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Report of the Intergovernmental Group of Experts on Competition Law and Policy on its eighteenth session

Held at the Palais des Nations, Geneva, from 10 to 12 July 2019

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I. Agreed conclusions

The Intergovernmental Group of Experts on Competition Law and Policy,

Recalling the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,

Taking into account the resolution adopted by the Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Geneva, Switzerland, July 2015),¹

Considering the provisions related to competition issues adopted by the fourteenth session of the United Nations Conference on Trade and Development (UNCTAD XIV; Nairobi, July 2016), including the provisions in paragraphs 69 and 76 (x) of the Nairobi Maafikiano,²

Reaffirming the fundamental role of competition law and policy for sound economic development and the need to further promote the implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices,

Noting that the 2030 Agenda for Sustainable Development and the outcomes of UNCTAD XIV focus on addressing the opportunities and challenges of globalization for development and poverty reduction,

Underlining that competition law and policy is a key instrument for addressing the benefits and challenges of globalization, including by enhancing trade and investment, resource mobilization and the harnessing of knowledge and by reducing poverty,

Recognizing that an effective enabling environment for competition and development should include both national competition policies and international cooperation to deal with cross-border anticompetitive practices,

Recognizing further the need to strengthen the work of UNCTAD on competition law and policy to enhance its development impact and benefits for consumers and business,

Welcoming the contribution from Peru to its work, in the form of the virtual catalogue of best practices in competition and consumer protection, and encouraging interested member States to send information to the secretariat on these instruments,

Expressing appreciation to the contribution from South Africa, in facilitating the round table on competition issues in the health-care sector at its eighteenth session,

Noting with satisfaction the important written and oral contributions from member States and their competition authorities and other participants, which contributed to a rich debate during its eighteenth session,

1. *Welcomes* the efforts of member States in implementing the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices; and *reaffirms* the interest of competition authorities in exchanging experiences, best practices and challenges regarding competition law and policy;

2. *Underlines* the benefits of enhancing and strengthening enforcement capacities and promoting a competition culture in developing countries and countries with economies in transition through capacity-building and advocacy activities targeting all relevant stakeholders; and *requests* the UNCTAD secretariat to disseminate the summary of the discussions of the Intergovernmental Group of Experts on this topic to all interested member States, including through its technical cooperation activities and peer reviews;

¹ TD/RBP/CONF.8/11.

² TD/519/Add.2.

3. *Emphasizes* the importance of regional cooperation in the enforcement of competition law and policy and invites competition authorities to strengthen their bilateral and regional cooperation;

4. *Underlines* the importance of international cooperation as recognized in section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, including informal collaboration among authorities, and calls upon UNCTAD to promote and support cooperation between Governments and competition authorities, as directed by the Accra Accord (paragraphs 103 and 211), the Nairobi Maafikiano (paragraphs 69 and 76 (x)) and the resolution adopted by the Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (paragraphs 3 and 16);

5. *Expresses its appreciation* to the participants in the discussion group on international cooperation and the UNCTAD secretariat for their valuable contribution and engagement and for drafting the resulting report, which successfully fulfilled the mandate entrusted by the sixteenth session of the Intergovernmental Group of Experts;

6. *Welcomes and endorses* the document on guiding policies and procedures in implementing international measures under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices prepared by the discussion group on international cooperation, requesting it to be submitted for consideration and approval by the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, to be held in 2020;

7. *Requests* the UNCTAD secretariat, in cooperation with the representatives of the competition authorities of member States and members of the discussion group on international cooperation, to disseminate the guiding policies and procedures in implementing international measures under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices across regions, involving business and academia, during the preparatory year before the Eighth United Nations Conference to Review All Aspects of the Set;

8. *Recognizes* the benefits and challenges of the digital economy for businesses and consumers and the importance of competition for digital markets and the innovation therein; *encourages* competition authorities to adapt their enforcement practices and use their competition law frameworks to promote and protect competition in digital markets; and *urges* competition authorities to cooperate with each other in dealing with cross-border anticompetitive practices;

9. *Calls upon* UNCTAD to continue its work in the area of the digital economy to ensure that all countries, especially developing countries and the least developed countries, benefit from the innovation it brings;

10. *Expresses appreciation* to the Government of Belarus and the Eurasian Economic Commission for requesting assessments by the UNCTAD secretariat of their competition-related provisions and for sharing related challenges with other competition agencies during its eighteenth session; and *recognizes* the progress achieved to date in the legal and institutional framework for competition at the national level (Belarus) and the regional level (Eurasian Economic Commission);

11. *Recognizes* that health care is an essential service and basic right; and *encourages* competition authorities to continue their advocacy and enforcement work to seek to ensure that access to health care is granted to all citizens at affordable prices;

12. *Decides* that UNCTAD should, considering the experiences with voluntary peer reviews undertaken to date and in accordance with available resources, undertake a further voluntary peer review of the competition law and policy of the West African Economic and Monetary Union during the Eighth United Nations Conference to Review All Aspects of the Set;

13. *Invites* all member States and competition agencies to assist UNCTAD on a voluntary basis by providing experts or other resources for future and follow-up activities in connection with voluntary peer reviews and their recommendations;

14. *Requests* the UNCTAD secretariat to prepare reports and studies as background documentation for the Eighth United Nations Conference to Review All Aspects of the Set on the following topics:

(a) Strengthening competition in the digital economy;

(b) Guiding policies and procedures in implementing international measures under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices;

(c) Implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices;

