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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Global Forum on Competition****COMPETITION PROVISIONS IN TRADE AGREEMENTS****Summaries of contributions****-- Session II --****5-6 December 2019**

This document reproduces summaries of contributions submitted for Session II at the 18th Global Forum on Competition 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***-- Summaries of contributions --****Abstract**

This document contains summaries of the various written contributions received for the discussion on "Competition provisions in trade agreements" held during the 18th meeting of the Global Forum on Competition in Paris, France (5-6 December 2019, Session II). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an \*.

## *Algeria\**

The review of the trade agreements signed by Algeria through the angle of competition provisions shows that only the association agreement with the European Union is of particular relevance for the subject.

It provides for the parties to deal with:

- Anti-competitive agreements (article 41)
- Abuse of dominant position (article 41)
- Commercial State monopolies (article 42)
- Exclusive rights awarded to State Owned Enterprises (SOEs) and special rights granted to certain enterprises (article 43)
- Mutual and gradual liberalisation of public procurement (article 46)

In addition, Annex IV of the agreement determines how the above-mentioned articles should be applied.

On the other hand, even if Algeria has not yet adhered to the WTO and retains its status of observer, the association agreement with the EU strongly builds on the WTO principles through the prohibition of quotas or the most-favoured national (MFN) treatment. Articles 22 and 23, concerning dumping practices and trade defences are treated in line with the WTO agreement. It is the case for the other trade agreement signed.

This consideration raises the question of Algeria's delay in adhering to this global institution, and also creates the paradox of a country that is fully integrated in the regional trade agreements even before joining the WTO, while it is customary for the opposite to take place.

It is also useful to note that the Preferential Trade Agreement between Algeria and Tunisia signed in 2008 includes competition provisions modelled on article 10:

- Agreements between companies capable to prevent, restrict or distort competition;
- Abuses of dominant position on the entire market or a part of it.

However, article 10 does not provide details on the way in which these provisions should be implemented. It is important to note that both countries have competition authorities.

Finally, the recent agreement on establishing the African free trade area (ZLECAF) to which Algeria has adhered shows the will to put in place a competition framework at intra-African level, as shown by the fact that a protocol of competition policy is to be adopted (see articles 6 and 7 of the agreement).

At the end of our written contribution, we have mentioned the importance of a transnational competition framework to be established within the WTO.

For the adoption of binding rules, the WTO is the most suitable framework because of its universal remit. It is an international organisation consisting of a multitude of precise agreements that are compulsory and that – thanks to the Memorandum of Understanding

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\* Translation of the French summary submitted by Algeria.

on dispute settlement – has a unique instrument in international public law susceptible to be mobilised to implement competition rules.

Finally, if multilateral competition rules are to be realised, developing countries should benefit, as stated by Professor Andreas Heinemann, “an explicit clarification in the WTO agreement, in the sense that the implementation of competition law does not prevent the industrial policy or the development policy of a country”.

## *Australia*

This paper discusses the interaction between free trade agreements (FTAs) and competition policy and enforcement from an Australian perspective. It addresses the sorts of issues that arise from the interaction between trade and competition policy and enforcement, including for a national competition authority like the Australian Competition and Consumer Commission (ACCC).

Competition policy and enforcement have had a significant positive effect on the impact of trade liberalisation. The close and complementary relationship between trade and competition policy is founded on the similarity of their objectives: both trade and competition policy aim to enhance welfare through the provision of a more efficient allocation of resources, whether it be by lowering governmental barriers to trade or through promoting competition.

Australia has a highly-developed competition law framework from both a policy and enforcement perspective. The competition chapters in Australian FTAs reflect Australia's commitment to the core elements that are required for a high-functioning competition law regime. This is evidenced across Australia's FTAs currently in force or concluded.

Australia's established competition law framework and ability to adhere to the principles in competition chapters ensures consistency between our FTAs and our competition policy and enforcement. Accordingly, with the exception of reforms to prevent misuse of market power across Australian and New Zealand markets, at least in recent years, there have been no changes to domestic competition laws arising out of FTAs to which Australia is a party.

The substantive differences that exist between our bilateral FTAs generally reflect the capacity of our counterpart to make the same level of commitment to a comprehensive competition framework as Australia at that time, so in some instances they are framed as commitments by our counterpart to establish core elements of a competition regime in the future.

