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**Agenda Item 3e. Report of the discussion group on
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Superintendencia de Competencia, Antiguo Cuscatlán, June 27th, 2018

EL SALVADOR'S COMPETITION SUPERINTENDENCE (SC) OPINION ABOUT THE MOST RECENT FAS¹ PROPOSAL AND THE COFECE PROPOSAL² FOR COOPERATION BETWEEN COMPETITION AGENCIES WITHIN THE SCOPE OF THE UNITED NATIONS

I. BACKGROUND

To issue this official opinion, the Competition Superintendent considered the technical analysis of the most recent FAS proposal and of the COFECE proposal regarding the following documents:

- Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (“UN Set”)³.
- Agreed Conclusions of the 2017 IGE.⁴
- Letter SC/DSC/c/310/2018/eo, of April 16th 2018, sent by the SC to the FAS.
- Comments of the following DGIC members to the first “Toolkit”⁵ developed by the Russian FAS, as sent by the UNCTAD: UNCTAD, United States of America Federal Trade Commission and Department of Justice, Federal Competition Authority of Austria, Croatian Competition Agency, German Competition Authority (Bundeskartellamt), Hungarian Competition Authority (GVH), Italian Competition Authority (AGCM), Japan Fair Trade Commission (JFTC).
- First “Toolkit” proposal, developed by the FAS in 2017, later sent by the UNCTAD on February 20, 2018, and the preliminary technical analysis this SC performed of the same.
- COFECE proposal⁶, sent by the UNCTAD on May 29, 2018.
- Revised version of the FAS proposal (*Draft Version 2*), sent by the UNCTAD on June 15, 2018, which included comments and counterproposals by ten competition authorities.
- FAS comments to the COFECE proposal, sent by the UNCTAD on June 15, 2018.
- Obstacles to International Cooperation in Specific Cases Survey Report prepared by the UNCTAD Secretariat, dated June 18, 2018.

¹ “Draft Version 2. Revised as of June 5, 2018 (for consideration). Toolkit on International Cooperation of Competition Authorities on Combating Restrictive Business Practices of Transnational Corporations and Transborder Violations of Rules on Competition”

² “Proposal for Consideration- International Cooperation Among Competition Agencies in Competition Enforcement Cases - Mexican Federal Economic Competition Commission.”

³ <http://unctad.org/en/docs/tdrbpconf10r2.en.pdf>

⁴ “Report of the Intergovernmental Group of Experts on Competition Law and Policy on its Sixteenth Session”, July 5-7, 2017.

⁵ “Draft (for consideration). Toolkit on International Cooperation of Competition Authorities on Combating Restrictive Business Practices of Transnational Corporations and Transborder Violations of Rules on Competition”, developed by the FAS in, later sent by the UNCTAD to the DGIC Members on February 20, 2018.

⁶ “Proposal for Consideration- International Cooperation Among Competition Agencies in Competition Enforcement Cases - Mexican Federal Economic Competition Commission.”

- Participation in the UNCTAD's Discussion Group on International Cooperation (DGIC) Conference calls on the following dates: October 9, 2017, February 20, 2018, June 19, 2018.

II. PERTINENCE OF AN INTERNATIONAL INSTRUMENT TO FACILITATE INSTITUTIONAL COOPERATION AMONG COMPETITION AGENCIES

This SC believes international cooperation in light of Section F of the "UN Set" on Competition could be enhanced in an effective manner and the DGIC contributes to that aim. Thus, we recognize the relevance of the valuable proposals presented by the FAS and by the COFECE, respectively, and we express our gratitude to both authorities for the efforts devoted to develop those.

The precise course of future action should be decided within the IGE. We believe the discussion of any instrument should initiate by agreeing the type of cooperation to be covered by the text, considering the expected benefits and the needs identified in the Survey Report (the Survey responded by IGE members).

The negotiation of an international instrument that allows for cooperation initiatives to promote and to protect competition is convenient. Until this date, the only proposal presented to the DGIC in this sense was developed by the FAS, and ten competition agencies later commented it. Nevertheless, it would be essential to assure the clarity of the final negotiation instrument. A definite text should not impair or detriment the attributions, powers and independence granted to competition authorities to fulfill their mandate, by virtue of the respective domestic legislations.

Concerning the COFECE proposal, this SC does not regard as equivalent to the initiative mentioned in the previous paragraph an international instrument that lays down provisions to accomplish informal cooperation currently been performed, or that could be conducted, among competition agencies. Nonetheless, the SC does not oppose to this kind of effort provided it comprises a clear added value to the current bilateral and regional relations among competition authorities, some regulated by specific agreements. Considering the document proposed by COFECE does not constitute a negotiation text, this SC will not issue precise comments.

III. COMPREHENSIVE COMMENTS ABOUT THE "TOOLKIT" PROPOSED BY THE FAS (Draft Version 2)

A. General comments about the proposed text

The SC does not consider the second version of the "Toolkit", drafted by the FAS, as a concrete negotiating text proposal. In different sections, it merges for consideration and along with the FAS text proposal, the valuable but diverse comments and counterproposals sent by ten competition agencies to the former version of this document, which deserve to be analyzed.

It is worth recognizing the receptiveness and the effort of the FAS to relate those counterproposals, some in square brackets, to coherently form this second version of the text. However, it is complex to analyze the current "Toolkit" because the variety of content proposals complicates its understanding and -mainly- in sections I, II, III, IV, V, VII and VIII leaves unintelligible the real base proposal.

Thus, at this stage, the SC issues general remarks without prejudice that if a text continues to be discussed within the DGIC and/or the IGE, precise comments to a further refined proposal could be issued.

