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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Summary of Discussion on the roundtable on Digital Evidence Gathering in Cartel Investigations

18th Meeting, 28 September 2020, Virtual

This document prepared by the OECD Secretariat is the summary of discussion of the roundtable on Digital Evidence Gathering in Cartel Investigations held as part of the eighteenth meeting of the OECD-IDB Latin American and Caribbean Competition Forum held on 28-29 September 2020 in a virtual format.

More documents related to the Forum can be found at: oe.cd/lacsf.

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Summary of Discussion of the Roundtable on Digital Evidence Gathering in Cartel Investigations

28 September 2020, Virtual Zoom meeting

By the Secretariat

1. On 28 September 2020, the Latin American and Caribbean Competition Forum held a roundtable on Digital Evidence Gathering in Cartel Investigations. The purpose of the roundtable was to discuss legal and practical challenges arising from digital evidence gathering in cartel investigations and identify ways for competition authorities to overcome them. It was held virtually on Zoom and chaired by Mr. Mario Umana (Lead Trade and Competition Specialist Integration and Trade Sector, Inter-American Development Bank [IDB]). Over 150 delegates attended the roundtable.
2. The **Chair** opened the roundtable highlighting increasing importance of digital evidence gathering in cartel investigations and its advantages. He noted that competition agencies have increasingly been relying on digital evidence in their fight against cartels and the increasing digitalization of evidence has improved the chances of detecting and proving cartels. He observed that, at the same time, digital evidence also raises new legal and practical challenges, which would be discussed at this roundtable. He then introduced the expert speaker for the roundtable, Mr. Dirk Van Erps (Adviser to the Deputy Director-General for Antitrust and Cartels at the European Commission).
3. After introductory remarks from the Chair, the **Secretariat** (Ms. Cristina Volpin) presented the Secretariat background paper [DAF/COMP/LACF(2020)2] by explaining that while digitalization change how companies operate and generates challenges for competition authorities in their fight against cartels, it also provides remarkable opportunities for them to strength their ability to detect cartels more efficiently.
4. The **expert speaker** (Mr. Dirk Van Erps) presented the resources required and the best practices for conducting digital evidence gathering in cartel investigations based on his experience gained at the European Commission. In terms of resources, he noted that, while the digital evidence opens a whole new way for competition agencies to access to information, it requires substantive resources for initial and continuous investments. He mentioned that the Directorate-General for Competition of the European Commission has a dedicated team of well-trained IT staff that ensures that their IT equipment is properly installed and the necessary licenses are maintained.
5. As regards the inspections, he noted that the European Commission has strong incentive to limit the amount of files to be collected because of the “access to file” procedure that obliges the European Commission to make accessible all the related data on the file to all parties involved in the proceedings. The key to achieve such a goal is the preparation (e.g. research on the companies to be inspected, their IT system etc.). Another way of collecting digital evidence is a request for information which is used for example in relation to the data that is unlikely to disappear.

6. Finally, he also shared his experience in inspections under the time of Covid-19. The circumstances brought about by Covid-19 requires additional safety measures and increased work for each step of inspections. Therefore, the European Commission is trying to prioritise inspections for cases with the highest risk of data destructions (e.g. on-going cartels).

7. After the presentation of the expert speaker, the delegations who had submitted written contributions took the floor and discussed issues relating to digital evidence gathering in cartel investigations.

8. In the first part of the roundtable, the Chair invited the **United States, Peru¹, Columbia, Mexico and Portugal** to present their practical institutional solutions to gather digital evidence in the most effective way.

9. The **United States (Department of Justice (DoJ))** stated that the DoJ share similar challenges as the European Commission in terms of resources and that it has undertaken certain reforms in relation to its internal organisation. For instance, it launched a specialised litigation support unit that facilitates the gathering, processing, and reviewing of digital evidence. The unit is made up of professionals with education and experience in the fields of IT, legal case management, and project management, with a particular emphasis on experience with litigation, e-Discovery, and forensic tools. It also hired a new attorney general who focuses on electronic discovery in criminal cartel cases and provides expertise and guidance on issues arising with digital evidence throughout the lifecycle of an investigation. It emphasized that communication and coordination between the IT staff and investigative teams is vital to ensuring efficient receipt and processing of digital evidence.

10. It also noted challenges relating to communications via new electronic tools other than emails, such as Snapchat and Facebook. The challenges pertain to, for example, how to process communications on these tools in a format that the attorneys can review. Additional resources may be required to process such communications.