Australia considers that in the context of interconnected, interdependent, global, digital markets, there are substantial benefits to be gained from improving international cooperation in competition enforcement, and that FTAs can support these improvements. For example, they could seek to strengthen the commitment to improve the ability for competition agencies to provide mutual assistance and be able to share information as required for enhanced enforcement cooperation. In some instances this may require legislative change to both enable information sharing and to allow competition agencies to interact with each other to effectively collaborate where it is in the interests of both parties. Government-to-government commitments to do this in the context of FTAs could help accelerate the legislative change required in some jurisdictions to enable enhanced enforcement cooperation.

Australia considers that multilateral FTAs can establish an effective framework for technical cooperation such as capacity building initiatives. Capacity building programs can improve cooperation and the collective ability of competition agencies in a region to address anti-competitive conduct. The FTA between Australia, New Zealand and ASEAN (AANZFTA) demonstrates the benefits of competition chapters with jurisdictions that have newly enacted or are yet to enact competition laws and independent competition enforcement agencies.

Australia's Department of Foreign Affairs and Trade (DFAT) leads the work developing, negotiating and implementing FTAs. The Treasury provides input as the government department with responsibility for competition policy. The Australian Competition and Consumer Commission (ACCC) acts as a technical advisor, providing assistance as required. In the case of some FTAs, the ACCC has been engaged to directly negotiate competition chapters. In the case of the AANZFTA, the ACCC provides substantial capacity building support to assist its ASEAN counterparts with their implementation of competition law and policy.

We consider that competition chapters in FTAs produce the best outcomes when there is collaboration and strong mutual understanding between areas of government responsible for the trade policy, competition policy, and competition law enforcement.

## *Canada*

The Competition Bureau takes a lead role in the negotiation of competition policy chapters in all of Canada's free trade agreements (FTA). Canada seeks four key provisions to ensure that the benefits of trade liberalisation are not offset by anti-competitive conduct. These include commitments to adopt and maintain laws to proscribe anti-competitive conduct; to maintain a competition authority to administer those laws; to adhere to the principles of procedural fairness, non-discrimination and transparency; to encourage cooperation activities; and to exclude the chapter from both state to state and investor-state dispute settlement. Canada also conducts a Gender-based Analysis Plus (GBA+) to inform ongoing negotiations and to identify opportunities to add new gender-responsive and gender-inclusive trade provisions across trade agreements, including in the area of competition policy.

Negotiating ambitious competition policy provisions and advocating for strong institutions and legal frameworks promotes convergence on competition law and policy and levels the playing field for firms. In the absence of international competition law, FTAs also establish frameworks in which authorities can explore cooperation activities such as notification, investigative assistance and technical assistance.

The Bureau also pays close attention to other chapters when there are implications for competition policy to ensure that commitments made in other areas of the agreement align with and correspond to existing competition laws in Canada. For example, the *UPS v Canada* case at the NAFTA Investor-State Arbitration Panel signaled to the Bureau that confidential information obtained or received by the Commissioner of Competition should be more effectively protected from disclosure in international dispute settlement proceedings. Since then, the Bureau has worked with Global Affairs' trade law experts to ensure that the Bureau is not required to disclose confidential information during trade related proceedings such as dispute settlement or committee work. Working in close collaboration with lead negotiators in other cross-cutting areas allows relevant authorities to advocate for provisions that are in line with existing laws, mitigating the risk of legal disputes, and allows relevant stakeholders to plan for changes that will arise once an FTA enters into force.

## *European Union\**

The European Union (EU) has various types of trade agreements in place. The EU approach on competition provisions depends on elements such as the overall aim of the agreement, taking into account the economic interconnectedness between the EU and the other Party.

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. To that end, the EU aims to include rules on the following elements in its trade agreements: competition law, e.g. by obliging Parties to establish or maintain a competition law or drawing up common rules; competition authority, with the aim to get the Parties to have an independent authority equipped with sufficient powers; procedural fairness, typically requiring Parties to apply competition rules in a transparent manner; and cooperation between competition authorities, generally laying down the principles of cooperation. The EU generally excludes the provisions on anticompetitive conduct and merger control from dispute settlement.

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. The first one is the WTO+ approach, which aims to have rules on subsidies that go beyond the WTO rules. The aim is 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. The EU aims to subject these provisions on subsidies to dispute settlement. The second approach, used mainly in the enlargement context, is 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. Under most of the EU trade agreements, a breach of the State aid obligations can be brought to dispute settlement.

