**MODEL RECOMENDATIONS**

**on the application of a waiver of confidentiality in the process of considering global mergers and acquisitions by the BRICS member states**

The model recommendations on the application of a waiver of confidentiality in the process of considering global mergers and acquisitions by the BRICS member states (hereinafter referred to as the M&As) are aimed at developing the unified practice of using this mechanism by the competition authorities of the BRICS member states when interacting with the competition authorities of the BRICS member states, and the parties to the M&A (hereinafter referred to as the Parties).

The international practice of controlling M&As shows the growth in the number of cross-border M&As, i.e. performed by global companies (groups of individuals), as a result of which such M&As have affected or may affect the state of competition in several jurisdictions at once. In this regard, in order to increase the efficiency of the process of considering applications (hereinafter referred to as the Applications) and reducing the costs of their consideration, it seems advisable to expand interaction between the competition authorities of the countries the state of competition of which may be affected by the M&A.

The national legislation on the protection of confidential information of the BRICS member states and other states significantly limits the ability to exchange information and documents between the competition authorities when considering M&As.

In case the M&A is considered by competition authorities in two or more jurisdictions, the Parties may voluntarily provide the waivers, which could be used by the competition authorities to obtain uniform and non-contradictory results of the consideration of the M&A in various jurisdiction, taking into account the interest of their states.

The waiver allows the competition authorities of different countries to exchange information and conduct a comprehensive and qualitative analysis of the impact of the M&A on the state of competition in the respective jurisdictions. The exchange of information between the competition authorities of different countries helps to obtain the information and analytical data they need without sending duplicate requests, which allows to establish the actual state of competition in the analyzed market in the optimal time and make uniform and (or) reasonable decisions that do not contradict each other. This, inter alia, will allow the Parties to fully implement such decisions.

The procedure for obtaining a waiver can be initiated both by the competition authority that received the application for approval of the M&A, and by the Parties to the M&A.

The Model Recommendations are of voluntary nature and shall serve as a recommendation and advocacy tool both for competition authorities and for the Parties.

**Principles for the use of the waiver by the competition authorities**

The Model Recommendations use the following abbreviations:

Competition authority – a competition authority requesting negotiations with another agencies on the M&A;

Foreign competition authority – a competition authority that has received a request for negotiations on the M&A from the competition authority.

The use of the waiver is recommended for interaction between the competition authority and the foreign competition authority (in case the competition authority interacts with several foreign competition authorities, the waivers are issued for each of the relevant foreign competition authorities separately) based on the following principles, unless otherwise provided by law on protection of confidential information of the relevant state:

         1. The competition authority, prior to sending a waiver request to the Parties, needs to make sure that the relevant foreign competition authority is considering the same M&A.

         2. The competition authority, requesting a waiver from the Parties, should be interested in conducting consultations and (or) negotiations on the M&A under consideration with the relevant foreign competition authority.

         3. The competition authority, requesting a waiver from the Parties, needs to make sure that there is a logistic and technical opportunity to conduct consultations and (or) negotiations on the M&A under consideration with the relevant foreign competition authority (the availability of safety and protection of information from unauthorized access by special means of communication, lack of an insurmountable linguistic barrier, etc.).

         4. The competition authority, prior to sending a waiver request to the Parties, needs to make sure that the national legislation of the state of the relevant foreign competition authority provides for a sufficient degree of protection of confidential information.

When the foreign competition authority decides to hold consultations and (or) negotiations in connection with receiving a request from the competition authority, it should also be guided by the abovementioned principles.

The competition authority and the foreign competition authorities are guided by similar principles in cases when the foreign competition authority has already reviewed and agreed upon the M&A, consultations on which are requested.

Based on the principles mentioned, the following nature and conditions for providing a waiver of confidentiality may be proposed, unless otherwise provided by the legislation of the respective states:

**1. Voluntary nature of a waiver**

The decision to grant a waiver is taken solely at the discretion of the Parties.

A waiver is provided by the Parties based on their own decision for the purpose of considering the M&A or in connection with the receipt of a reasoned request from the competition authority, which should clearly and consistently indicate the M&A, for which a waiver is requested.

The refusal of the Party (Parties) to provide a waiver cannot be interpreted by the competition authority to the detriment of the Parties during further consideration of the M&A. In particular, the refusal to provide a waiver cannot be the basis for refusing to satisfy the application for approval of the M&A in connection with the failure to provide the requested information.

**2. Scope of the waiver**

When considering the M&A, the competition authority may determine the scope of information, for which the Parties are required to provide a waiver for the consultations/negotiations with the foreign competition authority prescribed in the text of the waiver.

In exceptional circumstances, the waiving Party may determine the scope of a waiver, i.e., the information it covers, when the waiver is given.

**3. Validity of a waiver**

A waiver becomes effective when both the competition authority and the foreign competition authority receives it, unless otherwise expressly provided by the waiver.

**4. Protection of confidentiality**

The competition authority is not entitled to disclose and (or) transfer to other foreign competition authorities and third parties not prescribed in the waiver, information received in the framework of consultations and (or) negotiations with the foreign competition authority without the consent of the Parties.

A request for consent to the transfer of information by the competition authority to the other foreign competition authorities or third parties not prescribed in the waiver can be sent to the Parties by the competition authority and foreign competition authority.

Violation by the competition authority and foreign competition authority of the confidentiality regime of the information received in the framework of consultations and (or) negotiations, for which a waiver was provided, entails liability in accordance with national legislation on the protection of confidential information of the states of the competition authority and foreign competition authority.

**5. Terms and conditions**

In order to formulate common approaches, the following mechanism of waiver can be proposed:

         1. A waiver is requested by the competition authority for a specific M&A with an indication of a specific foreign competition authority, with which consultations and (or) negotiations are planned to be held.

         2. In case it is planned to hold consultations and (or) negotiations with several foreign competition authorities one should take into account the need to send to the Parties a request for a waiver for all foreign competition authorities participating in consultations and (or) negotiations.

         3. A waiver is requested from each Party separately. The competition authority may initiate consultations and (or) negotiations with other foreign competition authorities in accordance with waivers provided.

         4. The Parties are entitled to provide a waiver without prior receipt of requests from the competition authority or the foreign competition authority. This waiver shall be effective from the date of receipt of the waiver by both the competition authority and the relevant foreign competition authority.

5. Consultations and (or) negotiations or the transfer of information in a different form in accordance with the receipt of the relevant requests by the competition authority and the foreign competition authority can be carried out solely and exclusively in accordance with the interaction with the principles of using the waiver mechanism specified in the Model Recommendations.

         6. A sample request form for a waiver can be found in Appendix 1. The competition authority may use both a sample request for waiver, as well any other communication channels including informal ones conducted in accordance with national legislation.

         7. A sample form of a waiver can be found in Appendix 2.