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COMPETITION PROVISIONS IN TRADE AGREEMENTS – Contribution from TUAC

- Session II -

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This contribution is submitted by TUAC under Session II of the Global Forum on Competition to be held on 5-6 December 2019.

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

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Competition Provisions in Trade Agreements

- Contribution from TUAC –

Key messages

This paper calls for a redesign of competition provisions in order to contribute to more socially-oriented trade policies.

Both competition and trade policies aim at liberalising markets and are usually presented as complementary. In parallel, international trade is frequently assumed to come with social costs, in a context of increasing corporate power.

Too much industry concentration harms the economy. It weakens investment and deter innovation. Most importantly, it contributes to deepening inequalities.

Competition chapters in trade agreements need to adjust to new challenges. Market liberalisation should not be treated as an end in itself but rather conditioned to broader societal objectives, including sustainability, decent work and the reduction of inequalities.

A country which does not abide by fundamental rights should be deemed to benefit from an unfair competitive advantage, akin to unlawful state aid. When assessing the effect of mergers and acquisitions, the impact on employment should always be assessed.

The new realities of global value chains need to be better captured. Whilst capital is concentrated among large multinationals, company groups are now rarely about a single activity.

The current e-commerce negotiations epitomise the tensions between trade, competition and sustainable growth.

Introduction

1. Following previous proposals to the OECD Competition Committee on the need to enhance protection against labour market monopsonies[1], TUAC is sharing the following contribution in view of the Global Forum on Competition of 5-6 December 2019. The sessions "competition under fire" and "competition provisions in trade agreements" are particularly relevant to this contribution.

2. Both competition and trade policies aim at liberalising markets and are usually presented as complementary. Anticompetitive practices, whether from firms or governments, may indeed compromise expanding economic opportunities. Competition clauses in free trade agreements have therefore been multiplying, often seeking a double objective: abolishing trade defences, and preventing anti-competitive behaviours from companies operating on global markets.

3. Unchecked international trade liberalisation however comes with social costs. While it may have given rise to a new middle class in a number of countries, it has also supported a model of growth that has given rise to greater inequality, and, in return, to

popular backlash against the current form of globalisation. Whilst multilateralism is a precious good, it is also in a crisis of confidence.

4. This paper calls for a redesign of competition provisions in order to contribute to more socially-oriented trade policies. The first section describes the social impact of the current trade and competition agenda, having regard to the fall of income labour share in the global economy and the concomitant rise in corporate power. The second section briefly analyses the shortcomings of current competition provisions and puts forward three proposals for reform in order to better take into account social challenges. The final section makes specific remarks about the current e-commerce negotiations, which epitomise the tensions between trade, competition and sustainable growth.

1. Section 1: Competition and trade: a "winners-take-all" outcome

1.1. The social benefits of trade?

5. Free trade is often presented as essential to economic progress, but it also comes with social costs. Over the past decades, the economic dimension of multilateralism, aiming at trade, investment and financial liberalisation has dominated global policy-making, while relegating social and employment issues to the domestic arena.

6. Trade and investment liberalisation alone does not necessarily translate into decent employment, in particular in terms of wages and skills upgrading. A recent OECD report on Foreign Direct Investment Qualities shows for instance that whilst multinationals generally enjoy productivity premiums, this performance does not fully translate into better wages. Foreign Direct Investment, which includes trade in services, is also associated with low job security and low participation of women in most of the countries studies[2]. As far as imports are concerned, sectors which are unable to compete with foreign competition face reduced employment[3].

7. Overall, the feeling that competitive advantages are being gained through poor working conditions is driving protectionism.

1.2. Who benefits from competition clauses in trade agreements?

8. In spite of the prominent position of competition in trade policies[4], industry concentration is steadily increasing. Industry concentration can be measured through mark-ups, i.e. a firm's ability to charge prices exceeding marginal cost of production, or by the ability to obtain extraordinary profits – the so-called "economic rents".[5] Both indicators point to an increase in market power since 2000. This rise is strongly concentrated in advanced economies, and particularly pronounced in North America[6]. According to the International Monetary Fund, average mark-up in advanced economies rose by about 7.7 percent throughout 2000–15.

9. A correlation can be made between strong market power and reliance on intangible assets and network effects, in line with the idea that firms are scaling-up production globally[7]. Against this background, the expanded market opportunities offered by the trade agenda are channelling the drivers for industry concentration. In other words, trade policies liberalising market access globally are magnifying the "winner-takes-all" outcome already achieved by successful firms.

