBCs.

¹ https://unctad.org/system/files/information-document/ccpb_IGECOMP2021_Report_WG_Cross_Border_Cartels_en.pdf.

² https://unctad.org/system/files/information-document/ccpb_IGECOM20_Report_WG_Cross_Border_Cartels_en.pdf.

³ https://unctad.org/system/files/information-document/ccpb_IGECOM2023_Report_WG_CBCs_en.pdf.