

## **Guiding Policies and Procedures under Section F of the UN Set on Competition**

**[Draft proposed to/agreed at the 18<sup>th</sup> Session of the IGE on Competition Law and Policy for consideration by the Eighth United Nations Conference to Review the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices]**

The Eighth United Nations Conference to Review the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, hereinafter “UN Set”,

1. **Recognizing** the importance of cooperation<sup>1</sup> among competition authorities,<sup>2</sup> hereinafter “authorities,” in addressing anticompetitive practices and reviewing mergers which may affect international trade and development;
2. **Recognizing** the increasing interconnection of economies and the importance of addressing Member States’ calls for practical guidance on enforcement cooperation related to potential anticompetitive practices and mergers having cross-border effects;
3. **Recognizing** that many authorities, especially from developing countries and countries with economies in transition, face challenges with international cooperation and would benefit from effective assistance that would allow them to better realize the benefits of cooperation on competition cases;
4. **Recognizing** that cooperation depends on mutual trust and assurance of appropriate confidentiality protection established between the authorities involved and that cooperation should be exercised to the extent consistent with the laws and regulations in force in their respective Member States, their respective important interests, and within their reasonably available resources;

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<sup>1</sup> Section F of the UN Set states that “[c]ollaboration at the international level should aim at eliminating or effectively dealing with restrictive business practices.” Since the UN Set was adopted, work in the IGE and other international bodies including the International Competition Network (ICN) and the Competition Committee of the Organisation for Economic Cooperation and Development (OECD) has further developed understanding of the importance of international cooperation on a broader level, including collaboration, coordination, and other types of international cooperation. These concepts are referred to collectively hereinafter as “cooperation.”

<sup>2</sup> As used herein, the term “authorities” includes regional authorities that have been empowered by Member States to apply regional competition rules or legislation as well as national authorities.

5. **Considering** the desire to catalog existing practical guidance for authorities seeking to engage in cooperation related to enforcement activities, such as investigations of suspected anticompetitive conduct and merger review (hereinafter collectively referred to as “investigations”), and for subjects of such enforcement activities (hereinafter “parties”) and for others seeking to facilitate cooperation whose interests may be affected or affect such enforcement activities (hereinafter “third parties”);
6. **Considering** the importance of utilizing the framework of cooperation provided in Section F of the UN Set, especially for authorities from developing countries and countries with economies in transition, by expanding and clarifying procedures for such cooperation;
7. **Considering** the importance of utilizing assistance of the Competition and Consumer Policy Branch, Division on International Trade and Commodities of the UNCTAD Secretariat (hereinafter “UNCTAD Secretariat”) in maintaining points of contact, disseminating related information, facilitating consultations, and assisting cooperation in competition enforcement in order to better achieve the goals of Section F of the UN Set;

**Recommends** to Member States the following Guiding Principles and Procedures in implementing international measures under Section F of the UN Set, on the premise that these are non-binding and that adherence to them by each Member State is voluntary.

## **I GUIDING PRINCIPLES**

Member States recognize the following guiding principles:

8. Cooperation can benefit authorities, parties and third parties. Cooperation can:
  - (a) help to promote consistent outcomes;<sup>3</sup>
  - (b) increase investigative efficiency by reducing unnecessary duplication of work, delays and burdens for parties, third parties and authorities;
  - (c) reduce gaps in information available to authorities and lead to a more informed decision-making process;
  - (d) help to promote convergence, both in the analysis of specific cases as well

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<sup>3</sup> Different authorities could appropriately reach different outcomes in the same matter, as the conduct or merger might have different potential effects in different jurisdictions. Cooperation may still be useful to ensure that the outcomes are consistent and do not conflict with each other.

