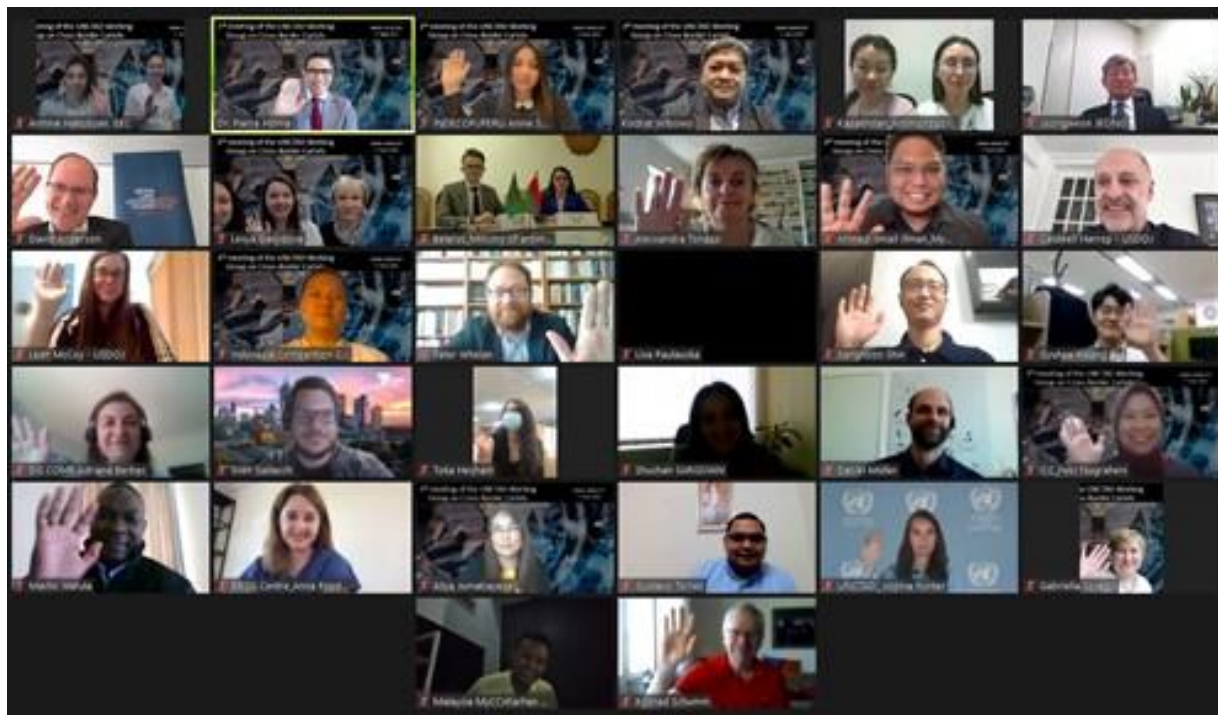


Report of the Third Meeting of the Working Group on Cross-border Cartels
1st June 2021



The Third meeting of the Working Group on Cross-border Cartels (WG-CBC) was held virtually on June 1st 2021 for 2 hours and in two languages (English and Russian). Interpretation into Russian was provided by the Eurasian Economic Commission (EEC). This meeting comprised of two sets of presentation of case studies: the first case was investigated in the Eurasian region by the EEC and the competition authorities of Belarus, Kazakstan and Russia; the second case was investigated by competition authority of Indonesia. The presentations were followed by a QA session. More than 102 people registered out of which 87 participated.

Mr David Anderson, Bryan Cave Leighton Paisner LLP (Belgium), gave a quick debriefing of the last session held on April 13th 2021. He noted how promising this working group is for developing countries and younger agencies. He made three points that were raised at the last meeting on waiver, leniency and cooperation. Regarding waivers, he highlighted how the cases of Peru, Chile and South Africa demonstrated that it is a key tool for cooperation. Therefore, having a waiver friendly environment is paramount for younger agencies combined with trust building exercises. He followed by pointing out that absence of effective leniency is an obstacle for many younger and developing agencies. Successful leniency requires at first a buy in from the private sector, compliance with international standards, clear procedures and policies which are similar with neighbouring countries. Cooperation and trust are two essential assets and a real key between agencies. He closed his debriefing by stating that working together on compliance is an essential step towards more cooperation and trust building.

