

Unclassified**English - Or. English**

22 November 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION PROVISIONS IN TRADE AGREEMENTS – Contribution
from BIAC****- Session II -****5 December 2019**

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

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Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

JT03455142

Competition Provisions in Trade Agreements

- Contribution from BIAC -

1. Introduction

1. *Business at OECD* and its members, including the leading business federations in all 36 OECD member countries, are committed to a global rules-based trade and investment system that opens international markets and removes trade and investment barriers and practices that impede open competition around the world. We support policies that promote global trade and investment and establish a level playing field for business, while ensuring that open markets deliver the widest benefit to people and communities in OECD countries and beyond.

2. *Business at OECD* would emphasize several key points. First, competition provisions in trade agreements can provide an important tool to ensure the recognition and endorsement of sound competition principles, which we strongly endorse. Second, these principles are not self-enforcing. Thus, trade agreements containing competition provisions need a more structured and effective means of addressing situations where one party is not fulfilling its treaty obligations. In particular, private parties who are affected by a states' non-fulfilment should have a means of redress, even if through authority-to-authority mechanisms. In particular, OECD should review and advance the role that international comity principles can play to addressing this gap. This includes exploring the notion of a jurisdiction's "important interests" and developing transparent notification principles. Third, competition provisions in trade agreements promote procedural and substantive convergence, which not only fosters a global competition culture and reduces potential conflicts but also reduces the likelihood of the politicisation of competition law. For this reason, the OECD should continue to advocate for established competition standards such as substantial lessening of competition or consumer welfare standards.

3. Finally, competition provisions in trade agreements form only part of the constellation of relationships and should not be expected to fulfil all objectives aimed at convergence in competition law. Memoranda of understanding, comity agreements, cooperation agreements, informal cooperation, waivers and, of course, multilateral initiatives through the OECD or International Competition Network all play an important role. The role of competition provisions in trade agreements are only one element in the international competition firmament, and we will focus on what these can be expected to achieve. In particular, we focus on: dispute resolution, comity principles and the need to converge on substantive standards.

4. We recognize that competition provisions in trade agreements essentially aim at ensuring greater convergence in competition law proceedings in order to reduce obstacles to trade or protectionism and, notably removing conflicts that arise between different approaches to market regulation. Competition provisions may seek to achieve such underlying goals in a number of ways, whether through capacity building or seeking convergence on rules and/or procedures. As the *Laprèvote et al.* research shows, these vary

in scope and depth.¹ A benefit of having competition provisions in trade agreements is, therefore, that they promote the importance and benefits of open competition policy beyond the competition community to a broader governmental and non-governmental audience.

5. Moreover, competition provisions in trade agreements help build a common understanding of the benefits of market-based competition and the importance of maintaining competitive markets that deliver long-run consumer welfare benefits. They also foster convergence on substantive principles and procedural norms that increase legal certainty and reduce costs for economic actors who are active across jurisdictions. Convergence reduces the risk of conflicts through divergent approaches, extraterritorial reach or other disputes that ultimately undermines the competition system. For the business community, this tends to be the most tangible benefit for competition provisions in trade agreements.

6. There has been a marked increase in the inclusion of competition law related provisions in trade agreements, no doubt due in large part to the increasingly prominent role competition law has taken in the relevant domestic markets. There are, however, competition provisions in trade agreements that do raise some challenges. These include the lack of clear and effective dispute resolution mechanisms, principles of comity and the different standards and objectives of competition policy in the various signatory jurisdictions (in particular developing versus developed countries).

2. Dispute Resolution Involving Business Actors

7. Trade agreements engage relations between states and where disputes arise these tend to be governed by state-to-state dispute resolution mechanisms provided for under such agreements. Competition provisions within these agreements tend to be excluded from the scope of dispute settlement mechanisms.² This situation creates a lacuna where one party to the trade agreement does not fulfil its obligations under the competition chapter. The situation is compounded where companies under competition investigation allege that they are suffering from a breach of the provisions of the competition chapter as affected companies have no direct recourse to the relevant elements in the trade agreement that they should be benefitting from. This exclusion means that the benefits of competition provisions in trade agreements—the spread of competition regimes around the world—can be frustrated.

