Approved in principle by the
decision of the heads of the BRICS
Competition Authorities
as of May 27

Announced within the meeting
BRICS Coordination Committee on
Antimonopoly Policy
on _____

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.

Appendix 1 to the Model Recommendations

To: name, address of the company/legal entity

Request for waiver on the M&A [name]

[Name of the competition authority] is currently considering an application of the company [name] on the acquisition of rights to determine the conditions for entrepreneurial activity by companies [names] filed on [date] in accordance with article [article number] of the Law.

In order to consider the application [name of the competition authority], it is necessary to cooperate with [name of the foreign competition authority], which was filed with an application on the same M&A.

In this regard, let us kindly ask you to send the official letters to the [name of the competition authority] with the consent to provide waivers for cooperation with [name of the foreign competition authority] to consider this application.

[signature]

Appendix 2 to
the Model Recommendations

[Name of the competition authority receiving a waiver]

[Address of the competition authority receiving a waiver]

[Name of the legal entity issuing a waiver]

[Contact information (name of responsible representatives, phone, fax for communication, email address)]

Details of the M&A, within
the framework of which a waiver is required

[Date of issue of the waiver]

1. WAIVER

1.1. On behalf of [Name of the company/legal entity], I hereby confirm that [Name of legal entity] agrees to provide the [Name of the competition authority receiving the waiver] with a waiver of confidentiality in accordance with [Details of the regulatory act regulating the obligation not to disclose information of confidential nature] and other applicable laws (hereinafter referred to as the "waiver"), to the extent that it is necessary for the [Name of competition authority – recipient of the waiver] to have the possibility to discuss with [Name of the foreign competition authority for interaction with which the waiver is issued].

1.2. The waiver was or will be sent to [Name of the foreign competition authority, with which a waiver is issued], so that this foreign competition authority has the opportunity to discuss with [Name of the competition authority – recipient of the waiver] the information received from [Name of the legal entity] in the case related to [name of the M&A], which, in the absence of such a waiver, would be subject to the confidentiality rules established in relation to [Name of the foreign competition authority, for interaction with which a waiver is issued].

1.3 [Name of the legal entity] agrees that employees of the [Name of the competition authority receiving the waiver] can discuss with [Name of the foreign competition authority, for consultation with which a waiver is issued] the statements, data and information provided by [Name of the legal entity], as well as the results of the analysis of M&A conducted by [Name of the competition authority receiving the

waiver], which contain or refer to materials [Name of the legal entity], which, in the absence of a waiver, would be subject to confidentiality rules.

2. TERMS AND CONDITIONS

2.1 Use of data [Name of the foreign competition authority, for interaction with which a waiver is issued]

For the avoidance of any doubt, the information transmitted on the basis of this waiver may be used by [Name of the foreign competition authority, for interaction with which a waiver is issued] solely for the purposes of [merger under consideration] and for no other purpose. Disclosure is carried out under the strict condition that for the [Name of the competition authority receiving the waiver] such information is still confidential and cannot be transferred to any third parties not prescribed in the waiver.

2.2 Use of data [Name of the competition authority receiving the waiver]

The waiver specified in paragraph 1 of this letter is provided on the following conditions:

(A) [Name of the competition authority receiving the waiver] is obliged to maintain confidentiality of the information provided by [Name of the legal entity] and information that will subsequently be received from [Name of the foreign competition authority, for interaction with which a waiver is issued], and is obliged to handle this information in the same way as if it were received directly from [Name of legal entity];

(B) [Name of the competition authority receiving the waiver] is not entitled to provide any information received from [Name of the foreign competition authority, for interaction with which a waiver is issued] to any third party not prescribed in the waiver;

(C) any information received from [Name of the agency, for interaction with which a waiver is issued] may be used solely for the purpose of [merger under consideration].

You can contact the following persons on all issues related to this waiver:

[Name, position, email address of representatives of the legal entity]

Copy was this letter was also sent to *[Name of the agency, for interaction with which a waiver is issued]*.

[Name, position, email address of representatives of the agency, for interaction with which a waiver is issued]

Signed by a duly authorized representative [Name of the legal entity]