

United Nations



**United Nations Conference
on Trade and Development**

TD/B/C.I/CLP/12

Distr.: General
16 September 2011

Original: English

Trade and Development Board
Trade and Development Commission
Intergovernmental Group of Experts on Competition Law and Policy
Eleventh session
Geneva, 19–21 July 2011

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

Held at the Palais des Nations, Geneva, from 19 to 21 July 2011

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I. Agreed conclusions adopted by the Intergovernmental Group of Experts at its eleventh session

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,

Further recalling the provisions relating to competition issues adopted by UNCTAD XII in the Accra Accord, including the provisions in paragraphs 54, 74, 75, 103, 104 and 211 of the Accra Accord,

Also recalling the resolution adopted by the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices held in Geneva, on 8–12 November 2010,

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 Principles and Rules,

Noting that UNCTAD XII has focused on addressing the opportunities and challenges of globalization for development, and that the upcoming UNCTAD XIII will address development-centred globalization in Doha, on 21–26 April 2012,

Recognizing the extent of economic reform efforts undertaken unilaterally, regionally and multilaterally by developing countries and economies in transition, including the adoption and implementation of competition law and policy over the last two decades; and noting with satisfaction that these policies are stimulating economic growth and economic development,

Underlining that competition law and policy is one of the key instruments for addressing globalization, including by enhancing the benefits of trade and investment, resource mobilization and the harnessing of knowledge,

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

Recognizing further the need to strengthen the work of UNCTAD on competition law and policy so as to enhance its development role and impact,

Noting with satisfaction the high level of written and oral contributions from competition authorities of members, academia, non-governmental organizations and the business community participating in its eleventh session,

1. *Appreciates* the quality of documentation prepared by the UNCTAD secretariat, including the peer review reports, and the organization made for its eleventh session;

2. *Encourages* further promotion of competition policy as a tool that contributes to development and supports economic growth, structural change, inclusive development and poverty reduction, and invites development partners to support such initiatives of developing countries and economies in transition;

3. *Notes with satisfaction* the cooperation of UNCTAD with other international forums, including with the International Competition Network, the Organization for Economic Cooperation and Development and regional institutions; and appreciates the secretariat's continued efforts to take into account in its publications and work the outputs of the International Competition Network, the Organization for Economic Cooperation and Development and other relevant institutions;

4. *Expresses appreciation* to the Government of Serbia for volunteering for a peer review during the eleventh session of the Intergovernmental Group of Experts and to all Governments and regional groupings participating in the review; recognizes the progress achieved so far in the elaboration and enforcement of Serbia's competition law

and invites all member States to assist UNCTAD on a voluntary basis by providing experts or other resources for future activities in connection with voluntary peer reviews;

5. *Decides* that UNCTAD should, in the light of the experiences with the voluntary peer reviews undertaken so far and in accordance with available resources, undertake further voluntary peer reviews on the competition law and policy of member States or regional groupings of States, and provide feedback on the follow-up of the peer reviews during the following sessions of the Intergovernmental Group of Experts;

6. *Recommends* that UNCTAD, as part of the dissemination strategy for its policy analysis and research, should promote the exchange of country experiences and best practices among developing countries and economies in transition in the field of competition law and policy and the interface with consumer issues;

7. *Underlines the importance* of establishing appropriate foundations for an effective competition agency as a necessary condition for the effective implementation of competition law and ensuring efficient use of resources, promoting growth and economic development; and calls upon UNCTAD to promote and support young competition agencies to put in place appropriate competition agencies suitable to their circumstances as directed by the United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices;

8. *Notes with satisfaction* that governments in several developed and developing countries have made progress in putting in place a system to achieve coherence between competition policy and other policies. For many countries, however, progress on policy coherence between competition policy and other policies has had mixed results – especially countries that do not have a competition law or enforcement bodies; stresses that in order to deliver policy coherence, governments need to adopt strategies and principles that promote internal and external coherence in their operations;

9. *Emphasizes the importance* of discussions of the round tables on the foundations of an effective competition agency, the importance of coherence between competition and other government policies, international cooperation in competition cases, including at the regional levels and the effectiveness of capacity-building extended to young competition agencies; and takes note of the written contributions of competition agencies and participants in these issues;

10. *Requests* the UNCTAD secretariat to disseminate the conclusions of the discussions of the Intergovernmental Group of Experts on these topics to all interested member States, competition agencies and other relevant institutions, including through its technical cooperation activities;

11. *Requests* the UNCTAD secretariat to organize three round tables at the twelfth session of the Intergovernmental Group of Expert on the following topics:

(a) Competition policy and public procurement;

(b) Knowledge and human resource management for effective enforcement of competition law;

(c) Cross-border anti-competitive practices: the challenges for developing countries and economies in transition;

12. *Recommends* that the twelfth session of the Intergovernmental Group of Experts hold a voluntary peer review of the United Republic of Tanzania, Zambia and Zimbabwe,

13. *Further requests* the UNCTAD secretariat, with a view to facilitating the round-table discussions, to prepare reports on items 11(a), (b), and (c) above. With a view to facilitating the consultations at the peer review, the secretariat should prepare an executive summary of the peer review report in all working languages, as well as a full report of the peer review in its original language;

14. *Also requests* the UNCTAD secretariat to prepare for the consideration of the twelfth session of the Intergovernmental Group of Experts and to include on its website

an updated review of capacity-building and technical assistance, taking into account information to be received from member States no later than 30 January 2012; a further revised chapter III (Restrictive agreements or arrangements) and chapter VIII (Some possible aspects of consumer protection) of the Model Law on Competition on the basis of submissions to be received from member States and other relevant resources no later than 30 January 2012; and further issues of the *Handbook on Competition Legislation* containing commentaries on national competition legislation;

15. *Takes note with interest* of the information regarding requests for technical assistance and requests the secretariat to keep member States updated on these requests, as well as on their follow-up, on a regular basis. This information could serve as a basis for further discussion among beneficiary countries, donors and the UNCTAD secretariat on possible ways to translate requests into action, and may assist the secretariat and member States in defining the areas of focus of UNCTAD for technical cooperation within its mandate;

16. *Also takes note with appreciation* of the technical cooperation activities of UNCTAD and expresses gratitude for the continuous support provided by bilateral and multilateral donors.

