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Global Forum on Competition

COMPETITION PROVISIONS IN TRADE AGREEMENTS

- Executive Summary -

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This executive summary by the OECD Secretariat contains the key findings from the discussion held under Session II at the 18th Global Forum on Competition on 5-6 December 2019.

More documents related to this discussion can be found at: oe.cd/cpta.

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Executive Summary

*By the Secretariat***

On 5 December 2019, participants in the OECD Global Forum of Competition discussed the topic of competition provisions in trade agreements. Considering the papers submitted by the expert panellists, the written contributions and the discussion by delegates and the expert panellists, the following key points emerged:

1. *Trade agreements have increased significantly over the last 30 years and they have become major instruments to lower non-tariff barriers. Currently about 90 percent of trade agreements incorporate competition provisions or chapters.*

Bilateral and regional agreements develop alongside the World Trade Organization (WTO) multi-lateral agreements. As part of the effort of reducing “non-tariff barriers”, many bilateral and regional agreements increasingly include a variety of chapters and provisions on regulatory matters such as government procurement, Intellectual Property Rights (IPR) and competition policy.

Around 90% of all the trade agreements incorporate competition-specific provisions or chapters, with a slightly lower proportion for developing countries. However, there are almost no bilateral agreements that cover competition provisions between low-income countries. This shows that multilateral agreements, such as the African Continental Free Trade Agreement, are critical for less developed economies or low-income countries to benefit from competition policy as a tool to foster trade.

Competition provisions have the objective of preserving the gains of liberalisation, as well as to prevent selective enforcement of competition law by the signatories to the agreement. Almost 30% of the agreements state the aim of preserving the gains of liberalisation and a similar percentage includes the objective of preventing selective enforcement or strategic enforcement of antitrust laws for strategic purposes.

In addition to competition-specific provisions, trade agreements incorporate competition principles more broadly. First, they embed principles, such as non-discrimination, transparency and most favoured nation principles, which may have an impact on competition policy. Second, sector-specific provisions on intellectual property, investment and government procurement are also relevant for competition, since they deal with matters such as lowering barriers to entry or rules that protect incumbent firms.

2. *The most frequent competition provisions concern commitments to prohibit abuses of market power and anti-competitive agreements, commitments to ensure that SOEs and subsidies do not distort the level-playing field and provisions on international co-operation.*

There is variation in the type and language of competition provisions in trade agreements. Agreements aiming at closer economic ties among the signatories may result in greater alignment through competition provisions.

* This executive summary does not necessarily represent the consensus view of the Global Forum participants. It does however identify key points from the discussion at the Roundtable, including the views of the expert panellists and the participants’ oral and written contributions.

About one-third of agreements require the parties to adopt or maintain competition laws, with some variation in their wording. A higher share (48%) requires parties to prohibit anti-competitive agreements and concerted practices and an even higher number (50%) imposes obligations to prohibit abuses of market power. The latter is the most common provision and it is slightly more frequent than provisions about anti-competitive agreements. By contrast, provisions on merger control are included in only 12% of trade agreements, involving highly advanced economies that already have significant merger control experience such as Australia, the EU, Canada, Korea, New Zealand and Singapore.

Almost half of trade agreements contain commitments on SOEs, even though the language can vary significantly. Some agreements, require that SOEs and monopolies are subject to regulatory control, act in accordance with commercial considerations, act in a non-discriminatory manner and refrain from using monopoly power to engage in anti-competitive conduct. In other cases, for instance the trade agreements to which the EU is a party, apply general abuse of dominance provisions to these companies and sometimes refer explicitly to the Treaty on the Functioning of the European Union (TFEU). The provisions on subsidies and state aid, which are included in almost 50% of trade agreements, equally show wide variation. Those involving the EU rely heavily on the concept of state aid from the TFEU. This is especially the case for neighbouring jurisdictions, while in other cases (such as the EU-Korea agreement) obligations are less detailed.

Only one-fourth of the trade agreements include enforcement principles that are competition specific. These often contain a generic commitment to ensure transparent and non-discriminatory enforcement, but some define more detailed due process standards. About 50% of the trade agreements include provisions on co-operation and co-ordination in competition policy. For instance, these refer to positive or negative comity, taking into account the interests of the other party either to refrain or to investigate certain practices, notification requirements or exchange of information requirements.

3. *Trade agreements have contributed to the establishment and harmonisation of competition law in a number of countries, especially when the signatories did not have a developed competition framework.*

The impact of trade agreements ranges from strengthening the institutional framework and enhancing the powers of the competition authority to expanding the scope of the competition law, for instance to cover SOEs. More generally, trade agreements can help bring competition policy into the mainstream of policy discussions and therefore help the competition authority in its broader advocacy efforts. As such, these government-to-government commitments may present some additional benefits compared with MoUs between competition authorities. Conversely, there are also examples of competition regimes that have developed independently of trade agreements.

Some participants noted that the provisions on antitrust and mergers have become more standardised over time, probably also due to the work on international co-operation by organisations such as the OECD and the ICN. Trade agreements have built on this emerging standardisation and have contributed to the harmonisation of competition regimes.