15. *Requests* the UNCTAD secretariat to facilitate consultations on the topics of competitive neutrality and combating cross-border cartels at the Eighth United Nations Conference to Review All Aspects of the Set;

16. *Requests* the UNCTAD secretariat to prepare, for the consideration of the Eighth United Nations Conference to Review All Aspects of the Set, an updated review of capacity-building and technical assistance activities, based on information to be received from member States;

17. *Requests* the UNCTAD secretariat to revise and update the commentaries on chapters III and IV of the Model Law on Competition, based on submissions to be received from member States;

18. *Notes with appreciation* the voluntary financial and other contributions received from member States; *urges* member States to consider making voluntary financial and other contributions, to assist UNCTAD on a voluntary basis in its capacity-building and technical cooperation activities by providing experts, training facilities or other resources; and *requests* the UNCTAD secretariat to pursue its capacity-building and technical cooperation activities, including training, and, where possible, to focus on maximizing their impact in all interested countries.

Closing plenary
12 July 2019

II. Chair's summary

A. Opening plenary

1. The eighteenth session of the Intergovernmental Group of Experts on Competition Law and Policy was held in Geneva from 10 to 12 July 2019. In his opening remarks, the Secretary-General of UNCTAD referred to UNCTAD research showing a significant increase in market concentration in the non-financial sector between 1995 and 2015. In 1995, the market capitalization of the top 100 firms amounted to 31 times that of the bottom 2,000 firms; by 2015, the top 100 firms were worth 7,000 times more than their smaller competitors. A high level of market concentration was a problem in many sectors, including agriculture, pharmaceuticals and technology. In this context, competition law and policy were crucial to achieving inclusive and sustainable development. Effective competition law enforcement benefited consumers. When firms agreed to fix prices, consumers paid on average 50 per cent more, and when cartels were stronger, consumers paid 80 per cent more. In this regard, the Secretary-General noted that the eighteenth session of the Intergovernmental Group of Experts would discuss the market power of dominant digital platforms. Such platforms had penetrated many aspects of people's lifestyles, from shopping to social interaction. Amazon, Apple, Facebook and Google had replaced oil and gas and telecommunications firms among the top 10 global companies based on market capitalization in 2018. Digitalization, through network effects, economies

of scale and scope and data-driven business models, had led to dominant digital platforms in markets such as those for electronic commerce, online searches, online advertising and social networking. Such platforms offered many opportunities, but controlled consumer data, which conferred market power. This had raised both competition and consumer protection concerns. The digital economy reinforced the need for international cooperation between competition authorities worldwide. The Secretary-General noted that UNCTAD was facilitating cooperation between competition agencies, and encouraged delegates at the session to actively engage in the preparatory work for the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, to be held in 2020.

2. One delegate noted that the competition regime in Malawi, established 21 years previously, had been integrated into the national economic system, and highlighted the work of UNCTAD in assisting the Government in this regard. Malawi had adopted a competition law in 1998 and established a competition agency in 2012, which had made significant progress in competition law enforcement. In June 2019, Malawi had requested a voluntary peer review of its competition law and policy, to be conducted in 2021, in order to ascertain the effectiveness of national competition law enforcement. The exercise would identify the strengths the competition agency should leverage and the weaknesses in the legal and institutional framework to be addressed in order to improve the effectiveness of the agency.

3. Another delegate described the competition commission established in Brunei Darussalam in August 2017, which conducted its work under the three pillars of enforcement, advocacy and advising of other government departments. Law enforcement against anticompetitive agreements was a priority and merger control and investigations into abuse of dominance would start at a later stage. The delegate stressed that competition policy could not and should not address all policy objectives.

4. One delegate emphasized the commitment of Ecuador to competition policy and expressed appreciation for the support of UNCTAD in this area.

5. The representative of an intergovernmental organization detailed the regional competition rules of the Economic Community of West African States developed in 2008 and the establishment of the competition agency, which had begun operations in January 2019. The mandate of the agency was to review the commercial activities in the common market, conduct inquiries and investigations and determine whether any enterprises were engaged in anticompetitive acts. The representative noted the intention to build partnerships with other institutions, including UNCTAD.

6. The representative of another intergovernmental organization recalled the voluntary peer review of the competition law and policy of the West African Economic and Monetary Union conducted by UNCTAD in 2007 and requested an ex post voluntary peer review of the competition law and policy of the Union.

7. The representative of an intergovernmental organization expressed appreciation for the support of UNCTAD and the European Union to the Economic and Monetary Community of Central African States in the area of competition law and policy. The responsibility for competition law enforcement in the Community was shared by national and regional authorities and was complementary.

8. One delegate highlighted the fact that the Competition Commission of India focused on the digital economy, promoted leniency to facilitate law enforcement against cartels and conducted dawn raids.