II. Proceedings

A. Statement of the Secretary-General

1. The full text of the opening statement, which was made on behalf of the Secretary-General by the Deputy Secretary-General of UNCTAD, Mr. Petko Draganov, is available online at <http://www.unctad.org/Templates/webflyer.asp?docid=15624&intItemID=4899&lang=1>.

B. General statements

2. The eleventh session of the Intergovernmental Group of Experts on Competition Law and Policy organized by UNCTAD was held at the Palais des Nations in Geneva, on 19–21 July 2011. Representatives from 68 countries and 8 intergovernmental organizations, including the heads of competition authorities, attended the high-level discussions.

3. Many delegations from developing countries informed the meeting about the economic downturn and the negative consequences it had on the implementation of competition law and policy in their countries. In particular, it was reported that the financial and economic crises facilitated the formation of collusion and other types of anti-competitive conduct and posed many challenges for implementing competition law.

4. Delegates cited several examples of the progress made to date in strengthening their respective institutions. The main focus was on building the necessary foundations for effective enforcement of their competition law, including advocacy with government, sector regulators, business and the courts.

5. Some delegations reported an increase in the number of competition cases handled in the areas of anti-competitive practices. Several newly established agencies highlighted the main features of their competition regimes. Many delegations from developing countries, including the least developed countries and regional integration groupings, recognized the continued role of advocacy in promoting competition culture among stakeholders. Coherence between competition and other government policies was addressed to fight anti-competitive practices. A number of delegations underscored the importance of political support and current challenges, including law enforcement.

6. Two delegations described the challenges faced by national competition authorities when their countries were parties to regional integration groups with binding regional competition rules. There was a need to clarify the appropriate attribution of

competence between national and regional authorities to effectively enforce competition rules. In one case, the lack of clarity in the attribution of competence hindered the national government from introducing timely economic reforms.

7. Two delegates said that the UNCTAD peer review proved to be helpful to their countries in modifying their competition law, and in adopting a new consumer protection law and the drafting of a new competition bill, respectively.

8. Several delegates thanked UNCTAD and other donors for providing technical assistance to developing countries to improve their institutional enforcement capacities. In that regard, numerous participants called upon UNCTAD to continue providing technical assistance and advisory work to their respective countries.

9. A representative of the World Trade Organization (WTO) said that liberalization promoted competition and that the two were complementary. Competition was necessary to avoid the negative effects of trade and investment liberalization. Public procurement was an area where anti-competitive practices such as bid rigging adversely affected the use of public resources. Although the negotiations on the Singapore issues had been suspended at WTO until completion of the Doha Round, work on a multilateral agreement on competition would be revisited at his Organization. He said that the work of UNCTAD would facilitate future negotiations towards achieving that objective.

10. A representative of the African Regional Intellectual Property Organization (ARIPO) outlined the objectives and activities of the Organization. It drew attention to anti-competitive practices stemming from an abuse of dominant positions based on intellectual property rights that mainly affected the least developed countries. ARIPO had established a platform for training experts and invited UNCTAD to identify areas in which it could cooperate with it in providing capacity-building in intellectual property and competition policy for interested African countries.

11. Several delegations expressed their appreciation to UNCTAD for organizing the meeting, as its interactive discussions afforded them an opportunity to exchange ideas and experiences with their peers.

C. Closing plenary

12. The representative of India made a slide presentation on the Competition Commission of India. The Commission was fully operational and empowered, and had handed down decisions on some 94 cases. It had received strong support from government, judiciary and parliamentary committees, accompanied with high expectations such as providing fast-track treatment of cases, dealing effectively with cartels and observing strict time lines to produce results.

13. Commenting on the foundations of a competition agency, he said that preparing a competition policy for his country was a major challenge, especially since there was no common definition thereof. The Commission would welcome further guidance on adopting such a definition. Achieving coherence was another challenge it faced and it was to be hoped that competition policy would serve that purpose.

14. Pointing to the Government's need to increase bilateral technical cooperation, he said that the Commission appreciated the opportunity to benefit from the capacity-building services offered by UNCTAD. The Commission was eager to share its experiences and to provide assistance to younger authorities in competition law. The speaker invited UNCTAD and the delegates to partner with India on competition issues.

D. Round table on the foundations of an effective competition agency

15. The key speaker of the round table was Mr. John Fingleton, Chief Executive Officer, Office of Fair Trading of the United Kingdom of Great Britain and Northern Ireland. The panellists were Mr. William Kovacic, Commissioner of the United States Federal Trade Commission; Mr. Khalid Mirza, former Chair of the Pakistan Competition

Commission; Mr. Fernando Furlan, Chair of the Administrative Council for Economic Defence of Brazil and Mr. Dionisio de la Cruz, Director of the Colombian Superintendencia de Industria y Comercio.

16. The UNCTAD secretariat presented a background study on the foundation of an effective competition agency and highlighted the main features characterizing efficient public regulatory bodies: transparency and accountability, the guarantee of due process, agencies funded in proportion to their mandate and staffed by highly qualified individuals of irreproachable integrity, and a judicial review process. Defining objectives and priorities, appropriately allocating resources and taking sound decisions were internal processes that were necessary for a competition agency to be effective. The UNCTAD secretariat drew attention to the challenges faced by young competition authorities in developing countries. To meet those challenges, the secretariat suggested benchmarking institutional profiles; developing a competition culture; updating and amending laws, guidelines and procedures; evaluating the impact of decisions and using UNCTAD voluntary competition peer reviews.

17. The secretariat also introduced the revised chapters (IX and X) of the UNCTAD Model Law on Competition, which provided an overview of how different competition law regimes could set up the administering authority and of the organization, functions and powers of the administering authority. Comparative assessments provided the basis for the formulation of core principles that could guide developing countries when designing their competition regimes.

18. Mr. Fingleton opened the session by providing a high-level view of the main elements that are necessary to build strong foundations for an effective competition agency. There was a need for agencies to create a well-defined vision and mission to guide them. External representation (public perception, managing expectations, communication and stakeholder engagement), strategy and prioritization and the importance of well-qualified staff (legal, economic and project skills development, talent management, motivation, values and institutional culture) were important factors to be borne in mind. He stressed the importance of having a clear and transparent process for reviewing evidence and decision-making.

