



Economic and Social Council

Distr.: General
5 November 2010

English only

Economic Commission for Europe

Committee on Trade

Centre for Trade Facilitation and Electronic Business

Sixteenth session

Geneva, 8-10 December 2010

Item 8 of the provisional agenda

UN/CEFACT structure, mandate, terms of reference and procedures

Comments by the secretariat regarding proposals made in documents submitted under agenda item 8

Summary

Under agenda item 8, the UN/CEFACT Bureau has submitted for the Plenary's consideration and approval a draft-revised mandate, terms of reference and rules of procedure for UN/CEFACT, including a new structure for UN/CEFACT, together with other related draft revised documents.

The secretariat recognises the need for change to enhance the efficiency and effectiveness of UN/CEFACT in addressing the needs of member States and appreciates the efforts of the Bureau in preparing the draft revised documents.

The secretariat is making these comments with a view to assisting the Bureau and the Plenary in the next steps regarding consideration of these draft documents, and to ensure that the Plenary only approves provisions that conform to United Nations rules and procedures.

It is noted that these draft documents were prepared by the Bureau and were submitted as received by the secretariat to meet deadlines for editing and translation; and that it was envisaged that secretariat comments would follow and be given due consideration in the expected revision of these draft documents.

Introduction

1. The present note provides comments by the secretariat on specific provisions of the documents submitted to the Plenary under agenda item 8, all of which are related to: a draft revised mandate; terms of reference; and procedures for UN/CEFACT and which include a new structure for UN/CEFACT. These documents were prepared by the Bureau and were submitted as received by the secretariat, since time did not permit consultation prior to the submission for translation.
2. The documents concerned as follows:
 - ECE/TRADE/C/CEFACT/2010/15: Draft revised mandate, terms of reference and procedures for UN/CEFACT;
 - ECE/TRADE/C/CEFACT/2010/16: Overview of proposed changes to R.650 REV 4 and related documents;
 - ECE/TRADE/C/CEFACT/2010/17: Draft revised rules of procedure for the UN/CEFACT Bureau;
 - ECE/TRADE/C/CEFACT/2010/18: Draft revised Code of Conduct;
 - ECE/TRADE/C/CEFACT/2010/ 22: Draft procedures for developing and approving cooperation agreements, cooperation plans and collaboration statements;
 - ECE/TRADE/C/CEFACT/2010/ 24: Draft revised open development process.
3. The scope of these comments is limited to these specific issues as identified in the documents listed above. The comments do not attempt to exhaustively address all issues arising from the documents commented upon.
4. The secretariat is making these comments with a view to assisting the Bureau and the Plenary in the next steps regarding consideration of these draft documents, and to ensure that the Plenary only approves provisions that conform to United Nations rules and procedures.
5. It is noted that these draft documents were prepared by the Bureau and were submitted as received by the secretariat to meet deadlines for editing and translation; and that it was envisaged that secretariat comments would follow and be given due consideration in the expected revision of these draft documents.
6. Given time constraints, it has not been possible to review and comment at this time on two other documents submitted under this agenda item: the Draft revised Intellectual Property Rights Policy (ECE/TRADE/C/CEFACT/2010/20) and Abbreviations and definitions for the revised mandate, terms of reference and procedures for UN/CEFACT and related documents (ECE/TRADE/C/CEFACT/2010/19). The secretariat may have comments on these at the Plenary session itself.
7. The issues to which the comments relate fall mainly into three broad, and sometimes overlapping, categories:
 - (a) Conformity with United Nations rules and norms, including those related to member State prerogatives, the decisions of higher-level United Nations intergovernmental bodies and the roles and responsibilities of UN/CEFACT and the UNECE secretariat;

(b) Governance issues, including adherence to the general principles on the basis of which UN bodies are structured and operate (within UN/CEFACT, within the rest of the UN system¹, and to member States);

(c) Minor errors or points for clarification.

8. To facilitate the consideration of these issues, the comments have been consolidated around similar issues, with cross-references as appropriate. Wherever possible, re-drafting suggestions are provided with respect to the points raised.

9. The secretariat appreciates the efforts of the Bureau in preparing the draft revised documents and looks forward to being of continuing assistance in efforts to enhance the efficiency and effectiveness of UN/CEFACT in addressing the needs of member States.

