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Agenda Item 3e. Report of the discussion group on international cooperation

Contribution by

Federal Antimonopoly Service

Russia

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(for consideration)

Comments made by UNCTAD
Comments made by USA [US]
Comments made by Germany [DE]
Comments made by Italy [IT]
Comments made by Austria [AT]
Comments made by Vietnam [VN]
Comments made by Hungry [HU]
Comments made by Peru [PE]
Comments made by Croatia [HR]
Comments made by Seychelles [SC]
Comments made by South Africa [ZA]

Toolkit on International Cooperation of Competition Authorities on Combating Restrictive Business Practices of Transnational Corporations and Transboarder Violations of Rules on Competition

[US General comments:

1. Consideration of the Toolkit is premature;

2. The solutions proposed by the Toolkit do not appear well targeted to address the problems that have been identified at the stage of analyzing obstacles to international cooperation

3. Duplication of existing (OECD and ICN) documents]

[DE General comments:

1. Support to analysis of the existing work products of OECD and ICN and develop them instead of duplication and compilation.

2. An informal and flexible cooperation approach might be more promising and might raise incentives to make frequent use of them. Formal cooperation is limited by many practical difficulties

3. Support to the approach of identifying the obstacles to cooperation before the discussion how the results could be translated into specific measures].

[IT General Comments:

1. Cooperation within existing international documents could be effective. Instead of creating new cooperation mechanisms priority should be given to promoting knowledge and encouraging implementation of existing tools and documents.

2. Global competition community should encourage the informal case-specific cooperation between competition officers.

3. Introduction of formal cooperation mechanism within UNCTAD is premature.]

HR: the title should be more simple. Suggestion:

Toolkit on International Cooperation between Competition Authorities in the Promotion and Enforcement of Competition Law/in Combating Restrictions of Competition

Current Toolkit is aimed to assist [UNCTAD, HU, HR, SC, ZA - Competition Authorities of the] States in implementation of Section F "International Measures" of the United Nations Set of Principles and Rules on Competition, establishes voluntary procedures and tools, that can be used in the process of combating restrictive business practices of transnational corporations and transboarder violations of rules of competition.

The goal of the Toolkit is to ensure effectiveness and efficiency of Competition Authorities, or other institutions exercising functions of control and supervision of competition legislation, on issues of detection, prevention and suppression of restrictive business practices of companies exercising their activity on the territory of States.

[UNCTAD, HU, HR, SC, ZA - Competition Authorities of the] States may use the following tools of international cooperation:

I. Notification

[UNCTAD: to add information on when the Notification takes place]

[HR: need the reference to the affected markets of another State]

[SC: to be more precise under which conditions and procedures implementation of enforcement decisions take place]

[DE: Number of decisive circumstances that may trigger notification should be limited as notification requirements can be burdensome]

1. [UNCTAD, HU, HR, SC, ZA - Competition Authority of one State] in accordance with its respective legislation may notify [UNCTAD, HU, HR. SC, ZA - Competition Authority of] the other State on enforcement actions which:

(a) may influence enforcement activity of the other State;

(b) involve business practices, including abuse of dominant position and anticompetitive agreements, carried out fully or in substantial part within the scope of powers of the other State [UNCTAD, HU, HR, SC, ZA - Competition Authority of the other State] [;

(c) involve mergers, acquisitions or other actions, in which one or more of the participants of a deal or a company, controlling one or more part, participating in a deal, is a person, registered or settled in accordance with legislation of the other State;

(d) involve activity of economic entities, defined by legislative acts of the other State;

(e) involve implementation of enforcement measures which are, to a large extent, require implementation or prohibit any actions on the territory of other State or refer to execution of activity on the territory of other State in the framework of implementation of compliance with competition legislation.

[HR: to clarify what the prohibit action on the territory of other State means]

2. Notification on actions mentioned in the Point 1 of the present Article, shall be sent in reasonable time to allow the [UNCTAD, HU, HR, SC, ZA – the Competition Authority of the] other State to take appropriate measures.

3. Where notifications pertain to private persons' information, [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States shall observe its national legislation on privacy, non-disclosure of information consisting personal data, confidential information and commercial secrets.

4. Notification pursuant to the present Article is not required for each subsequent request for information in the same matter unless the [UNCTAD, HU, HR. SC, ZA – Competition Authority of the] State requesting information becomes

aware of new facts, indicated in Point 1 of the present Article, or [UNCTAD, HU, HR, SC, ZA – Competition Authority of the] other State requests otherwise in relation to a particular issue.