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. To that end, the EU aims to include provisions that: clarify 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; make clear 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; and 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.

## *Finland*

The views expressed in the Finnish 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.

As for Finland, there are approximately 40 trade agreements that are fully or partly in force and notified to the WTO. Nearly all of them contain competition provisions. However, trade agreements have had no major impact on the establishment or development of the national competition laws in Finland. 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.

Finland monitors the effects of trade agreements on national level, mostly in co-operation 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.

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.

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. In addition, 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).

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.

## *Hong Kong, China\**

Hong Kong, China (HKC) currently has six Free Trade Agreements (FTAs) notified to the World Trade Organization. All of them have competition provisions and four have competition-specific chapters.

All the FTAs aim to promote of competition. This is often expressed in general terms. All FTAs but one also have the objective of enhancing co-operation and co-ordination between competition authorities in each jurisdiction. Two FTAs have an additional objective related to procedural fairness in competition law enforcement activities. Finally, all the FTAs include provisions related to the control of state aid.

The impact of FTAs on the Competition Ordinance of Hong Kong and its enforcement is non-existent so far.

In all of the FTAs with a competition-specific chapter, the contents of this chapter are excluded from the general dispute settlement mechanism. Neither the dispute settlement mechanism nor any other alternative mechanisms have been applied in relation to a competition related matter. The Hong Kong Competition Commission (HKCC) is not aware of any interpretation problems concerning the implementation of the competition provisions of the FTAs or any inconsistencies between the FTAs or the FTAs and the Competition Ordinance.

HKC has set up a mechanism to monitor the effect of the FTAs by establishing either a joint committee or a working group to review the agreement within a certain timeframe. This includes a review of the competition provisions in the trade agreements.

The HKCC was invited to contribute in the drafting of the FTA between HKC and Australia, engaging in discussions with the negotiators to provide competition-related knowledge and legal expertise during the process. To date, the HKCC has not issued any opinion on draft legislation implementing competition clauses related to trade agreements. However, the Competition Ordinance provides the HKCC a function to advise the Government on competition matters in and outside HKC.

## *Indonesia*

Competition law in Indonesia has been around for almost two decades. From the adoption, the implementation of the law has been progressing in a rapid phase. There has been more than 300 decisions made by the competition authority, the Competition Supervisory Commission of Indonesia (KPPU). Many of the appeal have been won by the Commission. Its involvement in regulatory making process has been significant. Thanks to the effort made by the public and relevant stakeholders.

Toward its importance, competition policy is started to be adopted by many international trade agreements. Competition policy has been acknowledged to affect the work of free trade or movement of goods and services across the world. Hence, newer bilateral trade agreements have started to include competition provision as the negotiated chapters. In Indonesia, competition provision was first adapted by the Indonesia Japan Comprehensive Economics Partnership Agreement (IJEPA). The agreement contains various agreements in the fields of trade in goods and services, taxes, intellectual property, and business competition.

Specifically for competition, one of the objectives of the agreement is to promote competition by addressing anticompetitive activities, and cooperate on the promotion of competition. In this case, there is a particular Chapter that specifically regulates competition. The specific chapters of competition in general cover several substances such as cooperation on the promotion of competition, non-discrimination, and procedural fairness. Specifically, the cooperation covers various detailed aspects such as notifications, information exchange, and coordination of law enforcement activities, technical assistance, transparency, consultation, and arrangements regarding information confidentiality.

The new wave of EPA later came to Indonesia and the ASEAN region. Many international trade agreements started to adopt competition policy as one of the pillars. The agreement by Indonesia with competition matter later agreed with Australia, and European Free Trade Agreement. The ongoing trade negotiation with competition's inclusion was made with the European Union. While in the ASEAN region, the agreement with competition chapters was agreed under ASEAN-Australia-New Zealand Free Trade Agreement, and Regional Comprehensive Economics Partnership (RCEP) Agreement between ten ASEAN countries and six of its dialogue partners (Australia, China, India, Japan, New Zealand and South Korea).

## *Philippines\**

The Philippines has eight trade agreements in force, two bilateral and six adopted by ASEAN. It is also negotiating three additional agreements. The two bilateral agreements and one other have a specific chapter on competition policy. In the rest of agreements, competition-related provisions can be found in other chapters.