I. Comments on Draft revised mandate, terms of reference and procedures for UN/CEFACT, ECE/TRADE/C/CEFACT/2010/15

1. Rules applicable to meetings (paragraph 10)

10. Instead of only referring to “general United Nations rules”, the paragraph should refer to both “general United Nations and UNECE rules”. The reference to the symbol number E/ECE/778/Rev.3 for the Terms of Reference and Rules of Procedure of the Economic Commission for Europe should be updated to refer to E/ECE/778/Rev.5. To cater for further revisions of these rules, the phrase “as may be revised from time to time” could be inserted at the end.

2. Roles, responsibilities and reporting chain of the secretariat (paragraphs 13, 15, 16, 25(g), annex A.2)

11. Two issues arise here:

(a) The references to the role of the Centre, including both the Plenary and the Bureau, with respect to dissemination and promotion of “the implementation of its deliverables in cooperation with national Governments, intergovernmental organizations, non-governmental organizations and organizations representing industry and commerce” overlook the fact that official contacts and communications made under the name of the UNECE and/or its intergovernmental bodies should always pass through the secretariat. This would serve to ensure: that communications follow rules; that there is a continuity in relations with third parties even when elected officers change; and that there is one central “repository” for communications that any member State can consult. It is also not correct, as in paragraph 25(g), to suggest that the Bureau would “supervise” rather than “provide policy direction to” the work of the secretariat². Suggested wording for paragraphs 13, 15, 16 and 25(g) to take this into account follow:

(i) Paragraph 13: “*The Centre, through the secretariat, disseminates...*”;

¹ See ECE/TRADE/C/CEFACT/2010/15, Annex A-1: UN/CEFACT within the UN Framework.

² Rule 24 of the Terms of Reference and Rules of Procedure of the Economic Commission for Europe (E/ECE/778/Rev.5) provides as follows: “The Executive Secretary shall direct the staff provided by the Secretary-General and required by the Commission, and its Subsidiary Bodies.”

- (ii) Paragraph 15 (see suggested text in paragraph 3 below);
 - (iii) Paragraph 16 (see the suggested text in paragraph 3 below);
 - (iv) Paragraph 25(g): *“To provide policy guidance, as appropriate, to promotion and communication activities as well as to cooperation with other bodies”*.
- (b) Given that the UNECE secretariat is not part of the intergovernmental structure of UN/CEFACT, the secretariat should be deleted from the diagram in annex A. 2 entitled, “Internal structure of UN/CEFACT”.

3. Provision and allocation of resources (paragraphs 15 and 16)

12. Two issues also arise here:

- (a) Paragraphs 15 and 16 could be interpreted as indicating that UN/CEFACT makes decisions regarding the level of resources allocated to it within the United Nations system. This is done by the General Assembly, based on recommendations submitted by UNECE, not by subsidiary bodies.
- (b) Matters relating to the allocation of resources within UNECE are under the responsibility of the Executive Secretary³ who is also responsible for the implementation of the overall programme of work of UNECE (of which the programme of work of UN/CEFACT is only one part). This is not a joint approval process as implied in paragraph 16⁴.

13. Suggested wordings for paragraphs 15 and 16 that take into account the comments in paragraphs 8 and 9 above are as follows:

- (i) Paragraph 15: *“UNECE provides secretariat resources to assist in the functioning of UN/CEFACT. The Bureau will indicate their priorities to the secretariat, which will advise if existing resources are adequate to fully cover such priorities. Where this is not the case, the Bureau will work with the secretariat to identify, to the extent possible, necessary extrabudgetary resources. This information will be communicated to the Plenary for endorsement.”*
- (ii) Paragraph 16: *“The Plenary shall have the executive responsibility for determining the strategic and policy directions as well as the programme of work of the Centre, taking into account available resources and identifying where additional, extra-budgetary resources need to be raised. It shall be...”*

4. Dispute resolution (paragraphs 16 and 27)

14. Four issues arise here relating to the Bureau, the Ombudsman and the Plenary:

- (a) The Bureau is elected by and is “responsible to the Plenary for the open, transparent and efficient operation of the Centre” (under paragraph 23), as well as for the operational functioning of UN/CEFACT (paragraph 25(h)) in support of the implementation of the approved programme of work. Therefore, it would not be appropriate, as proposed in paragraph 27, for the Bureau to accept as final any

³ Ibid.

