



**Economic and Social  
Council**

Distr.  
GENERAL

TRADE/WP.5/1999/13  
26 January 2000

Original: ENGLISH

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**ECONOMIC COMMISSION FOR EUROPE**

COMMITTEE FOR TRADE, INDUSTRY AND  
ENTERPRISE DEVELOPMENT

Working Party on International  
Legal and Commercial Practice  
Forty-eighth session, (WP.5)  
Brno, Czech Republic  
29 November - 1 December 1999

**REPORT OF THE FORTY-EIGHTH SESSION**

**HIGHLIGHTS**

- WP.5 Forum agreed on Guidelines on Improving the Implementation of Competition Rules in the Transition Economies.
- The BOT Group has begun preparations of a "Negotiating Platform for Public-Private Partnerships" to assist civil servants in negotiating concession contracts for infrastructure projects.
- The Intellectual Property Group will hold its first Consultative Meeting in Estonia early in 2000.
- WP.5 approved three Briefing Papers on New Financing Techniques for Trade and Investment.
- WP.5 agrees that its next Forum will be on the subject of "Public-Private Partnerships: New Concepts for Infrastructure Development".
- Mr. David Winter, Chairman, will prepare for the next session of WP.5 a document outlining a strategic vision for the future of the Working Party.

## **INTRODUCTION**

1. The Working Party on International Legal and Commercial Practice held its forty-eighth session in Brno, Czech Republic from 29 November to 1 December 1999.

2. The session was attended by representatives from: Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Hungary, Kyrgyzstan, Latvia, Netherlands, Norway, Romania, Slovakia, Slovenia, Spain, Switzerland, Turkey, and the United Kingdom of Great Britain and Northern Ireland. The European Commission was also represented.

3. The following United Nations body was also represented: the United Nations Conference on Trade and Development (UNCTAD).

### **Item 1 - ADOPTION OF THE AGENDA**

4. The provisional agenda (TRADE/WP.5/1999/3) was adopted.

### **Item 2 - ELECTION OF OFFICERS**

5. Mr. David WINTER (United Kingdom) and Mr. Dorel COLODEICIUC (Romania) were re-elected Chairman and Vice-Chairman, respectively.

6. Mr Winter informed the Working Party that he would be willing to serve for a further two years if that were to be its wish and that he would develop a proposal for the future organization and work of WP.5 in the first half of 2000 for review by delegations and approval at the next session. This proposal would include the appointment of an additional vice-chairperson to better conform with the practices of other UN/ECE bodies. He would further propose that the new vice-chairperson become the next chairperson. At that point, the position of the second vice-chairperson would be reserved for the past chairperson and he would assume this position. This procedure would ensure continuity and provide additional, needed support to the numerous, highly successful sub-groups which had been established during the last few years. The proposal to be distributed to WP.5 members would also contain more specific details about the responsibilities of WP.5 bureau members and the working group. In the interim, the Chairman welcomed comments from WP.5 members with regard to his proposals and possible nominations for the new vice-chairperson.

### **Item 3 - FORUM ON RECENT TRENDS IN COMPETITION LAWS AND THEIR IMPLICATIONS FOR BUSINESS IN CENTRAL AND EASTERN EUROPE AND THE CIS**

#### **Documentation:**

<b>TRADE/WP.5/1999/1</b>	<b>Information Bulletin No.1</b>
<b>TRADE/WP.5/1999/14</b>	<b>Information Bulletin No.2</b>
<b>TRADE/WP.5/1999/4</b>	<b>Background Paper</b>

7. An international Forum with the participation of the Ministry of Industry and Trade and the Office for the Protection of Competition of the Czech Republic, was held in Brno during the first day, and the first half

of the second day of the session. Several private enterprises provided financial support for the event. The Central European initiative (CEI) also contributed support.

8. Around 120 persons attended this Forum, the majority coming from the public sector.

9. The Forum was organized in plenary sessions and in five working groups. The discussions of the working groups and their recommendations, which were approved, are attached as annex 1 to this report.

10. The Working Party congratulated the secretariat on the organization of the Forum, which had been a success, and acknowledged the contribution of BIP, which assisted the secretariat in its organization. The Working Party further expressed its pleasure at the large number of experts from Competition authorities who had participated. It welcomed the fact that the Forum had created a network of public- and private- sector participants willing to attend follow-up meetings on the subject of competition. It further recognized that this event had fulfilled a need for greater dialogue between the public and private sectors within the UN/ECE region on competition matters.