The agreements of the Philippines only contain basic provisions on competition. It is unlikely that the agreements had an impact on the establishment of a competition framework in the Philippines. The agreements do not have provisions mandating the Parties to establish a competition law or a competition authority. Similarly, the provisions of trade agreements have had minimal influence on the implementation and enforcement of competition law in the country so far.

For now, the Philippines focuses on the area of technical cooperation and capacity building for the enforcement of its competition policy. There are some initiatives to build the capacity of the Philippines Competition Commission (PCC) under the umbrella of trade agreements.

The Philippine-Japan Economic Partnership contains references to principles (e.g. non-discrimination, transparency, and procedural fairness) as well as a general statement on anticompetitive practices. However, only the Philippine-European Free Trade Area Free Trade Agreement contains a proscription against specific anticompetitive practices. No agreement currently in force contains a proscription against anticompetitive mergers and acquisitions or mandates the establishment of a merger control regime.

Only one agreement contains a provision expressly subjecting State-owned enterprises to competition laws. The two agreements currently under negotiation contain more comprehensive provisions on State-owned enterprises.

No Philippine trade agreement provides for comprehensive rules on subsidies. One agreement makes a general reference to the WTO Agreement on Subsidies and Countervailing Measures.

The competition policy provisions in the Philippine agreements provide for the non-applicability of the dispute settlement chapter. Instead, there are mechanisms established for consultations.

The negotiations of trade agreements of the Philippines are lodged with the Bureau of International Trade Relations (BITR), a specialised office under the country's trade ministry. Nonetheless, considering the increasingly specialised nature of different components of agreements, the BITR often solicits the participation of various government agencies in dealing with international trade matters, including agreements negotiations. Since its creation, all international trade matters related to competition are handled by the PCC.

## Serbia

The Republic of Serbia has signed four trade agreements which contain competition provisions, among which the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part (hereinafter referred to as the SAA), along with the Interim agreement on trade and trade-related matters between the European Community, of the one part and the Republic of Serbia, of the other part, (hereinafter jointly referred to as the EU Agreement). This paper will focus primarily on the EU Agreement, considering its impact and economic significance for the Republic of Serbia.

According to an OECD study and categorization of trade agreements, the EU Agreement is a good example of the EC-family type of trade agreements. The EC-style approach has been adopted in a number of agreements, which came to life as part of the association processes of various Western Balkan countries. In the context of Serbia, the aims of the Association process, among others, are to support the efforts of the Republic of Serbia to complete the transition from a state-led into a functioning free market economy, to promote sound economic relations with the EU and gradually develop a free trade area between the signatories. Hence, the overarching objectives of the competition provisions in the EU Agreement relate to trade, considering the commitments of the Republic of Serbia and EU to the principles of free market economy and free trade. The competition provisions in particular are intended to ensure that potential gains from trade liberalisation are not undermined by the lack of rules on competition and by anticompetitive behaviour of market participants.

Under the EU Agreement, as a condition to become member of the EU, the Republic of Serbia is required to establish a functioning market economy, to adopt competition rules which are harmonised with the *acquis* and to establish a competition authority which would enforce those rules. The analysis of the EU Agreement shows that its competition provisions cover a range of issues: adopting and maintaining competition laws; enforceability of competition laws and establishing national competition authorities; regulating designated monopolies/state-owned enterprises; regulating state aid/subsidies; competition-specific exemptions and dispute settlement mechanisms for conflicts on competition.

Having in mind the obligation to harmonise its competition rules with EU law, in general, Serbia started the harmonisation process early on, in accordance with Article 72 of the SAA. Thus, Serbia already had a competition law in place when it signed the SAA (i.e. before it came into force), but there was a need to develop the secondary legislation, as well as the institutional framework which would ensure Serbia is able to adequately apply those competition rules.

The main provisions of the Serbian national competition law are almost identical to the EU competition law which means that, as for Serbia, the EU Agreement has had a major impact on the establishment and development of the national competition rules landscape. Whenever there has been an amendment of the competition law in Serbia, the reasons, among others, have been related to the developments in the EU law and needs of further harmonisation with the EU competition *acquis*. The EU influence on the Serbian competition regime has been strong, since the adoption of the EU *acquis* in the field was a requirement to be eligible for EU accession. Overall, the EU Agreement has had a positive

impact on the development of competition rules and policy in Serbia, particularly when it comes to competition provisions concerning the adoption and maintenance of competition rules and their enforceability, as well as establishing national authorities in the field of competition, among which is the Commission for Protection of Competition of the Republic of Serbia (the CPC).

