

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Global Forum on Competition**

**COMPETITION PROVISIONS IN TRADE AGREEMENTS**

**-- Session II -- Call for country contributions**

This document is a call for country contributions for Session II of the Global Forum on Competition to be held on 5-6 December 2019. GFC participants are invited to submit their contributions by **18 September 2019** at the latest.

More documentation related to this discussion can be found at: [oe.cd/2Fp](http://oe.cd/2Fp).

**JT03450032**

**TO ALL GLOBAL FORUM PARTICIPANTS**

**RE: Roundtable on “Competition Provisions in Trade Agreements”**

**18th Global Forum on Competition (5 and 6 December 2019)**

Dear GFC participant,

In December 2019, the Global Forum on Competition will hold a session on “Competition provisions in trade agreements”. I am writing in order to provide you with some information on the topic and organisation of the session, and to invite you to submit a response to our call for contributions.

Trade agreements are agreements between two or more partners through which a World Trade Organization (WTO) member grants to another, or to others, more favourable conditions than the general conditions under WTO rules. As such, trade agreements derogate from the WTO’s principle of non-discrimination between trading partners and have to be notified to the WTO for transparency purposes.<sup>1</sup>

Almost 300 trade agreements have been notified to the WTO as of mid-2019.<sup>2</sup> Their significant increase over the last 30 years suggests a trend towards greater economic integration, both bilaterally and regionally, to increase trade and spur growth. Trade agreements can include commitments that go beyond those made under WTO rules and they contribute to greater co-operation on a number of policy issues, such as foreign investment, intellectual property rights and environmental legislation.

The vast majority of trade agreements also include a competition policy chapter, individual competition provisions or more general provisions on the importance of competition.<sup>3</sup> These competition provisions may have a variety of objectives. For instance, competition provisions in a number of trade agreements explicitly aim to ensure that the benefits of trade liberalisation (e.g. by avoiding that abuse of dominance results in limiting access to market by foreign suppliers) are not offset by anti-competitive business conduct. Other objectives include promoting non-discrimination in the enforcement of competition law, encouraging greater transparency and procedural fairness, and achieving economic objectives, such as improving an investment-friendly climate.

Competition provisions in trade agreements cover a range of issues, such as the introduction of a merger control regime or of procedural safeguards. Laprévotte et al. (2015) adopt a classification of competition provisions into the following types: (a) generic commitments to promote competition; (b) adopting and maintaining competition laws; (c) regulating monopolies, State-owned Enterprises (SOEs) and enterprises entrusted with special or exclusive rights (e.g. competitive neutrality); (d) regulating subsidies and State Aid;

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<sup>1</sup> Under the so-called Transparency Mechanism, trade agreements are submitted to the WTO before they are ratified, for consideration by WTO members, see more information on the process at [https://www.wto.org/english/tratop\\_e/region\\_e/trans\\_mecha\\_e.htm](https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm).

<sup>2</sup> See WTO definitions ([http://rtais.wto.org/UserGuide/User%20Guide\\_Eng.pdf](http://rtais.wto.org/UserGuide/User%20Guide_Eng.pdf)) and data (<https://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>).

<sup>3</sup> In total, 80% of the trade agreements reviewed in Anderson et al (2018).

(e) lay down competition-specific exemptions; (f) replacing traditional trade defences with competition law instruments; (g) competition enforcement principles; (h) co-operation and co-ordination on competition between the signatory jurisdictions; and (i) dispute settlement mechanisms for conflicts on competition between the signatory jurisdictions.

The GFC session will cover competition-specific chapters in trade agreements, competition provisions, sector-specific provisions and other relevant provisions, concerning state aid, subsidies and State-owned Enterprises (SOEs), in other chapters of the trade agreements. To avoid overlap with the 2018 GFC session on Regional Co-operation Agreements, this session will cover trade agreements between two or more parties, notified to the WTO, but will exclude those agreements that have led to the establishment of regional competition authorities, such as COMESA or CARICOM.

The objective of the session is to look at different types of competition provisions in trade agreements and their objectives, the impact they have in practice and their usefulness (e.g. whether they led to change in the jurisdiction), and the role of competition authorities in the drafting and negotiation of these provisions. The present call for contribution aims at collecting information on these topics to prepare a Secretariat's note and to structure the discussion during the session.

The documentation for the roundtable will consist of:

- (i) an update of the article by Lapr evote et al. (2015) in the bibliography, providing a detailed classification of competition-related issues in trade agreements and model approaches in dealing with competition-related issues; and
- (ii) a Secretariat note summarising the results of the responses on the impact and usefulness of competition provisions in trade agreements in practice, as well as the role of the authorities who responded.

*The OECD webpage on “[Competition provisions in trade agreements](http://www.oecd.org/competition/globalforum/competition-provisions-in-trade-agreements.htm)” (long URL: [www.oecd.org/competition/globalforum/competition-provisions-in-trade-agreements.htm](http://www.oecd.org/competition/globalforum/competition-provisions-in-trade-agreements.htm) and short URL: [oe.cd/2Fp](http://oe.cd/2Fp)) will be the primary vehicle for conveying documentation and related links on this subject. It will become available on the main roundtables page at [www.oecd.org/competition/roundtables](http://www.oecd.org/competition/roundtables). Unless explicitly requested not to do so, the Secretariat will reproduce all written contributions on the site.*

The quality and utility of this roundtable will greatly depend on the written responses submitted by delegations. In order to assist you with the preparation of your response, I refer you to the suggested bibliography at the end of this letter, in particular the classification of competition clauses in Lapr evote et al. (2015), and the questions in the Annex. For some delegations, the preparation of the responses may benefit from co-operation with other relevant authorities in your jurisdiction.

