



UNCTAD

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## **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 twentieth session of the Intergovernmental Group of Experts on Competition Law and Policy**

### **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).<sup>1</sup> 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,<sup>2</sup> 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.<sup>3</sup>

Besides talking about the GPP at reporting session during the nineteenth session of the Intergovernmental Group of Experts on Competition Law and Policy in July 2021, UNCTAD has made references to the GPP and its practical use at the different meetings in 2022 of the Working Group on Cross-Border Cartels as well as several technical assistance and capacity building activities that the Secretariat assists to member States.

#### **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,<sup>4</sup> from competition

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<sup>1</sup> TD/RBP/CONF.9/9.

<sup>2</sup> UNCTAD/DITC/CPLP/MISC/2021/2.

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

<sup>4</sup> 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;

authorities in developing countries: South Africa and the Eurasian Economic Commission.

Regarding the South African request, which UNCTAD Secretariat received in December 2020, the Competition Commission of South Africa (COMPCOMSA) had 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. COMPCOMSA 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. COMPCOMSA 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.

Despite the good offices of the Secretariat to meet bilaterally with the foreign competition authority referred by the COMPCOMSA and after exhausted all the available legal and diplomatic channels, all efforts of obtaining information from the multinational company have been in vain. Notwithstanding the absence of costing and financial information from the company at investigation, COMPCOMSA managed to construct a referable case against the multinational company and its subsidiaries. By February 2022, COMPCOMSA released a media statement following its decision to refer the matter<sup>5</sup> and a public version of the ruling by April 2022. In sum, despite the challenges faced, the case was finalised in February 2022 and has referred to the Competition Tribunal for prosecution.

The second request was made by the Eurasian Economic Commission (EEC) in May 2021. The request referred to alleged abuse of dominance and anti-competitive agreements in the cross-border markets of mobile application store services and advertising services against a foreign-based multinational company. According to the additional information provided by EEC, they have started two case investigations regarding (a) unfavourable conditions on mobile application developers that those developers are obliged to use the payment systems belonging to the mobile application store service operators, and (b) unfavourable conditions for advertisers use advertising services in the search results of search engines.

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(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.

(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.

<sup>5</sup> Press Release of the Competition Commission of South Africa – 8 February 2022 available at: <https://www.compcom.co.za/wp-content/uploads/2022/02/COMPETITION-COMMISSION-PROSECUTES-A-MULTINATIONAL-HEALTHCARE-COMPANY-ROCHE-FOR-EXCESSIVE-PRICING-OF-A-BREAST-CANCER-TREATMENT-DRUG.pdf>

The Foreign-based multinational company is registered in several countries including two specific advanced authorities in the Americas and Europe for which cooperation agreements and contacts between EEC and these competition authorities in those countries are currently non-existent. Therefore, the EEC has difficulty in obtaining the relevant information from those companies or in contacting the referred competition authorities to obtain the information.

By October 2021, the Secretariat managed to get information from one of the two advanced competition authorities contacted and referred to public-available information on cases where the multinational company was involved. Naturally, more information about the cases was not disclosed, due to safeguards and confidentiality issues.

In 2022, the EEC informed the UNCTAD Secretariat that the case has been referred to be investigated by the national competition authorities of the Eurasian region pursuant to regional rules of case allocation between the Commission and the member States. The Secretariat was further informed that the case was still under consideration by national authorities.

### **1.3. Lessons learned so far**

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.

In previous reports, the Secretariat has mentioned that these challenges in international cooperation between competition authorities were already highlighted in the survey titled “Obstacles to International Cooperation in Specific Cases”,<sup>6</sup> which was conducted by UNCTAD in 2018. By 2020, with the adoption of the GPP, it was meant that to some extent the challenges identified could be overcome, based on the promotion of mutual trust and understanding of competition authorities’ legal frameworks so as to facilitate contacts between competition authorities, and to clarify what is feasible, especially for less experienced competition authorities of developing countries.<sup>7</sup>

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<sup>6</sup> UNCTAD (2018) “Obstacles to International Cooperation in Specific Cases”, available at: [https://unctad.org/system/files/non-official-document/ciclp17th\\_UNCTAD\\_rep\\_en.pdf](https://unctad.org/system/files/non-official-document/ciclp17th_UNCTAD_rep_en.pdf).

<sup>7</sup> 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. Suggestions for future work**

In the previous report of 2021, UNCTAD suggested two different areas to further promote the GPP: (1) design an advocacy plan for the GPP to be used in developing countries; and (2) 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.

While these two suggestions remained valid for this report in 2022, more should be done in this respect as there have been only two requests so far that have been submitted to the Secretariat since the adoption of the GPP in 2020.

The following would streamline the two suggestions proposed earlier and include a third suggestion for the consideration of the member States at the IGE 2022.

### **2.1. Organization of regional virtual capacity building workshops on the substantive and practical aspects of the GPP**

Besides the organization of 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, the UNCTAD Secretariat should organize virtual capacity building activities in relation to the GPP at the regional level in coordination with the regional organizations that enforce competition laws across the world and/or partnership with the Regional Economic and Social Commissions of the UN Secretariat worldwide.

### **2.2. Gathering & sharing international cooperation instruments**

To operationalize the suggestion of *gathering 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*, the Secretariat and its partners should prepare ad-hoc regional background documentation for the organization of the above-mentioned virtual workshops so members at the regional level can fully discuss the different instruments at their disposal and consider their usage as appropriate.

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 twentieth session of the IGE on Competition Law and Policy and/or in future sessions.

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