8. It is not the position of *Business at OECD* that dispute resolution mechanisms in trade agreements merely be extended to competition provisions. The specificity of competition regulation would not be appropriate to most aspects of that model. However, it is also true that where a country fails to properly institute the competition provisions agreed to, to the detriment of particular sectors or companies, then effective mechanisms

¹ François-Charles Laprévotte, Sven Frisch & Burcu Can, *Competition Policy within the Context of Free Trade Agreements* (2015) E15 Initiative, available at <http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevotte-Frisch-Can-FINAL.pdf>.

² See, e.g., EU-Canada Comprehensive Economic and Trade Agreement, Ch. 17 (CETA), available at <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>. Chapter 17 governs Competition Policy. Article 17(2)(4) notes that the measures to proscribe anti-competitive business conduct will be consistent with the principles of transparency, non-discrimination, and procedural fairness. Article 17(4) notes, however, that “Nothing in this Chapter shall be subject to any form of dispute settlement pursuant to this Agreement.”

must be available if the competition provisions are to have credibility. As discussed below, the increasing tension between competition policy and industrial policies also increases the need to ensure that countries and their competition authorities abide by the obligations set out in competition provisions and that the parties affected by such breaches can seek effective resolution. This can be achieved by an effective redress mechanism.

9. These mechanisms could include the establishment of competition-specific and specialized dispute resolution panels for competition matters or other effective bilateral mechanism. And while cooperation mechanisms permit for consultation,³ there needs to be a means to correct and address breaches or flaws. However, given the specificities of competition enforcement and jurisdictional challenges, a pragmatic approach would also be to build on international comity principles.

3. Effective International Comity Principles

10. Comity principles—that require respect for another’s sovereign jurisdiction and restraint from extraterritorial effect—are well established in international law. These have been developed as a means of avoiding disputes, yet typically have not found their way into competition provisions in trade agreements. However, the application of comity principles to competition provisions—and notably in the dispute resolution context—provides interesting opportunities to limit potential conflict.⁴ As noted recently by U.S. Department of Justice Assistant Attorney General Makan Delrahim, “[C]omity is necessary if we do not want to create a race to the bottom where antitrust becomes a tool for industrial policy.”⁵ *Business at OECD* recommends that the OECD take the opportunity to endorse and advance the role that comity principles can play more broadly, notably given the challenges facing international competition enforcement.

11. In those dedicated competition agreements where comity principles are fleshed out, notably those entered into by the European Commission, authorities are allowed—and are sometimes required—to notify each other of investigations that might affect each other’s “important interests.” In general, the need for such notification has been reduced, given increased cooperation, coordination and investigative assistance during parallel investigations.⁶ However, there are many instances where there are no parallel investigations ongoing. Such notification ought to occur where the “home” jurisdiction of the companies in question does not outlaw particular practices (e.g. conditional rebates) that are subject to challenge in the investigating jurisdiction or, importantly, where a remedy in the investigating

³ It is true that agreements can contain “cooperation” mechanisms that are ostensibly as an alternative to dispute resolution. For example, the EU- South Korea agreement notes, at Article 11.7, that the parties can enter into specific and prompt consultations in order to address specific competition matters raised by one of the parties. *See* Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 2011 O.J. (L 127) 6, art. 11.7

⁴ *See* Valerie Demedts, *The Future of International Competition Law Enforcement* (Brill Nijhoff, 2018).

⁵ *See* Makan Delrahim, “With a Little Help from My Friends”: Using Principles of Comity to Protect International Antitrust Achievements, Remarks Before the 46th Annual Fordham Competition Law Institute Conference on International Antitrust Law and Policy 16 (Sept. 12, 2019), *available at* <https://www.justice.gov/opa/speech/file/1201656/download>.