This debriefing was followed by the presentation on the Cohlear CBC case in the Eurasian Economic Union. First, Mr. Alexey Shushkevich from the EEC, gave a brief overview of the cartel

case, which dealt with hearing aid products and involved companies located in Belarus, Kazakhstan and Russia, and explained how the suppliers attempted to regulate orders. Then he exposed the specific legal framework of the EEC and how it applied in this case including the three procedural stages. In 2018 the EEC received an application from the Ministry of National Economy of the Republic of Kazakhstan, alleging a possible violation of paragraph 5 of Article 76 of the EAEU Treaty. As part of the investigation, the EEC sent a request for documents necessary for the investigation and request to inspect the premises, documents and objects of the person under investigation or under consideration for violation of the general rules of competition. With the cooperation and investigation carried out with the respective competition agencies, it was found out that the participants of the anticompetitive agreement divided the EAEU market along the borders of the states and each of them observed the ban on the sale of goods outside their territory, in addition to a unified price approach. The EEC raised this case and obtained that the violation stopped including a payment of fines.

Representatives from the Kazakhstan antimonopoly agency noted the transborder aspect of the market of the case and, based on the conclusion that similar agreements were being conducted in neighboring territories, filed an application to the EEC on possible violation of the EAEU competition law related to prohibition of anticompetitive agreements. Ms Alesya Abramenko from the Belarus competition authority highlighted that the characteristics of the market were specifically at stake and the main question centered around the transborder feature of the market of hearing aids. Ms Lesya Davydova from the Russian Antimonopoly Agency (FAS) noted that this case is a vivid example of effective regional cooperation, the success of which largely depended on the cooperating agencies. She also stressed that it is extremely important when cooperation between experienced and less experienced agencies, especially when it comes to exchange of sensitive confidential information, is based on strong legal ground, as in this case, on the grounds of the EAEU Treaty's provisions. International platforms, such as OECD, ICN and UNCTAD, are of paramount importance for building strong legal ground for cross border cartel investigations especially for the sake of young competition agencies.

This first presentation raised numerous questions. Dr Peter Whelan, the University of Leeds (United Kingdom), asked about case prioritization and evaluation of effectiveness by the authorities. The EEC replied that since this specific case really impacted consumers severely, it was given priority. The FAS noted that the key factors of success have been efficient cooperation and close interaction as well as trust. Regarding the evidence of the case, communication between companies on how they divided the market and supported each other was used by the EEC. One question raised the issue of extraterritorial application of EAEU competition law. The EEC highlighted that it does not compete with national sovereignty and that there is no concept of extra territoriality enshrined within its Treaty provisions. A final question delved into the impact of COVID-19 in case procedure. The EEC stated that COVID-19 hindered the application of procedural aspects to comply and observe rights of the EAEU Treaty, especially in relation to the timing of case consideration which had to be dealt with through the development of ad hoc mechanisms, teleconference, open access to electronic documents online and constant interaction with agencies which called for special rules of communication.

The second case on scooter parts (Scootermatic CBC case) was then presented by Mr Kodrat Wibowo, the Indonesian Competition Commission (ICC). Motorbikes are hugely popular in Indonesia, Southeast Asia's biggest economy and their sales are a key indicator of consumption. In addition to the dominance of the scooter market, in which two companies are dominated, ICC also found that the price movement of Yamaha and Honda scooters went hand in hand. The increase in the price of the Yamaha scooter always followed the increase in the price of the Honda scooter. The case was started from a market inquiry in 2014 which was followed by an investigation in accordance with Article 5(1) of Indonesian competition law, the Law No. 5/1999, in relation to two multinational companies, YIMM and AHM, on the marketing of scootermatic class 110-125cc. Article 5(1) stipulates that enterprise is prohibited to establish an agreement with its competing enterprise to fix price on certain good and or service which shall be paid by consumer or customer in the same relevant market. ICC investigators discovered evidence of direct "collusive" communication between the presidents and marketing executives of the two companies between 2013 and 2015. ICC also had teleconference with Japanese Fair Trade Commission (JFTC) to discuss some approaches in dealing with this case. ICC concluded that YIMM had intentionally and systematically served misleading facts to build perception which in favour of YIMM's interest. The violations led to imposition of huge fines after an unsuccessful appeal.

Both substantive and practical questions were raised following the presentation. Mr Wibowo from Indonesian noted that even if a memorandum of understanding was already in place with JFTC, the case required to involve more public authorities (Ministry of Foreign Affairs, Embassy of Japan to Indonesia) because the ICC is independent which requires more efforts. Therefore, cooperation with other governmental institutions is essential in the case of Indonesia to deal with CBC cases. The recent case of street hailing in Malaysia, Philippines, Vietnam and Singapore resulted in better cooperation efforts between agencies and the ICC in the sharing of data. Cooperation could be taken to the next level in the future among the agencies to facilitate case cooperation. Cooperation with JFTC was paramount in providing a database and permissions because of the sensitivity of the case. Economic analysis included evidence from JFTC and was challenging due to the level of data. Evidence for this case was gathered based on email communication and witness statements (ie golf course meeting).