11. The Working Party recommended to the secretariat that the report and the recommendations of the Forum should be transmitted for information to the next session of the Committee for Trade, Industry and Enterprise Development and the Economic Commission for Europe.

12. The Working Party requested that the secretariat publish the Forum proceedings.

#### **Item 4 - GUIDE TO FINANCING PRIVATE ENTERPRISES AND TRADE**

##### **Documentation:**

<b>TRADE/WP.5/1999/5</b>	<b>Leasing: Legal and Regulatory Aspects of Leasing Operations with a View to Eastern Europe</b>
<b>TRADE/WP.5/1999/6</b>	<b>Use of Land as Security for a Loan</b>
<b>TRADE/WP.5/1999/7</b>	<b>The Options for International Dispute Resolution</b>

13. Mr. Neil Aitken, the author of TRADE/WP.5/1999/7, presented the paper, "The options for international dispute resolution". The Working Party congratulated Mr. Aitken on his presentation and commended the quality of the paper. It requested comments from delegations prior to 1 March 2000 and requested the secretariat to publish the paper as a separate briefing paper. In addition, it requested that the two other papers presented to the session, TRADE/WP.5/1999/5 and TRADE/WP.5/1999/6, also be published as briefing papers.

14. Mr. Winter proposed that an invitation to all members of the Working Party and other interested parties be sent, suggesting that further papers relevant to this topic be sent to the secretariat for the consideration of

the Working Party at its next session. He himself, he announced, would prepare a paper on corporate governance for the next session.

**Item 5 - WORK OF THE SUB-GROUPS**

**(a) Build-Operate-Transfer (BOT) Group**

**Documentation:**

**TRADE/INFORMAL/1999/18 Public-Private Partnership for the Central European Initiative: A New Concept for Infrastructure Development**

15. On behalf of its Chairwoman, Ms. Corinne Namblard-Bouverot (France) and Mr. Michael Dymacek (Czech Republic) of the Build-Operate-Transfer (BOT) Group, reported that the Group had made excellent progress since the last session of the Working Party. Among the Group's achievements, Mr. Dymacek noted the following:

- raising of funds to hire editors to finalize Part II of the BOT guidelines;
- preparation of a document, "Public-Private Partnerships for Infrastructure Development in CEI countries" with the financial support of the Czech Government for a seminar at the CEI Summit in Prague (both the seminar and document had been well received);
- undertaking of technical assistance missions to the CIS on concrete projects;
- writing of a negotiating platform on public-private partnerships for Infrastructure for the Government of Bangladesh that will be available to all Governments after it has been finalized.

16. He further reported that, in cooperation with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), the Group would be holding a consultative meeting with the Government of Bangladesh from 15 to 17 February 2000. He also said that the Group intended to cooperate with the Ministry of Transport of the Government of the Czech Republic in investigating some proposed transport projects in March/April 2000.

17. The Working Party welcomed the progress and the substantial output of the Group. It looked forward to the finalization and publication of Part II of the Guidelines. It also requested the secretariat to undertake some minor editing and then publish for wider distribution, the document entitled: "Public-Private partnerships for infrastructure development in CEI countries". It thanked the Chairwoman of the Group for her efforts in fund-raising that had allowed the hiring of editors to finalize Part II of the Guidelines.

**(b) Real Estate Advisory Group (REAG)****Documentation:**

TRADE/WP.5/1999/10

Real Estate Advisory Group (REAG) Report  
1998/1999

ECE/TRADE/1999/INFORMAL/19

WP.5 Draft Programme for Real Estate Group  
REAG) Activities in 2000

18. The secretariat informed the Working Party that the recommendations and policies of REAG had been well disseminated through a series of seminars and Conferences throughout the year involving the Chairman, Mr. Robert Hall, and the secretariat.

19. The Working Party praised the work of REAG despite difficulties in raising the funding for missions. It then approved the work programme for REAG proposed by its Chairman and the secretariat in document ECE/TRADE/INFORMAL/1999/19 and as found in annex 2 to this report.