9. The keynote speaker emphasized that the digital economy would account for 25 per cent of global gross domestic product by 2020 and 60 per cent by 2022. With regard to competition enforcement activity against digital platforms since 2010, there had been 29 investigations of Google, 20 of Amazon, 16 of Apple and one of Facebook, for a total of 66. In the same period, 27 policy studies had been prepared by competition authorities worldwide. The speaker stated that there was emerging consensus on these matters and highlighted some key takeaways. Digital markets differed with regard to their increasing returns of scale, multi-sidedness, economies of scope, network effects, massive amounts of

data collection and use, competition for the market and interconnectedness, as well as consumer inertia. Similarly, power and competition dynamics also differed. Risks to consumer welfare involved prices, quality and innovation. Competition policy goals did not need to change and, with regard to methodology, there was no need to change the tools but rather to adapt analysis to the new business realities by broadening market definitions, recognizing intermediary or bottleneck powers and focusing on non-price-related effects. Enforcement needed to be bolder and quicker; there were more potential risks of underenforcement than overenforcement. In addition, the burden of proof needed to be reversed and the standards of proof needed to be lowered. In this regard, authorities could make use of interim measures. Finally, the speaker advocated reforming merger control regimes and suggested adjusting notification thresholds to reflect transaction values; paying attention to data, economies of scope and innovation effects; and giving weight to potential competition in merger reviews. There was a role for regulation, by allowing for data portability by consumers and ensuring transparency and non-discrimination by platforms and interoperability between them to facilitate switching, as well as preventing default settings by platforms.

B. Work programme, including capacity-building in and technical assistance on competition law and policy: Studies related to the provisions of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices – Competition issues in the digital economy

(Agenda item 3 (a) (i))

10. Under the agenda item, the Intergovernmental Group of Experts on Competition Law and Policy held one round-table discussion. The UNCTAD secretariat presented the background document on competition issues in the digital economy (TD/B/C.I/CLP/54), detailed ways to promote and protect competition in the digital economy and described the challenges faced and possible policy options to address them. The secretariat noted that the competition framework and enforcement tools needed to be adapted to the features and business models of digital platforms. There was a need to broaden the consumer welfare standard beyond price analysis, to include non-price factors such as consumer choice, privacy, data protection and innovation. Finally, the secretariat stressed the importance of cooperation between competition authorities at the bilateral, regional and international levels.

11. The first panellist presented the digital economy-related challenges faced by the Competition Authority of Kenya. With regard to the definition of the digital economy, the Group of 20 and the World Economic Forum definition comprised all jobs in the digital sector; Kenya had adopted a broader definition, namely, to include the entirety of sectors participating in the digital environment. The digital economy therefore needed to be regulated and competition law was the competent law to regulate this economy, rather than sectoral legislation such as telecommunications regulations. However, in an effort to ensure coordination between government stakeholders, the Competition Authority had approached the central bank, the communications authority and the insurance authority to gather relevant information and ensure coherence. One challenge was that digital markets evolved so quickly that business dynamics changed in the course of investigations, for example with regard to mobile payments. The dominant firm in Kenya had concluded exclusive agreements with agents with which customers could deposit or withdraw money. During the investigation, the dynamics of the market had changed, with agents no longer essential actors, thereby rendering the outcome of the investigation irrelevant. The panellist stressed that the dynamism of the digital economy required competent staff. The resources of competition agencies did not allow them to master the complexities of all platforms, but they could undertake vigorous advocacy initiatives. The use of moral suasion to influence big firms could be effective if reputational consequences came into play. Rather than continuing to change regulations, the Competition Authority focused on advocacy, cooperation with sector regulators and enforcement of competition law for infringements. Current merger guidelines were being revised to address digital particularities and

innovation and the Authority had revised its definition of the market, to address the multi-sided nature of digital markets; introduced interoperability as a solution to address the dominance of platforms; and moved from using the consumer welfare standard to applying non-price-related standards. The panellist stressed that competition authorities needed to devote more resources to research and more efforts to advocating for procompetition regulation when trying to address the negative externalities of the digital economy. He suggested that national competition authorities with dual mandates for competition and consumer protection should ensure that the two departments worked together and had a common approach to addressing digital economy-related challenges. The benefits of the digital economy included, in particular, enhancing the accessibility and affordability of financial services for the poor. A document on a digital economy blueprint for Kenya indicated the future direction of regulation and enforcement. Regulation needed to be outcome-based, collaborative and case-specific, at both the national and international levels. Finally, with regard to a regional perspective on competition in the digital economy, the panellist noted that the Continental Free Trade Area in Africa would be an opportunity to formalize an African competition forum at which members could share experiences and expertise on regulation and enforcement; set benchmarks; engage in case handling and exchanges of information; and conduct joint research studies, thereby mitigating resource constraints.

12. The second panellist presented the benefits of digital transformation for economic development, which improved inclusiveness in terms of access to services and goods and facilitated disruptive innovation. He highlighted the importance of digital innovation for development, as it allowed for swifter communication, overcoming difficulties of geographical or economic distance. Competition issues in the digital economy were common in both developed and developing countries. Competition enforcement in the digital economy related to other policy areas such as data privacy, cybersecurity and electronic commerce. Current enforcement tools needed to be adapted to the new realities and there was a need to redefine markets, redefine market power and reconsider efficiencies. For example, Austria and Germany had revised their merger laws and the Russian Federation had revised the definition of dominance. With regard to remedies, the panellist stressed that, as global companies operated globally, it was difficult to impose remedies that addressed local concerns. Finally, the panellist urged coordination between competition authorities, to ensure coherence in remedies, and stressed the importance of international cooperation to address all of these challenges.