5. Notification pursuant to the present Article shall be sent in writing and shall be [VN-endeavor to be] sufficiently detailed to enable the [UNCTAD, HU, HR, SC, ZA – the Competition Authority of the] notified State to make initial assessment of the effect of the enforcement activity by the [UNCTAD, HU. HR, SC, ZA – Competition Authority of the] notifying State. The notification shall [VN – endeavor to] include information on the nature of the enforcement activities, the legal provisions concerned of the laws of the States. Where possible, notifications shall [VN – endeavor to] include names and locations of the participants of enforcement procedure.

[HR: to clarify if the notifications of this Chapter involves legal provisions of both States]

[HR: to clarify the procedure for enforcement and need to gain approval from both sides]

[ZA: the Toolkit could be supplemented by the list of contact points in every authority. The Toolkit may also incorporate standard specifications or a standard form specifying the type of information that would be required for notification. The form could include non-confidential information like the names of the firms involved, a summary of the activity and a contact person]

II. Exchange of Information

[SC: stress that mutual cooperation could be initiated not only by States but also be regional blocks]

[DE: Having the appropriate safeguards is vital and any definition of confidential information is multi-layered and complex]

1. In order to combat restrictive business practices of transnational corporations [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States may in their mutual interest exchange [UNCTAD: there is not common definition of the confidential and non-confidential information; SC - non-confidential information should be clearly defined] ~~non-confidential~~ information, experience and views with regard to concrete cases or deals of economic concentration which are or may affect the interests of the other State :

UNCTAD: to withdraw the general items of the list which do not trigger the willing to cooperate~~.~~

HR stress the same issues as UNCTAD

[ZA supposes that exchange of information on advocacy initiatives, updates to legislation, joint research and technical assistance is a subject of informal cooperation and should not be a part of a formal document]

~~1) developments of national competition legislation and policy;~~

~~2) operational issues affecting the efficiency and/or effectiveness of competition agencies of the States, its institutional design and independence;~~

~~3) mutual cooperation initiatives as on the bilateral as multilateral basis, including, respective regional associations as well as on the platforms of International Competition Network (ICN), Organisation for Economic Cooperation and Development (OECD), World Intellectual Property Organisation (WIPO), United Nations Conference on Trade and Development (UNCTAD);~~

~~4) initiatives of conducting joint market studies, consideration of economic concentration deals, coordination of efforts on investigation of violations of competition legislation;~~

~~5) issues of competition advocacy;~~

~~6) technical assistance initiatives in the sphere of competition legislation and enforcement.~~

2. The [UNCTAD, HU, HR. SC – Competition Authority of one] State [VN - shall endeavor to] provide to [UNCTAD, HU, HR, SC – the Competition Authority of] the other State with any information on restrictive business practices if such information, from the opinion of the [UNCTAD, HU, HR, SC, ZA – Competition Authority of the] sending State, could be a basis for enforcement activity of [UNCTAD, HU, HR, SC, ZA - the Competition Authority of] the other State.

[HR: to clarify how one State could assess that something might be the basis for enforcement activity of another state]

3. The [UNCTAD, HU. HR. SC, ZA – Competition Authority of one] State may send to [UNCTAD, HU, HR, SC, ZA– the Competition Authority of] the other

State a request for relevant information with explaining the factual background of a case, for consideration of which the requested information is required.

A [UNCTAD, HU, HR, SC, ZA – Competition Authority of the] State, received the request, shall [VN – endeavor to] provide the [UNCTAD, HU, HR, SC, ZA - Competition Authority of the] requested State with the information at its disposal if such information considered as to be relevant to the enforcement activity of the [UNCTAD, HU, HR, SC, ZA – Competition Authority of the] requested State.

Requesting information shall [VN – endeavor to] be sent in reasonable time, agreed between the [UNCTAD, HU, HR, SC, ZA– Competition Authorities of the] States, but not later then 60 days from the date of the receipt of the request.

4. Exchange of information may be made via e-mail, hard copies, fax or telephone.

5. The language used in exchange of information shall be English, unless otherwise agreed by the [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States.

III. Exchange of confidential information

[UNCTAD – to withdraw this Chapter]

[HR: concerns about absence of the common definition of confidential information]

[AT: Austrian legislation does not provide a legal basis to exchange confidential information outside the EU].

[ZA: exchange of confidential information due to national restrictions across jurisdictions should be considered on a case by case basis and could be implemented in a phased manner starting with bilateral rather then multilateral cooperation]

1. States, following national interests, possibilities and limitations imposed by national legislations, may, following mutual agreements, exchange confidential information to the extent not inconsistent with the laws of States as well as with obligations under international law. States take into account that exchange of information prohibited by national laws or not complied with national interests of a State, does not execute.

2. In submitting information upon a request, a State may impose the restrictive conditions concerning:

(a) the confidentiality of submitting information;

(b) the storage, use of, or access to any information submitted;

(c) the copying, returning or disposal of copies of any information submitted;

(d) the payment of costs reasonably incurred by the responding State.