19. Mr. Kovacic (panellist) said that setting priorities and leadership were the underlying principles of a strong foundation of a competition agency. There was a trade-off between building capacity for a young agency and handling competition cases during the first 10 years of an agency's existence. Based on the experience of the Commission, it took 10 years for an agency to build a strong foundation and up to 20 years to be able to handle competition cases effectively. He drew attention to the risks involved in selecting cases and the importance of proper decision-making, including consultations among Commission members, both internally and externally; the collegial decision-making process; the multiplier effect of various decisions and the need to ensure coherence.

20. One delegate asked how young agencies could learn from that experience. One panellist suggested that they should first identify the areas where the needs lay, decide how to meet those needs and learn from the mistakes of others to avoid repeating the same mistakes.

21. Mr. Mirza (panellist) identified three challenges facing competition agencies in developing countries. Firstly, in countries such as Pakistan, collusive behaviour and other anti-competitive practices were considered part of the corporate culture. Secondly, social and political factors determined attitudes toward competition policy. The lack of political support led to weak institutions, low budgetary resources and poor technical expertise. As a result, young competition agencies failed to establish priorities or strategies to combat anti-competitive practices; instead they merely responded to a few complaints. Thirdly, opposition by economic interests aimed to dilute the law and weaken competition agencies through the appointment of poorly qualified board members and budgetary restrictions. Best practices enabling the Commission to tackle those challenges included building support for the agency among key stakeholders, producing high-quality research, recruiting qualified staff and maintaining their morale, lowering compliance costs, establishing a high moral authority and ensuring the integrity of the Commission and its staff.

22. Mr. Furlan (panellist) said that four elements were necessary for an agency to be effective: efficient project delivery and knowledge dissemination; ex-post evaluation; human resource management; and communication and accountability.

23. CADE had established a fast-track system to speed up the handling of competition cases, project management to develop jurisprudence for case law of more than 10 years and human resource management capacity-building. It had also improved its communication and accountability strategy. Ex-post evaluation was not yet a practice in his agency, but CADE had developed an indirect system whereby appealed cases were reviewed by external think tanks. An economic unit had been set up in his agency to assist in the ex post-evaluation of decisions.

24. Mr. de la Cruz (panellist) said that CADE emphasized the importance of capacity-building for young competition agencies. He presented the newly amended Colombian competition law, which aimed to ensure the free participation of competitors in the market; guarantee consumer welfare and promote economic efficiency. With regard to bid rigging and collusion in public procurement, he said that 55 per cent of businessmen were willing to corrupt public officials if the process was complicated. Therefore, his agency had introduced a leniency programme for whistle blowers and a public communication strategy in order to combat bid rigging.

25. One delegate said that the notion of risk was not easy to define when handling competition cases. Another said that risk existed when the appellate courts had different objectives from those of the competition authority. The key speaker said that there was always a risk associated with the decision of the court, but that it was possible to evaluate the risk and to identify it.

26. Many delegates raised the question of the independence of competition agencies and wished to know how to reduce political interference. One suggestion was to follow the political evolution of the country concerned to determine at what point the politicians were willing to give the agencies more independence. Another was to persuade the political system of the importance of the work done by the agencies. One delegate said that independence, if obtained, had to be used properly and could thus contribute significantly to an agency's credibility.

E. Round table on the effectiveness of capacity-building in the area of competition policy

27. The key speaker for the round table was Mr. Stanley Wong, former Director of the Competition Authority of Ireland. The panellists for the session were Ms. Louise Sènou, Director of the Competition Bureau, Ministry of Commerce of Benin; Mr. Luis Humberto Guzman, Head of the Competition Authority of Nicaragua; Mr. Fernando Furlan, Chair of the Administrative Council for Economic Defence of Brazil; and Mr. Hanspeter Tschäni from the Swiss State Secretariat for Economic Affairs, or SECO.

28. The key speaker said that competition law was only one component of competition policy and that competition authorities should also take account of other public policy goals. There were five pillars of capacity-building for competition law and policy: the enforcement agency, government, the judiciary, the business community and the academia. The agency required sufficient assistance to promote and enforce competition law. Capacity-building through advocacy directed to governments was essential for the promotion of a culture of competition policy. There was, in particular, a need for education and exchange within the government on the principles and aims of competition law. It was also important to actively communicate with the government to determine common views and prevent inconsistencies. The judiciary played a key role in the legal system by reviewing final decisions on the merits of a case. It was thus important to provide the judiciary with technical assistance: training in the principles of competition laws and in underlying economic concepts. It was necessary to communicate, educate and interact with the business community to prevent anti-competitive conduct. Academia played a vital role in establishing a culture of competition.

29. One panellist said that capacity-building was a valuable asset for developing countries. In particular, African countries had benefited greatly from technical assistance and advice on new competition legislation. The present expert meeting offered a unique opportunity for the exchange of experience. Capacity-building had helped train State officials and establish a university course on competition policy in Benin. The peer review of Benin had been useful in modernizing national competition law.

30. Another panellist said that a competition culture should be created to deal with the opponents of competition law. Competition authorities often had to deal with powerful private actors that resisted the development of competition law and policy. It was thus important to build capacity to enhance the independence of competition authorities, which required medium-term to long-term assistance. The UNCTAD Competition and Consumer Protection Policies for Latin America programme, also known as COMPAL, was a successful model for promoting competition law. In Nicaragua, for example, it had been instrumental in providing training for competition law experts before the competition authority had been established.

31. One panellist said that the competition authority in Brazil was sufficiently independent, but lacked resources and suffered from high staff turnover. The Brazilian competition authority had a successful internship programme for Brazilian university students called PinCADE. The political status of the Brazilian competition authority had improved in various instances, for example after controlling the inflation rate, stabilizing the economy and winning a major competition case in court.

32. Another panellist gave a presentation on capacity-building from the perspective of a donor country. Allocation funding was subject to close scrutiny, and effectiveness was a critical criterion. His government had adopted a strategy with a focus on sustainable engagement, continuous monitoring and evaluation by experts, and self-evaluation. The programmes were broken down into phases: each phase depended on the success of the previous one. To be successful, capacity-building should look at the larger policy framework and development objectives and seek to retain knowledge and expertise in the beneficiary country.