**(c) Advisory Group on the Protection and Implementation of Intellectual Property Rights for Promoting Investment****Documentation:**

TRADE/WP.5/1999/11

Report of the Inaugural Meeting held on 17 September  
1999, Palais des Nations, Geneva, Switzerland

20. The secretariat informed the Working Party that the initial funding for the work of the Group had been achieved and the Advisory Group would hold a first consultative meeting in Estonia early in 2000. The Chairman noted that it was important for this meeting to achieve all its objectives.

**(d) Expert Advisory Group to Consider Possible Revisions to the European Convention on International Arbitration of 1961****Documentation:**

TRADE/WP.5/1999/12

Report 1998/1999

21. Mr. William Pissoort (Belgium), Chairman of the Expert Advisory Group, made a report to the Working Party on its progress, including the initial findings from the questionnaire which had been sent to signatory countries and arbitration institutions nominated by UN/ECE member Governments. He said that the replies had been encouraging and had proved to him that there was a large consensus on revising the Convention, including removal of the word "European" from the title, thereby enlarging the scope of the instrument. He informed the Working Party that the Group would meet in Vienna on 17 and 18 February 2000, hosted by the United Nations Commission on International Trade Law (UNCITRAL), to consider the replies in more detail. Furthermore, he reported that the Group was exploring with the Southeast European Cooperative Initiative (SECI) how it could provide assistance to participating States on improving the legal, institutional and business environment for arbitration in the region.

22. Mr. Winter congratulated the Group on its impressive start. He suggested, however, that political support would be required before the Group could begin work on substantive revision of the Convention and urged the Group to bear in mind the sensitivities of established bodies in this area. He welcomed the Group's efforts to provide technical assistance on dispute resolution.

**Item 6 - OTHER BUSINESS**

**(a) Measures against crime and corruption**

23. The Chairman informed the Group that he had received a request from the UN/ECE Deputy Executive Secretary, Ms. Danuta Huebner, to explore the need for a Code of Conduct or similar instrument to deal with the problem of crime and corruption in the region. Therefore, he proposed that a small group of experts be established to report back initially on the need for such an initiative in the light of work being done elsewhere by other international organizations, such as the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe. He suggested that the Group communicate by e-mail and that he would consolidate the responses and send these direct to the Deputy Executive Secretary. Professor Lebediev (Russian Federation), Professor Wim Timmermans (Netherlands) and Ms. Birgit Thomson-Guth (Switzerland) agreed to be part of this informal group, which was agreed by the Working Party.

**(b) Future work**

**Documentation**

**TRADE/WP.5/1999/13 Report of the forty-eighth session**

24. The Working Party considered topics for its next Forum. After some discussion, it agreed to hold the next Forum on "Public-Private Partnerships for Infrastructure Development in the UN/ECE economies " and to ask support from the UN/ECE BOT Group in the preparation of this event. It also agreed, in view of the large interest expected, to invite the secretariat to request help from an outside conference organizer.

**(c) Dates of future meetings**

25. It was agreed that the forty-ninth session, which would include the holding of a Forum, would take place from 4 to 6 December 2000.

**Item 7 - ADOPTION OF THE REPORT OF THE FORTY-EIGHTH SESSION**

26. The Working Party adopted its report of the forty-eighth session, subject to approval of the final text by the Chairman.

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Annex 1

## RECOMMENDATIONS OF THE WP.5 FORUM

NEW TRENDS IN COMPETITION LAWS AND THEIR IMPLICATIONS FOR BUSINESS IN THE  
COUNTRIES OF CENTRAL AND EASTERN EUROPE AND THE CIS

Brno, Czech Republic, 29 and 30 November 1999

Participants identified the following new trends in competition policy and practices as being particularly relevant in the ECE region:

- Growing recognition by Governments of the importance of competition issues, as they concern both EU candidate countries and non-EU candidate countries.
- Conflicting pressures from business on Governments: on the one hand pressure to preserve subsidies; and, on the other, pressure to eliminate anti-competitive practices - State aids, discrimination, etc. both nationally and locally in order to create a level and an equitable playing field.
- Evolution of competition and its various aspects (mergers and acquisitions, State aids, public procurement, etc.) and the need by Governments to assign to appropriate national bodies the responsibility to deal with issues, e.g. an antimonopoly office, Ministry of Finance, and to avoid overlapping responsibilities.
- Potential for useful cooperation between various national competition authorities.
- Overall need for coherent framework of international rules on competition.