Bearing in mind its status of an independent authority with public competences, which is accountable to the National Assembly of the Republic of Serbia and not part of the Government structure, the CPC is not involved directly in the negotiation process of trade agreements. This was also the case with the EU Agreement at the time when it was drafted. Nonetheless, the CPC may have a consultative role in the negotiation of trade agreements (for example, by giving its opinion to the Draft of CEFTA Agreement or drafting the relevant part of the Report of the Republic of Serbia for Accession to the WTO) and/or contribute by delivering its opinions and written submissions regarding provisions of the draft agreements concerning competition to the relevant ministries in charge.

When it comes to the SAA, unlike in the case of initial drafting and negotiation of this agreement, the CPC has been very active in its implementation and reporting to the European Commission on the fulfilment of the country's obligations thereof. The CPC has done so through participation of its representatives in the Negotiating Group for Chapter 8 (Competition Policy).

Most importantly, in substantive terms, the CPC provides considerable contribution to the country's progress, both in terms of ensuring regulatory compliance with the EU *acquis* in the relevant areas and adequate implementation of the law thus harmonised.

## Turkey

To this date, Turkey has signed 37 Free Trade Agreements (FTA) with other countries. 11 of them were cancelled due to those countries' becoming a member of the European Union, 1 of them is suspended by the Turkish Grand National Assembly (Syria), 1 of them has ended (Jordan) and 4 of them are still pending ratification in the jurisdictions of the Parties (Lebanon, Sudan, Venezuela and Qatar). Therefore, we can state that Turkey currently has 20 FTAs in effect with these countries/free trade areas: EFTA, Israel, North Macedonia, Bosnia and Herzegovina, Palestine, Tunisia, Morocco, Egypt, Albania, Georgia, Montenegro, Serbia, Chile, Mauritius, South Korea, Malaysia, Moldova, Faroe Island, Singapore and Kosovo<sup>1</sup>.

Most of the FTAs (18) contain a reference to "Competition" in their article on "Objectives"<sup>2</sup>. However, a more detailed article on competition is not included in every FTA. Only 13 FTAs contain a separate article on competition. The FTAs that contain a separate article on "Competition" also differ in their coverage of the anti-competitive practices. As we all know, the generally accepted anti-competitive practices are "agreements that have as their object or effect the prevention, restriction or distortion of competition" (which cover both vertical and horizontal restrictions), "abuse of dominant position" and "concentrations" (mergers and acquisitions). While all of these FTAs cover, "abuse of dominant position" 12 of them covers both vertical and horizontal agreements<sup>3</sup> and only 4 of them cover concentrations<sup>4</sup>.

When we look at the last 8 years, only 2 FTAs (South Korea and Singapore) contain a separate chapter on competition. Turkish Competition Authority (TCA) expects this trend to continue because a separate chapter on competition is present in only one of the FTAs that is still pending ratification in the jurisdictions of the Parties'.

Turkish Competition Authority (TCA) has always been involved in the preparation and negotiation process of the articles on competition. In this regard, representatives of the TCA have attended the negotiations of the FTAs, prepared the draft versions of the articles on competition and engaged with the responsible ministry in the preparation of the counter proposals for these articles. TCA is always open to sending its experts to these negotiations as these FTAs increase the entry (and as a result competition) into the markets of the Parties. TCA is also happy to be present in these negotiations as the experts on both sides get the chance to meet with each other and improve their understanding of other Parties' competition laws. This, in turn, creates a unique opportunity to improve the dialogue between the two competition authorities.

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<sup>1</sup> More information can be found at this link (in Turkish): <https://www.ticaret.gov.tr/dis-tiliskiler/serbest-ticaret-anlasmalari/yururlukte-bulunan-stalar> and at this link (in English): <https://www.trade.gov.tr/free-trade-agreements>

<sup>2</sup> Malaysia and Singapore FTAs do not refer to competition in their article on objectives.

<sup>3</sup> Singapore FTA only covers horizontal agreements.

<sup>4</sup> EFTA, Montenegro, South Korea and Singapore FTAs cover concentrations.