⁶ *Id.* at 5.

jurisdiction may have extraterritorial impact.⁷ Given that the underlying objective of competition provisions in trade agreements is to avoid conflicts or divergence in the application of competition law, competition provisions should reflect common norms that secondary agreements or memoranda of understanding should flesh out.

12. It is also clear that such “important interests” go well beyond competition interests, as noted by the 2017 U.S. Department of Justice and Federal Trade Commission *Antitrust Guidelines for International Enforcement and Cooperation*.⁸ These interests would include policy interests (for example, the ability to regulate certain practices or sectors within the home jurisdiction). This is particularly important as potential conflict between competition enforcement and non-competition regulation or policy can potentially become a trade issue.⁹

13. A related concern to extraterritorial impact arises when authorities investigate deals or practices over which they have no apparent jurisdiction. In this situation, it is important to verify at the outset of a case that an authority has jurisdiction as a means of avoiding the expense and delay of a full competition assessment. To address this concern, transparency measures in a competition chapter should recommend that authorities can establish such jurisdiction to the home state, upon request.

14. Comity principles contain a number of areas that could be developed as a means to enhance the effectiveness of competition provisions in trade agreements. The first, as noted above, is the issue of “important interests.” The investigating authority has the obligation to notify when the important interests of the home state are affected. The investigating authority effectively needs to know what the important interests of the “home” state are. The OECD Competition Committee, which has been at the forefront of international cooperation in competition enforcement, could usefully discuss what the scope of “important interests” could be, notably in a competition context and how jurisdictions could ensure that these are known. It would also be important to understand how far these important interests might go beyond the classic competition context relating to the sovereign right of states to regulate their economy, for example in the field of intellectual property rights, and how these could be addressed.

15. The second issue is one of transparency. There has been little study of the practice of notification and what the effect of such notification may be. Does notification require the agencies to dialogue on the case in point? Are the companies concerned able to take part in such dialogue? What of the interests of third parties? Where the important interests go beyond mere competition regulation (e.g., where the sector concerned relates to assets of strategic importance or other regulated issues such as privacy), is the “home” authority not under an obligation to engage with their relevant ministries or agencies? Again, the OECD Competition Committee would be well placed to discuss the scope of such

⁷ *Id.* at 15 (“For instance, we have seen countries require global licensing of U.S. patents as a remedy. Such decisions have the real potential to decrease incentives to invest and to innovate. When a foreign enforcer imposes such a remedy globally, it takes away the Antitrust Division’s ability to reach a different conclusion and risks harming American consumers. It also takes away the ability of every other jurisdiction to reach a different conclusion.”).

⁸ U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for International Enforcement and Cooperation* (2017), available at <https://www.justice.gov/atr/internationalguidelines/download>.

⁹ John “Jay” A. Jurata, Jr. & Inessa Mirkin Owens, *A New Trade War: Applying Domestic Antitrust Laws to Foreign Patents*, 22 GEO. MASON L. REV. 1127 (2015).

mechanisms to ensure the effectiveness of the competition provisions in trade agreements and the functioning of the competition system.

16. Given the increase in competition jurisdictions, globalisation of business practices and sectors, the public international law principle of comity should be given greater standing and authority *vis-à-vis* competition authorities, particularly where competition provisions in trade agreements refer to such principles. The OECD Competition Committee has touched on these issues during its roundtable discussion in December 2017 debating the challenges related to the imposition of extraterritorial remedies in cross-border cases.¹⁰

4. Use of Trade Agreements for Common Competition Standards

17. Competition provisions in trade agreements will, at a high level, cover particular areas of firm conduct—such as collusive agreements, unilateral conduct and mergers. The aim is to foster, through enforcement and guidance, merits-based competition leading to long-run consumer welfare. It is recognised that jurisdictions may apply competition law in differing ways (even where legal standards appear similar on paper) depending on the nature of their particular legal system. The trend to date has been to promote effect-based competition principles, based on sound economic theories applicable to observable facts before them. However, as the 2019 Global Forum on Competition discussion on competition under fire shows, there is increasing pressure on the competition system, notably with the rise in economic patriotism, to use competition law to foster non-competition policy outcomes. This section focuses on the use of competition provisions in trade agreements to foster convergence on substantive principles and procedural norms.

