

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

Current Toolkit is aimed to assist 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 transborder violations of rules of competition.

The goal of the Toolkit is to provide effectiveness and efficiency of competition authorities, or other institutions exercising functions of control and supervision over competition, on issued of detection, prevention and suppression of restrictive business practices of companies exercising their activity on the territory of States.

States may use the following tools of international cooperation:

I. Notification

1. A State in accordance with its respective legislation may notify 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;

(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 other State;

(d) involve activity of economic entities, defined by legislative acts of 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.

2. Notification on actions mentioned in the Point 1 of the present Article, shall be sent in reasonable time to allow the other State to take appropriate measures.

3. Where notifications pertain to private persons' information, 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 State requesting information becomes aware of new facts, indicated in Point 1 of the present Article, or 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 sufficiently detailed to enable the notified State to make initial assessment of the effect of the enforcement activity by the notifying State. The notification shall include information on the nature of the enforcement activities, the legal provisions concerned of the laws of States. Where possible, notifications shall include names and locations of the participants of enforcement procedure.

II. Exchange of Information

1. In order to combat restrictive business practices of transnational corporations States may in their mutual interest exchange non-confidential information, experience and views with regard to:

- 1) developments of national competition legislation and policy;
- 2) operational issues affecting the efficiency and/or effectiveness of competition agencies of 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. A State provides to the other State with any information on restrictive business practices if such information, from the opinion of a sending State, could be a basis for enforcement activity of the other State.

3. A State may send to 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 State, received the request, shall provide the requested State with the information at its disposal if such information considered as to be relevant to the enforcement activity of the requested State.

Requesting information shall be sent in reasonable time, agreed between the States, but not later than 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 States.

III. Exchange of confidential information

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 object 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.

IV. Enforcement cooperation

1. In case of existence of mutual interest, 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.

2. In enforcement cooperation, competition authority of a State keeps independent on using enforcement tools according to 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 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.
- 5) sending joint requests for information to economic entities;
- 6) sending joint requests for waivers;
- 7) conducting joint market analysis, including analysis of transborder effects;

8) coordination in making decisions on existence/absence of violation of competition legislation;

9) coordination of opinions when imposing remedies in merger cases.

4. If a State considers that restrictive business practices, exercising on the territory of the other State, adverse its interests, such a State may notify on that matter the other State on the territory of which restrictive business practices take place, and may ask through the notification 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 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 States, if its holding is necessary, 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. Notifying State informs 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 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 a notified State to take its own enforcement actions in accordance with national legislation.

V. Consultations

1. Considering provisions of Clause 4 of Section 4 of the United Nations Set of Principles and Rules on Competition, States may on bilateral basis hold consultations, inter alia, in the following consequences:

- 1) a State in course of an investigation of violation of competition legislation identified that restrictive business practices affect interests of the other State;
- 2) two or more States investigate the same restrictive business practice and all the stakeholders would benefit from holding consultations;

- 3) a company, situated on the territory of one State, exercises restrictive business practices on the territory of 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 States participating in such consultations.

2. States (one of the States) on mutual agreement may conduct preliminary assessment of transborder influence of restrictive business practices of company(s). Such assessment may include the following items:

- 1) identification of States 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 States;
- 4) description of possible adverse effects on competition, harmful effects (damages), emerged on the territory of one of more States involved 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 States;
- 7) necessity to involve experts (incl. UNCTAD), including but not limited to writing s joint report on the consultations and their results in accordance with provisions of Section F of the UN Set.

3. States may in unilateral, bilateral or multilateral collect information, facts and data on how far restrictive business practices affect (may affect) competition on the territories of States involved in consultations.

4. Confidential information may be exchanged voluntarily between 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. Avoid of conflicts

1. 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.

2. If a State identifies possibility of adverse effects of its enforcement actions on the territory of the other State, such a State shall be properly notified.

3. If mutually agreed, States may exchange views and opinions on the situation and initiate consultations under Part V of the present Toolkit.

VII. Regional cooperation

1. Taking into consideration the level of economic integration, 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 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

1. If needed, the State may ask UNCTAD for assistance in the following forms:

(a) organizing a meeting between 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 States.

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

(c) preparation of draft report on results of consultations, summarizing of the positions of the States involved;

(d) conducting substantive research on the topic or practice requested by a State;

2. If agreed upon 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.

3. If consultations end with mutually agreed solutions of issues discussed during the consultations, the States may request UNCTAD to assist by creating a mechanism for implementation of the mentioned decision.