33. The panellist from the Federal Trade Commission said that technical assistance could contribute to building the managerial skills that were necessary for handling competition cases. In addition, long-term advisors were important in capacity-building endeavours. He gave practical examples of technical assistance provided by the Commission and reported on the initiatives undertaken by the International Competition Network. It was crucial that competition agencies and international organizations build on each other's comparative advantages in providing technical assistance to interested countries.

F. Round table on the importance of coherence between competition and other government policies

34. Mr. Manuel Sebastião, President of the Portuguese Competition Authority, delivered the keynote speech to initiate the round table. The speakers for the first panel were Ms. Connie Lau, Chief Executive of the Hong Kong Consumer Council; Mr. Alberto Heimler, Central Director for Research and International Affairs at the Italian Competition Authority; and Mr. Eduardo Pérez Motta, President of the Mexican Federal Competition Commission. The speakers of the second panel included Mr. Joseph Wilson, Commissioner at the Competition Commission of Pakistan; Ms. Eleanor Fox, Professor at the School of Law, New York University; and Mr. Bambang P. Adiwiyoto, President of the Competition Institute of the Association of Southeast Asian Nations.

35. The UNCTAD secretariat presented a background study on the importance of coherence between competition and other government policies. There was need for the coordination of policy design and enforcement by policymakers in order to achieve developmental goals, minimize tensions, avoid duplication and enhance resource use. There was also a need to create a mechanism for dialogue. Further, policymakers should make every effort to ensure that their policies did not negate government efforts to

improve the economic well-being of the people. Although policy incoherencies were sometimes justifiable, effective coordination made it much easier to deal with economic crises and natural disasters. Policy coherence at the national level facilitated regional policy designing and enforcement. UNCTAD had helped to address policy incoherencies through its peer review processes and follow-up actions.

36. The key speaker described the tensions between competition policy and other government policies. Competition policy was the responsibility of the government, whereas competition law enforcement and advocacy was the responsibility of the competition authority. The latter could promote competition-friendly policies through advocacy activities. Competition authorities were hampered by economic policies and the legal and regulatory framework in which they operated, as well as by the judicial system. However, if all economic actors respected the rule of law, those constraints would affect the work of competition authorities to a lesser degree.

37. Ms. Lau (panellist) spoke about strengthening competition policy by protecting consumer rights and outlined the status, role and functions of the Hong Kong Consumer Council. Coherence could be achieved in various ways to maintain economic efficiency at optimal levels; it was important to have laws against anti-competitive conduct and misleading and deceptive conduct. A consumer legal action plan fund had been set up in her country to fund court action on behalf of consumers. It was important to establish a clear relationship between competition policy and consumer policy and to develop a healthy marketplace that integrated the principles of truth in advertising and honesty in business transactions.

38. Mr. Heimler (panellist) said that it was essential to promote competition and antitrust enforcement through pro-competitive reforms. A number of activities had undergone liberalization in his country. Professional services and pharmacies had been liberalized by the adoption of a decree in 2006. The objective was to improve consumer protection and to strengthen the enforcement powers of the competition authority. Reforms, such as the elimination of minimum tariffs in the professions sector and the possibility of informative advertising, had been carried out, despite strong opposition from the sectors concerned. In the pharmacies sector, the sale of non-prescription drugs in the presence of a professional pharmacist had been liberalized. Consequently, consumers were better informed and prices in those sectors had declined since 2006. Likewise, prices had fallen by 10 per cent in the pharmacies sector, and the quality of pharmacy services had improved. There were several potential challenges in undertaking reforms, in particular those posed by special interests, which often hampered liberalization measures.

39. Mr. Pérez Motta (panellist) shared Mexico's experience and emphasized the role of advocacy in promoting competition and in channelling legislative and regulatory outcomes in favour of competition. For decades, Mexico's development model had involved trade and industrial policies that sheltered domestic industry from competition, and therefore led to low-quality products, fewer choice for consumers, high prices, low growth and few incentives to innovate. Reforms had been launched to increase economic efficiency and competitiveness. Nonetheless, Mexico still had major inefficiencies in regulated markets. The Mexican Federal Competition Commission had been granted powers to issue binding and non-binding opinions with respect to draft laws and secondary regulation, through which it could advocate competition. It was important to combine formal powers with other advocacy initiatives, such as public discussions, and to draw on the experience of international experts in advocating for competition and promoting international best practices. It was necessary to communicate effectively with lawmakers to obtain the support of the executive body in upcoming laws, and to build trust and gain recognition as providers of outside opinions and advocates for consumers, or in other words, voters. The panellist summarized the lessons learned by his agency and recommended that the competition authorities should advocate the benefits of competition policy to all stakeholders.

40. Mr. Wilson (panellist) discussed the reasons for incoherence between competition and other government policies. The role of government was to ensure the health of a nation, which included infrastructure, medical facilities, education and employment, and the provision of public goods. The State should set up a competition agency to ensure the provision of competitive markets, which were public goods. There were cases of

incoherence between the different objectives of a competition policy, such as economic efficiency as opposed to consumer welfare, especially when mergers raised prices but reduced costs, thereby increasing economic efficiency. The functions of competition law might go beyond the objectives laid down in the law. It was important to internalize other policies and ensure compliance with other laws that would complement and enhance consumer welfare. Competition agencies played a vital role in measuring the benefits of competitive markets against other public interest, such as the right to life, in cases of life-saving drugs and the livelihoods of a large number of employees. He said that it was time to think of consumer welfare in a broader context and urged competition authorities to use public-interest exceptions, where available.

41. Ms. Fox (panellist) discussed the incoherence between competition and other government policies and defined them as tensions. There were two reasons for those tensions. First, there were many aims of the society that could not be met by the market and which could be called legitimate public interests, such as environment, safety, health and jobs. Second, the power of vested interests was great. There were many challenges involved in resolving policy tensions: dealing with legitimate public interests, finding the right trade-off and choosing the right person or function to make the trade-off. Competition impacts and other public interests should be kept separate. With regard to vested interests and crony-government problems, the government might work hand in hand with the vested interests and share the gains. That was often seen in procurement and sectors such as highways and construction. Advocacy by facts could provide a solution to the problems relating to subsidies, antidumping measures and export cartels. It was important to set standards for those who should weigh the costs of trade-offs and make decisions, and to promote transparency.