As a result of these FTAs, TCA has obtained a legally binding tool to improve its communication with the other competition authorities. Even though TCA has not extensively used this option to improve its competition enforcement efforts, the inclusion of provisions on competition has led to an increase in the interaction of TCA with other competition authorities.

## *Ukraine*

### **Trade Agreements of Ukraine**

Due to the fact that fair competition is one of the milestones of market economy and economic growth, almost all Ukrainian international trade agreements (“TA”) in force, to which Ukraine is a party (over 15) include provisions concerning competition issues. TAs with competition provisions (“TACP”) can be divided into two groups:

- General provisions stating that unfair or anti-competitive business practices are incompatible with the TACP (nearly 10 TACPs);
- More detailed provisions addressing wider range of competition-related issues (TACPs concluded with Montenegro, Macedonia, EFTA, Canada and EU).

### **Role of the AMCU**

Although the state body responsible for bi- and multilateral negotiations in the sphere of TAs is the Ministry of Economic Development, Trade and Agriculture of Ukraine (MEDTA), the Antimonopoly Committee of Ukraine (“the AMCU”) is always involved in such negotiations if a draft trade agreement contains provisions relating to competition by nominating its representatives as members of the official delegations of Ukraine and/or drafting amendments or observations to the text of the draft TACP during the process of internal prior negotiations.

### **Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part (“EU – Ukraine AA”)**

In 2014, Ukraine has declared the EU integration as a national strategic policy. In order to bring the Ukrainian legislation in conformity with EU *acquis*, Ukraine has concluded the EU-Ukraine Association Agreement. Chapter 10 “Competition” of this TACP consists of 2 Sections devoted to Antitrust and mergers (Section 1) and State Aid (Section 2).

AMCU is responsible for implementation of Chapter 10 provisions which include numerous obligations for Ukrainian side (e.g. to launch the state aid monitoring and control system, to draft and adopt a list of amendments to Ukrainian legislation in the spheres of antitrust, mergers and state aid etc.), most of them have already been implemented while the others are to be implemented in the nearest years.

Regarding the state aid, Ukraine adopted the Law on State Aid to Undertakings, which is to be amended, with draft amendments being under preparation by the AMCU. Furthermore, criteria for assessing the compatibility of state aid in a number of sectors have already been adopted. In cases which are not sufficiently addressed by the national laws AMCU directly applies principles of *acquis communautaire* on the basis of Article 264 of the EU – Ukraine AA.

There is also a permanent obligation for Ukraine to submit annual state aid reports to the European Commission.

This TACP has the greatest impact on legislation and enforcement not only of competition policy but on a wide range of trade-related issues as well. As a result, EU – Ukraine AA has deeply affected establishment and improvement of the Ukrainian competition framework.

## *United States\**

The United States (U.S.) is a party to eight trade agreements with competition chapters. This accounts for about one third of its total number of free trade agreements. The objective of these chapters is to promote competitive markets in its trade partners.

The competition policy chapters contain provisions covering the following issues: promoting competition; adopting or maintaining competition laws; ensuring minimum procedural fairness principles; setting forth cooperation mechanisms; and regulating designated monopolies and state enterprises. Some of the competition chapters have basic monitoring provisions, and working groups or committees have been set up in the past and might be set up in the future to provide a forum for discussion.

The competition provisions are not intended to have any effect on the substantive antitrust enforcement abilities of either the U.S. or the applicable trading partner, nor do they conflict with existing U.S. law, regulations, or guidelines. The competition chapters though have contributed to the adoption of bilateral cooperation agreements (e.g., Mexico, Chile, Colombia, Peru, and Korea), and helped to strengthen the relationships between the U.S. antitrust agencies (the Department of Justice and the Federal Trade Commission) and their trading partner counterparts.

Dispute settlement under the trade agreements has been explicitly carved out for the competition law enforcement provisions. However, the competition chapters normally include consultation provisions, which have been invoked on one occasion.

In the U.S., the internal governmental process surrounding negotiation of competition chapters of trade agreements is a collaborative one between the U.S. trade and antitrust agencies. Both the Department of Justice and the Federal Trade Commission participate in the internal deliberative process, along with the U.S. Trade Representative, the U.S. Department of Commerce, the U.S. Department of State, and other interested agencies. The U.S. antitrust agencies and the U.S. Trade Representative have led the U.S. delegation charged with negotiating the competition chapter, and an interagency process determines what language should be sought. Participation of the U.S. antitrust agencies is key to maintaining the proper role of the competition agency and sound objectives of competition policy, while accounting for the goals of the U.S. trade negotiators.