11. **Columbia** stated that, along with the 4th industrial revolution, the Superintendence of Industry and Commerce (SIC) has recognised the importance of strengthening its digital tools. In this context, it created a forensic lab thanks to the financial support of the Israeli competition authority. The forensic lab runs the digital tools and organize the evidence before it can be analysed and used in the investigations. On the basis of this forensic lab, it created a specialised IT unit composed of engineers and professionals with technical and specialized knowledge in computer forensic science.

12. It also presented a new project – “Sabueso” project – launched in February 2020. It involves using process automation and machine learning to identify anti-competitive practices. For instance, based on publicly available information, it follows goods and services on electronic platforms and analyse and present a large amount of data in a user-friendly manner. The project should in particular be useful in the time of Covid-19 since more and more people started purchasing various products on platforms.

13. Finally, it shared a recent judgement of the Colombian Constitutional Court in 2019 that reiterated the constitutionality of the SIC’s investigative powers during administrative proceedings. One of the key points of the judgement on the SIC’s functions is that the Court stated that the SIC can request, copy and review information contained in computers, tablets and e-mails without a Court order.

¹ Due to technical issues in connection with the interpretation from Spanish to English, statements from Peru were not made accessible to the Secretariat.

14. **Mexico** then shared its experience with digital evidence gathering. In 2014, the Mexican Federal Economic Competition Commission created the Directorate-General for Market Intelligence (DGIntM) within its Investigation Authority (IA) which is fully dedicated to monitoring markets and screening market data to gather sufficient evidence to initiate antitrust proceedings. While it only had 4 staffs in 2014, over time it became more specialised and includes specialists from different fields today (e.g. economists, specialists in security, IT and AI experts). The DGIntM conducts forensic information analysis, process digital data, carry out market monitoring and screening of information to issue market reports for opening investigations, and provide strategic information to help identify lines of investigation. On average, 25% of cartel cases opened each year were initiated through screening process by the DGIntM.

15. In terms of challenges associated with digital evidence gathering, it noted that one of the main challenges is the high level of investment required for IT infrastructure and mentioned that, at present, the most efficient and cost-effective solutions for storage and processing big data are cloud based. Another challenge relates to communication protected by attorney-client confidentiality. Currently, the Mexican Federal Economic Competition Commission has a team that ensures that the information to be collected does not infringe attorney-client privilege.

16. The **Chair** noted that, in view of the legal, financial and practical challenges discussed so far, it would be useful from competition agencies in Latin America to co-operate and support each other to tackle these challenges.

17. **Portugal** presented its strategy to strengthen its enforcement power for gathering digital evidence. It consists of a number of initiatives such as introducing advanced forensic IT equipment and software, providing staff with IT training on a regular basis, deploying more staff from different backgrounds (lawyers, economists and IT experts) for inspections, increasing duration of dawn raids (from 1 or few days to 1-2 weeks). In addition, has also created an online channel which allows for whistleblowers to communicate to the agency information concerning potential competition infringements in an anonymous way.

18. It noted that, while digital evidence gathering requires significant costs, in its experience, the benefits brought by the investment in advanced forensic IT solutions and related capacity building appeared to be superior to the associated costs. This was not only because such solutions save time, allowing for the review of a larger set of evidence in a shorter period of time, but also because in doing so they enable structural changes regarding the way it organises dawn raids and even, more generally, investigations.

19. The **expert speaker** (Mr. Dirk Van Erps) observed that the competition agencies face similar challenges in respect of digital evidence gathering. It requires significant investment for expertise, tools and infrastructure that must be updated frequently. He also found remarkable that, in Mexico, 25% of cartel cases opened each year were initiated through screening process by the DGIntM.

20. In the second part of the roundtable, the Chair invited **Costa Rica**² and **Spain** to present legal challenges they faced in conducting digital evidence gathering.

² Due to technical issues in connection with the interpretation from Spanish to English, statements from Costa Rica were not made accessible to the Secretariat.

21. **Spain** reported that, during the inspection conducted by the inspectors of CNMC (Comisión Nacional de los Mercados y la Competencia), the inspectors are entitled to have access to information of the investigated company, irrespective of the medium on which it is stored. In fact, the staff of the investigated company must collaborate with the inspectors, guaranteeing access to the information and devices that the inspection team considers should be subject to verification, responding to the questions of the inspectors to this effect, and identifying any documentation that could affect their privacy or right of defence.

22. It noted that the inspectors often encounter instances where employees of the investigated company have private information on their professional devices and professional information on their private devices. If an employee of the investigation company claims that his/her device is a private device, in practice, the inspectors briefly check to determine if that device does not contain any professional information. There have been instances where, after such verification, the inspectors decided not to copy information from the devices that were considered as personal.

23. It also shared its experience in conducting inspections remotely. During a remote inspection conducted in March 2019, the inspection team had remote control of various devices of the investigated company. This proved to be successful as it allowed inspectors to conduct an inspection as if they were on the premises of the investigated company.