## WORKING GROUPS

State aids

The Working Group identified the need for comprehensive legislation on State aids in each country. There was a need, the Working Group argued, for greater discipline to control State aids at various levels of public administration, local as well as national. Control should also encompass the different types of aid, notably indirect aid (tax breaks, etc.).

They agreed that such comprehensive legislation to ensure better discipline on the use of State aids should enshrine the following principles:

- State aids control should be decentralized to the appropriate authority, even if final control should be done at national level.
- The State aids monitoring authority should be as independent as possible to avoid political lobbying and interference. There is a need to protect the independence of this authority by providing it with the appropriate institutional framework and powers. Governments should give the authorities responsible for competition clear and open support to protect their independence.
- State aids to attract investment can be counterproductive and of doubtful value in the use of scarce public resources. There should be a clearer

commitment from Governments to cooperate in the use of State aids for investment promotion, particularly to avoid unhealthy competition.

#### Annex 1

At the same time, some participants of the Working Group argued that there could be a need in certain cases (specific sectors, transition economy, etc) to allow enterprises to have some market dominance as an incentive for innovation. Public-private partnerships in infrastructure projects, based on concessions, also should not be undermined by new trends in competition law and practice.

Finally, the Working Group suggested that EU Accession countries should endeavour to harmonize their legislation in this area.

#### **Mergers and acquisitions (M&As): Deregulation of natural monopolies and public utilities**

The Working Group noted that most countries of the region have small markets in transition and are vulnerable to unregulated M&A activity. They are keen to join the EU market, and wish to adopt harmonized competition rules that will support that process.

It argued that because of their small size, there is a need to address the problem of market size (economies of scale) and for countries to control anti-competitive mergers. Some countries only have notification obligation for mergers, but powers to control them will come, for most, in 2000 when the law is amended to that effect. Those countries that have merger control have difficulty in prohibiting a merger. Rather, they will authorize it provided certain obligations are fulfilled (e.g. to repeal a long-term exclusive supply agreement, or an exclusivity contract, or to divest a particular branch or plant).

It further observed that it is necessary (and difficult) to define the relevant market, the different thresholds (turnover and market share in most countries); establish pre and post-merger notification systems, and the difficulty to make changes in an entity and its operations once a merger had already taken place.

As concerns the role of the competition authorities and anti-monopoly offices, the Working Group argued that there is a need for: consistency in decision-making; for the competition authority to send a clear message to enterprises, transparency in law enforcement; publicity regarding decisions and the preservation of confidentiality; and, finally, for international cooperation as markets become more and more globalized.

#### **Public procurement**

The Working Group argued that the key issue is to persuade Governments to take open public procurement seriously, bearing in mind some of the benefits realized from open public procurement practices.

Related to this issue is the need for Governments to assign responsibility and competence for public procurement to specific departments. When responsibility is passed from one ministry to another or divided among bodies with sometimes conflicting objectives there is no certainty on policy and responsibility is shifted too easily.



The Working Group observed that it is extremely important to envisage an adequate system of remedies that are easily understood and properly used. Business should be encouraged to take recourse and purchasing authorities must be aware that they can be challenged under effective procedures. This will help to instill confidence in the system.

Government officials who are new to public procurement but who have a responsibility for large budgets need training and guidelines, the Working Group argued, to help them in their jobs. This can help to avoid difficulties in implementation, can increase confidence and also cut down the number of queries and challenges which are brought on very small procedural points.

Several delegations wanted to meet their peers in other jurisdictions - the exchange of views and experiences is extremely valuable to those who have to implement procurement systems.

#### **Harmonization of competition legislation with that of the EU**

At an institutional level, the Working Group argued that there is a need for a continuous and permanent process of harmonization of laws to EU competition law (moving target phenomenon).

There is also a need, the Working Group argued, to improve the efficiency of the institutional mechanism. There are, however, the Working Group observed, reasonable provisions to meet the legal requirements fixed by European authorities. Members of the Group agreed that further efforts were required to increase the independence of the competition authorities, to remove them from political influence.

The Working Group also saw a need for long-term training for civil servants and judges. It further agreed that a competitive culture is required not only at the governmental level but also at the business level. Many domestic companies do not understand the importance of competition law and practice and the authorities need to undertake advocacy programmes to raise awareness. The private sector needs transparency and reasonable implementation of competition legislation that is predictable and stable. In particular, there is a need for transparency in terms of access to files and to information provided by the authorities.