13. The third panellist shared the experiences of the Competition Authority of France. The fact that platforms were markets that allowed for the internalization of transaction costs had resulted in a new business model that challenged traditional linear models. One challenge related to addressing multi-sided markets, which required further investigative capacity due to jurisdictional issues. One recurrent concern related to elucidating how a dominant firm could reinforce barriers to entry, in particular in the self-preferencing of platforms in multi-sided markets. Factors other than prices, such as quality, privacy and innovation, also came into play. For example, in France, Google had been accused of predatory pricing by a linear competitor with regard to its maps and had stated that a multi-sided business model allowed for losses to be incurred on one side of the market and profits to be earned on the other. The judge at the court of first instance had sided with the plaintiff, yet the decision had been reversed in appeals. Following another case, the Competition Authority had required Google to determine clear and non-discriminatory criteria for access to advertising. In addition, the Authority engaged in joint work in cooperation with Germany and the United Kingdom of Great Britain and Northern Ireland on issues related to the digital economy and was currently working on a report on algorithms. The panellist emphasized the need for cooperation at the national level between national competition authorities and other authorities, such as sector regulators and press institutions, as well as at the international level. He alluded to the need for adjustments to adapt existing tools to new circumstances and emphasized that the digital economy raised many challenges, for example with regard to urbanist concerns with regard to the types of services provided by companies such as Airbnb, which required regulation, and stated that competition law could not resolve all problems. Finally, with regard to ex ante regulation, the panellist stated that this could petrify relationships between business and regulators,

stifle innovation and increase regulatory costs. The panellist stated that regulations should be as procompetition as possible and underlined the importance of adapting the tools of antitrust enforcement to digital markets.

14. The fourth panellist detailed the revision to the competition law of Germany carried out in June 2017, which had introduced additional criteria for the assessment of the market position of firms in the digital economy, including direct and indirect network effects, parallel use of services from different providers and switching costs for users (as multihoming can lessen the danger of market tipping), economies of scale in connection with network effects, access by firms to data relevant for competition and innovation-driven competitive pressure. The revision had also introduced a transaction value threshold for mandatory premerger notification, leading to the development of new guidelines on how to calculate transaction value, jointly with Austria, which had introduced a similar threshold. This allowed the Federal Cartel Office to consider the acquisition by large established companies of start-ups with a high economic value. Prior to the revision, preparatory work had included a joint paper with France on competition law and data, published in May 2016; a paper on the market power of platforms and networks produced by a think tank within the Federal Cartel Office; and a special report by the German Monopolies Commission on the challenges of digital markets, published in June 2015. The panellist highlighted that the revision reflected the emphasis noted by other panellists, in that it had not been a fundamental change but attempted to explain the additional criteria that could be considered in competition cases involving digital platforms. The aim of such clarification was to explain to others involved in competition law enforcement and adjudication, such as the judiciary and the business community, the aspects that would be considered. The requirement to take a holistic view in all circumstances remained. In February 2019, the Federal Cartel Office had restricted the collection and processing of user data by Facebook, requiring a compliance road map to be submitted within six months of the decision and this conduct to be stopped 14 months after the decision, yet had not provided details on how to implement the decision. A fine had not been imposed, in accordance with practice in Germany when considering new circumstances. The Federal Cartel Office had taken this decision given the dominance of Facebook in the market in Germany among social networks. The panellist emphasized that there were two theories of harm, namely, vertical harm resulting from a company's conduct in imposing unfair business terms on users, who lost control of their data and could not decide freely how their data should be used, and horizontal harm in creating impediments for competitors that could not amass the same amount of data as Facebook.

15. The fifth panellist detailed antitrust enforcement under the European Commission and the approach to promoting competition in digital markets. The Commission was responsible for the enforcement of competition rules in the European Union, where the conduct at stake had an effect on trade between the member States. The Commission considered that digital markets were similar to other markets and had made use of its enforcement powers in the digital area, as in other sectors, through several decisions. The Commission had first brought a major case in this area in 2004, against Microsoft. In recent years, the Commission had adopted three decisions against Google, several decisions in the area of electronic commerce and accepted commitments by Amazon and Apple with regard to digital publications and was currently assessing a complaint from an online platform providing music streaming services. These cases showed that existing tools were adequate. With regard to data, data analysis could be incorporated in the market analysis, for example as carried out by the Commission in a case related to Google; with regard to network effects, these had been taken into account in the first case in this area in 2004, as well as recently in a case related to the operating system of Google; and with regard to algorithms, the Commission had considered algorithm-related behaviour, in particular in vertical commercial relations, in recent cases on resale price maintenance. The panellist cited the report of the European Commission on competition policy for the digital era, published in April 2019, in which the first finding was that existing substantive tools were adequate in dealing with digital markets. The report provided ideas for remedies and regulatory frameworks with regard to access to data. It was important to identify new issues and select the appropriate tools and adapt them to circumstances if needed. Finally, the panellist advocated making use of existing tools, including commitments, settlements and interim

measures and improving the duration of competition proceedings. He stressed the need to bring additional clarity to the market by means of guidelines on vertical and horizontal anticompetitive practices, which needed to be reviewed.

16. The sixth panellist stated that the Philippines Competition Commission had a different perspective on merger reviews for possible anticompetitive effects involving high technology firms. Referring to the review of the merger between Grab, a ride-hailing company in Singapore, and the ride-hailing company Uber, he stated that the merger had involved the understanding of the algorithms used in the applications, as well as the parameters used to determine price and supply and demand for particular routes. The transaction had been constrained by the fact that, as the sector regulator had not renewed the licence of Uber to continue operating in the Philippines, Uber could not sell part of its operations. The panellist noted that merger notification thresholds should extend beyond the value of the sales, revenues and assets of firms, to include transaction values. For example, Uber had gained a 27 per cent share in Grab, and this did not meet the threshold requirement. However, big data was not sufficiently assessed for notification requirements. The panellist stated that one of the key lessons learned was that behavioural commitments were not preferable and that the priority should be not to impose fines but to ensure that anticompetitive conduct ceased. In addition, regional reviews of mergers were preferable for companies. The Competition Commission believed that the use of memorandums of understanding towards effecting regional cooperation in merger reviews was a process worth pursuing and had initiated a memorandum of understanding process with the Competition and Consumer Commission of Singapore. Finally, the panellist stated that the guiding policies and procedures in implementing international measures under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was a useful template for national competition authorities to use in regional-level cooperation.