18. The inclusion of due process requirements in competition chapters is not only essential in promoting procedural convergence, but transparent and meaningful due process mechanisms go a long way in ensuring the objectivity and quality of competition enforcement. This is a critical means of ensuring that non-competition considerations are kept out of competition assessments. Key procedural requirements include impartial, transparent, and predictable enforcement; meaningful engagement with parties and third parties; confidentiality protections; and other recommendations detailed in the International Competition Network's *Guiding Principles for Procedural Fairness in Competition Agency Enforcement*.¹¹ Another longstanding procedural standard for inclusion in competition chapters is the presumption that the party alleging the infringement should bear the burden of proof, which should be reversed only in exceptional cases, e.g., hardcore cartels. More recent trade agreements, such as the 2018 Agreement between the U.S., Mexico and Canada, do contain detailed procedural fairness provisions relating to competition law enforcement and can provide inspiration in this regard.¹²

¹⁰ See *Extraterritorial Reach of Competition Remedies*, OECD, available at <http://www.oecd.org/competition/extraterritorial-reach-of-competition-remedies.htm>.

¹¹ Int'l Competition Network, ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement (2018), available at <http://icn2018delhi.in/images/AEWG-Guiding-Principles-4PF.pdf>.

¹² See Agreement between the United States of America, the United Mexican States, and Canada, Ch. 21-Competition Policy, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/21_Competition_Policy.pdf. Chapter 21 seeks to recognise and safeguard procedural rights elements such as procedural transparency, timeliness, access to justice provisions, protection of confidentiality and privileged information, rights of defense (including knowing the specific

19. Along with procedural convergence, it is equally important to foster convergence on substantive principles to increase legal certainty and reduce the risk of conflicts across jurisdictions. The situation of South Africa is particularly instructive, given the close link between its competition laws and broader public interest objectives that may, of themselves, affect trade relations. For example, South Africa's Competition Amendment Act (2018)¹³ introduced two standalone prohibitions for buyer power and price discrimination which does away with traditional tests such as substantial lessening of competition or consumer welfare standards and considers only whether small or medium businesses or firms owned by historically disadvantaged persons will be impeded from participating in the market. Were such provisions to be aggressively applied, this could well raise issues under trade agreements. Furthermore, the Amendment Act provides for the establishment of a security committee tasked with assessing foreign mergers on the basis of national security interests (including broad factors such as the "economic and social stability of the [country]" as well as the "supply of critical goods or services to citizens, or the . . . government"¹⁴) that will create additional complexity notably to the resolution of competition-related trade disputes if such an assessment of foreign mergers ventures into the terrain of trade issues.¹⁵

20. Professor Roberts writes that competition policy—particularly in relation to developing markets—may be used to address different market outcomes.¹⁶ In this regard, Professor Roberts suggests that:

South Africa made clear choices to combine a law with broad objectives and public interest provisions in mergers, with relatively narrow provisions on anti-competitive conduct in line with Anglophone countries As the cases have demonstrated, this meant that the choices made in the provisions relating to anti-competitive conduct did not reflect the objectives in the Act which emphasized the ability to participate in the economy, including by small and medium enterprises and by historically disadvantaged persons, and the need to address the legacy of apartheid in terms of concentrated ownership and control. The objectives have found expression in mergers conditions, however.¹⁷

competition laws alleged to have been violated), access to information needed to prepare an adequate defense, the right to be heard and to cross-examine witnesses.

¹³ Competition Amendment Act 18 of 2018 (S. Afr.).

¹⁴ *Id.* § 18A(4)(d, h).

