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

Contribution by

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Comments on the FAS Toolkit on International Cooperation
Comments submitted by the Competition Commission of South Africa
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1. The Competition Commission of South Africa (“CCSA”) welcomes the opportunity to comment on the Toolkit on International Cooperation (“Toolkit”) prepared by the Federal Antimonopoly Service (“FAS”) and thanks FAS for the work it has done to develop the Toolkit in the spirit of advancing international cooperation.
2. The CCSA would like to take this opportunity to make preliminary inputs on the FAS Toolkit, and understands that FAS has proposed that the Toolkit be discussed at the seventeenth session of the UNCTAD Intergovernmental Group of Experts (“IGE”) on Competition Law and Policy during July 2018. The CCSA would support the initiative to discuss the Toolkit at the IGE.
3. We now proceed to comment on the draft Toolkit on a section by section basis.

Comments on Section I: Notification

4. The FAS Toolkit proposes that competition authorities (or states, in the language employed in the Toolkit) notify other authorities of any enforcement action that may influence the enforcement activity of the other authority or that involves economic entities registered in another state.
5. The CCSA supports the principle of notifying other authorities of enforcement activity that may affect the enforcement authority with particular emphasis on notification happening at the authority level and not state-to-state. The CCSA believes that inter-authority engagements would work better than if the engagements had to happen state-to-state.
6. The CCSA also notes that this section is drafted in a permissive manner, indicating that states are not obliged to notify other states at each stage of the investigation or at every time that a request for information will be made. This ensures that cooperation is not burdensome, which is supported.

7. The CCSA proposes that the Toolkit could be strengthened, and cooperation eased, by specifying a point of contact within each authority for the initial notification of relevant enforcement activity. The Toolkit may also incorporate standard specifications or a standard form specifying the type of information that would be required for notification. This form could include non-confidential information like the names of the firms involved, a summary of the activity and a contact person.

Comments on Section II: Exchange of Information

8. The CCSA supports the proposal that authorities exchange non-confidential information of mutual interest related to advocacy initiatives, updates/changes to legislation, joint research and technical assistance.
9. The exchange of such non-confidential information may not require exceedingly formal cooperation mechanisms but could include sharing newsletters or regular updates amongst interested parties and could be implemented relatively quickly.

Comments on Section III: Exchange of Confidential Information

10. As acknowledged in the Toolkit, the exchange of confidential information is circumscribed by national legislation. The CCSA would thus be bound by the provisions of the Competition Act, 89 or 1998 (as amended) in terms of the treatment of confidential information. Though the CCSA understands that any comprehensive Toolkit on international cooperation must traverse the topic of the exchange of confidential information, the CCSA notes that this may, in practice, best be considered on a case by case basis and could be implemented in a phased manner starting with bilateral (rather than multilateral) commitments.

Comments on Section IV: Enforcement Cooperation

11. The section on enforcement cooperation is again largely drafted in a permissive manner that affirms authorities' independence in deciding investigative strategy and tools, which is important.
12. The CCSA proposes that further clarity is required on the proposal in the Toolkit that authorities may consider "*coordination in making decisions on the existence/absence of violation of competition legislation*" and "*coordination of opinions when imposing remedies in merger cases*". Instead of proposing "coordination" in these matters, the toolkit may instead wish to refer to "discussions" or "consultation" between authorities

on these matters as agreement on the proposed course of action may not always be likely (nor desirable), but this does not preclude discussions on these matters.

13. The CCSA also believes that the Toolkit should recognise other existing mechanisms for cooperation in other platforms such as the OECD and ICN which can work alongside the Toolkit.

Comments on Section V: Consultations

14. This section of the Toolkit provides examples of situations in which bilateral and multilateral cooperation may be beneficial. The CCSA agrees, in principle, with the examples provided while noting that it is not (and need not be) an exhaustive list.

Comments on Section VI: Avoidance of conflicts

15. In clause VI (1), the Toolkit specifies that states “*will minimize any potential adverse effect of their enforcement activities that could happen on the territory of the other state*”. The CCSA proposes that this requires further clarity and discussion. The statement is currently somewhat vague and may fetter the discretion of authorities to initiate investigations and impose sanctions. The statement also seems to contemplate restricting any adverse effect of enforcement activities beyond competition and it is not clear, for example, whether a fine imposed on an economic entity in another state may qualify as an adverse effect under this clause.

Comments on Sections VII and VIII

16. These sections are noted.

Conclusion

17. The CCSA welcomes the opportunity to engage further on the Toolkit and would like to indicate its willingness to provide further substantive and editorial comments on subsequent versions, if required.