17. The seventh panellist detailed the recent inquiry into digital platforms by the Australian Competition and Consumer Commission and its findings on the growth of key digital platforms and their impact on news media, advertisers and consumers. The inquiry had identified concerns with the ability of and incentive for such platforms to favour their own business interests through their market power and presence across multiple markets; the lack of transparency in the operations of such platforms towards advertisers, media, businesses and consumers; awareness and understanding of consumers of the extensive amount of information collected by such platforms and their concerns regarding the privacy of their data; and the role of such platforms in determining the news and information accessed by Australians, how this information was provided and its range and reliability. The inquiry had focused on Facebook and Google due to their size and significance and their level of influence on news and journalism in Australia. With regard to leveraging market power, the inquiry had found that the vertical or conglomerate nature of the two platforms across products and services was significant and raised risks that platforms could leverage market power from one market to another, including by preferencing their own related services, a risk highlighted in the case brought by the European Commission against Google; and with regard to data and competition, the inquiry had emphasized that user data had a critical role in the business model of advertiser-funded digital platforms and that Facebook and Google had many touch points with consumers, enabling them to capture a significant amount of data, creating a feedback loop that enabled them to improve their services and attract more users and advertisers. Opening up access to data held by major digital platforms might reduce barriers to competition in existing markets and assist competitive innovation in future markets. The Australian Competition and Consumer Commission was implementing the consumer data right, an economy-wide reform that would enable customers to share their data with competing service providers and comparison service providers and would initially apply to the banking and electricity sectors. Measures that could address some of the issues identified included those that sought to ensure sufficient oversight of digital platforms; ensure consumer protection through strengthened consumer and privacy and data protection laws; better inform consumers and improve their bargaining positions when dealing with digital platforms, including through gaining greater control of data and personal information; better equip competition law regimes to cope with digital mergers; support the choice and quality of

journalism on digital platforms; and address the impact of digital platforms on the commercial news sector and the risk that certain types of journalism beneficial to society might be underprovided. With regard to digital mergers, greater emphasis needed to be placed on the potential for competition in the future and the Commission had recommended changes to merger legislation in Australia to increase the emphasis on potential competition and on the importance of data. Finally, the panellist noted that merger legislation could more explicitly require examination of the potential removal of a competitor from the market due to a merger operation, yet such analysis was possible even within the current framework.

18. The eighth panellist detailed the current debate on big technology companies in the United States of America. One issue related to the market definition and the means of assessing the acquisition of start-ups by dominant platforms. Federal Trade Commission hearings on competition and consumer protection law had involved discussions on evaluating nascent competition, privacy, big data and competition, and received more than 850 comments and led to various papers. The Commission enforced competition law in digital markets as in any other sector but aimed to refrain from stifling innovation. Finally, the panellist stated that the current antitrust framework was sufficient to deal with competition cases in digital markets.

19. The ninth panellist proposed a code of conduct to help ban the most exclusionary and exploitative practices *ex ante*, in order to liberate the resources of authorities. He emphasized that technology giants should abide by the rules created and advocated procompetition law enforcement first, rather than regulation, although he noted that enforcement should be faster and take a more dynamic view of markets. Some aspects of digital problems were not due to anticompetitive behaviour and the panellist proposed light regulatory codes to handle such issues. He stressed the need to preserve the innovation initiatives of digital platforms and questioned whether the rules were adequate, encouraging authorities to act fast. The legal framework was adequate, but new forms of algorithmic collusion could not be captured. The panellist therefore urged competition authorities to adapt the legal framework, push its boundaries if necessary and bring the courts along. He recommended conducting market studies and using interim measures. To address the challenges of digitalization, he suggested improvements to competition law to make enforcement action quicker. The challenges in digital markets arose not from behavioural problems but from the nature and structure of these markets and procompetition regulation was therefore preferable. Finally, the panellist noted that businesses were dependent on digital platforms and it was therefore crucial to balance their market power with responsibility.

20. During the ensuing discussion, some delegates shared national experiences in enforcing competition law in digital markets, including on big data, algorithms and collusion. One delegate stated that big technology firms might not have a physical presence in many countries, yet their decisions impacted these markets. Another delegate emphasized the greater need for coordinated enforcement both globally and regionally, advocated a global legal instrument to ensure that anticompetitive behaviour was scrutinized equally everywhere worldwide and suggested having effective means to roll out remedial action in developing countries. One delegate referred to big data as leading to dominance and possible abuse, stating that algorithmic collusion required in-depth studies by competition authorities and that current antitrust analysis was insufficient in addressing the dynamic nature of the digital economy. Another delegate stressed the need to obtain advice from more experienced competition authorities on enforcement in the digital economy. One expert referred to the proposal to prohibit the disclosure of source code under free trade agreements and suggested that this could hinder authorities from accessing and analysing data. Another expert referred to pre-existing remedies used over a century prior in competition law, such as divestiture. Several delegates stressed the need to strengthen regional and international cooperation and coordination in competition law enforcement related to digital economy players.