¹⁵ There are, of course, a number of examples around the world where there are mechanisms for political or socio-economic priorities to override competition law assessments. See, for example, recent cases in Germany and France where Ministers of Economy overruled decisions of the national competition authorities (in the cases [Milba/Zollern](#) and [Cofigeo/Agripole](#)) on national public interest grounds, setting aside the legal and economic analysis under the national merger control laws. While national security review mechanisms are increasingly available in many jurisdictions, they should not be used to advance socio-economic objectives under the pretence of "national security."

¹⁶ Simon Roberts, *Assessing the Record on Competition Enforcement Against Anti-Competitive Practices and Implications For Inclusive Growth* 32 (REDI3X3 Working Paper No. 27, 2017), available at <http://www.redi3x3.org/sites/default/files/Roberts%202017%20REDI3x3%20Working%20Paper%2027%20Competition%20policy%20and%20inclusive%20growth.pdf>.

¹⁷ *Id.* at 32-33.

21. The approach by Professor Roberts highlights the complexity of harmonising standards between different jurisdictions where the introduction of socio-economic objectives in competition policy, though laudable from a public interest perspective, may further complicate any attempts to harmonise competition law and policy. This, in turn, makes the objectives of achieving a shared standard of competition enforcement in trade agreements all the more challenging to implement.

22. In some jurisdictions, therefore, competition law and policy may be viewed as a means of advancing socio-economic and industrial policy objectives which may be incongruent with other jurisdictions and thereby inhibit the creation or application of new trade agreements. Given South Africa's significant regional influence, many African countries, as well as many significant members of the BRICS block of nations,¹⁸ may follow South Africa's precedent and policy approach.¹⁹ Importantly, South Africa is also party to a number of regional trade agreements (which have a strong African regional perspective) as well as with the European Union member states and its fellow BRICS members.²⁰

¹⁸ Brazil, Russia, India, China and South Africa.

¹⁹ See, for example, the South African Competition Commission's role and assistance in Nigeria's recent Competition Law Act. For a further discussion, see *Breaking News: Nigerian Competition Act Signed Into Law*, PRIMERIO (Feb. 7, 2019), available at <https://africanantitrust.com/2019/02/07/nigerian-competition-act-signed-into-law>. See also ELEANOR M. FOX & MOR BAKHOUM, MAKING MARKETS WORK FOR AFRICA (Oxford, 2019).

²⁰ A review of the trade agreements to which South Africa is a party shows that the concerns regarding the efficacy of the competition law provisions contained therein, as highlighted by Laprévotte. These agreements include:

[Southern African Customs Union \(SACU\)](#): The SACU agreement, which came into operation on July 15, 2004, created a "Common Customs Area" which contains only limited competition law provisions but has no reference, somewhat strikingly, to dispute resolution mechanisms for competition law matters. Parties to the agreement the Republic of Botswana, Kingdom of Lesotho, Republic of Namibia, Republic of South Africa and the Kingdom of Swaziland.

[European Free Trade Association–Southern African Customs Union \(EFTA-SACU\)](#): The EFTA-SACU free trade agreement, which was signed on June 26, 2006 and came into force on the May 1, 2008, contains a number of competition law provisions including principles on the settlement of competition-related disputes between signatory jurisdictions. The EFTA-SACU states the following in this regard under Article 15(2-3):

A Party which considers that the operation of this Agreement is adversely affected by a practice referred to in paragraph 1 may request the Party or Parties in whose territory such practice originates to co-operate with a view to putting an end to the practice concerned or its adverse effects. Co-operation shall include, to the extent permitted by domestic law, the exchange of information that is available to the Parties in relation to the matter in question.

In the event that co-operation between the Parties directly involved according to paragraph 2 does not lead to a solution, the affected Party may request consultations in the Joint Committee with a view to reaching a mutually satisfactory solution.

