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COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION PROVISIONS IN TRADE AGREEMENTS – Contribution  
from Finland****- Session II -****5 December 2019**

This contribution is submitted by Finland 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](http://oe.cd/cpta).

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## Competition Provisions in Trade Agreements

### - Contribution from Finland –

The views expressed in this contribution should be balanced against the fact that the European Union has exclusive competence to negotiate trade agreements on behalf of the EU member states, like Finland. For this reason, many of the views in this contribution are intended to stimulate the discussion on the relationship between trade policy and competition policy and not necessarily to take a stand on the existing trade agreements as such.

### 1. Background

#### 1.1. Approximately how many trade agreements with competition provisions have come into force between your jurisdiction and partner countries?

1. Approximately 40 trade agreements that are fully or partly in force and notified to the WTO. Nearly all of them contain competition provisions. EU has a wide variety of different trade agreements: for example association agreements (EU-Western Balkans, Euro-Mediterranean), Agreement on European Economic Area, regional agreements (EU-SADC, EU-CARIFORUM), customs unions (EU-Turkey) and free trade agreements (EU-Japan, EU-Canada), of which some are only partly in force. In some agreements (EU-SADC, EU-Mexico) competition provisions are left to be agreed later.

#### 1.2. What are the objectives of the competition provisions in these agreements (e.g. promoting open markets, procedural safeguards)?

2. There is some variety in the EU's trade agreements, but generally the objectives are very similar. The variety comes more from the commitments that the other party is willing to make. Analysis using the provision taxonomy by Lapr v te:

- *Promoting competition:* Many, but not all, trade agreements have clauses that set out the general competition principles. Usually parties recognise the importance of fair and free competition and acknowledge that anticompetitive practices can distort the proper functioning of markets.
- *Adopt or maintain competition laws:* There is a similar article in every trade agreement that has competition provisions. It prohibits anti-competitive agreements and abuse of market powers. In some agreements, anti-competitive mergers are also prohibited.
- *Regulate designated monopolies, SOEs, enterprises entrusted with special or inclusive rights:* All agreements that have provisions on competition have also articles regarding these. Provisions are very similar. Usually adopting or maintaining measures that disturb trade between parties are prohibited. In the EU-Western Balkan agreements, the EU legislation sets out principles.

- *Regulate state aid/subsidies*: The majority of the agreements have provisions on subsidies. Usually subsidies are prohibited, in so far as they may affect trade between parties. Sometimes there are more exemptions to the other party (see section e. below).
- Usually there are also provisions on exchange of information regarding subsidies (see section h. below).
- *Lay down competition-specific exemptions*: When subsidies are regulated, agriculture and fishery are covered by the transparency provisions. In some agreement with developing countries, the other party gets temporary exemptions, usually regarding steel. In the EU-South Korea agreement, steel is partly exempted, and in the EU-Japan agreement there are some other exemptions, such as aid in economic emergency.
- *Abolish trade defences*: Almost every agreement of the EU acknowledges that the agreement does not prohibit antidumping or countervailing measures that are allowed by the WTO rules.
- *Set forth competition enforcement principles*: The majority of the agreements include enforcement principles, usually requiring both parties to have operationally independent authority to enforce competition laws. In the EU-Moldova agreement, authority is also required to have “adequate human and financial resources”. In the EU-Euro-Mediterranean and the EU-North-Macedonia agreement, the Association Council will decide on the implementation later.
- *Co-operation and co-ordination mechanisms between signatory jurisdictions*: The majority of the agreements have mechanisms regarding co-operation and co-ordination. Usually it covers exchange of information, especially regarding subsidies. There are also other forms of co-operation, such as co-ordination in enforcement activities.
- *Set out principles on the settlement of competition-related disputes between signatory jurisdictions*: Competition disputes are always left out of ad hoc dispute settlement mechanisms created in some agreements. Usually agreements have a clause that allows parties to “take appropriate measures” after consulting the other party or the Association Council.

### **1.3. 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?**

3. In principle, trade agreements can improve the ‘competition framework’ if, for instance, trade agreements facilitate that new market operators may enter the national markets and start competing there. New entry will normally have a positive impact on ‘competition framework’ in the country.