C. Work programme, including capacity-building in and technical assistance on competition law and policy: Studies related to the provisions of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices – Competition issues in the health sector, specifically looking into pharmaceuticals and health-care services

(Agenda item 3 (a) (ii))

21. Under the agenda item, the Intergovernmental Group of Experts on Competition Law and Policy held one round-table discussion, facilitated by the Competition Commission of South Africa. The Deputy Commissioner of the Competition Commission presented a report titled “Competition in health-care markets: Access and affordability” and highlighted the drivers of access to affordable health care and the role of competition and regulation in ensuring that health-care markets worked.

22. The panellists emphasized that the cost of and access to health care remained a pervasive issue worldwide. The health of citizens was directly linked to a nation’s productivity and economic development, as recognized under Goal 4 of the Sustainable Development Goals. In particular, the global market share of certain firms raised concerns about the extent and nature of competition in pharmaceutical markets, in which customers were often Governments bearing the costs of health care. With regard to the affordability of medicines, some prevailing factors were identified, including the use or misuse of intellectual property rights; barriers to entry of cheaper alternatives, for example through collusion between established pharmaceutical firms; and excessive or unfair prices resulting from anticompetitive practices. Competition authorities worldwide were striving to address these competition-related concerns, towards achieving affordable health care for all. However, health sector issues were complex and there was a need to identify areas in which to intervene. The panellists discussed the challenges faced by developing countries and countries with economies in transition, presenting examples from India and Kenya. There was a general lack of infrastructure and basic health-care services, and the panellists emphasized the urgent need for developing country agencies to prioritize bold actions to improve health care. In this regard, sound government procurement was key to ensuring affordable and accessible medicines. Emerging issues in the health sector included new technologies such as telemedicine, which helped to improve access to health care through mobile applications in developing countries. For example, in India, the cost of medicines made up nearly 70 per cent of required treatments and was often unaffordable by the poor; the Government was promoting an alternative system that would be less reliant on pharmaceutical firms and that involved strong regulatory frameworks and policy coherence for the benefit of citizens, taking into account issues such as data portability. Finally, the panellists emphasized the need for policy coherence and coordination between authorities on competition and intellectual property rights, in ensuring that excessive pricing based on such rights was treated as abuse of dominance in certain cases.

23. Two panellists urged competition agencies to celebrate 5 December as World Competition Day, as observed by UNCTAD and over 25 countries, as it helped to draw the attention of society as a whole to issues critical for human development; competition policy fell into this category. The theme of World Competition Day in 2019 would be related to health care and pharmaceuticals.

24. During the ensuing discussion, several delegates highlighted the importance of access to health care and that large pharmaceutical firms dictated the price of medicine in many jurisdictions. Several delegates shared national experiences in dealing with health sector issues through studies, regulatory instruments and cases related to pharmaceuticals, pay-for-delay, excessive pricing and government-controlled pricing.

D. Work programme, including capacity-building in and technical assistance on competition law and policy: Studies related to the provisions of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices – International cooperation of competition authorities in the fight against cross-border anticompetitive practices and mergers

(Agenda item 3 (a) (iii))

25. Under the agenda item, the Intergovernmental Group of Experts on Competition Law and Policy held one round-table discussion. In opening the discussion, the UNCTAD secretariat presented its work on international cooperation in cross-border anticompetitive practices and mergers in 2011–2017, highlighting the challenges of international cooperation, including the protection of information through domestic law; the lack of an internationally recognized definition of confidential information; the absence of confidentiality waivers, except in the European Union; limitations in the admissibility of information and the implementation of leniency programmes at the cross-border level; the lack of mutual understanding and trust between competition authorities; and the lack of effective regional frameworks to deal with cross-border cases. A framework for cooperation, which could establish the basis for developing a set of rules and procedures for international cooperation, was available in article 4, section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.

26. One delegate shared the experience of Malaysia with regard to challenges in international cooperation, presenting instances of informal cooperation in the digital sector, such as with regard to the merger of Grab and Uber, and in the poultry industry; and with regard to leniency applications, stressing the importance of engagement with foreign agencies in providing disclosure and guidance on certain aspects.

E. Work programme, including capacity-building in and technical assistance on competition law and policy: Voluntary peer review of competition law and policy

(Agenda item 3 (b))

27. Under the agenda item, the secretariat presented the legal assessments of the competition laws of Belarus and the Eurasian Economic Commission undertaken as part of UNCTAD technical assistance. Based on the Model Law on Competition and international best practices from developed and developing countries and countries with economies in transition as a benchmark, the assessments covered the main substantive provisions of the laws, with a focus on extraterritorial application and international cooperation, and aimed to underpin efforts to strengthen fair competition at the national and regional levels.

28. In his opening remarks, the Minister of Antimonopoly Regulation and Trade of Belarus expressed his appreciation for the recommendations of UNCTAD. He highlighted the importance of a cooperation agreement signed by the agency and the International Finance Commission in April 2019, which had resulted in a significant increase in investigations of potential anticompetitive practices (97 in the past six months). Finally, he stressed that effective competition policies were not only crucial for creating a level playing field for businesses, in particular small and medium-sized enterprises, but could also enhance the protection of consumer interests and rights.

29. The representative from the Eurasian Economic Commission noted that the legal assessment was highly useful in identifying several gaps in the mandate of the Commission to address anticompetitive conduct, both within national jurisdictions and across borders, among others concerning extraterritoriality. A regional merger control regime had as yet not been established in the Eurasian Economic Community. Finally, the representative stated that the Commission welcomed the recommendations of UNCTAD to develop a leniency programme, streamline the definition of confidential information to facilitate regional cooperation and add tools for economic analysis.

