



UNCTAD

Report on the implementation of the guiding policies and procedures under section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices for the nineteenth session of the Intergovernmental Group of Experts on Competition Law and Policy

Note by the UNCTAD Secretariat

I. Activities undertaken by UNCTAD Secretariat since the adoption of the GPP

1.1. Dissemination of the GPP

In its Resolution, the Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (Review Conference) requested UNCTAD Secretariat to continue the dissemination of the Guiding policies and procedures under Section F of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (GPP).¹ Accordingly, UNCTAD Secretariat has been working in the wider dissemination of the GPP on various occasions. In February 2021, the GPP were published as an UNCTAD official document,² while relevant information on background and process of the discussions for the adoption of the GPP, including the discussions of the Discussion Group on International Cooperation (DGIC), is also available in the dedicated webpage.³

1.2. Experience gained so far in the implementation of the GPP

Since the adoption of the GPP in October 2020, UNCTAD Secretariat has received two (2) specific requests for facilitation of cooperation under Section F of the UN Set, based on the Section III. 21 of the GPP,⁴ from competition authorities in developing countries.

¹ TD/RBP/CONF.9/9.

² UNCTAD/DITC/CPLP/MISC/2021/2.

³ <https://unctad.org/Topic/Competition-and-Consumer-Protection/working-group-on-competition-law-enforcement>.

⁴ 21. In the case of consultations under paragraph 4 of Section F of the Set:

(a) The requesting authority may ask UNCTAD secretariat for:

(i) Assistance with preparing the request for consultation;

(ii) Advice on procedural matters within the scope of a consultation;

(iii) The provision of mutually agreed conference facilities by the Secretary-General of UNCTAD, if needed;

(iv) Guidance, especially for authorities from developing countries and countries with economies in transition, with regard to confidentiality assurances and any use of information shared in the course of such consultation, if necessary, based on the works listed in the appendix below;

(v) Interpretation of the provisions of the Set;

(vi) Participation in the consultation, upon specific request and consent by all authorities involved.

Regarding one of the requests, which UNCTAD Secretariat received in December 2020, a competition authority from a developing country has not been able to obtain key information from a company based in a different country in conducting its investigation against abuse of dominant position, although the alleged abusing practice by the foreign company affects their national market. The competition authority sent a request for information to a subsidiary of the foreign company established in their jurisdiction, however, the subsidiary failed to reply to the request stating that the requested information is owned and controlled by its parent (foreign based) company. The competition authority also sought the support from the competition authority of the jurisdiction of the parent company, but due to the lack of cooperation agreements between them, no exchange of information was possible.

Another request received by UNCTAD Secretariat in May 2021 also refers to an anti-competitive case investigation by the competition authority of a regional economic organisation against a foreign-based multinational company. Without existing cooperation agreements between competition authorities in countries where the company is registered and operates its business, the competition authority is struggling to obtain the necessary information to advance in its investigation.

Both requests illustrate the challenges of investigation cooperation and exchange of information between competition authorities without formal cooperation agreements such as MOUs; requesting competition authorities require information regarding companies involved in the alleged violation, which are only available outside their jurisdictions and seek cooperation with other competition authorities which have jurisdiction over those companies.

These challenges in international cooperation between competition authorities are highlighted in the report of the survey titled “Obstacles to International Cooperation in Specific Cases”,⁵ which was conducted by UNCTAD in 2018; the survey summarized that the main obstacles to international cooperation relate to (i) awareness factors; a general lack of awareness of cooperation practices, (ii) legal factors; a lack of national legal basis to facilitate and support cooperation with foreign competition authorities, and (iii) practical factors; an overall lack of trust to cooperate and share information with other competition authorities.

In this regard, the GPP were developed to overcome such factors when possible. The GPP were designed to promote mutual trust and understanding of competition authorities’ legal frameworks, to facilitate contacts between competition authorities, and to clarify what is feasible, especially for less experienced competition authorities of developing countries.

(b) In case the assistance of the UNCTAD secretariat is needed to facilitate consultations, the scope of that assistance needs to be determined before the consultation officially begins.

(c) Consultations should be in compliance with the laws and rules on confidentiality applicable in the jurisdictions involved.