42. Mr. Adiwiyoto (panellist) gave a presentation on the importance of regulations and policies in the Indonesian electricity sector. Various reforms affecting subsidies, antidumping measures and export cartels had been introduced since 2002 to open the sector to competition. Legislation passed in 2009 had allowed private enterprises to participate in the sector, but had created a conflict of interest between policymakers, regulators and operators. In addition, the term “participation” mentioned in the law required clarification. The speaker summarized the technical and economic characteristics specific to the sector and raised the issues of discrimination with respect to tariffs and treatment, the abuse of dominant positions and cross-ownership in the sector. It was a challenge to have different objectives in place, such as ensuring social welfare while maintaining the business aspect. The latter implied potential tensions, such as electricity being an agent of development as opposed to operating as a profit-making company.

43. Many delegates agreed that incoherence between competition policy and other government policies could occur. It was necessary to create a framework aimed at preventing tensions between different policies and to issue an overarching government document that provided a global vision of its development and economic objectives and policies.

44. Some delegates emphasized the importance of dialogue among different stakeholders. One stressed the need to establish a mechanism to manage overlapping jurisdictions between the competition authority and sector regulators to reduce tensions between enforcers. Another suggested that the competition authority should advocate for competition culture so that policymakers could into consideration the importance of competition policy.

45. One delegate pointed to the possible tensions between the trade and industrial policy and the competition policy, and stressed the need for coordination between the two, stating that subsidies might have an adverse effect on competition. Likewise, import tariffs could decrease import competition, which was contrary to competition policy.

46. Another delegate stressed the importance of putting in place the necessary criteria for State aid, since it could reduce competition and address public-interest issues in certain cases. He recommended reforms of State aid in order to direct such aid to sectors of common public interest.

47. One panellist said that it was important to involve the competition authority in issues related to State aid and to allow it to provide the government with advice. Many

delegates claimed that the problem of allocation could often generate tension between the competition agency and government ministries.

48. One delegate asked how to eliminate that tension, while another wished to know whose role it was to assess public interest and whether competition policy was the appropriate tool to be used to achieve other government policy objectives, such as developing local industry and ensuring employment.

49. Another delegate said that competition authorities should focus on advocacy to broaden the initial mandate and space given to it by law by promoting a competition culture and building alliances with other stakeholders.

G. Voluntary peer review of competition law and policy in Serbia

50. The peer review of competition law and policy in Serbia was moderated by Dr. Vincent Martenet of the Swiss Competition Commission. The peer reviewers were Ms. Monica Widegren of the Swedish Competition Authority, Mr. Sam Pieters of the European Commission, Mr. William Kovacic of the United States Federal Trade Commission and Mr. Salvatore Rebecchini of the Italian Competition Authority. The Serbian delegation was headed by Mr. Bozidar Djelic, Deputy Prime Minister of Serbia. The Serbian Commission for Protection of Competition (CPC) was represented by Ms. Vesna Jankovic, President of the Commission, members of the Council of the Commission and staff.

51. The first session was devoted to the presentation of the main findings of the peer review report, followed by a presentation by the Serbian delegation and a question-and-answer session.

52. Mr. Abel Mateus, UNCTAD consultant, said that Serbia had become a country in transition towards a market economy in the post-conflict period and that it was in a decisive process of recovery and of accession to the European Union and WTO. The overall economic context in Serbia was characterized by a good level of infrastructure. However, modernization and expansion in the transportation and energy sectors would be necessary for economic growth. As to the overall level of competition in Serbia, several markets in Serbia were highly concentrated, in particular food retail and milk.

53. In 1996, Serbia had adopted its first antimonopoly law, which remained, however, without any practical importance. Subsequently, modern rules on competition were introduced in the first Law on Protection of Competition (2005); CPC was established in 2006 as an independent government body charged with the administration of Serbia's competition law. A recent reform of Serbia's competition regime had resulted in the adoption of the new Law on Protection of Competition (LPC) that entered into force on 1 November 2009 and was complemented by the adoption of eight by-laws in 2010. Today, Serbia's competition law regime was aligned with the competition law of the European Union. The speaker outlined substantive provisions of LPC such as the prohibition of anti-competitive agreements, the abuse of a dominant position and merger control. CPC had an independent council that took decisions in investigations carried out by the technical staff. CPC was financed mainly by merger fees, which were considered to be unsustainable, unpredictable and insufficient. In addition, CPC was understaffed, making it difficult to perform its tasks effectively. With regard to enforcement, CPC would need to acquire expertise in carrying out dawn raids in order to wage an effective campaign against the cartels.

54. In his observations on the report, the Serbian Deputy Prime Minister stressed the importance of the reconciliation process in Serbia and in the region as a basis for economic development. Serbia aimed to establish an open economy with export-led growth. Significant reforms were being undertaken with a view to acceding to the European Union and WTO. Competition law and policy would play an important role in that process. Competition law was of key importance in an economy in transition. He welcomed the opportunity of the peer review of his country, which would allow CPC to develop its activities on firm basis.

55. A CPC Council member reiterated Serbia's commitments to maintaining economic reforms. She said that CPC had made significant progress since the entry into force of the new competition law, especially with regard to the courts. However, efforts should be made to reduce procedural mistakes. Though merger control represented a major part of CPC enforcement activity, the number of cases dealing with anti-competitive behaviour had increased. There was an acute need for competition advocacy in an environment that was not familiar with the issue. CPC was taking great pains to educate business representatives, legislators and judges.

56. The questions raised by the reviewers and speakers from the floor related to the following areas: (a) the legal framework; (b) competition law enforcement; (c) institutional capacity, including expertise for economic analysis; (d) the judicial review of competition cases; (e) the relationship between CPC and sector regulators; (f) public procurement and privatization and (g) advocacy.

57. Given the recent introduction of dawn raids into the Serbian competition law, two panellists asked how CPC would prepare itself for using that power. In response, CPC explained the challenges of preparing for a first dawn raid. To date, it had organized meetings with the police force, but further training and preparation were necessary. With respect to attracting and retaining good staff, it was important to establish a reputation for sound economic analysis and efficiency.

58. The Serbian delegation explained that it aimed to establish a virtuous circle of attraction of highly qualified staff to improve its enforcement record and thus enhance CPC's reputation.

59. Several CPC decisions had been overturned by the Court because of procedural mistakes. While the new law on competition limited the procedural risks, CPC had undertaken measures to remedy the situation. A department of legal affairs had been set up to ensure that the procedure and rights of defence were observed. Further, statements of objections would be formulated in all investigation procedures. Decisions handed down by CPC were subject to judicial review by the newly created Administrative Court. Administrative judges were not trained in competition law.

