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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

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

18th Meeting, 28 September 2020, Virtual

This document prepared by the OECD Secretariat is the executive summary 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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Executive Summary of the Roundtable on Digital Evidence Gathering in Cartel Investigations

28 September 2020, Virtual Zoom meeting

By the Secretariat¹

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.

Based on the background note prepared by the OECD Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

1. *Digital evidence made available by the digitalization of private businesses and public administrations presents opportunities for competition agencies for the conduct of their investigations.*

The changes brought about by digitalisation have transformed law enforcement in many policy areas, including competition. Companies communicate internally and externally via digital means and increasingly create, store and process information in digital format. Accordingly, competition agencies have increasingly been relying on digital evidence in their fight against cartels. The increasing digitalization of evidence has improved the chances of detecting and proving cartels, contributing the successful conclusion of investigations.

Several countries have indeed reported successful use of their digital evidence gathering capabilities in their investigations. For example, Russia, Korea, Brazil and the UK have each developed tools to facilitate cartel detection through digital screening cartel tools that enable through a vast collection an analysis of datasets to flag suspicious behaviours. Some of these initiatives extend to the use of more sophisticated technologies such as natural language processing (NLP) and supervised machine learning (ML). For example, Brazil's data analytics and screening project – Project Cérebro – is now trying to rely on algorithms to identify digital documents with similar features, thus reducing the amount of digital data to be analysed with the forensic software, although such an initiative is still in the very early stages.

¹ This executive summary does not necessarily represent the consensus view of the roundtable. It identifies key points from the discussion at the roundtable, including the views of the expert, the delegates' oral and written contributions, and the issue note prepared by the OECD Secretariat.

In view of the opportunities presented by digital evidence gathering, several competition authorities have reinforced their digital capabilities in order to take advantage of digital tools. For instance, 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. Other countries, such as Portugal, have opted to invest significant resources in training staff and providing them with the required tools instead of formally creating a separate forensic IT team or unit.

2. *At the same time, digital evidence gathering in cartel investigations also raises new legal and practical challenges.*

While legal challenges vary according to the relevant legal framework of each jurisdiction, a number of legal challenges were identified across jurisdictions with respect to the collection of evidence by digital tools.

The first one relates to the respect of due process rights of the companies that are subject to the authorities' investigations. Digital technologies allow authorities to collect a large amount of data from businesses. Those could include any information that is stored in digital forms, such as emails, text and voice messages or pictures exchanged through mobile devices, contracts and accounting books. However, the respect of due process rights of the investigated companies requires that such broad powers of investigation aided by digital technologies be exercised within the limit of proportionality. In other words, the scope of data collected from businesses needs to be proportionate to the purposes of the authorities' investigations. For example, while digital technologies allow seizing whole hard-drives or servers for examination of the documents contained therein, there is a legal risk that this goes beyond the scope of the investigation since the seized data may include personal information or information that is irrelevant to the investigation. When such a risk materialises, it could significantly delay the investigation and negatively affect the procedural efficiency of competition authorities.

Another legal challenge associated with the use of digital technologies arises in connection to the location of digital information. In fact, in certain circumstances, the storage space containing the information relevant to the investigation could be located outside the reach of the investigating jurisdiction. In such cases, competition authorities may find themselves unable to extend their investigative powers to the data located abroad.

As regards practical challenges, several countries reported that building and maintaining digital evidence gathering capabilities is more costly than traditional investigative capacity. In this respect, agencies need continue to make an efficient use of their limited resources when designing their use of digital technologies. This requires adequate planning and design of the most cost-effective use of digital technologies. In practical terms, this translates for example in determining how many software licenses of the forensic IT software the authority needs to have in place on a yearly basis so that, if need be, it is able to deploy the necessary IT resources within a short notice period.

Another practical challenge relates to the implementation of digital evidence gathering. Several countries reported that a large volume of digital evidence takes time to process and convert into a reviewable format, which could negatively affect the efficiency of investigations. It was agreed that a key to overcome such challenges is the preparation (e.g. research on the companies to be inspected, their IT system etc.) and communication between the legal staff leading the case, the inspectors executing the search and the technical staff (IT experts).

3. *Co-operation with other regulatory agencies and competition authorities could be beneficial in further enhancing digital evidence gathering capability*

Digital technologies have been used not only for the purposes of competition investigations but also for the detection of other illegal conduct, such as manipulations of stock and commodities prices and indices, revenues management, stock options back-dating, insider trading, and tax evasion. Many public agencies, such as financial regulatory authorities, procurement agencies and energy or telecom regulators, also make use of digital tools in their enforcement and monitoring responsibilities. In this respect, co-operation with other national agencies and competition authorities could prove useful in achieving efficient use of limited resources that are available to the competition authorities.

UNCTAD also 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 Competition Centre in Lima.