- as more generally, in relation to principles applicable to the review of mergers and suspected anticompetitive conduct; and
- (e) increase familiarity between authorities and mutual understanding of their processes, which in turn may help foster trust and facilitate future cooperation.
9. It is important to provide authorities from developing countries and countries with economies in transition with practical tools and methods of cooperation. Timely provision and maintenance of effective guidance relating to the UN Set and relevant procedures and tools for cooperation will help such authorities to more effectively address suspected anticompetitive practices and mergers in their jurisdictions.
10. Cooperation between authorities is based on mutual trust and is performed on a voluntary basis. While authorities are in principle encouraged to cooperate in investigations that may raise competition issues of common concern in their jurisdictions, authorities have full discretion to decide whether to cooperate. Cooperation does not limit an authority's right to make independent enforcement decisions.
11. Cooperation between authorities can be especially beneficial in cases that raise competition issues of common concern, including in global or cross-border cases in which investigations or remedies may overlap, or in which investigation by one authority may affect parties in another jurisdiction, or remedies applied in one jurisdiction may impact another jurisdiction.
12. Significant flexibility exists in the way authorities may seek to cooperate with each other. The extent of cooperation may vary from case to case, ranging from less extensive cooperation, for example, keeping each other informed of past experience with cases with similar suspected conduct or theories of harm, to more extensive cooperation, such as when parallel investigations of the same cross-border suspected anticompetitive conduct may be launched, or a common remedy may be designed to address the effects of conduct or mergers in more than one jurisdiction. There may be various reasons for differing levels of cooperation and engagement, such as differences in the potential impact of the conduct on the

jurisdictions involved, as well as differences in procedural rules, the scope or timing of investigations, or authorities' resources. Each authority has full discretion to determine the level of cooperation appropriate to its needs throughout the process.

13. Parties have the ability to facilitate cooperation, especially in merger cases and as well as to leniency applicants in cartel cases. Some types of cooperation may depend on the extent of parties' willingness to facilitate cooperation, e.g., providing appropriate waivers of confidentiality,<sup>4</sup> or in the case of mergers, working with authorities to align review timetables. In such cases, it may be beneficial for authorities to explain to parties the benefits of such cooperation, how the parties may help to facilitate such cooperation, and how their confidential information will be protected. Authorities are also encouraged to request that parties inform them of the existence of contact(s) with other authorities.
14. One of the key requisites of successful cooperation in competition cases is the ability to provide effective and credible assurances<sup>5</sup> that shared information will be maintained in confidence and will be used only for purposes that the sharing authorities have permitted. Requesting authorities should inform the sharing authorities if there is a possibility that the shared information may be used for criminal and/or other legal proceedings.
15. Effective cooperation between authorities is supported by mutual trust and an understanding of each other's legal frameworks, confidentiality rules and investigative processes. Authorities may find it useful to have discussions or share informational materials about their respective processes, and if necessary, seek the assistance of UNCTAD Secretariat. Explanations of investigative practices, timetables, procedures and confidentiality rules increase transparency and mutual understanding and can therefore help make cooperation more effective and, when appropriate information of this type is made public, may foster greater willingness of parties to facilitate cooperation.

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<sup>4</sup> Hereinafter referred to as a waiver. Waivers are most commonly employed in merger cases or with respect to leniency applications in cartel cases. More information on waivers in merger cases, as well as the ICN MWG Model Confidentiality Waiver, may be found at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG\\_ModelWaiver.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_ModelWaiver.pdf). An ICN model leniency waiver is available at [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG\\_LeniencyWaiverNote.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_LeniencyWaiverNote.pdf).

<sup>5</sup> For example, through legislation, bilateral cooperation agreements, adherence to multi-lateral frameworks or agreements, definitive policy statements (e.g., guidelines, regulations, or rules on confidentiality), or a case-specific assurance.

16. Authorities that engage in cooperation may find it useful to develop their own authority-to-authority protocols for cooperation. However, formal agreements or other authority-to-authority protocols for cooperation are not a necessary precondition for authorities to cooperate if appropriate assurances of confidentiality have otherwise been established, including with the assistance of UNCTAD Secretariat as will be discussed in section III.

## II TOOLKIT FOR COOPERATION IN COMPETITION CASES

17. A significant body of information has been collected by international and multilateral organizations including the International Competition Network (ICN), the Competition Committee of the Organization for Economic Cooperation and Development (OECD), UNCTAD and other entities that provide valuable information about how cooperation in particular cases can be made more effective. Authorities are encouraged to refer to these works provided in the ANNEX.
18. Requests for cooperation between authorities are addressed directly from one authority to the other.
19. Requests for cooperation are most helpful when they include:
  - (a) An indication of the jurisdictions and enterprises involved;
  - (b) A factual description of the alleged competition concern(s), including, if practicable and appropriate, a preliminary definition of the relevant market(s); a preliminary assessment of the enterprise(s) involved and their market power; and a description of the alleged harmful effects of the competition concern(s) on the interests of the requesting authority's jurisdiction;
  - (c) The legal basis under which the alleged competition concern(s) may be reviewed under the requesting authority's law; and
  - (d) A description, if known, of the cooperation sought from the requested authority.
20. Authorities may seek assistance through UNCTAD as described in Section III, including with respect to preparing requests for cooperation and facilitating contact with other authorities.
21. In relation to the implementation of this section, there should be flexibility between

the authorities in initiating cooperation based on each authority's relevant domestic law and policy, or mutual agreement and understanding. Member States recognize that tools of cooperation among authorities may include the following:

(a) Initial contacts

- i As appropriate to the investigation, early contact in a variety of ways, including contact with other authorities, information supplied by parties, or formal or informal notifications, may allow for a more meaningful discussion among authorities at key stages of their respective investigations.
- ii Initial contacts between authorities may be used to discuss the potential scope and depth of cooperation appropriate to the investigation, as well as the need for and frequency of additional contacts.

(b) Further communication among authorities

- i The frequency and level of further communication will normally depend on the nature of the cooperation. When ongoing cooperation is mutually beneficial, experience demonstrates that periodic communication by cooperating authorities throughout their respective enforcement activities, especially at key decision-making stages, can be helpful to avoid conflicting outcomes.
- ii Discussion between authorities are generally held among the relevant investigative staff, including as appropriate, case handlers, economists, lawyers, other technical experts, and management.

(c) Timing alignment

- i Investigations that are aligned at key decision-making stages may allow for more efficient cooperation by allowing for more meaningful discussions between authorities.
- ii Meaningful cooperation can take place even if authorities are in different phases in their respective processes. In such cases, it may still be beneficial for authorities to discuss theories of

harm, factual findings, and case resolutions.

- (d) Exchange of information, confidentiality and waivers of confidentiality
- i Information sharing between authorities (whether orally or in writing) occurs in a manner consistent with each authority's legal obligations to maintain confidentiality. An authority's commitment to protect the confidentiality of information that it receives from another authority during cooperation is a critical factor in the ability and willingness to share information.
  - ii In most jurisdictions, the consent of the party or third party that provided confidential information is usually required to enable an authority to share that information, whether orally or in writing, with another authority. While the exchange of non-confidential information can lead to effective cooperation, a waiver of confidentiality may enable more extensive cooperation as it allows for more informed and detailed discussions in relation to substantive assessment and possible remedies, especially in merger cases.
  - iii The decision as to whether to grant a waiver is at the sole discretion of the party that provided the confidential information. Refusal to grant a waiver does not prejudice the refusing party in the investigation. Transparency about applicable rules and practices on the handling of confidential information promotes greater understanding about the process of sharing information for both authorities and parties and may serve to encourage parties to grant waivers. Authorities can facilitate the granting of waivers by explaining the benefits of their use and through the development of model waivers.<sup>6</sup>

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<sup>6</sup> Authorities may find it useful to promulgate model waivers that seek to protect confidentiality in the context of the authorities' needs and applicable law. Authorities have found that waivers are more readily offered by parties when they address legitimate concerns regarding the exchange of information (for example, the concern that a document covered by privilege in one jurisdiction may not be privileged in another). In some jurisdictions, oral waivers may be acceptable. For a link to a model waiver, see Article 13.

- (e) Discussions on substance and case resolution
- i When appropriate to the matter under applicable law, discussions on substantive issues relevant to the investigation might include but are not limited to: market definition, market dynamics, theories of competitive harm, economic theories and empirical evidence needed to test those theories, potential competitive effects and efficiencies of the conduct as well as potential remedies.
  - ii When more extensive cooperation is expected to be mutually beneficial, authorities may discuss investigative planning, evidence gathering methodology, and the manner through which particular substantive aspects and theories of harm may be investigated.

### **III THE ROLE OF UNCTAD IN FACILITATING COOPERATION UNDER SECTION F OF THE UN SET**

- 22 UNCTAD is the focal point for competition law and policy within the United Nations system. The UNCTAD mandate dates back to the adoption of the UN Set in 1980. The UN Set plays an important role in encouraging the adoption and strengthening of laws and policies in this area at the national and regional levels. UNCTAD assists developing countries and countries with economies in transition in adopting or revising competition legislation and policies, to align with international best practices, as well as regional frameworks in these areas.
- 23 UNCTAD Secretariat provides valuable technical assistance to facilitate and improve the level of cooperation in competition cases. It can undertake a facilitating function to assist authorities, especially from developing countries and countries with economies in transition that desire to request cooperation from authorities that do not have well-developed relationships with such authorities.<sup>6</sup>
- 24 UNCTAD Secretariat can assist authorities with the development of confidentiality provisions and promote mutual trust among authorities that will support more effective cooperation.