60. A participant asked CPC about the role of public procurement in relation to competition law implementation and the campaign against bid rigging. Serbia had launched a public debate on the issue and decided to develop a public procurement strategy to address competition-related issues, including bid rigging with the public procurement office. Guidelines for the detection of bid rigging in public procurement had been formulated according to guidelines developed by the Organization for Economic Cooperation and Development (OECD) and would be delivered to the public procurement offices.

61. Several questions and comments related to the privatization process. In Serbia, most State-owned enterprises had been privatized before the competition law had entered into force; consequently, CPC could not assist in that process. One delegation said that prior to launching privatization, it was necessary to address competition issues and make adjustments such as restructuring and unbundling certain enterprises to avoid converting a public monopoly into a private monopoly. Robust funding was crucial to maintain a solid basis for CPC. The CPC budget relied mainly on merger fees, a practice that was questioned by panellists and delegates because it could be unpredictable and insufficient.

62. In the second session, CPC was given the opportunity to ask other competition authorities specific questions, with a view to benefiting from their experience. The Serbian delegation asked how best to operate a leniency programme and for comment on the Serbian regime. One delegate highlighted the importance of the continued promotion of a leniency regime to create and maintain public awareness. For example, members of the cartel office would refer to the leniency regime in their public speeches and would inform about the possibility to benefit from the leniency regime when carrying out dawn raids. However, a leniency regime only attracted applications if there was a threat of credible enforcement. Another delegate was of the view that it would be necessary to clearly indicate the reduction in fines that a leniency applicant could expect as an incentive for self-reporting for Serbian companies. His country's approach was to grant leniency to all applicants, whether they were ringleaders or not.

63. In reply to the query on dawn raids, one participant said that insider information would be helpful to identify the type of evidence to look for, as well as its possible location. Such information would typically be provided by a leniency applicant. However, CPC was advised not to rely solely on leniency application.

64. In response to Serbia's request for an evaluation of its State aid system, one delegate said that the body charged with the control of State aid should be functionally independent in order to ensure the effective control thereof. Another delegate suggested that the affiliation of the Serbian control unit for State aid with the Ministry of Finance could lead to challenges in the future. Conferring to CPC the jurisdiction for State aid control could be a solution to the issue.

65. Given that advisory opinions on competition issues in draft legislation were not taken into account by the government and the legislature, CPC wished to know the views of other delegations. One delegate said that in his country, the government was legally bound to submit draft legislation to the competition authority for an advisory opinion on the competition law assessment, but this obligation was not always met. His country's competition authority had taken steps to remedy the situation, including a request to provide a written justification for not taking into account competition concerns in a particular case and a survey sent to other European competition authorities.

66. Another delegate said that the peer review of her country had been very beneficial, as it had stimulated a policy dialogue with the various stakeholders involved in the sphere of competition law and policy in her country and had secured high-level government support for the work of the competition authority. An international conference had been co-organized with UNCTAD for the dissemination of the peer review results, marking the tenth anniversary of the competition authority in her country. Peer review recommendations on legal reforms had been implemented in some spheres, but the competition law would need to be amended in others.

67. The UNCTAD secretariat outlined proposed technical assistance activities based on the findings and the recommendations of the peer review and in dialogue with CPC.

68. The representative of the Swiss State Secretariat for Economic Affairs said that the Secretariat was pleased to have supported the peer review financially. Serbia was a priority country supported by the Secretariat; further, the Secretariat would be pleased to continue providing support to Serbia, with UNCTAD as a development partner. He called upon other development partners and agencies to take part as well.

69. A representative of the German Agency for International Cooperation said that his organization had helped the Armenian competition authority implement the peer review recommendations of 2010 and invited the Serbian delegation to address similar requests for technical assistance to the Agency's office in Serbia.

70. In conclusion, the Deputy Prime Minister of Serbia and a member of the Council of CPC said that CPC would organize an international conference in 2012 to discuss the progress made on the implementation of the peer review recommendations.

H. Round table on the review of the experience gained so far in enforcement cooperation, including at the regional level

71. The round table was moderated by the Vice-Chair of the eleventh session of the Intergovernmental Group of Experts. Mr. Sam Pieters of the European Commission delivered the keynote speech. The panellists for the session were (a) Mr. Spencer Waller, Professor and Director at the Institute for Consumer Antitrust Studies of Loyola University Chicago; (b) Mr. Anatoly Golomolzin, Deputy Head of the Russian Federal Antimonopoly Service; (c) Mr. Russell W. Damtoft, Associate Director at the Office of International Affairs of the United States Federal Trade Commission; (d) Ms. Alessandra Tonazzi of the Italian Competition Authority and (e) Mr. Marc Hansen, a private competition law practitioner at Latham & Watkins.

72. The keynote speaker shared the experience of the European Union with regard to international cooperation, in particular, cooperation with competition authorities outside

the European Union on policy and enforcement issues of mutual interest. Cooperation took place at the bilateral level, based on bilateral cooperation or free trade agreements and memorandums of understanding, as well as at the multilateral level, for example, within the context of the International Competition Network, OECD, WTO or UNCTAD. Another basis for cooperation on competition issues stemmed from the European Union's enlargement process, which could be viewed as a special form of bilateral cooperation with candidate countries. Formal cooperation agreements were not, however, a prerequisite for cooperation; the lack of such agreements did not mean that authorities remained ignorant as to what took place in other jurisdictions. The interaction of case teams with foreign agencies was considered a type of informal cooperation.

73. The keynote speech was followed by a short presentation of the note prepared by the UNCTAD secretariat in document TD/B/C.I/CLP/10 (Review of the experience gained so far in enforcement cooperation, including at the regional level), that referred to the challenges faced by competition authorities in a globalized economy, given the jurisdictional and practical limitations of their enforcement powers.

74. Mr. Waller (panellist) described the history and prospects of international antitrust cooperation from the perspective of the United States. Cooperation grew out of conflicts between the United States and its key trading partners caused by the extra-territorial application of United States antitrust law. The multipronged approach of the United States included putting greater emphasis on comity and initiating routine bilateral consultations, particularly with the European Commission, Japan and Canada, as well as ad hoc consultations on individual matters. First- and second-generation cooperation agreements concluded with Germany, Australia, Canada and the European Commission, for example, included assisting the other party in locating and securing evidence, stepping up the exchange of information between agencies, providing information on anti-competitive activity affecting trading partners and introducing positive comity provisions.