⁴ Ibid.

decisions made by an Ombudsman without considering the consequences of those decisions for the programme of work and its implementation (i.e. an explicit and considered review and acceptance of the decision by the Bureau taking into account the impact of the decision). Given the wide range of issues covered by UN/CEFACT, it would be more appropriate for the Bureau to appoint one or more mediator(s) for each case, based on their expertise, rather than one Ombudsman to cover all issues.

(b) Any decisions that have an impact on the programme of work, whether made by a subordinate body, as part of a dispute resolution, or for any other reason, must be confirmed by the Plenary. However, this is not indicated in paragraph 27.

(c) Within the United Nations structure, member States can establish binding adjudicative mechanisms for dispute settlement only through the General Assembly or through an international conference. Since it is therefore not possible to establish an Ombudsman mechanism within UN/CEFACT, the adoption of a voluntary mediation procedure under which an independent and/or external expert is asked to mediate should not raise any problem. Should such a function be established, it would need to be made clear that this is a voluntary process with the objective of reaching an amicable solution to the dispute, the outcome of which would be reported to the Bureau and/or the Plenary.

(d) Paragraph 16 states that the Plenary shall be “the final arbiter of any appeal originating from any subordinate body of UN/CEFACT”. While the Plenary could accept appeals to decisions made under the aegis of the Bureau, it could not be the “final arbiter” because member States dissatisfied with a Plenary decision retain the right to bring the matter to higher intergovernmental bodies along the reporting chain (such as the UNECE or the Economic and Social Council) for decision.

15. Keeping in mind the objectives of obtaining impartial advice and the expedited resolution of disputes, the following are suggestions for revised text:

(i) Paragraph 16, last line: *“The Plenary shall also consider any appeals from its subsidiary bodies or its HoDs regarding decisions made by the Bureau and, as appropriate, take decisions”*;

(ii) Paragraph 25(h): replace *“ombudsman activities”* with *“the resolution of disagreements that have an impact on the implementation of the programme of work, as described in paragraph 27”*;

(iii) Paragraph 27: *“When there is a disagreement that has an impact on the implementation of UN/CEFACT’s programme of work that cannot be resolved at a lower level, or an appeal to the Bureau by a participant to a decision made by a UN/CEFACT subsidiary body, the Bureau can decide either to make a decision itself without any further steps, or it can appoint a mediator [or “ombudsman”]. The mediator [ombudsman] would then discuss the issue in question with all parties concerned with the objective of coming to a commonly agreed upon solution and, if that is not possible, the mediator [ombudsman] will make a recommendation to the Bureau for its consideration. Any decisions that would result in a change to the programme of work would need to be confirmed by the Plenary, either via the intersessional approval procedure or at its next session. A Head of Delegation may also appeal any such decision to the Plenary”*.

5. Plenary powers and control (paragraph 17, 20, 21 and 24)

16. Three issues arise here:

(a) Paragraph 17: While modifications to the structure of UN/CEFACT are subject to Plenary approval, these are not, as stated, the sole responsibility of the Plenary since these changes would also require approval, in the majority of cases, by the ÚNECE Executive Committee (EXCOM);

(b) Paragraph 20: The Plenary may decide to appoint a Rapporteur for any topic it wishes to and does not require a recommendation from the Bureau. This wording could also be interpreted to also apply to the candidates for Rapporteur posts and heads of delegation may nominate whomever they wish for positions. Therefore, in both cases, “Rapporteurs” cannot be limited to only those recommended by the Bureau, as indicated here;

(c) Paragraph 21: Reference is made here to the intersessional approval process, but no cross reference is made to the document containing this procedure. Document ECE/TRADE/C/CEFACT/2010/16 indicates that the intersessional procedure is now part of this document, but it appears to be missing;

(d) Paragraph 24: While the Bureau may appoint advisors, it may not appoint teams of specialists or other groups. The UNECE Guidelines for the establishment and functioning of teams of specialists within UNECE (ECE/EX/2) requires that the establishment of teams of specialists and their terms of reference must be approved both by the parent body and the EXCOM. Teams of Specialists then decide how to organize their own internal work, without further approval, and this may involve establishing teams or groups of experts with specific tasks that are within the approved terms of reference of the Team of Specialists.