4. As for Finland, during the recent decades, trade agreements have had no major impact on the establishment or development of the national competition laws. Whenever there has been an amendment of the competition law in Finland, the reasons have related purely to the needs of changing national or EU competition policy.

5. Currently, given that Finland is a member of the European Union, the main articles of the Finnish national competition law are almost identical to the EU competition law (table below). The main articles of the EU competition law have been unchanged since they were established in the Treaty of Rome in 1957.<sup>1</sup>

**Table 1.**

EU Article 101.1	Finnish Competition Act, Article 5
<p>1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:</p> <p>(a) directly or indirectly fix purchase or selling prices or any other trading conditions;</p> <p>(b) limit or control production, markets, technical development, or investment;</p> <p>(c) share markets or sources of supply;</p> <p>(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;</p> <p>(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.</p> <p>2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.</p>	<p>(1) All agreements between undertakings, decisions by associations of undertakings, and concerted practices by undertakings which have as their object the significant prevention, restriction or distortion of competition or which result in a significant prevention, restriction or distortion of competition shall be prohibited.</p> <p>(2) In particular, agreements, decisions, or practices which:</p> <p>(a) directly or indirectly fix purchase or selling prices or any other trading conditions;</p> <p>(b) limit or control production, markets, technical development, or investment;</p> <p>(c) share markets or sources of supply;</p> <p>(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or</p> <p>(e) make the conclusion of a contract subject to acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such a contract shall be prohibited.</p>
<p><b>EU Article 101.3</b></p> <p>The provisions of paragraph 1 may, however, be declared inapplicable in the case of:</p> <ul style="list-style-type: none"> <li>- any agreement or category of agreements between undertakings,</li> <li>- any decision or category of decisions by associations of undertakings,</li> <li>- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:</li> </ul> <p>(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;</p> <p>(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.</p>	<p><b>Finnish Competition Act, Article 6</b></p> <p>The prohibition of Section 5 does not, however, apply to any agreement between undertakings, any decision by associations of undertakings, or any concerted practice by undertakings, or any category of agreements, decisions or concerted practices, which:</p> <ul style="list-style-type: none"> <li>- contributes to improving the production or distribution of goods or to promoting technical or economic progress;</li> <li>- allows consumers a fair share of the resulting benefit;</li> <li>- does not impose on the undertakings concerned restraints which are not indispensable to the attainment of these objectives; and</li> <li>- does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.</li> </ul>

<sup>1</sup> For these main articles, see <https://ec.europa.eu/competition/antitrust/legislation/articles.html>.

EU Article 102	Finnish Competition Act, Article 7
<p>Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.</p> <p>Such abuse may, in particular, consist in:</p> <p>(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;</p> <p>(b) limiting production, markets or technical development to the prejudice of consumers;</p> <p>(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;</p> <p>(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.</p>	<p>Any abuse by one or more undertakings or association of undertakings of a dominant position shall be prohibited. Abuse may, in particular, consist in:</p> <p>(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;</p> <p>(b) limiting production, markets or technical development to the prejudice of consumers;</p> <p>(c) applying dissimilar conditions to equivalent transactions with trading partners, thereby placing them at a competitive disadvantage;</p> <p>(d) making the conclusion of a contract subject to acceptance by the other contract party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such a contract.</p>

*Note: The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:(a) directly or indirectly fix purchase or selling prices or any other trading conditions;(b) limit or control production, markets, technical development, or investment;(c) share markets or sources of supply;(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.*

**1.4. 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 votte et al. (2015) reproduced below and provide examples.**

6. In general, no. (see above Q3).

7. Taking Lapr votte's list as a benchmark, in terms of enterprises entrusted with special or exclusive rights and in the area of regulating subsidies and state aid, the European Union has exclusive competence in all enforcement actions based on Articles 106 (special or exclusive rights) and 107-109 (state aid) of the EU Treaty. We are not aware of any practical antitrust or merger cases where co-operation and co-ordination in competition matters between Finland and another jurisdiction was based on a trade agreement. In all cases we are aware of, antitrust and merger cooperation has been based on other international agreements (e.g. relating to EU, OECD or Nordic agreements) and taken place outside the trade agreements.