30. During the ensuing discussion, several delegates commended the work conducted on the legal assessments, which demonstrated collaborative efforts among the participating jurisdictions and provided a good basis for stronger cross-border enforcement and advocacy in the future.

F. Work programme, including capacity-building in and technical assistance on competition law and policy: Report of work on capacity-building in and technical assistance on competition law and policy

(Agenda item 3 (c))

31. Under the agenda item, the Intergovernmental Group of Experts on Competition Law and Policy held one round-table discussion. In opening the discussion, the UNCTAD secretariat presented the activities carried out in 2018–2019.

32. The first panellist presented a project of the Economic and Monetary Community of Central African States, expressing appreciation to UNCTAD and the European Commission for related funding. Through this project, member States of the Community could strengthen their competition law enforcement capacities. New provisions in the regional competition rules included a change in the threshold for merger control (from \$1 billion to \$10 billion) and regulations on anticompetitive behaviour in public procurements and powers in investigation procedures.

33. The second panellist presented a technical assistance programme in Albania supported by UNCTAD in 2015–2017. The peer review of the competition law and policy of Albania had focused on increasing the capacity of administrative staff and judges and a culture of advocacy in society, including among the business and academic communities. The peer review had helped align the competition law to that of Europe. Finally, the panellist summarized the main activities of the authority in 2018–2019, including market studies and investigations.

34. The third panellist detailed the technical assistance activities carried out by UNCTAD in El Salvador. In 2018, UNCTAD had provided advice on the reform of the competition law. In addition, UNCTAD had participated in a forum of competition authorities in Central America with a presentation on the strategic considerations for an effective competition policy from a multilateral perspective and had also participated in the competition day of El Salvador and in two television and radio programmes.

35. During the ensuing discussion, one delegate detailed the free trade agreements concluded between Australia and New Zealand and between Australia and the Association of Southeast Asian Nations, as well as the technical assistance activities available for the latter under such agreements.

G. Work programme, including capacity-building in and technical assistance on competition law and policy: Review of chapters IX and X of the Model Law on Competition

(Agenda item 3 (d))

36. The UNCTAD secretariat presented the revisions made to chapters IX and X of the Model Law on Competition. One delegate stated that there was some incorrect information regarding the competition authority of the United Kingdom and offered to submit corrections by February 2020. Another delegate proposed that all of the contributions from member States be collected and reflected in the secretariat document on the revision of the relevant chapters.

H. Work programme, including capacity-building in and technical assistance on competition law and policy: Report of the work undertaken by the discussion group on international cooperation

(Agenda item 3 (e))

37. The UNCTAD secretariat presented a report of the work undertaken by the discussion group on international cooperation in 2018–2019, which had culminated in the formulation of draft guiding policies and procedures in implementing international measures under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. This had built on earlier work undertaken by the discussion group on a survey of the main obstacles to international cooperation, to which jurisdictions of varying degrees of maturity had contributed, as well as a toolkit on combating restrictive business practices presented by the Russian Federation and supplementary proposals from other countries participating in the discussion group.

38. The members of the drafting committee, namely Austria, Italy, Japan, the Russian Federation and the United States, provided their perspectives on the process, along with general insights. The member from the Russian Federation reaffirmed the need for enforcement cooperation between agencies, considering the challenges posed by cross-border anticompetitive practices. With contributions from more than 50 competition agencies worldwide, academics, businesses and lawyers, the draft guiding policies and procedures constituted the means to provide not only guidance, but a workable and practical mechanism for international cooperation, with a particular relevance for developing countries. The member from the United States noted the clear consensus on the necessity and urgency of cooperation and expressed appreciation for the efforts of the International Competition Network and the Organization for Economic Cooperation and Development in this regard. Recalling, among others, surveys conducted by the International Competition Network in 2013, the Organization for Economic Cooperation and Development in 2014 and UNCTAD in 2017, on concrete challenges with regard to cooperation, he highlighted some key issues, such as legal barriers and practical constraints, in particular concerning confidentiality, and noted that the draft guiding policies and procedures extended existing frameworks to younger agencies. The member from Japan stressed the cohesiveness of the committee and its continued efforts to consolidate existing work and additional proposals. The member from Austria stated that the finalization of the draft guiding policies and procedures had been achieved at an ad hoc expert meeting in April 2019, at which more than 60 member States had participated. One of the key issues discussed at the meeting had been the need to promote the exchange of non-confidential information and draw up a clear mandate for UNCTAD. Finally, the member from Italy expressed appreciation to UNCTAD for providing a platform for cooperation, in particular for developing countries, and emphasized trust as a crucial prerequisite for international cooperation.

39. During the ensuing discussion, the representative of an intergovernmental organization noted that the document was now up-to-date. One delegate, commending the degree of sophistication and flexibility, which would render it highly applicable in different jurisdictions, offered to prepare a Portuguese version of the document. Several delegates expressed appreciation to UNCTAD for building consensus and meeting an important milestone in strengthening international cooperation between competition agencies. One delegate expressed interest in actively working on a common road map. Another delegate noted that the discussion group on international cooperation was in itself a good example of international cooperation. Finally, one expert referred to the challenge faced by younger competition authorities in explaining the benefits of international cooperation to parties being investigated, as noted in the draft guiding policies and procedures, and emphasized the important role of private practitioners in advocacy activities in this regard.