B. Title

This SC proposes an inclusive title in the following sense *“Toolkit on International Cooperation Between Competition Authorities to Promote and Protect Competition”*, so that the instrument also encompasses cooperation to promote competition in the areas covered by Section II. *Exchange of Information*, numbers 1), 2), 3), 5) and 6) of the former *“Toolkit”*⁷, which have been eliminated from the current -second- version.

That does not imply this SC validates the previous text proposed by the FAS for the abovementioned numbers of Section II. of the *“Toolkit”*. Thus, if later cooperation in competition advocacy is restored to the text, the precise content of those provisions, proposed by the FAS in the earlier version, shall be carefully reviewed on the new text.

C. Correspondence among the object and the subjects

Evolving from the 2017 *“Toolkit”*, this second version seems to be binding for the competition agencies as opposed to the States, as it was proposed by the FAS on the former version. The SC welcomes this change, because the *“Toolkit”* concerns cooperation among competition agencies with respect to their own attributions and within their mandate.

If a refined text proposal is put forward for negotiation, this competition agency proposes to analyze if the respective commitments are achievable in practice, considering the different competition regimes, to favor their applicability.

It is worth mentioning that, in the case of El Salvador, a strictly State commitment would entail a more extended process of negotiation and approval of the formal instrument to comply with the required legal formalities for the adoption of international binding instruments.

D. Terminology and definitions

Understandably, the second version of the *“Toolkit”* proposed by the FAS adopts terms of the *“UN Set”* from 1980. Nevertheless, this SC proposes to clarify the terminology used in the proposed *“Toolkit”*, to make clear its compatibility with the present domestic provisions on competition and with the national or International legal instruments, as applicable. One option could be to add a definitions section, other option could be to allocate efforts to narrow the terminology employed in the proposal.

Reasonably, broadness in international instruments is conciliatory, but we do not consider appropriate to allow ambiguous terms that could eventually difficult the implementation of the commitments agreed by the competition agencies.

⁷ 2017 *“Toolkit”* proposed by FAS: *“...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);5) issues of competition advocacy; 6) technical assistance initiatives in the sphere of competition legislation and enforcement.”*

Examples of key terms that, if preserved as proposed, its interpretation, discretionary or not, could potentially lead to a different meaning from the Parties intention, could be: [From the second “*Toolkit*”. Emphasis is added] “*influence*”, “*involve*”, “*substantial part*”, “*mergers, acquisitions or other actions*”, “*activity of economic entities*”, “*relevant information*”.

The ambiguity discussed above is particularly sensitive in provisions that if interpreted could have implications over the independence and powers not only of competition agencies, but also over those of Member States, including their sovereignty and over the powers of other public bodies, for instance:

- “...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 if other State** in the framework of implementation of compliance with competition legislation...”⁸
- “...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.**”⁹

Therefore, if a text is later negotiated, it shall assure, even in its terminology, due regard for the domestic competition regime. It should carefully avoid impairing the attributions, powers and independence granted to competition authorities to fulfill their mandate, as guarantors of competition in their respective jurisdictions, by virtue of the domestic legislations. The SC considers essential to guarantee the clarity of the text to be negotiated as that determines the scope and magnitude of the commitments. The ambiguities of the current text difficult issuing precise comments.

On the other hand, the different sections of the “*Toolkit*” should respond to the obstacles identified by the competition authorities in the DGIC Survey and to their causes (essentially awareness, legal, institutional and practical factors), so that the instrument serves to mitigate the obstacles encountered by peer agencies to cooperate in the promotion and protection of competition.

Thus, the current proposals in those sections might benefit from a review that allows to: 1) refine the commitments that could be acquired without impairing the powers and independence of the Parties, to facilitate its implementation, and 2) identify commitments that could contribute to overcome the obstacles faced by competition agencies to cooperate effectively.

It is worth mentioning this competition agency will not support any proposal that, even without intention, might be able to impair its powers and independence and/or the sovereignty of the State.

E. About Section III. *Exchange of confidential information*

The exchange of confidential information constitutes a highly sensitive issue due to legal provisions in different jurisdictions to protect this type of information of third parties and of the competition agency.

Competition laws usually include rules for the proper protection of confidential information, because of the serious implications its disclosure would entail. In that sense, it would be difficult to favor the practical effectiveness of commitments in this area because that would require to consider and reconcile

⁸ I. 1 e), Page 2. FAS, *Draft Version 2*. Emphasis added by the SC.

⁹ IV. 1, Page 4. FAS, *Draft Version 2*. Emphasis added by the SC.

the respective legal provisions on the matter in different jurisdictions, in a more fitting and careful manner, in the wording of the "*Toolkit*".

In the case of the SC, the exchange of confidential information is unviable, as it carefully safeguards its compliance with strict and important domestic rules to protect that type of information.

IV. COMPREHENSIVE COMMENTS ABOUT THE COFECE PROPOSAL

The COFECE proposes a flexible informal cooperation approach. For the same reason, it could be more feasible to implement in the short term, as opposed to the negotiation of a specific international instrument to regularize cooperation among competition agencies on specific acts.

Nevertheless, the COFECE proposal is not a set instrument but an analysis that in its pages 5 and 6 resembles a roadmap proposal for cooperation within the UNCTAD framework, broadly: 1) favor communications between contact points of peer agencies, 2) disseminate knowledge and good practices on international cooperation, 3) to foster networking and mutual understanding, using the existing regional networks or promoting the development of new ones.

Even though that roadmap is valuable, in so far it could be the basis for the further development of a structured instrument, at this stage, without a precise instrument, the SC will not issue specific comments.