17. The following are some suggestions for revised text for the above paragraphs:

(a) Paragraph 17: *“Modifications to the structure of UN/CEFACT are the responsibility of the Plenary and must be approved by the Plenary, the Committee on Trade and the UNECE Executive Committee”;*

(b) Paragraph 20: *“The Plenary may appoint rapporteurs to undertake functional and...”;*

(c) Paragraph 24, second and third sentences: *“The Bureau may also appoint advisors to itself and make recommendations to the Plenary for the establishment of teams of specialists, their terms of reference and membership. It may also make recommendations to teams of specialists with regard to how they might consider organizing their work. The names and purposes of appointed advisors will be reported to the Plenary on an annual basis.”*

6. Coordination of work with other international organizations (paragraph 6(d))

18. The phrase “notably in the context of a Memorandum of Understanding for a Global Facilitation Partnership for Transport and Trade” should be changed to “*notably in the context of the Global Facilitation Partnership for Transport and Trade*”⁵ as the concept of

⁵ For further information refer to www.gpftt.org.

having a Memorandum of Understanding for the Global Facilitation Partnership was considered at one time but was ultimately dropped.

II. Comments on overview of proposed changes to R.650 REV 4 and related documents, ECE/TRADE/C/CEFACT/2010/16

19. The table in this document indicates that the intersessional approval process has been included in the draft revised mandate, terms of reference and procedures for UN/CEFACT, ECE/TRADE/C/CEFACT/2010/15 – but this is inaccurate. The document contains only a reference to the procedure (see paragraph 21).

III. Comments on Draft revised rules of procedure for the UN/CEFACT Bureau, ECE/TRADE/C/CEFACT/2010/17

1. Voting (paragraph 8)

20. Because there are no longer provisions in the revised terms of reference to ex-officio Bureau members, in this paragraph should be deleted (also refer to paragraphs 8 and 18 in the mandate and terms of reference, ECE/TRADE/C/CEFACT/2010/15, which provide for all Bureau members to be elected).

2. Responsibility for communication (paragraph 13)

21. Please refer to the comments on paragraph 25(g) of ECE/TRADE/C/CEFACT/2010/15 above, where the role of the secretariat in communications is outlined. (see paragraph 2 of the Comments on Draft revised mandate, terms of reference and procedures for UN/CEFACT above). A suggested revised text for this paragraph is as follows:

“To provide policy guidance, as appropriate, to promotion and communication activities, with the support of the secretariat, including timely communication of UN/CEFACT developments, e.g. through quarterly reports, the UN/CEFACT website and the Forum meetings”.

IV. Comments on Draft revised UN/CEFACT Code of Conduct, ECE/TRADE/C/CEFACT/2010/18

1. Sanctions and appeal (paragraphs 3 and 9)

22. A more detailed procedure needs to be included for handling violations to the code of conduct. To ensure the right of due process to participants accused of violating the code, this enlarged procedure should include a provision giving them an opportunity to defend themselves before a decision is made – i.e. not just through appeal.

23. The Bureau does not have the power to revoke a participant’s membership in UN/CEFACT before the responsible Head of Delegation has withdrawn the nomination of that participant from the national delegation. Therefore, one step in the more detailed procedure mentioned above could be a request from the Bureau to the Head of Delegation concerned to withdraw the nomination to the national delegation of the person in question.

Then, if the Head of Delegation does not respond positively, the Bureau could raise the matter before the Plenary.

24. For the reasons enumerated in the comments to the Mandate and Terms of Reference (ECE/TRADE/C/CEFACT/2010/15), the references to an Ombudsman should be deleted. Something might instead be provided along the lines of “*The Bureau may call upon the services of an adviser to review an apparent conflict of interest and provide the Bureau with recommendations*”.

2. Conflicts of interest (paragraphs 5, 6, 8 and 9)

25. Some initial comments are set out below, but given the complicated legal nature of this topic, there is a strong need to consult with the Office of Legal Affairs (OLA) of the United Nations in connection with the drafting.

26. The issues identified so far relate to:

- the definition of conflict of interest (including distinguishing between potential and actual conflicts of interest);
- the body to whom declarations of conflict should be made;
- sanctions and appeal.