3. Conditions of submitting confidential information are [HR, SC: subject of applicable national and international laws]. [RU: Possibility of exchange of confidential information should be] a subject of mutual negotiations of the States in every particular case.

4. Information, submitted as a result of exchange, is kept confidential on the territory of States unless otherwise agreed by the States. [HR: the exchanged information should be kept confidential except when the parties to which information refers, gives the consent to disclose such information].

IV. Enforcement cooperation

[SC supports the views made by UNCTAD; propose to add regional blocks]

[DE: New enforcement tools are interesting but difficult to out into practice]

1. In case of existence of mutual interest, [UNCTAD, HU, HR. SC, ZA – Competition Authorities of the] States may exercise cooperation in course of making decision on initiation of investigation, opening a case on violation of competition legislation, consideration of a case on violation of competition legislation as well as in course of making decision on existence or absence of violation and defining further sanctions.

[HR: to clarify the meaning of "defining further sanctions". HR also express concerns on differences in sanctions across the jurisdictions]

2. In enforcement cooperation, the Competition Authority of the States [HR: to clarify which State] keeps independency on using enforcement tools according to its respective national legislation as well on making a final decision on a case according to interests and goals of a State.

3. In case of their mutual interests, cooperation of [UNCTAD, HU, HR, SC, ZA – the Competition Authorities of the] States may be exercised in the following forms:

1) exchange of ~~non-confidential~~ information, including that of mentioned in the Part II of the current Toolkit;

2) holding consultations including in the form of those mentioned in Part V of the current Toolkit.

3) simultaneous (agreed, joint) conducting of inspections (dawn raids);

4) discussion of use of the unified methodology of consideration of mergers, acquisitions, conducting market analysis and consequences of restrictive business practices, etc. [HR: to clarify what means by unified methodology (because of the difference in approaches among jurisdictions)]

5) sending joint requests for information to economic entities;

6) sending joint requests for waivers;

7) conducing joint market analysis, including analysis of transboarder effects;

8) coordination [ZA: "discussion" or "consultation"] in making decisions on existence/absence of violation of competition legislation; [HR: contradiction with the principle of independence of Competition Authorities] [AT cannot accept it due to national procedural aspects].

9) Coordination [ZA: "discussion" or "consultation"] of opinions when imposing remedies in merger cases.

4. If a [UNCTAD, HU. HR. SC, ZA – Competition Authority of one] State considers that restrictive business practices, exercising on the territory of the other State, adverse its interests, such a [UNCTAD, HU, HR, SC, ZA – Competition Authority] may notify on that matter [UNCTAD, HU, HR. SC, ZA – the Competition Authority of] the other State on the territory of which restrictive business practices take place, and may ask through the notification the [UNCTAD, HU, HR, SC, ZA – Competition Authority of the] other State to initiate appropriate enforcement actions to prevent the relevant restrictive business practices.

The notification shall include information on nature of restrictive business practices and on possible consequences for notifying State as well as suggestion on

providing additional information or other assistance, which [UNCTAD, HU, HR, SC, ZA – the Competition Authority of the] notified State is able to propose.

5. After receiving notification and in accordance with Part 4 of the present Article and after holding consultations between the [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States, if its holding is necessary, [UNCTAD, HU, HR, SC, ZA – the Competition Authority of the] notifying State makes a decision on necessity of initiation of enforcement actions or expending enforcement actions in relation to restrictive business practices mentioned in the notification. [UNCTAD, HU, HR, SC, ZA – The Competition Authority of the] notifying State informs [UNCTAD, HU, HR, SC, ZA – the Competition Authority of the] notified State on significant preliminary and final results of relevant enforcement actions in reasonable time.

In making a decision on initiation of enforcement actions a [UNCTAD, HU, HR, SC, ZA – Competition Authority of the] notifying State is guided by national legislation on competition, and in case of its absence – by relevant national or international laws.

Provisions of the present Article do not limit rights of [UNCTAD, HU, HR, SC, ZA – the Competition Authority of the] notified State to take its own enforcement actions in accordance with national legislation [HR: or other relevant and applicable national or international law].

[ZA: the Toolkit should recognize other existing mechanisms for cooperation in other platforms such as the OECD and ICN]

V. Consultations

[SC: add regional blocks]

[ZA agrees in principle and points that the list is not exhaustive]

1. Considering provisions of Clause 4 of Section 4 of the United Nations Set of Principles and Rules on Competition, [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States may on bilateral basis hold consultations, inter alia, in the following consequences:

1) a [UNCTAD, HU, HR, SC, ZA – Competition Authority of the] State in course of an investigation of violation of competition legislation identified that restrictive business practices affect interests of the other State;

2) [UNCTAD, HU, HR, SC, ZA – Competition Authorities of] two or more States investigate the same restrictive business practice and all the ~~stakeholders~~ [PE – States] would benefit from holding consultations;

3) a company, situated on the territory of one State, exercises restrictive business practices on the territory of the other States;

4) any other situations in which restrictive business practices may have adverse effects on markets of different States;

In case of consideration of mergers, acquisitions, joint ventures and/or other takeover of control over the company, which affect (may affect) competition on the territory of different States, consultations are holding taking into account national legislation of the States participating in such consultations.