75. In free trade areas, the deeper the economic integration, the deeper the competition, harmonization and cooperation. Competition agencies could discuss a wide range of issues, regardless of the existence or language of cooperation agreements, for instance, theories of harm, market definition, timing, private litigation and remedies. However, the discussion of confidential information required legal instruments or waivers by the parties. The speaker emphasized the importance of commitment, credibility and confidence, and the need to protect confidential information.

76. Mr. Golomolzin (panellist) described the experience of the Russian Federal Antimonopoly Service in enforcement cooperation, placing particular emphasis on the Interstate Council on Antimonopoly Policy. He informed the meeting about the Headquarters on Joint Investigations of Violations of the Competition Legislation in the member countries of the Commonwealth of Independent States (CIS), the main platform for cooperation of competition authorities in those countries. A joint investigation of the air transportation market had resulted in recommendations for increased competition in the air transportation market in CIS countries, including by ensuring non-discriminatory access to the services provided by natural monopolies and the promotion of competition in the potentially competitive sectors connected with the air transportation market. A new form of cooperation among the BRIC countries – Brazil, Russia, India and China – was taking place in the form of biannual meetings.

77. Mr. Damtoft (panellist) spoke on enforcement cooperation from a practical perspective. He said that cooperation mattered in the following scenarios: (a) cases where conduct was examined in two or more jurisdictions, (b) cases where the conduct investigated by one authority might have effects in another jurisdiction, (c) cases where witnesses or evidence were located in another jurisdiction and (d) cases where remedies might have an impact in another jurisdiction. It was important to balance cooperation and confidentiality. Firms had more incentives to cooperate voluntarily if they were confident about confidential treatment. Most cooperation instruments sought to build on relationships rather than supersede confidentiality laws. Successful approaches to cooperation included effective cooperation on the basis of publicly available or non-confidential information, waivers of confidentiality and efforts to forge cooperative relations. Under the first approach, potentially sharable information related to the existence of investigation; theories on harm, markets or remedies; and industry background. Much

could be accomplished without using confidential information. Parties could waive confidentiality to facilitate cooperation. Effective cooperation, which required mutual trust and strong relationships, could be accomplished with or without a formal mechanism and could take place wherever there were common enforcement interests. Future work on international cooperation could include the creation of a centralized list of cooperation liaisons, blogs to share information, webinars, case alerts and the development of guidelines and advocacy materials on the value of cooperation.

78. Ms. Tonazzi (panellist) spoke about the increasing need for cooperation between competition agencies. Anti-competitive infringements often involved multinational firms, with effects spreading to different countries. Since more and more countries were adopting competition laws, mergers had to be notified in several jurisdictions, thus leading to increased cooperation. Cooperation was crucial for young competition agencies and would allow them to develop technical skills more quickly than before and speed up the adoption of good practices. Informal cooperation would allow agencies to rapidly gain knowledge and develop trust and relations between agencies prior to engaging in more formal cooperation. The European Competition Network had been established to provide a framework for mechanisms of close cooperation among national competition authorities in the European Union, including cooperation in enforcement against cartels; to provide a forum for discussion of competition issues and to build a common competition culture.

79. Mr. Hansen (panellist) shared the experience of an international law firm that represented clients in international cartel investigations and merger cases involving multiple jurisdictions. The role of the private counsel in both scenarios differed significantly. In the latter, the merging parties and their legal representatives took the lead, since they would have to assess where the proposed transaction should be notified and to submit merger notifications accordingly. In the event of international cartel prosecution, companies could take the lead only if they were immunity applicants. Once dawn raids were carried out, companies typically had much less control over the entire process. Leniency systems had created a race against the clock and companies would have to take important decisions on complex matters in a very short time frame. When faced with an international cartel investigation, a company would need to hire a global law firm specialized in international cartel defence to conduct a full internal investigation and assess the facts in the various legal systems affected. Once the facts and legal implications – for example, criminal exposure of the company's management and its exposure to administrative fines – were established for the jurisdictions concerned, the company would need to decide whether to apply for leniency or defend the case, a very difficult and multifaceted decision. Whatever the case, the company would need to plan for years of litigation.

80. With regard to the private-sector perspective on the proliferation of leniency regimes in recent years, the cooperation of competition authorities was welcome; however, the conflicts caused by differences in the design and operation of leniency regimes around the world should be borne in mind. Such conflicts affected cost-benefit analyses that were carried out to determine whether to apply for leniency.

81. In the debate that followed, speakers from the floor agreed with the increased importance of enforcement cooperation in a globalized economy and provided further examples for enforcement cooperation from their respective countries and regions. A large number of delegates said that effective enforcement cooperation started on an informal basis. Typically, competition authorities would first build up personal relationships, which would allow sharing of experience and useful information other than confidential information at the case level. Such personal and informal relationships would be forged during international and regional events such as the meeting of the Intergovernmental Group of Experts. Several delegates referred to twining projects between well-established and younger competition authorities, which would make it possible to forge close relations not only to learn from each other, but to work together. More formal cooperation, for example in the form of bilateral cooperation agreements, would stem from well-established informal cooperation. Mutual trust was crucial to cooperation.

82. Given that the exchange of confidential information required a legally solid basis, such as a bilateral or multilateral agreement, one participant asked what type of information could qualify as being confidential. One delegate said that, while sharing

confidential information among member States of the Common Market for Eastern and Southern Africa had not been possible in the past, some members had begun modernizing their competition laws and strengthening regional cooperation among their competition authorities.

