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from the European Union****- Session II -****5 December 2019**

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Competition Provisions in Trade Agreements

- Contribution from the European Union* -

1. Introduction and scope

1. The EU has various trade agreements in place, ranging from trade agreements that mainly aim at removing or limiting tariffs for goods (such as the EU-Japan Economic Partnership Agreement), over Customs Union Agreements (such as the Association Agreement between the EU and Turkey) to agreements that provide wide access to the European Single market (such as the Agreement on the European Economic Area). In the context of enlargement, trade agreements named Stabilisation and Association Agreements constitute the legal instrument for alignment to the EU acquis and progressive integration into the EU market.¹ The EU has also concluded trade agreements called Association Agreements within the framework of the European Neighbourhood Policy (ENP), under which the EU works with its Southern and Eastern Neighbours.²

2. The EU approach on competition provisions in trade agreements is not a “one-size fits all approach”. The approach chosen depends on elements such as the overall aim of the agreement, taking into account the economic interconnectedness between the EU and the other Party.

3. Against this background, this EU contribution provides an overview of the objectives and practice of competition provisions in EU trade agreements (overview provided in the table in the annex), focussing on provisions relating to anticompetitive conduct and merger control, subsidies and state aid, as well as public enterprises and private enterprises entrusted with special or exclusive rights.

4. Cooperation agreements dedicated to competition matters do not fall in the scope of this paper. However, the paper touches upon competition related cooperation provisions to the extent that they are figuring in EU trade agreements.

2. Anticompetitive conduct and merger control

5. The overarching objective of the provisions on anticompetitive conduct and merger control is to avoid that the positive effects of trade and investment liberalisation are undermined by the lack of rules on competition.

6. To that end, the EU aims to include rules on the following elements in its trade agreements: competition law, competition authority, procedural fairness and cooperation between competition authorities.

* This contribution was prepared by the European Commission/DG COMP.

¹ See also https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/saa_en.

² See also https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp_en.

7. As regards **competition law**, some EU trade agreements oblige the Parties to establish or maintain a competition law, which effectively addresses the competition distortions as set out in the agreement (see e.g. Japan, Free Trade Agreement between the EU and Vietnam, Free Trade Agreement between the EU and Singapore, Economic Partnership Agreement between the EU and Cariforum States). Other EU trade agreements draw up common rules for the Parties (such as the Agreement on the European Economic Area, which is based on common rules and equal conditions of competition). Yet other EU trade agreements oblige the other Party to approximate its law to the EU rules on anticompetitive conduct and merger control. The latter approach is mainly taken in the enlargement context (see e.g. the Stabilisation and Association Agreements concluded with the Western Balkan countries), and with some countries neighbouring the EU (see e.g. Association Agreement between the EU and Ukraine, Association Agreement between the EU and Morocco, Association Agreement between the EU and Tunisia).

8. As regards the **competition authority**, the EU's ambition is to get the Parties to have an operationally independent authority, equipped with powers to enforce effectively the competition law. Nearly all EU trade agreements include such a provision.

9. As regards the principle of **procedural fairness**, many of the EU trade agreements require the Parties to apply competition rules in a transparent manner, respecting the principles of procedural fairness.

10. The EU also aims to include the basic principles of **cooperation** between competition authorities in EU trade agreements, while more detailed rules as regards cooperation are laid down in separate agreements on cooperation (see e.g. Japan: the EU-Japan Economic Partnership Agreement lays down basic principles; more detailed rules on cooperation are laid down in a separate agreement between the EU and Japan concerning cooperation on anti-competitive activities from 2003³).

11. Finally, the EU generally excludes the provisions on anticompetitive conduct and merger control from **dispute settlement**, since the EU does not consider dispute settlement to be an appropriate mechanism to deal with competition cases.