(a) Paragraph 5: It would be better to indicate that paragraph 5 applies to potential conflicts of interest, taking into account that the point at which a potential conflict of interest becomes an actual one is open to wide interpretation. It would also be better to indicate that the examples in the definition make up a non-exhaustive list. However, the coverage could also be narrowed and made more precise - for example, if the definition was limited to financial interests of the participant or the participant’s employer. In addition, the three examples given in the definition are too broad:

- First example: All of the participants (whether government or private sector) have either a personal or professional interest in the work. Whether or not that interest is “in direct conflict with UN/CEFACT’s mission” is open to wide interpretation.
- Second and third examples: Many UN/CEFACT experts and delegates participate in other standards organizations. If they are not working on UN/CEFACT-related standards, or if they are and the objective is to align these other standards with those of UN/CEFACT, then there is no conflict of interest. The same can be said for having a “*Position in publicly visible advisory boards*”.

(b) Paragraph 6: Declarations of conflict of interest should not be sent to the officers of an intergovernmental body. Declarations of potential conflict of interest need to be lodged with a secretariat that has the capacity to maintain centralized, long-term records and provide an institutional memory and where individuals would be subject to disciplinary sanctions by the United Nations for breach of confidentiality. One proposal, for discussion with the Office of Legal Affairs, might be to specify that the secretariat must make a timely release of relevant information to the Bureau Chair, either upon request by the Chair or at its own initiative, if the Chair or the secretariat have reasonable grounds for believing that a potential conflict of interest may have crystallized into an actual conflict. For reasons of confidentiality, the Plenary should not be informed of potential conflicts of interest,

but only of action taken by the Bureau with respect to actual conflicts of interest, or matters brought before it under (c).

(c) Paragraph 9: All comments regarding this paragraph which have been made under “Sanctions and appeals” (Chapter IV, section 1) would be applicable here, as well as the comment made on paragraph 6 (Chapter IV, section 2) regarding information provided to the Plenary.

27. For any conflict of interest issues involving a Bureau member, a different procedure needs to be put in place or (the United Nations Office of Legal Affairs could be consulted) since the Bureau cannot make decisions or recommendations regarding disputes within the Bureau – including the appointment of a mediator/ombudsman.

3. General comment on this section

28. To facilitate understanding by non-English speakers, and even those English speakers that who not lawyers, it might be better to avoid the use of the word “recuse” or “recusal” and just use the definition: i.e. “disqualify [oneself/themselves]” or “withdraw [oneself/themselves]”.

29. Annex: UN/CEFACT Conventions of Netiquette: In the introductory paragraph the word “guidelines” should be changed to “conventions” or “rules” because guidelines cannot be mandatory, which these are “*violating the normative conventions can result in sanctions by the Bureau, such as removal from UN/CEFACT membership*”. Because they are mandatory and refer to conduct, these conventions should also be included in the points under the “Code of Conduct” in paragraph 2.

30. If adherence to these conventions of netiquette is included in the Code of Conduct (see paragraph 2), then the references to sanctions for not applying them should be deleted (as sanctions for not following the Code of Conduct would apply). Otherwise, the outlined sanctions also need to provide for due process (i.e. a procedure for those accused to defend themselves before a decision is made – i.e. not just in appeal).

V. Comments on Draft Procedures for Developing and Approving Cooperation Agreements ECE/TRADE/C/CEFACT/2010/22

1. General remarks

31. In view of the large number of points where this document does not coincide with United Nations rules, it is suggested that the document be withdrawn and a new document be developed with enough time allocated for full consultation between the secretariat and the Bureau during the drafting. Some of the points in question are as follows.

(a) United Nations rules do not allow an intergovernmental body to develop draft agreements directly with other organizations. This is a responsibility of the secretariat whose role cannot be limited to merely assisting in “reviewing and revising the draft”[Cooperation Agreement] because it:

- Represents the legal entity (UNECE) which is a party to the agreement;
- Has the responsibility for ensuring that the agreement conforms to all United Nations rules, as well as directives from higher level intergovernmental bodies (Committee on Trade and UNECE Executive Committee);

- Needs to ensure implementation of the agreement over the long term.