2. [UNCTAD, HU, HR, SC, ZA – Competition Authority of the] States (one of the States) on mutual agreement may conduct preliminary assessment of transboarder influence of restrictive business practices of company(s). Such assessment may include the following items:

1) identification of jurisdictions and companies involved;

2) description of restrictive business practices or unfair behavior, including, inter alia, if possible, preliminary definition of market(s) and companies involved;

3) legal qualification of restrictive business practice according to national legislation of the States;

4) description of possible adverse effects on competition, harmful effects (damages), emerged on the territory of one of more States, [UNCTAD, HU, HR, SC, ZA – Competition Authorities of which] involve in consultations;

5) restrictions, connected with confidential information (documents, data, materials or their copies, presenting evidences of restrictive business practices);

6) detailed description of process of further cooperation between the [UNCTAD, HU, HR, SC, ZA - Competition Authorities of the] States;

7) necessity to involve experts (incl. UNCTAD), including but not limited to writing a joint report on the consultations and their results in accordance with provisions of Section F of the UN Set.

[HR: UNCTAD expertise should be of general manner and should not be applied to concrete cases, investigation of which include confidential information]

[SC: UNCTAD expertise should be kept informal]

3. [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States may in unilateral, bilateral or multilateral [HR: "agreement" or "framework"] collect information, facts and data on how far restrictive business practices affect (may affect) competition on the territories of the States involved in consultations.

4. Confidential information may be exchanged voluntarily between the [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States based on the provisions of Part III of the present Toolkit, using waivers, received from all the companies in relation to which consultations are holding.

VI. Avoidance of conflicts

UNCTAD: this will be difficult to achieve

1. The [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States acknowledge that they will minimize any potential adverse effects of their enforcement activities that could happen on the territory of the other State.

[ZA: this point should be carefully discussed to clarify how "adverse effects" should be defined]

2. If a [UNCTAD, HU, HR, SC, ZA – Competition Authority of one] State identifies possibility of adverse effects of its enforcement actions on the territory of the other State, such a [UNCTAD, HU, HR, SC, ZA – Competition Authority] shall be properly notified.

3. If mutually agreed, [UNCTAD, HU, HR, SC, ZA – the Competition Authorities of the] States may exchange views and opinions on the situation and initiate consultations under Part V of the present Toolkit.

VII. Regional cooperation

[UNCTAD: provide more substance of inclusion of regional groups in the Toolkit]

[SC: support the view made by UNCTAD]

[HR: to think if this Chapter is necessary because it is difficult to define regional groups and regional groups are part of global cooperation, which is much broader]

1. Taking into consideration the level of economic integration, [UNCTAD, HU, HR, SC, ZA – The Competition Authorities of the] States may discuss within regional alliances mutually agreed issues of competition policy and enforcement as well as coordination of efforts for combating restrictive business practices

2. Cooperation of [UNCTAD, HU, HR, SC, ZA – the Competition Authorities of the] States within regional alliances may be exercised as in accordance with as multilateral agreements as tools established in the present Toolkit.

VIII. Request for UNCTAD assistance

Vietnam: to clarify the UNCTAD assistance

HR: UNCTAD assistance should be limited to informal consultative tools, but not concrete cases

1. If needed, the [UNCTAD, HU, HR, SC, ZA – Competition Authority] may ask UNCTAD for assistance in the following forms:

(a) organizing a meeting between the [UNCTAD, HU, HR, SC, ZA - Competition Authorities of the] States according to Part VI of the present Toolkit in order to discuss possible mutually agreeable solutions of the issues raised between the consulting [UNCTAD, HU, HR, SC, ZA - Competition Authorities].

(b) providing of conference facilities on the UNCTAD platform;

(c) preparation of draft report on results of consultations, summarizing of the positions of the [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States involved;

(d) conducting substantive research on the topic or practice requested by [UNCTAD, HU, HR, SC, ZA – the Competition Authority] State;

2. ~~If agreed between the [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States involved in consultations under Part V of the present Toolkit, UNCTAD shall invite representatives of private and public companies involved in restrictive business practices~~ [HR points out that this provision represent the role of UNCTAD as arbitration].

3. If consultations end with mutually agreed solutions of issues discussed during the consultations, the [UNCTAD, HU, HR, SC, ZA – Competition Authorities of the] States may request UNCTAD to assist by creating a mechanism for implementation of the mentioned decision.