⁵ UNCTAD (2018) “Obstacles to International Cooperation in Specific Cases”, available at: https://unctad.org/system/files/non-official-document/ciclp17th_UNCTAD_rep_en.pdf.

More precisely, the GPP enable UNCTAD Secretariat to facilitate the cooperation between competition authorities in several concrete means, and UNCTAD Secretariat has already been providing support to the requesting competition authorities accordingly. Section III. 21 of the GPP provide that competition authorities can request the following support when seeking consultations with other competition authorities: (a) assistance with preparing the request for consultation; (b) advice on procedural matters within the scope of the consultation; (c) provision of mutually agreed conference facilities by UNCTAD secretariat, if needed; (d) guidance, especially for authorities from developing countries and countries with economies in transition, concerning confidentiality assurances and any use of information shared in the course of such consultation, if necessary; (e) interpretation of the UN Set provisions; as well as (f) direct participation in the consultation itself, upon specific request and consent by the participating authorities. UNCTAD Secretariat can also gather publicly available legal texts and guidelines relevant to cooperation such as confidentiality rules in relevant jurisdictions, in light with Section III.18 of the GPP.

II. Challenges and suggestions for future work

The GPP adopted last year under the UN Set have already proved useful since UNCTAD has received two requests invoking it so far. These requests brought to light specific challenges that developing countries face when requesting information from counterparts in anticompetitive practices cases. Thanks to these requests, issues raised in making such a request were identified, and thus some practical steps may render the process easier for competition authorities.

2.1. Further dissemination of the GPP

As mentioned above, to date UNCTAD Secretariat has received two requests to trigger the GPP. One is from an experienced competition authority of a developing member State enquiring support to facilitate cooperation with a competition authority from a developed member State from another continent; and the second request came from a regional economic organization competent to enforce competition provisions at regional level, enquiring information from two member States' companies outside its jurisdiction.

In this regard, to continue to raise awareness of other member States and/or regional organizations competition authorities, particularly from the developing world and countries with economies in transition, the UNCTAD Secretariat could organize further informative sessions on the substantive and procedural matters of the GPP, in cooperation with member States' competition authorities, beyond the regular activities of UNCTAD Intergovernmental Group of Experts (IGE) on Competition Law and Policy.

This would contribute to further disseminate and give visibility to the GPP and present the procedural steps for requests⁶, amongst other aspects. The UNCTAD Secretariat could organize these sessions bearing in mind member States'

⁶ Which include the information needed by UNCTAD Secretariat to have a comprehensive understanding of the request and its legal framework, namely referring to supporting documentation, to previous steps undertaken by the requesting authority and to the applicable timeframe.

competition authorities' comments to adjust this initiative. At the nineteenth session of the IGE on Competition Law and Policy in July 2021, member States will have the opportunity to discuss and decide other ways forward and activities to be implemented in this regard.

2.2.Outstanding legal obstacles of international cooperation

As discussed in Section 1.2 above, the first request highlighted the need to address legal obstacles to the effective use of the GPP in practice. As such, when two countries do not have concluded a formal cooperation agreement, no exchange of information is feasible, therefore preventing any concrete cooperation.

Indeed, the UNCTAD's survey of 2018 noted that most responding authorities faced numerous legal obstacles related to restrictions on exchange of information, to the limited ability to cooperate between authorities in general, and to the lack of international cooperation agreements between authorities. These issues hindered their cooperation efforts in cross border cases.

UNCTAD Secretariat could gather and share a comprehensive list of international cooperation instruments and agreements in force to support competition authorities to better understand the existing mechanisms and reflect on the most suitable avenues to explore. UNCTAD Secretariat could analyse existing agreements and instruments to highlight key provisions and driving factors for effective international cooperation between competition authorities, seeking to assist developing countries' competition authorities. These activities are in line with the proposals considered in the UNCTAD Secretariat research paper on this broad issue published in 2021.⁷

Other initiatives to consider towards the improvement of international cooperation in competition law enforcement and the use of the GPP may be suggested and discussed by member States' representatives during the nineteenth session of the IGE on Competition Law and Policy and/or in future sessions.

⁷ See the paper "International cooperation in competition law enforcement – challenges for developing countries and best practices", available at: <https://unctad.org/webflyer/international-cooperation-competition-law-enforcement-challenges-developing-countries-and>.