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<sup>6</sup> The address of Competition Law and Policy and Consumer Protection Branch, UNCTAD is Palais des Nations, CH-1211 Geneva Switzerland, T.: + 41 22 907 02 47, E-mail: [ccpb@unctad.org](mailto:ccpb@unctad.org).



25. UNCTAD Secretariat can also assist authorities by providing publicly available legal texts and guidelines that are relevant to cooperation, such as confidentiality rules, rules concerning investigations, and data protection rules in other jurisdictions.
26. UNCTAD Secretariat should maintain a list of contact persons who may facilitate international cooperation at each Member State's authority, including where appropriate by identifying contacts for particular types of conduct (e.g., mergers, cartels) and identifying linguistic abilities among contacts.
27. UNCTAD Secretariat should periodically review and recommend changes to the list of work products compiled by international and multilateral organizations provided in the ANNEX.
28. In case of consultation under Section F.4 of the UN 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 the 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 work products listed in the ANNEX;
    - v interpretation of the UN Set provisions; and
    - vi upon specific request and consent by all authorities involved, participation in the consultation.
  - (b) In case the assistance of UNCTAD Secretariat is needed to facilitate consultations, the scope of the 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.

## ANNEX

### **Section One: Guidance from International Organizations on how cooperation in particular cases can be made more effective.**

1. Organization for Economic Cooperation and Development, Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings (2014), which contains a mechanism allowing non-OECD members to adhere to it;
2. International Competition Network Practical Guide to International Enforcement Cooperation in Mergers (2015), which provides a practical guide in the context of increased multijurisdictional mergers and multilateral cooperation;
3. International Competition Network, Framework for Merger Review Cooperation (2012, regularly updated), a useful tool for possible approaches for information exchange among case teams, including a framework for providing assurances of confidentiality;
4. International Competition Network, Waivers of Confidentiality in Merger Investigations (2005), which identifies and discusses issues underlying the rationale, content, and use of waivers, and offers several model waivers of confidentiality;
5. International Competition Network, Framework for the promotion of the sharing of non-confidential information for Cartel Enforcement (2016, regularly updated), a useful tool for improving international enforcement cooperation by fostering “pick up the phone relationships”;
6. International Competition Network, Waivers of Confidentiality in Cartel Investigations (2014), which provides a definition of waivers of confidentiality in a cross jurisdictional context and their purpose in information sharing. It outlines distinctions between waivers and other information exchange practices and provides templates for waivers of confidentiality;

### **Section Two: Other Background Information**

1. Cross-border anticompetitive practices: The challenges for developing countries and economies in transition (UNCTAD, 2012);
2. Modalities and procedures for international cooperation in competition cases involving more than one country (UNCTAD, 2013);
3. Informal cooperation among competition authorities in specific cases (UNCTAD, 2014);
4. International cooperation in merger cases as a tool for effective enforcement of

- competition law (UNCTAD, 2015);
5. Enhancing international cooperation in the investigation of competition cross-border cases: tools and procedures (UNCTAD, 2017);
  6. Survey report on the obstacles to international cooperation. UNCTAD Discussion Group on International Cooperation. (UNCTAD 2018);
  7. International Competition Network, Co-operation Between Competition Agencies in Cartel Investigations (2007), which carries out a stocktaking of the various forms of co-operation between authorities in cartel investigations. It identifies some of the barriers to greater co-operation and proposes some avenues for exploration as to how those barriers might be lowered or removed;
  8. Asia Pacific Economic Cooperation (APEC), Survey on Information Exchange on Competition in APEC Region: Phase I (2012);
  9. SADC Declaration on Regional Cooperation in Competition and Consumer Protection Policies.
  10. OECD, Report on the OECD/ICN Survey on International Enforcement Cooperation (2013);
  11. Challenges on International Cooperation in Competition Law Enforcement (OECD, 2014).