The EFTA parties include the Republic of Iceland, Principality of Liechtenstein, Kingdom of Norway, and the Swiss Confederation. The SACU parties include the Republic of Botswana, Kingdom of Lesotho, Republic of Namibia, Republic of South Africa and the Kingdom of Swaziland.

[European Union and Southern African Development Community \(EFTA-SADC\)](#): The EFTA-SADC agreement, signed on June 10, 2016, created an Economic Partnership between the EU and SADC. The agreement contains a number of the general competition law provisions similar to those identified by Laprévotte as being common in most trade agreements. The signatories to the EFTA-

23. However, as with many jurisdictions, there has been a significant increase in cooperation between domestic competition agencies and international competition agencies predominantly by way of memoranda of understanding (MoU) between the respective competition agencies.²¹ To date, we are not aware of any trade related disputes being resolved by the respective competition agencies as a result of any MoUs, despite certain of the MoUs expressly referring to trade disputes. Given the significant increase in the use of bilateral MoUs, we would recommend that MoUs expressly state that the respective agencies will apply international best practice (where determinable) in resolving cross-border conflicts in addition to reinforcing competition provisions in trade agreements.

5. Conclusion

24. The inclusion of competition provisions in trade agreements are of increasing importance in creating a common understanding of the role that competition law plays in global trade. This is a critical element in competition advocacy by agencies, who should be involved in the drafting of such provisions, with an eye toward the following important considerations. First, these provisions need to be made effective, either through a review mechanism or other dispute resolution system, particularly where a signatory is in breach of the terms of the competition provisions. Where companies are directly affected by the breach, the mechanism should provide for their involvement. Efforts to make competition provisions meaningful should look to comity principles, as described above. Otherwise these provisions are not meaningful in practice.

25. Second, parties should consider an express reference in trade agreements to the relevant standards which will underpin any competition law dispute resolution mechanism. Through the work of the OECD Competition Committee and the International Competition Network, broader common understanding is injected into these debates, helping to improve the functioning of competition regimes notably by fostering internationally recognised principles of procedural transparency and fairness that would ensure the objective application of competition law standard, eschew protectionism, and avoid confirmation bias. Indeed, the OECD Competition Committee's country reviews could also consider the

SADC agreement have also signed a "Declaration on Competition and Consumer Policies". The primary objective of the Declaration is to foster co-operation and the development of objective competition standards (in particular reference is made to the United Nations Principles on Competition). Although this is a positive development insofar as referencing a set of competition standards is concerned, the Declaration itself, however, does not create any substantive competition law obligations/standards which are binding on the signatories. Although there are dispute resolution mechanisms envisaged in terms of the EFTA-SADC agreement, the requisite Tribunal has not been established as of yet.

²¹ Memorandum of Understanding Between The Directorate-General Competition of the European Commission and the Competition Commission of South Africa (June 22, 2016), *available at* <http://www.compcom.co.za/wp-content/uploads/2016/05/MOU-between-DG-Comp-and-CCSA-22-June-2016.pdf>; Memorandum of Understanding Amongst Competition Authorities of the members States of the Southern African Development Community on Cooperation in the Field of Competition Policy, Law and Enforcement (May 26, 2016) *available at* http://www.nacc.com.na/cms_documents/cad_sadc_mou_26may16_gaborone.pdf; Memorandum of Understanding Between the Competition Authorities of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People's Republic of China and the Republic of South Africa on Cooperation in the Field of Competition Law and Policy (May 19, 2016), *available at* <http://www.compcom.co.za/wp-content/uploads/2016/05/MoU-BRICS.pdf>.

extent to which a particular country's competition jurisdiction is compliant with the competition provisions it has entered into, notably with other OECD members.

26. Finally, given the complexity of competition policy and nature of enforcement, competition provisions in trade agreements should be supplemented by flanking instruments such as MoUs that can get into greater detail of cooperation, capacity building and collaboration, as well as substantive principles. Reference to the principles outlined or endorsed by the International Competition Network or OECD could be expressly included in trade agreements (particularly in trade agreements between developing countries and developed economies).