10. Too much industry concentration harms the economy. It weakens investment and deters innovation. Most importantly, it contributes to deepening inequalities. As TUAC described in a previous contribution on labour market monopsonies, excessive corporate power contributes to unbalanced labour relations. This results in wage stagnation, degrading working conditions and lower levels of employment[8].

11. In the light of the multiplication of competition provisions in trade agreements, lawyers are sometimes arguing in favour of a codification of the different chapters. Considering the social and economic impact of these provisions, such a technical exercise would be inappropriate. The next section makes some proposals for a more ambitious, socially-oriented, reflection.

2. Section 2: Three proposals to adjust competition standards to social challenges

12. Competition chapters in trade agreements need to adjust to new challenges for at least three reasons. First, competition law as it currently stands with its one-dimensional focus on consumer price does not sufficiently take into account inequalities and how social welfare is distributed. It therefore fails to fulfil its goals of achieving economic efficiency and protecting the vulnerable.

13. Second, competition provisions in trade agreements have not caught up with the development of global value chains ('GVCs'). Corporate behaviours in global markets are no longer about tariff-jumping only but also about fulling exploiting the combination of digitalisation, trade, investment and financial liberalisation. GVCs seek scale, technological know-how and diversification of the activities. Business practices are as a result changing and corporate group structures are more complex than ever[9]. A too rigid methodology for defining the relevant market, focussing for instance on products as opposed to ownership of capital, fails to measure the scale of corporate power.

14. Third, focusing on free markets and the potentially distortive effects of state intervention makes market entry for smaller firms more difficult.

2.1. Recognise social dumping as unfair competition

15. The belief that any attempt to tie in social standards to trade agreements is a form of "protectionism" still prevails in many intergovernmental forums. Yet, unfair competition based on social dumping is pervasive. It fuels inequalities and undermines societal trust in global and national governance and in the private sector.

16. The purpose of competition needs rethinking. Market liberalisation should not be treated as an end in itself but should be conditioned to broader societal objectives, including sustainability, decent work and the reduction of inequalities.

17. This change of focus entails in particular that competition starts addressing asymmetries between workers and employers. A central element is to promote workers' fundamental rights to unionise and to bargain collectively. According to a recent OECD report, increasing the coverage of collective bargaining will help to achieve a broad sharing of productivity gains[10].

18. A country which does not abide by fundamental rights should be deemed to benefit from an unfair competitive advantage. In the same way as tax reliefs can be tackled for

unduly distorting the market, a government's failure to enforce core ILO standards should be akin to unlawful state aid.

19. When assessing the effect of mergers and acquisitions, the impact on employment should always be assessed. And just like a merger can be refused in case of too large supplier power, it should also be possible to stop mergers in case of too large buying power when a labour market monopsony which cannot be addressed by structural and behavioural remedies is arising around the corner.

20. Finally, trade and investment agreements should respect the right of government to regulate working conditions, including setting living minimum wages and ensuring adequate social protection.

2.2. Capture the new realities of GVCs

21. In a context of exacerbated trade tensions, suspicions of insufficient competition enforcement are arising and calls for more systematic recourse to reciprocity principles are being made[11].

22. Independently from national enforcement of competition principles, there is a case to be made for competition chapters to be revised so as to better capture the new realities of global value chains. For this, the relevant sizes need to be understood in a global context, and no longer within national or narrow regional perimeters. Most importantly, the relevant markets should no longer be defined at product level only. Whilst capital is concentrated among large multinationals, company groups are now rarely about a single activity. A range of products and services in the output market can be very large and yet the global operational and labour strategy piloted by the controlling firm remains the same across the entire corporation. It is therefore essential to approach a group of companies as a single entity, and not as an aggregation of distinct legal units.

23. As far as labour market monopsonies are concerned, it is appropriate to measure the degree of employer power over individual workers[12].

2.3. Initiate a reflection on the interplay between industrial policies and competition

24. A reflection should be engaged on how to foster more market entries, especially in disadvantaged areas. The objective should be to address wealth capture by a few large firms, but also to contribute to more harmonious development globally. The benefits of trade are indeed not shared evenly among economies. Whilst in OECD countries, trade and investment are linked with higher productivity and R&D intensity, developing economies are struggling to move up the GVC in terms of added value activities.

25. Industrial policies may provide some answers. These policies aim at changing the volume and quality of business production in order to increase the economic performance of a given sector. In a globalised world, the design of industrial policies should not be limited to national level only[13].