3. Subsidies and State aid control

12. The overarching objective of the provisions on subsidies and State aid control is to improve the level playing field through limiting negative effects of subsidies on trade and investment. Broadly speaking, the EU applies two different approaches to reach this objective:

3.1. WTO+ approach

13. The idea of WTO+ is to have rules on subsidies that go beyond the WTO subsidy rules, the Agreement on subsidies and countervailing measures (SCM Agreement), in particular when concluding bilateral trade agreements with another WTO member. The EU aims to lay down rules that encourage the Parties to be transparent on subsidies, to allow for bilateral consultations, and to prohibit the most harmful type of subsidies.

³ <https://ec.europa.eu/competition/international/legislation/japan.pdf>.

14. As regards **transparency**, the aim is to enhance transparency for subsidies to both goods and services, either through providing information on subsidies directly to the other Party, or through publication of such information on a website (see e.g. Singapore).

15. The EU also aims to allow the Parties to **consult each other** if a subsidy risks having a negative effect on trade between the Parties. When asked about such negative effects, the subsidising Party has to provide information on the subsidy. On this basis, the Parties try to find a mutually satisfactory resolution. Many of the EU trade agreements include such a consultation clause, although in slight variations (in Japan the other Party has to “accord sympathetic” consideration to the concerns of the requesting Party; Vietnam and the Comprehensive Economic and Trade Agreement between the EU and Canada include a “best endeavours” clause to remove the negative effects of the subsidy in question).

16. Furthermore, the EU aims to **prohibit the most harmful types of subsidies**, namely subsidies to ailing companies without restructuring plan and unlimited guarantees (see e.g. Singapore and Vietnam).

17. Finally, the EU aims to subject these provisions on subsidies to **dispute settlement**.

3.2. Convergence of rules

18. In some circumstances, the EU’s ambition is higher than WTO+, namely to have rules similar to the EU rules on State aid control, including effective enforcement through an operationally independent authority, and highlighting transparency on State aid. This approach has been taken mainly in the enlargement context, and more generally with countries with a high level of economic interconnectedness.

19. As regards **State aid rules**, the EU trade agreements aiming at convergence include a substantive provision largely the same as the respective provisions in the Treaty on the Functioning of the European Union. Those provisions either have to be applied in a uniform manner by the Parties, which implies that the respective State aid authority also applies the EU acquis (see the Agreement on the European Economic Area, which applies the principle of homogeneity). Other EU trade agreements contain an interpretation provision requiring to apply the EU State aid acquis (e.g. Morocco, Tunisia, Stabilisation and Association Agreement between the EU and Montenegro), and also the jurisprudence of the European Court of Justice (e.g. Ukraine).

20. When it comes to the enforcement **authority**, most of the EU trade agreements aiming at convergence require an independent authority with the powers necessary for enforcing State aid rules. This power must include the power to order granting authorities to recover unlawful State aid from the beneficiary (e.g. Ukraine, Montenegro).

21. **Transparency** rules are phrased along the lines of the transparency rules for State aid granted in the EU (e.g. Ukraine) and may also include specific reporting obligations (e.g. Montenegro). These can be met either through notification or through publication of the relevant information on a website, so that the other Party can access it there.

22. Under most of the EU trade agreements, a breach of the State aid obligations can be brought to **dispute settlement**. If an arbitration panel is called to interpret EU law to solve the dispute, the arbitration panel has to refer the question to the European Court of Justice, so that the exclusive right of the Court of Justice to interpret questions of EU law is safeguarded (e.g. Ukraine). Other agreements allow for dispute settlement, but exclude questions of State aid from the possibility of arbitration (e.g. Montenegro).

4. Public enterprises, enterprises entrusted with special or exclusive rights

23. The overarching objective of the provisions on public enterprises and enterprises entrusted with special or exclusive rights is to enhance the level playing field between private and public enterprises, including the promotion of competitive neutrality between these types of enterprises.

24. To that end, the EU aims to include a provision - similar to EU competition and State aid rules - that clarifies that public enterprises and private enterprises entrusted with special or exclusive rights are subject to competition law alike and that subsidies or State aid provisions apply **to all enterprises** (see e.g. Japan, Ukraine). The EU also aims to include provisions that clarify that rules on anticompetitive conducts and merger control, as well as subsidies and State aid, must not hamper the performance of **services of general economic interest** (see e.g. Montenegro, Japan, Ukraine).