Written replies to this call for contributions are due **by 18 September 2019** to enable the Secretariat to prepare the summary of the responses in advance of the session.

All communications regarding documentation and logistics for this roundtable should be sent to Ang elique Servin ([Angelique.Servin@oecd.org](mailto:Angelique.Servin@oecd.org)). All substantive queries regarding this session should be sent to Federica Maiorano ([Federica.Maiorano@oecd.org](mailto:Federica.Maiorano@oecd.org)). Lynn Robertson ([Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)) is manager of the GFC and is available for any general questions or concerns.

## ANNEX I - Suggested questions for consideration in written contributions

If your jurisdiction is a signatory to many agreements, please feel free to concentrate on those you consider more relevant (e.g. in terms of impact, role of the authority, economic significance) and currently in force.

Participants are encouraged to raise any other relevant points in their submissions or during the discussion regarding the benefits and obstacles of competition provisions in trade agreements.

### Background

1. Approximately how many trade agreements with competition provisions have come into force between your jurisdiction and partner countries?
2. What are the objectives of the competition provisions in these agreements (e.g. promoting open markets, procedural safeguards)?
3. Did trade agreements in any way influence the establishment or improvement of the competition framework in your jurisdiction? If your jurisdiction has amended its competition legislation, how were competition provisions in trade agreements taken into account?
4. Have the competition provisions in the trade agreements led to modifications of existing legislation, the introduction of new legal texts, or changes in decision practice, guidelines or case law? Please indicate which type of competition provisions, with reference to the classification in Lapr evote et al. (2015) reproduced below, and provide examples.

### Impact of competition provisions

1. If there have been any of the above changes as a result of a trade agreement, please describe the main impact(s) (e.g. capacity building, co-operation, procedural standards, policy changes or enforcement action)?
2. With reference to the classification of competition clauses in question 4, which type of provisions have had the greatest impact in your jurisdiction, and why? Please describe and provide examples where possible.
3. Are competition policy provisions in your jurisdiction's trade agreements subject to dispute settlement? Has the dispute settlement clause in one of your trade agreements ever been invoked by one of the signatory jurisdictions for the competition policy provisions or involved competition matters? When dispute settlement mechanisms do not apply to competition matters, are there alternative mechanisms in place to settle issues that arise as a result of competition policy provisions?
4. Are you aware of any interpretation problems in implementing the competition provisions into national legislation? Please provide examples if applicable and describe how the ambiguities in the trade agreement requirements were addressed.

5. Have different trade agreements resulted in inconsistent clauses on competition matters, i.e. between the different trade agreements or with relevant national legislation/regulation/guidelines? If so, how has your jurisdiction addressed this inconsistency?
6. Has the country set up a mechanism to monitor the effect of the trade agreement? If so, what was your experience? Did you do an ex-post evaluation of the agreement? If so, how did competition feature?
7. Are there any competition provisions you consider would have been valuable, but were not included in any of the trade agreements to which your jurisdiction is a party to? Please describe which type of provisions and the impact they could have.

### **Role of the competition authority**

1. Is the competition authority in your jurisdiction involved in the negotiation of trade agreements? Please describe your experience, the benefits from your involvement in the process and any challenges in the current set-up.
2. If not involved directly in the negotiation, do you engage in discussions with the negotiators? Does your authority have the power to issue an opinion on draft legislation implementing competition clauses, on its own initiative? Please describe your experience and any challenges in the current set-up.
3. Are there any discussions about changing the role of the competition authority in the development and negotiation of trade agreements?

## ANNEX II - Classification of competition provisions in trade agreements (Laprévôté et al., 2015)

<b>Classification of competition provisions in trade agreements</b>	
a.	Promote competition (e.g. in general terms, addressing anti-competitive practices in their territories)
b.	Adopt or maintain competition laws
c.	Regulate designated monopolies, State-Owned Enterprises (SOEs) and enterprises entrusted with special or exclusive rights (e.g. competitive neutrality)
d.	Regulate State Aid and subsidies
e.	Lay down competition-specific exemptions
f.	Abolish trade defences (e.g. anti-dumping, anti-subsidy)
g.	Set forth competition enforcement principles (e.g. procedural fairness, transparency, institutional design)
h.	Co-operation and co-ordination mechanisms between the signatory jurisdictions
i.	Set out principles on the settlement of competition-related disputes between the signatory jurisdictions

*Source:* Laprévôté et al., 2015.

## ANNEX III - Suggested Bibliography

- Anderson, R.D., Kovacic, W.E., Müller, A.C. and N. Sporysheva (2018), “Competition policy, trade and the global economy: existing WTO elements, commitments in regional trade agreements, current challenges and issues for reflection”, *World Trade Organization Staff Working Paper ERSD-2018-12*, [www.wto.org/english/res\\_e/reser\\_e/ersd201812\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201812_e.pdf).
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- Laprévôte, F.-C. (2015), “Antitrust in wonderland: Trade defense through the competition looking-glass”, *Concurrences N° 2-2015*, [www.concurrences.com/en/review/issues/no-2-2015/legal-practice/antitrust-in-wonderland-trade-defense-through-the-competition-looking-glass](http://www.concurrences.com/en/review/issues/no-2-2015/legal-practice/antitrust-in-wonderland-trade-defense-through-the-competition-looking-glass).
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- Sokol, D.D. (2008), “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *83 Chi.-Kent L. Rev.* 231, <https://scholarship.kentlaw.iit.edu/cklawreview/vol83/iss1/13>.
- Solano, O. and A. Sennekamp (2006), “Competition Provisions in Regional Trade Agreements”, OECD Trade Policy Papers, No. 31, OECD Publishing, Paris. <http://dx.doi.org/10.1787/344843480185>.