Mr Shin from Korea then gave comments on the EEC and ICC cases. He pointed to the necessity and advantage for competition authorities to involve actively foreign companies in the investigative process, this may be very useful in deepening and bringing to light a higher degree of violation. Regarding the EEC case, he noted that by involving the UK manufacturer, there might have been more understanding as to the violation which could have resulted from legitimate aim. The UK manufacturer might have requested distributors not to go beyond their territories to avoid free riding. By involving the foreign company, the characterization of the case might be different because it might come to light that the case is not a cartel but rather an abuse of dominance. In the ICC case, he stated that if the ICC manages to reach the Japanese headquarters of the companies, this can lead potentially to the revelation of bigger schemes of a truly global nature and of bigger regional cartel schemes.

Finally, the meeting closed with a discussion about the future activities of the working group. The FAS noted that the working group is an important space to discuss specific cases which demonstrates the importance of international cooperation when CBC are investigated. It stated that practices should be aligned and that one objective of the working group should be to elaborate an international document to spell out cooperation best practices in combatting CBCs. Such global standards could be developed in collaboration with the BRICS Competition Law and Policy Center, whose empirical research on cross border cartels shows that out of 47 respondents, 29 are supporting the creating of such global standards. Majority of those, who are in favour, are developing jurisdictions. This demonstrates demands from developing countries to move towards this objective. Indonesia concluded by highlighting that the differences in structure across the various legal systems can hinder cooperation and therefore concrete steps and guidance would be welcomed to support developing countries. Based on the survey, participants found this session useful in bringing forward practical case studies. Some participants recommended to use more interactive tools such as break out rooms, to discuss practical ways forward by looking at regional trends in addressing international cooperation and to carry out more advocacy work about the outcome of the working group's sessions. The US DOJ representative commented that the Guiding Policies and Procedures under Section F, which was adopted in October 2020, are still relatively new and that the proposal for future work of the Working Group should be discussed at the July IGE session.

List of questions raised for the EEC Case (Eurasian Economic Union)

- What evidence is used in this case?
- Did COVID19 strengthen or hinder cooperation and trust between agencies and EEC? Did you develop new ways of cooperating?
- How is the application of Eurasian competition law possible? Are there extraterritorial mechanisms? And if not, how do you go about it in an efficient manner?
- What would you improve for the future? How did this experience strengthen your cooperation?
- What were the key factors that contributed to the success of the cross border collaboration?
- From USDOJ - Excellent example of cooperation in a case of exclusive territories (not a per se cartel outside EU or EEC). Does EEC have example of traditional price-fixing cartel examples to share?
- The cross border engagement seems to have worked well but it is not clear why the conduct was regarded as cartel behaviour. Was it price fixing?

List of Questions raised for the ICC Case (Indonesia)

- How did you manage to gather evidence of the Meeting in Golf Course in practical term
- Did you face any challenges in establishing an economic analysis?

- As far as we understand ICC cooperated with JFTC on the case. what mechanisms of cooperation are stipulated by the MoU between ICC and KPPU and what mechanisms have you used in this investigation?
- Did you include pieces of evidence from JFTC in your economic analysis?
- What was the impact of this case on your cooperation with JFTC?
- How do you envisage to get more ministries onboard (advocacy) in collaboration efforts?
- Is international cooperation with foreign competition authorities common for ICC? What mechanisms do you use more often?
- Did you open the investigation in relation to branches or main companies abroad?
- Were the cooperation mechanisms you used sufficient and what can be done to make the international investigating more efficient?
- What was the legal basis of the ICC cooperation with JFTC - MOU signed between the two agencies or other legal frameworks?
- Do you have a Leniency Programme?

List of recommendations from participants for future sessions

- recommendation: discussing practical ways forward of cooperation (in practical terms) on cases
- after hearing specific case study it could be interesting to look at whether there are specific regional trends on addressing international cooperation
- maybe we need more break out rooms to discuss practical terms
- i d suggest to do a survey on what MS would like to do forward. I agree with FAS proposal. However we need to discuss how this will be done in practise
- This WG should focus more on advocacy efforts on what we are learning from these sessions
- The sessions should be more interactive
- Practical cases made clear that some jurisdictions have little knowledge or experience of how to conduct cross border cartels investigation, so the FAS proposal is very relevant
- I seem not see much input from Nigeria and other West African countries, how can you help with advocacy in this region