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Report on the Working Group on cross-border cartels to the 20th. session of the Intergovernmental Group of Experts on Competition Law and Policy (IGE Competition)

A. Background

1. The nineteenth session of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy held in July 2021 renewed the mandate of the UNCTAD Working Group (WG) on Cross Border Cartels (CBCs) established by the eight review UN Conference on Competition in October 2020. The report of the nineteenth session of the IGE on Competition Law and Policy also requested the Secretariat to prepare a report of the WG on CBCs' activities during the period September 2021 and June 2022.
2. The WG opens to Member States' Competition Authorities representatives and other relevant stakeholders such as representatives of international organizations and networks, of academia, of civil society organizations and practitioners.

B. Experience and insight gained so far

3. In second part of 2021, UNCTAD organized an *Ad-hoc* Expert meeting on Competition Law and Policy in November 2021 whose theme was cross-border cartels. Competition authorities with less experience in cross-border cartel enforcement showed interest to share and learn best practices from developed competition authorities. All participants regardless of their level of experience in CBC stressed the importance of sharing best practices and the exchange of experiences in this matter. Regarding the selection of relevant topics to be analyzed and discussed at the WG, FAS (Russian Federation) suggested to take the lead in drafting a questionnaire addressed to define the need and priorities of developing in relation to CBC enforcement.
4. During the discussions, participating member states stressed the following topics as relevant to the WG: digitalisation, leniency COVID19, cooperation, enforcement. US DOJ cautioned to focus on the most useful topics since it will create more impact to focus on developing countries to avoid duplication of work already being carried out by OECD and ICN.
5. In 2022, UNCTAD resumed activities under the framework of the WG on CBCs. In this regard, UNCTAD held three virtual meetings on 31 January, 29 March and 30 May. Full-fledged reports of these meetings were circulated to the members after each of the sessions.



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6. The 31 January meeting was to kick-off the activities of the WG on CBCs and agreed on the way forward for the next substantive meetings for March and May 2022. After the meeting, members agreed to continue with the presentation of cases that can underline how the practical difficulties and shortcoming competition authorities from developing countries may face.
7. The 29 March meeting discussed two practical cases. The difficulties from the Chilean Competition authority regarding international notification procedures found echo with other authorities such as CADE (Brazil). What emerged from the discussions is a crucial need to share tools and legislations of each country put in place for cooperation. The second case presented by European Commission dealt with an international cross-border cartel which affected several jurisdictions outside the EU. This case highlighted the importance of informal cooperation between agencies. The lesson learned from this case was that early cooperation between competition authorities is essential. The Commission started cooperation with other agencies at an early stage and identified jurisdiction which were affected by this cartel.
8. Similarly, the 30 May meeting discuss two practical cases. The cases presented by Austria and Colombia discussed the issue of cooperation through *amicus curiae*. US-DOJ highlighted the importance and great incentive for both parties to intervene through letters. The Colombian case showed that cooperation in investigating commodities is essential since some commodities like sugar are more prone to cartelization. Communication between agencies is crucial. However, cooperation in networks such as ECN is difficult to transpose to other jurisdictions as noted by European Commission. Cooperation can also be aggregated regarding one given market especially in pharmaceutical sector.

C. Challenges and suggestions for future work

9. The WG meetings have deepened the discussions on how practicalities of a multijurisdictional cross-border cartel investigation can significantly hamper the outcome of a successful international cooperation scheme. For instance, at the Chilean case presented at the 29 March meeting, the issue of international notifications to individuals abroad even though it was a domestic cartel case hampered considerably the outcome of the case.
10. The cases presented on 29 March 2022 highlighted the importance of informal cooperation and the need to share tools especially at the early stage of the investigation. The discussions about waivers could be developed into a research note.



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11. Regarding the latest meeting, a research note into competition issues in commodity market could be relevant since it is a very cartelized market at the cross-border level. Also, a research note on the importance of a network of competition authorities has on the process of investigation is crucial. Lastly, the issue of cooperation on aggregated markets like pharmaceutical market should be investigated and disseminated in a form of research note to be discussed in follow up meetings.

D. Recommendations

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.
16. In conclusion, the WG on CBCs agreed to request the Intergovernmental Group of Experts on Competition Law and Policy that its mandate be renewed to continue work.



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