26. Yet, competition and industrial policies suffer from considerable tensions. Where the competition gap is too wide, firms at the bottom of innovation are discouraged from entering the market. Nascent industries therefore need to be encouraged by the visible hand of the state[14]. On the other hand, industrial policies may also translate into harmful dumping practices, leading to overcapacity and dumping practices.

27. Another tension may arise between, on the one hand, the need for certain sectors to remain in the race for global leadership and, on the other hand, further strengthening oligopolies, which is ultimately harmful to the economy and social welfare.

28. A global reflection is therefore necessary on the necessary objectives and design of state interventions. Industrial policies and competition should become complementary.

3. Section 3: The case of e-commerce

29. The World Trade Organisation is since January 2019 negotiating rules on e-commerce, which is defined as "production, distribution, marketing, sale or delivery of goods and services by electronic means"[15]. These negotiations are quite far reaching as in addition to online shopping, they encompass free flow of data, localisation requirements, technology transfer, non-discrimination and privacy rights. Digital trade is also high on the OECD agenda, with a number of policy analysis being released by the Committee on Trade. These discussions perfectly illustrate the concerns that arise from a liberalising trade and competition agenda.

30. Market power is very pronounced in the digital economy where business models thrive on network effects and data capture[16]. Online platforms in particular enjoy bigger scale returns than ordinary businesses: the bigger the network and data volumes, the more consumers and suppliers will be willing to access the platform. Furthermore, smaller digital companies tend to be squeezed out partly due to an aggressive mergers and acquisitions strategy by larger rivals, partly because of their difficulty to find sufficient financing for research and development.

31. Such market power is giving rise to a number of concerns. From a public policy point of view, concentration of data and lack of control over it is problematic. If transparency and privacy standards are set by business groups, citizens and workers are in a weaker bargaining position and lack ownership. Economically, digital companies may act as gatekeepers on the Internet, which can be problematic for highly dependent buyers and sellers. Rent-seeking behaviours will in the longer run affect innovation and productivity. In terms of labour market effects, labour market monopsonies are particularly strong and working conditions deplorable. The dominant position in the primary market has also trickle-down effects on the secondary market. Online e-commerce platforms with quasi-monopoly status enjoy an equally dominant position in logistics and transport sectors, entailing unbalanced labour relations on both markets.

32. Unchecked liberalisation will most likely strengthen the market power of already dominant firms and exacerbate further existing imbalances. In this context, it is vital that competition objectives and design are carefully redesigned in order to adapt to new economic realities. The capacity of jurisdictions to strongly regulate for public interest must be encouraged. Digital industrial policies would also prove crucial to foster healthier competitive environment.

REFERENCES

[1] TUAC (2019), « Proposals to enhance protection against labour market monopsonies”, https://tuac.org/news/tuac-proposals-to-enhance-protection-against-rising-corporate-market-power/

[2] OECD (23.10.2019), “FDI Qualities Indicators; measuring the sustainable development impacts of investment”

[3] Myant (2017), “The impact of trade and investment agreements on decent work and sustainable development”, ETUI Brussels

[4] Laprévote (2019), “Competition policy within the context of free trade agreements”

[5] International Monetary Fund (April 2019), “ The Rise of Corporate Market Power and Its Macroeconomic Effects “ in “World Economic Outlook”

[6] Bajgar, M., et al. (2019), "Industry Concentration in Europe and North America", OECD Productivity Working Papers, No. 18, OECD Publishing, Paris

[7] OECD Global forum on productivity (2019) “Annual report 2019”

[8] See above note i

[9] OECD (2019), "Micro-Evidence on Corporate Relationships in Global Value Chains: The Role of Trade, FDI and Strategic Partnerships", *OECD Trade Policy Papers*, No. 227, OECD Publishing, Paris,

[10]. OECD (2019), “Negotiating our way up: collective bargaining in a changing world of work”

[11] Conseil d’Analyse Economique (2019), « Concurrence et commerce : quelles politiques pour l’Europe ? »

[12] Marinescu, Ioana Elena and Posner, Eric A. (2018), “A Proposal to Enhance Antitrust Protection Against Labor Market Monopsony”

[13] Guillou, Nesta (2011), « Quelle politique industrielle dans la mondialisation ? », OFCE 2011, pp1-11

[14] Aghion, Cai, Dewatripont, Du, Harrison, Legros (2015), "Industrial Policy and Competition", *American Economic Journal: Macroeconomics, 7 (4): 1-32.*

[15]

[16]OECD (July 2018), Maintaining competitive conditions in the era of digitalisation