While a number of examples concern young authorities, some recent trade agreements, such as the United States-Canada-Mexico Agreement (USCMA), include new provisions on due process that may lead to important amendments also in more mature competition regimes.

4. *By encouraging technical assistance programmes, trade agreements facilitate the harmonisation of competition frameworks in practice and improve co-operation among authorities.*

The discussion highlighted that technical assistance brings benefits both to the authorities that receive assistance and to the authorities providing it. Capacity building has an impact on shaping the competition laws and processes of the younger competition authorities, thus leading to greater harmonisation of competition regimes and procedures. In addition, by improving the expertise of these authorities international co-operation improves. For instance, the value of information exchanges and discussions among authorities greatly increase as the expertise and the enforcement abilities improve. Capacity-building events provide opportunities to familiarise with other enforcers and foster working relationships that can have practical significance in the future, as authorities deal with cross-border competition issues.

Some participants noted the importance of recognising that there may be significant differences in the level of development of competition policy between the parties. In these cases, the technical assistance provided by trade partners should be driven by a thorough evaluation of the other parties' needs, constraints and priorities.

At the same time, the provisions on technical assistance may not be considered essential by all countries. For instance, for some mature jurisdictions the most important vehicles for co-operation and convergence may remain competition-specific instruments, such as bilateral agreements and MoUs.

5. *The impact of competition provisions in trade agreements has not been investigated in a systematic matter. Empirical evidence on other non-tariff measures tends to show a positive impact on trade flows and domestic value added, with important differences depending on country characteristics and the details of the measures.*

The literature on trade agreements has investigated extensively the impact of non-tariff barriers on trade flows and domestic production, and tends to find a positive impact from addressing regulatory barriers. The specific effects depend on the details of the provisions and on country characteristics.

However, the analysis of competition policy provisions is not equally well developed, for a variety of reasons. On the one hand, it is difficult to obtain data and, on the other hand, many of the traditional techniques are not suitable to address the variety of provisions and the terms of implementation.

Some takeaways from the empirical literature are relevant for competition policy too. For instance, studies find that institutional structures tend to have a positive influence on gains from trade agreements: the stronger the institutional structure, the greater a country's ability to enforce the provisions in trade agreements and the more trade is created. In addition, evidence shows that provisions not covered by WTO agreements, such as those on competition, are particularly important for trade agreements between developed and developing countries. When focusing on the trade flows related to Global Value Chains (GVCs), these provisions tend to increase domestic value added.

6. *Competition provisions are not subject to the dispute settlement procedures that trade agreements foresee. A new dataset shows that trade agreements envisage some enforceability mechanisms of both competition provisions and sector provisions.*

Most trade agreements exclude the competition chapter or provisions from dispute settlement or contain an ad hoc dispute settlement mechanism that typically takes the form of consultations. Therefore, there is a question on the effectiveness of a number of these competition clauses in practice. Some agreements include consultation mechanisms, which have rarely been used even though a formal consultation procedure is currently underway, relating to a due process provision in a trade agreement.

While abuse of dominance is the anti-competitive practice most frequently covered in agreements, the provisions on collusive practices and merger control are more enforceable. As shown in a World Bank study, provisions in bilateral agreements are less enforceable than those in multilateral agreements. This holds for the substantive provisions on antitrust and merger control, as well as for provisions on State Aid and subsidies. However, this is not the case with provisions on State-owned Enterprises (SOEs), where the degree of enforceability is more similar across the two types of agreements.

Even those trade agreements that do not cover competition policy embed competition principles at the sectoral level and they make these sectoral provisions very enforceable. In fact, 90% of the trade agreements that have sectoral provisions embedding competition principles include binding language on enforceability.

Some interventions emphasised the importance of enforceability of competition provisions. For this purpose, two types of provisions were discussed: on the one hand, those that do not relate to the implementation of individual cases, such as the commitment to have an independent competition authority or generic commitments regarding non-discrimination; on the other hand, the provisions concerning individual cases. For the former, one could envisage stronger enforceability than is currently the case. For the latter, traditional dispute resolution may not be the most appropriate way of implementing competition provisions as dispute settlement provisions might be misused, or perceived to be a way to double guess the national competition procedure. However, other mechanisms that are less intrusive, such as comity, are available.

7. *Competition authorities usually have a limited role in the negotiation of trade agreements, by providing technical advice to the lead negotiators.*

Participants emphasised that successful negotiations require close and meaningful collaboration between all the areas of government responsible for trade policy, competition policy and competition law enforcement. Trade negotiations are increasingly complex and require hundreds of hours of work by civil servants. Competition authorities tend to be involved in the development and negotiation of trade agreements, even though other state bodies typically lead this process. The participation of competition authorities allows them to advocate for provisions that promote convergence and co-operation on competition law and enforcement, while keeping in mind consistency with current laws and mitigating the risk of legal disputes.

In the case of Canada, the Competition Bureau has a prominent role in the negotiation of competition chapters. The authority's intervention during the session noted the advantages of monitoring other chapters that may have implications for competition policy and enforcement. For instance, the Bureau identified the risk that it might be required to disclose confidential information, obtained in the course of its activities, during trade related proceedings, such as dispute settlement. In consequence, the Bureau worked with the trade authorities to address the risk and protect confidential information from disclosure.