III. Organizational matters

A. Election of officers

(Agenda item 1)

83. At its first plenary meeting on Tuesday, 19 July 2011, the Group of Experts elected its officers, as follows:

84. Chair: Mr. Theodor Thanner (Austria)

85. Vice-Chair-cum-Rapporteur: Ms. Louise Sènou (Benin).

B. Adoption of the agenda and organization of work

(Agenda item 2)

86. The Group of Experts adopted the provisional agenda contained in document TC/B/C.I.CLP/7. The agenda was thus as follows:

1. Election of officers

2. Adoption of the agenda and organization of work

3. (a) Consultations and discussions regarding peer reviews on competition law and policy, review of the Model Law, and studies related to the provisions of the Set of Principles and Rules

(b) Work programme, including the effectiveness of capacity-building and technical assistance to young competition agencies

4. Provisional agenda for the twelfth session

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

C. Provisional agenda for the twelfth session of the Intergovernmental Group of Experts on Competition Law and Policy

87. At its closing plenary meeting on 21 July 2011, the Group of Experts approved the provisional agenda for the twelfth session of the Intergovernmental Group of Experts on Competition Law and Policy (annex I).

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

88. At its closing plenary meeting, on 21 July 2011, the Intergovernmental Group of Experts authorized the Rapporteur to finalize the report of the session.

Annex I

Provisional agenda of the twelfth session of the Intergovernmental Group of Experts on Competition Policy and Law

1. Election of officers
2. Adoption of the agenda and organization of work
3. (a) Consultations and discussions regarding peer reviews on competition law and policy, review of the Model Law, and studies related to the provisions of the Set of Principles and Rules
(b) Work programme, including the effectiveness of capacity-building and technical assistance to young competition agencies
4. Provisional agenda for the thirteenth session
5. Adoption of the report of the Intergovernmental Group of Experts on Competition Law and Policy

Annex II

Attendance*

1. Representatives of the following States members of UNCTAD attended the meeting:

Algeria	Malaysia
Angola	Mauritius
Armenia	Mexico
Australia	Mongolia
Austria	Morocco
Benin	Namibia
Bhutan	Netherlands
Botswana	Nicaragua
Brazil	Niger
Brunei Darussalam	Pakistan
Bulgaria	Philippines
Burkina Faso	Portugal
Cameroon	Republic of Korea
Chad	Russian Federation
Chile	Rwanda
Colombia	Samoa
Comoros	Senegal
Congo	Serbia
Democratic Republic of the Congo	Sierra Leone
Egypt	South Africa
France	Spain
Gabon	Sudan
Gambia	Swaziland
Germany	Sweden
Ghana	Switzerland
Guatemala	Thailand
Haiti	Togo
Hungary	Tunisia
India	Turkey
Indonesia	Ukraine
Iran (Islamic Republic of)	United Arab Emirates
Iraq	United Kingdom of Great Britain and Northern Ireland
Italy	United Republic of Tanzania
Japan	United States of America
Jordan	Venezuela (Bolivarian Republic of)
Kenya	Viet Nam
Kosovo	Zambia
Lesotho	Zimbabwe

2. Representatives of the following Observers attended the meeting:

Palestine

* For the list of participants, see document TD/B/C.I/CLP/Inf.2.

3. The following intergovernmental organizations were represented at the meeting:
- Caribbean Community (CARICOM)
 - Central African Economic and Monetary Community (CAEMC)
 - Common Market for Eastern and Southern Africa (COMESA)
 - Economic Community of West African States (ECOWAS)
 - European Union
 - International Jute Study Group
 - Organization for Economic Cooperation and Development (OECD)
 - Southern African Customs Union (SACU)
 - West African Economic and Monetary Union (WAEMU)
4. The following specialized agencies or related organizations were represented at the meeting:
- World Intellectual Property Organization (WIPO)
 - World Trade Organization (WTO)
5. The following non-governmental organization (general category) was represented at the meeting:
- Consumer Unity and Trust Society (CUTS)
6. The following panellists made contributions to the meeting:
- Mr. John Fingleton, United Kingdom Office of Fair Trading
 - Mr. Khalid Mirza, former Chairman of the Pakistan Competition Commission
 - Mr. Bill Kovacic, United States Federal Trade Commission
 - Mr. Dionisio de la Cruz, Superintendencia de Industria y Comercio (Colombia)
 - Mr. Stanley Wong, International competition law counsel, StanleyWongGlobal (SW Law Corporation) former Member and Director of Mergers and Monopolies Divisions, Competition Authority (Ireland)
 - Ms. Louise Sènou (Vice-Chair of the session), Director, Competition Directorate, Ministry of Commerce, Benin
 - Mr. George Lipimile, COMESA
 - Mr. Luis Humberto Guzmán, Head of the Competition Authority, Nicaragua
 - Ms. Rahat Kaunain Hassan, Chair, Competition Commission, Pakistan
 - Mr. Hanspeter Tschäni, SECO, Switzerland
 - Mr. Fernando Furlan, Chairman of Competition and Antitrust Council – CADE, Brazil
 - Mr. Manuel Sebastião, President, Portuguese Competition Authority
 - Ms. Connie Lau, Chief Executive, Hong Kong Consumer Council
 - Mr. Alberto Heimler, Central Director for Research and International Affairs, Italian Competition Authority
 - Mr. Chilufya P. Sampa, Executive Director, Zambia Competition and Consumer Protection Commission
 - Mr. Eduardo Pérez Motta, President, Mexican Federal Competition Commission
 - Mr. Joseph Wilson, Commissioner, Competition Commission of Pakistan
 - Ms. Eleanor Fox, Professor at New York University of Law
 - Mr. Bambang P. Adiwiyoto, President of the ASEAN Competition Institute
 - Mr. Vincent Martenet, Swiss Competition Commission
 - Ms. Monica Widegren, Swedish Competition Authority
 - Mr. Sam Pieters, European Commission
 - Mr. Bill Kovacic, United States Federal Trade Commission
 - Mr. Salvatore Rebecchini, Italian Competition Authority
 - Mr. Bozidar Djelic, Deputy Prime Minister of the Republic of Serbia
 - Ms. Vesna Besarovic, Member of Council of the Commission for Protection of Competition of the Republic of Serbia
 - Mr. Sam Pieters, European Commission

Mr. Spencer Waller, Professor and Director, Institute for Consumer Antitrust Studies,
Loyola University Chicago
Mr. Anatoly Golomolzin, Federal Antimonopoly Service of the Russian Federation
Mr. Russell Damtoft, United States Federal Trade Commission
Ms. Alessandra Tonazzi, Italian Competition Authority
Mr. Marc Hansen, Antitrust private practitioner, Latham & Watkins
Mr. Ariel Ezrachi, Director of the University of Oxford Centre for Competition Law and
Policy
and the Slaughter and May Lecturer in Competition Law at the University of Oxford