III. Organizational matters

A. Election of officers

(Agenda item 1)

40. At its opening plenary meeting on 10 July 2019, the Intergovernmental Group of Experts on Competition Law and Policy elected Ms. Tebelelo Pule (Botswana) as its Chair and Mr. Sadaaki Suwazono (Japan) as its Vice-Chair-cum-Rapporteur.

B. Adoption of the agenda and organization of work

(Agenda item 2)

41. Also at its opening plenary meeting, the Intergovernmental Group of Experts adopted the provisional agenda for the session (TD/B/C.I/CLP/53), as follows:

1. Election of officers.
2. Adoption of the agenda and organization of work.
3. Work programme, including capacity-building in and technical assistance on competition law and policy:
 - (a) Studies related to the provisions of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices:
 - (i) Competition issues in the digital economy;
 - (ii) Competition issues in the health sector, specifically looking into pharmaceuticals and health-care services;
 - (iii) International cooperation of competition authorities in the fight against cross-border anticompetitive practices and mergers;
 - (b) Voluntary peer review of competition law and policy;
 - (c) Report of work on capacity-building in and technical assistance on competition law and policy;
 - (d) Review of chapters IX and X of the Model Law on Competition;
 - (e) Report of the work undertaken by the discussion group on international cooperation.
4. Provisional agenda for the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.
5. Adoption of the report of the Intergovernmental Group of Experts on Competition Law and Policy.

C. Provisional agenda for the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

(Agenda item 4)

42. At its closing plenary meeting on 12 July 2019, the Intergovernmental Group of Experts approved the provisional agenda for the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (annex I).

D. Adoption of the report of the Intergovernmental Group of Experts on Competition Law and Policy

(Agenda item 5)

43. Also at its closing plenary meeting, the Intergovernmental Group of Experts authorized the Vice-Chair-cum-Rapporteur to finalize the report after the conclusion of the session.

Annex I

Provisional agenda for the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

1. Opening of the Conference.
2. Election of the president and other officers.
3. Adoption of the rules of procedure.
4. Adoption of the agenda and organization of the work of the Conference.
5. Credentials of the representatives to the Conference:
 - (a) Appointment of a credentials committee;
 - (b) Report of the credentials committee.
6. Implementation of the United Nations Guidelines for Consumer Protection and the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.
7. Strengthening consumer protection and competition in the digital economy.
8. International enforcement cooperation among consumer protection authorities in electronic commerce.
9. International cooperation under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices: Adoption of the guiding policies and procedures.
10. Improving consumer product safety worldwide: Good data for good policy.
11. Competitive neutrality.
12. Combating cross-border cartels.
13. Review of capacity-building in and technical assistance on consumer protection and competition law and policy.
14. Voluntary peer review of consumer protection law and policy: Peru.
15. Voluntary peer review of competition law and policy: West African Economic and Monetary Union.
16. Other business.
17. Adoption of the report of the Conference.

Annex II

Attendance*

1. Representatives of the following States members of the Conference attended the session:

Afghanistan	Lao People's Democratic Republic
Albania	Lesotho
Algeria	Lithuania
Argentina	Madagascar
Armenia	Malawi
Australia	Malaysia
Austria	Mauritius
Belarus	Mongolia
Benin	Morocco
Bolivia (Plurinational State of)	Namibia
Botswana	Nigeria
Brazil	North Macedonia
Brunei Darussalam	Oman
Burkina Faso	Pakistan
Cambodia	Paraguay
China	Peru
Colombia	Philippines
Congo	Qatar
Côte d'Ivoire	Romania
Democratic Republic of the Congo	Russian Federation
Dominican Republic	Saudi Arabia
Egypt	Serbia
El Salvador	Seychelles
France	South Africa
Gambia	Spain
Georgia	Sri Lanka
Germany	State of Palestine
Guatemala	Switzerland
Guyana	Syrian Arab Republic
Hungary	Tunisia
India	Turkey
Indonesia	Ukraine
Italy	United Kingdom of Great Britain and Northern Ireland
Japan	United States of America
Kazakhstan	Uzbekistan
Kenya	Viet Nam
Kuwait	Zambia
Kyrgyzstan	Zimbabwe

2. The following intergovernmental organizations were represented at the session:

Common Market for Eastern and Southern Africa
Commonwealth Secretariat
Economic Community of West African States
Economic and Monetary Community of Central African States
Eurasian Economic Commission
European Union

* This attendance list contains registered participants.
For the list of participants, see TD/B/C.I/CLP/INF.10.

Organization for Economic Cooperation and Development
Organization of Islamic Cooperation
West African Economic and Monetary Union

3. The following United Nations organs, bodies and programmes were represented at the session:

Economic Commission for Europe

4. The following non-governmental organizations were represented at the session:

General category:

Consumer Unity and Trust Society International
Global Traders Conference



**United Nations Conference
on Trade and Development**

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Trade and Development Board
Trade and Development Commission
Intergovernmental Group of Experts on Competition Law and Policy
Eighteenth session
Geneva, 10–12 July 2019

**Report of the Intergovernmental Group of Experts on
Competition Law and Policy on its eighteenth session**

Held at the Palais des Nations, Geneva, from 10 to 12 July 2019

Corrigendum

Chapter I, agreed conclusions

Replace paragraph 6 with the text below.

6. *Welcomes* and endorses the document on guiding policies and procedures in implementing international measures under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices prepared by the discussion group on international cooperation, requesting it to be submitted for consideration and approval by the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, to be held in 2020;*

* See TD/B/C.I/CLP/55/Add.1.