25. Further, the EU aims to establish rules that require public enterprises and private enterprises entrusted with special or exclusive rights to act according to **commercial considerations** and to ensure **non-discriminatory treatment** when they engage in commercial activities. This means that the decisions of public enterprises and private enterprises entrusted with special or exclusive rights must be commercially motivated, and that enterprises entrusted with special or exclusive rights must not discriminate towards the other Party's goods, services and enterprises when buying or selling.

Annex

EU trade agreements with competition provisions	
ACP Countries (African, Caribbean, Pacific)	ACP-EU Partnership Agreement (Cotonou agreement) (2000)
Albania	Stabilisation and Association Agreement between the EU and Albania (2009)
Algeria	Association Agreement between the EU and Algeria (2005)
Armenia	Partnership and Cooperation Agreement between the EU and Armenia (2018)
Azerbaijan	Partnership and Cooperation Agreement between the EU and Azerbaijan (1999)
Bosnia and Herzegovina	Stabilisation and Association Agreement between the EU and Bosnia and Herzegovina (2015)
Canada	Comprehensive Economic and Trade Agreement between the EU and Canada (CETA) (2017)
Caribbean Community	Economic Partnership Agreement between the EU and Cariforum States (2008)
Central American Economic Integration (SIECA)	Association Agreement between the EU and Central America countries (2012)
Chile	Association Agreement between the EU and Chile (2002)
Colombia, Peru (Andean Community)	Free Trade Agreement between the EU and Colombia and Peru (2013), and Ecuador (2017)
Egypt	Association Agreement between the EU and Egypt (2004)
Faroe Islands	Agreement between the EU and the Government of Denmark and the Home Government of the Faroe Islands (1996)
Georgia	Association Agreement between the European Union and Georgia (2016)
Iceland, Liechtenstein, Norway	EEA Agreement (1994)
Israel	Association Agreement between the EU and Israel (2005)
Japan	EU-Japan Economic Partnership Agreement (2019)
Jordan	Association Agreement between the EU and Jordan (2002)
Kazakhstan	Enhanced Partnership and Cooperation Agreement between the EU and Kazakhstan (2016)
Republic of Korea	Free Trade Agreement between the EU and South Korea (2010)
Kosovo	Stabilisation and Association Agreement between the EU and Kosovo (2016)
Lebanon	Association Agreement between the EU and Lebanon (2006)
Mexico	Economic Partnership, Political Coordination and Cooperation Agreement between the EU and Mexico (2000)
Moldova	Association Agreement between the European Union and the Republic of Moldova (2014)
Montenegro	Stabilisation and Association Agreement between the EU and Montenegro (2010)
Morocco	Association Agreement between the EU and Morocco (2000)
North Macedonia	Stabilisation and Association Agreement between the EU and North Macedonia (2004)
Palestine	Association Agreement between the EU and Palestine Liberation Organisation (PLO) (1997)
Russian Federation	Partnership and Cooperation Agreement between the EU and the Russian Federation (1997)
Serbia	Stabilisation and Association Agreement between the EU and Serbia (2013)
Singapore	Free Trade Agreement between the EU and Singapore (signed in 2019)
South Africa	Agreement on Trade, Development and Cooperation between the EU and South Africa (1999)
Switzerland	Agreement between the European Economic Community and the Swiss Confederation (1972)
Tunisia	Association Agreement between the EU and Tunisia (1998)
Turkey	Association Agreement the EU and Turkey – Customs Union; Rules on competition laid down in a decision of the EC-Turkey Association Council from 1995(1996)
Ukraine	Association Agreement between the EU and Ukraine (2017)
Vietnam	Free Trade Agreement between the EU and Vietnam (signed in 2019)

Note: Years in brackets refer to the entry into force of the EU trade agreement, unless indicated otherwise.