It also observed that there was a need to answer the question: who defines competition policy? Does the competition authority have a role?

It concluded that more technical assistance was required from international organizations.

#### **Recommendations:**

Participating States called for annual technical follow-up meetings of European competition authorities focusing on the issues mentioned above, i.e. state aids, mergers and acquisitions, harmonization of legislation to EU norms, and public procurement, organized by appropriate organizations, such as the United Nations Economic Commission for Europe, the United Nations Conference on Trade and Development, the World Trade Organization, the Organisation for Economic Co-operation and Development and the Central European Initiative.

The objective of these meetings will be to measure progress, assess needs and provide, where appropriate, support for ongoing activities. These activities will improve the capability of the national competition authorities in dealing with multiple issues and encourage the international cooperation of officials from competition authorities who share the same problems, challenges and experiences.

The involvement of private companies, international experts and firms will be necessary for the full implementation of this programme. It is essential to hear their views in the process.

It is also important to use the experience of central European competition authorities in providing assistance to countries of the former Soviet Union.

A group of officials / delegates from the meeting could be contacted to act as a planning group for such an event, involving some of the following countries who were represented in Brno e.g. Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Hungary, Kyrgyzstan, Norway, Romania, Slovakia, Spain and Turkey.

The group would undertake its preparatory work in cooperation with the UN/ECE, the EU and UNCTAD. The Central European Initiative, through its newly established Investment Facilitation Unit in Trieste, could be considered as a possible vehicle to implement the programme.

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Annex 2

**DRAFT PROGRAMME FOR  
REAL ESTATE ADVISORY GROUP (REAG) ACTIVITIES IN 2000**  
(ECE/TRADE/INFORMAL/1999/19)

Since its establishment in 1997, the Real Estate Advisory Group (REAG) has achieved a considerable amount in terms of raising awareness, in both the public and private sectors, with regard to the importance of a well functioning real estate market to a country's overall economy. The attention of REAG in this respect has been directed principally to emerging economies in central and eastern Europe and former CIS countries.

Bearing in mind the above, the secretariat and Chairperson of REAG propose the following activities for the year 2000:

**I. WORKSHOPS**

- Organization of a joint UN/ECE - FEDRE workshop on the regional aspects of the ECE's trade and investment work in transition economies. FEDRE is the "Fondation pour l'Economie et le Développement Durable des Régions d'Europe" and they would fund the participation of a selected number of participants from regions in transition economies. The workshop would deal predominantly but not exclusively with real estate issues in transition economies. In all areas emphasis would be placed on topics of particular interest to regions and municipal Governments including local institutions, the education of real estate professionals; codes of conduct and valuation standards. The European Society of Chartered Surveyors has already agreed to provide one or more speakers for this event. The workshop would be held in Geneva during one and a half days in March 2000.
- Organization of a meeting in Geneva (May 2000, 1 day) among international organizations active in real estate business (European Union, World Bank, EBRD, German Mortgage Bankers Association, American Insurance Institute, American Mortgage Lenders Association, Central European Real Estate Associations Network, Smithsonian Real Estate Institute and leading global private sector bodies interested in real estate matters in the region). The purpose of this meeting would be to ensure that all of these organizations are aware of what the others are doing and, where appropriate, to encourage cooperation, joint projects and/or a coordinated approach. A questionnaire would be distributed to all of the invited organizations requesting information about their activities in support of well-functioning real estate markets in transition economies. The replies would then be published in a "guide" to these activities which, subject to available resources, could be updated on a regular basis.
- Organization of a Real Estate Forum in Geneva (September/October 2000). This could be done in cooperation with the European Society of Chartered Surveyors. The goal would be to bring together major public and private players in the real estate business and to bring them up to date with the most recent developments and opportunities in transition economies. This would also be used as an opportunity to promote participation in and funding of REAG activities, in particular via the presentation of a model project.

**II. OTHER ACTIVITIES**

- Review standards for valuation and, in particular, those developed by the European Group of Valuers' Associations (TEGOVA) in London in order to develop a recommendation and a programme for promoting the adoption of

valuation standards in central and eastern Europe. The result of this work would be presented to the year 2000 meeting of the Working Party.

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