(b) The Executive Secretary of UNECE is responsible (and accountable within the United Nations system) for the content of the agreement and, therefore, a procedure requiring that he signs an agreement coming from the Bureau of an intergovernmental body is not acceptable (reference paragraphs 2- 6);

(c) For the reasons stated under (a) and (b) above, it is for the secretariat to work with designated representatives of other organizations and to approve cooperation plans and statements, press releases and other such public documents. The secretariat can, and should, take advice on substantive content from the Bureau or a cooperation team designated by the Bureau;

(d) No cooperation agreement can deal with the allocation of either UN/CEFACT or secretariat resources (reference paragraph 9); the agreement can, however, deal with coordination and the division of labour between UNECE and another organization.

VI. Comments on Draft revised Open Development Process ECE/TRADE/C/CEFACT/2010/24

1. UN/CEFACT Open Development Process (principles for projects) (paragraph 2)

32. Bullet points 5 and 6 should begin with the words “*Require participants to*” as it is the participants rather than the projects which should abide by the UN/CEFACT IPR Policies and Code of Conduct.

2. Publication types (paragraphs 3 and 4)

33. Clearer and sharper distinctions appear to be needed between UN/CEFACT business standards and UNECE recommendations. As currently defined, recommendations (“trade facilitation or electronic business standards that provide formal guidance to Governments, the private sector and the business community”) appear to be partly a sub-set of business standards (“specifications that provide rules, guidelines and/or principles related to activities in the context of trade facilitation or electronic business”).

34. In paragraph 4, it is suggested that the phrase “and more will likely emerge” be removed as it is imprecise.

35. It may also be inappropriate to include reference and implementation guides, handbooks, brochures and training materials, because it is difficult to see how they could be subject to the ODP, especially when they need to be produced within a short period of time.

3. References to UN/CEFACT copyright (paragraphs 6 and 26)

36. These should be changed to read the “*Copyright disclaimer statement found in annex to the UN/CEFACT Intellectual Property Rights Policy (ECE/TRADE/CEFACT/2006/11)*”. This is what is specified in the IPR policy and the term “UN/CEFACT copyright” may not be used, as the copyright to UN/CEFACT outputs belongs to the United Nations.

4. Secretariat status, roles and responsibilities (paragraphs 11 and 34)

37. In paragraph 11, the secretariat should not be referred to as the UN/CEFACT secretariat but as the UNECE secretariat. Under paragraph 34, it would be the secretariat; not the Bureau, which publishes the Public Draft on the UN/CEFACT website and notifies heads of delegation and other distribution lists that the Public Draft is available for review.

5. Project inception (paragraphs 12, 13, 14, 16, 22 and annex IV)

38. Paragraphs 12 and 13 need to be reformulated. Individual members of a Plenary delegation, like individual experts, are indeed “stakeholders” in the work of UN/CEFACT. However, given the intergovernmental nature of UN/CEFACT, it would be inappropriate for individual delegation members or individual experts to submit proposals acting in their personal capacity. A possible alternative approach would be: to substitute in these two paragraphs the term “project submitter” or “project proposer” for “stakeholder”; delete in paragraph 13 the reference to individual delegation members; and then review the use of the term “stakeholder” throughout the rest of the document (sometimes it seems to refer to potential users and/or experts and not just the project proposer) and, where appropriate, make the same substitution.

39. Annex IV containing the template for letters of support by heads of delegation refers to “Permanent/Working Group”. Based on the text in paragraphs 12 and 13 and the proposed new structure, this should now refer to the project proposer (either using the generic term or by naming the actual proposer).

40. Paragraph 14 contains a requirement that “the Bureau will try to solicit expressions of support from other HODs”. This would be better if expressed as “*may decide to solicit*”, because this wording would preserve the discretion of the Bureau to solicit or not to solicit expressions of support. The need to preserve this discretion is inherent in both the Bureau’s overall responsibilities and its responsibilities for the review of projects as outlined under paragraph 25(e) of CEFACT/2010/15.

41. Paragraphs 16 and 22: In these paragraphs the roles ascribed to the sponsor are no doubt aimed at ensuring management control of and responsibility for project approvals and changes. To reinforce this function, it may be worthwhile to consider also giving to the sponsor a continuous monitoring and oversight role in the project and its team.