24. In the last part of the roundtable, the Chair invited **Brazil, Ecuador, UNCTAD**, and the **United States (FTC)** to discuss challenges and benefits of external co-operation for digital evidence gathering and how competition authorities can make use of collaborations to render investigations more effective.

25. **Brazil** reported that CADE (Conselho Administrativo de Defesa Econômica) has signed a Technical Cooperation Agreement with 27 State Prosecution Services, the Federal Police and several control bodies, with a view to jointly conducting investigations. It has allowed its investigation team to work closely with criminal investigators to (i) gather preliminary intelligence (focusing on collecting digital evidence related only to relevant targets), and (ii) share information during the investigation, regarding relevant key-words and time lapses, contextual data and related facts (to reduce the amount of data to be analysed and expedite forensic processing). It highlighted the importance of having formal partnership agreements signed by the heads of respective agencies, so that the agencies can feel comfortable in sharing information or investigative techniques.

26. It also presented its data analytics and screening project – Project Cérebro – which was primarily designed to develop automatic investigation tools, aimed at improving CADE's market surveillance capacity. It turned out that the tools developed within the framework of Project Cérebro were also useful for ongoing investigations and, in particular, analysis of digital evidence, thanks to recent developments in natural language processing (NLP) and supervised machine learning (ML). The idea is to teach the algorithm to identify digital documents with similar features, thus reducing the amount of digital data to be analysed with the forensic software. While this initiative is still in the very early stages, it does seem very promising as a path to innovation in the field of digital evidence analysis.

27. **Ecuador** shared its co-operation efforts with SERCOP (the public procurement governing body) and DINARDAP (National Directorate of Public Data Registration).

28. Building up on past informal co-operation, a co-operation was signed between SCPM (Superintendency of Market Power Control) and SERCOP in 2019. It aims to conduct joint actions in order to detect bid-rigging in public procurement. Pursuant to the agreement, a number of meetings were held between technical staff of SCPM and SERCOP in order to exchange information. In practice, SERCOP reports suspicious bid-rigging signs in public procurement to SCPM for further analysis. The co-operation also extended to a joint

statement during the Covid-19 outbreak that sought to remind businesses that emergency procurement does not suspend the application of competition law.

29. SCPM is also developing the information access interface in co-operation with DINARDAP, a public entity that provides a portal for the consultation of information from 36 data resources (e.g. financial, social security information, tax information etc.). It is expected that the interface would allow access to information sources and a particular set of variables necessary for the analysis of potentially problematic conduct.

30. **UNCTAD** emphasized the importance of international co-operation on the development of digital cartel screening tools in developing countries. It suggested that the implementation of digital screening cartel tools in Russia, South Korea, the UK and Brazil can be leveraged at regional level and capitalised upon to benefit other countries, notably through the use of regional incubators that less advanced countries piggy back on. It also mentioned that the OECD could play an important role in such co-operation with its regional centre in Lima.

31. The **United States (FTC)** reported that, while a great deal of co-operation has been achieved in the “soft co-operation” area, several countries decided to see if they could take it a step further to promote the kind of cooperation where agencies are able to conduct investigations on behalf of each other and provide more direct support for each other. Those countries are the US (DoJ and FTC), Canada, Australia, New Zealand and the UK. They recently signed a framework agreement which would not directly provide for this co-operation but created a template agreement they could use to create the instruments necessary for such co-operation.

32. The Chair then invited the **United States (DoJ)** to comment on the initiative it is pursuing co-operation between agencies in the Latin-America region.

33. The **United States (DoJ)** reported that it has been conducting technical co-operation training in the region focusing on investigative skills in cartel investigation which covers the whole range of techniques such as digital tools, investigation analysis and other tools that are used in the United States. For example, it held regional workshops in Chile in 2019 and plans to organise more workshops in the coming years in the region.

34. Before closing the roundtable, the Chair invited the **expert speaker** (Mr. Dirk Van Erps) to share his final remarks.

35. With respect to the access to information contained in private devices, he emphasized that it is not the legal nature of the device in question (professional or private) but the content of the information contained therein which determines the relevance to the investigation. On the remote inspection presented by Spain, he mentioned that in the experience of the European Commission, it proved useful to check the last synchronisation date of the data saved in the targeted devices and the company servers to ensure that the data they have access to be up-to-date. He also mentioned that he was impressed by the co-operation efforts with the procurement agency presented by Ecuador and noted that it would be beneficial for agencies and companies if the governments invest more to ensure the interpretability of different data sets across agencies, so that the relevant information is collected in a more efficient way.