## 2. Impact of competition provisions

**2.1. 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)?**

8. N/A (see above).

**2.2. 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.**

9. N/A (see above).

**2.3. 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?**

10. Competition disputes are always left out of ad hoc dispute settlement mechanisms created in some agreements. Usually agreements have a clause that allows parties to “take appropriate measures” after consulting the other party or the Association Council. None of the agreements have more nuanced articles about this. As far as we know, these consultations have not been used previously, since usually the dispute settlement mechanism of the WTO has been invoked.

**2.4. 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.**

11. No.

**2.5. 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?**

12. Provisions in the EU’s trade agreements seem to be in line with each other and with the EU legislation.

**2.6. 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?**

13. Finland monitors the effects of trade agreements on national level, mostly in cooperation with the European Commission. Evaluation is a key component in the implementation of EU’s FTAs. The Commission conducts analysis on various aspects of EU’s trade policy. Evaluations are made before, during, and after the negotiations.

14. The Commission has completed ex-post evaluations on trade agreements with EU-Mexico and EU-South Korea, and is currently evaluating the EU-Cariforum and six Euro-Mediterranean agreements. The evaluation of the EU-Mexico agreement does not have findings on competition. In the evaluation on the EU-South Korea agreement, some European companies reported problems concerning competition.

**2.7. 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.**

15. The following observations are not necessarily related to any trade agreements to which Finland is directly or indirectly a party to, rather the views expressed below are more or less general remarks by nature. In addition, there is a need to acknowledge that the European Union has exclusive competence to negotiate trade agreements on behalf of the EU member states, like Finland.

**2.7.1. Effectiveness of enforcement**

16. In principle, there is always a potential risk that unsupervised competition restrictions, not only being harmful for the market economy itself, may also eliminate or diminish the ‘free-market’ objectives of trade agreements. Due to this, it would be important to ensure that competition laws are enforced effectively. On some occasions, the competition provisions in trade agreements may perhaps lack certain procedural characterizations of how and through what kind of enforcement process the national competition laws are practically put in effect in the signatory jurisdictions. Hence, the competition laws may be well in place nominally but - for instance due to ineffective enforcement powers of competition authorities or national courts - the everyday enforcement of competition law may turn out to be weak and ineffectual. This means that competition rules in a signatory jurisdiction are in force ‘de jure’ but not ‘de facto’ and at least potentially this may put the opportunities foreseen in the trade agreement at risk.

**2.7.2. Governmental restraints**

17. Frequently, competition provisions focus on competition restraints like cartels, other harmful horizontal arrangements, abuse of dominance position, vertical restraints (affecting distribution of goods and services) and merger control. However, governments’ own actions may also distort competition in markets and eliminate a level playing field between competitors. If these potential ‘government-related’ distortions are not taken into consideration, competition issues in trade agreements may not have been tackled as effectively as needed. Among others, it would be important to be aware whether some sectors, industries and entities (like state-owned enterprises) have been left out from the competition law of the signatory jurisdiction (party to the same trade agreement).

**2.7.3. Fair procedure**

18. There is currently an intense discussion among the international antitrust agencies and stakeholders whether competition laws of a jurisdiction are enforced respecting ‘fair procedures’, whether enforcement procedures are transparently available and whether they are clearly explained in advance. Based on this, there is a potential issue whether procedural aspects of competition rules should play more important role also in relation to competition articles of trade agreements. As an example, the signatory jurisdictions in trade agreements may have an interest to ensure that competition law applies equally to all competing enterprises, and for instance irrespective of their ownership (e.g. private or state-owned) or irrespective of their nationality (national or foreign) so that competition law enforcement would not discriminate between competing firms.

### 3. Role of the competition authority

#### **3.1. 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.**

19. In some cases, the competition authority may have had a consultative role in these proceedings, although never being involved directly in the negotiation process of trade agreements itself.

#### **3.2. 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.**

20. Yes, along with its consultative role the Finnish competition authority is frequently given an opportunity to issue an opinion on the draft competition clauses in new trade agreements. This has been a very well-functioning and appropriate procedure.

#### **3.3. Are there any discussions about changing the role of the competition authority in the development and negotiation of trade agreements?**

21. No.