## *Eurasian Economic Union\**

The Eurasian Economic Union (EAEU) has signed or is in the process of negotiating a number of Free Trade Agreements that include provisions on competition. Further, the EAEU has signed a non-preferential Agreement on Trade and Economic Co-operation with China. The only agreements that have entered into force are one with Viet Nam (2016) and the one with China (October 2019). Hence, the impact of the agreements is still difficult to determine.

The main objectives of the competition provisions in these agreements are: ensuring that the benefits of trade liberalization are not undermined by anticompetitive practices on the territory of another party; promoting the proper functioning of markets and economic efficiency; guaranteeing procedural fairness and transparency in the sphere of competition; and developing co-operation between relevant authorities.

This is done through competition provisions that: promote competition, by outlining the anti-competitive practices that are prohibited; set forth competition enforcement principles, such as procedural fairness and transparency; develop co-operation and co-ordination mechanisms between the signatory jurisdictions, such as information exchanges or even requests that a partner initiates an investigation if the other party considers that its interests are substantially affected in the partner jurisdiction.

Dispute resolution clauses in trade agreements do not normally apply to competition provisions. At the same time, the EAEU aims to include in the agreements the possibility to hold consultations in order to foster mutual understanding between the Parties, or to address specific matters that arise under competition provisions. There is also the possibility to request consultations at the Joint Committee established under the Agreement with a view to facilitating a mutually satisfactory resolution of a matter. In any event, the EAEU is not aware of any interpretation disputes so far.

None of the provisions in the agreements has led to the modification of the existing legislation, case law or decision practice.

As regards the regulation of competition issues in the EAEU, this is done at two levels: national and supranational. At the national level, competition regulation is conducted by competition authorities subject to national legislation. At the supranational level, this is done by the Eurasian Economic Commission in accordance with the EAEU Treaty. Both national competition authorities and the Eurasian Economic Commission participate in the process of elaboration of competition provisions of trade agreements.

*UNCTAD\**

UNCTAD submitted a publication titled “Next Steps for the African Continental Free Trade Area: Visual Summary.” It is a joint publication of UNCTAD with the Economic Commission for Africa, the African Union Commission, and the African Development Bank. This publication considers the status of regional integration in Africa and addresses the opportunities provided by the African Continental Free Trade Agreement (AfCFTA) in various areas, including competition.

The section of the publication concerning competition policy points out that Africa’s competition regime remains patchy – many countries have no competition law or have it but no authorities are in place to enforce the law– and calls for harmonisation. Then, it outlines the options, in terms of enforcement modalities and scope of competition rules, for the ACFTA protocol on competition. In particular, the publication indicates that the protocol should cover the main substantive competition issues. Further, the publication points out that the protocol could be enforced through three arrangements: a supranational AfCFTA competition authority; a competition co-operation framework; and a sequential approach in which a supranational authority follows a competition network. Finally, the publication points out that a continental procurement policy could complement the protocol on competition. In particular, it considers that this policy could ensure predictability, transparency and harmonisation in procurement policies and produce competitively tendered government procurement. This, according to the publication, would be compatible with preserving the policy space for legitimate public policy objectives.

*World Bank\**

The World Bank submitted a study by M. Licetti, G. Miralles and R. Teh which reviews the competition provisions in more than 200 trade agreements. The scope of the review includes economy-wide obligations (such as the existence of a competition law and an enforcing body) and sector-specific obligations (in the investment, agribusiness, electronic commerce, government procurement and intellectual property sectors). The study also reports on the level of enforceability of the competition provisions in scope, based on categories such as “binding with no dispute settlement mechanism” and “binding with private-state dispute settlement”.

Four out of five trade agreements include competition provisions, confirming that a pro-competitive environment is necessary for trade related commitments to be effective. The data also show that low-income countries are usually not party to trade agreements with competition provisions, which suggests a missed opportunity for these countries.

Sector-specific commitments are found to play an important role in promoting competition. 72% of agreements include commitments in all the five sectors considered. This is particularly the case for bilateral agreements, compared with multilateral agreements.

The study finds that competition-related provisions tend to show a high degree of enforceability. For instance, 64% of trade agreements with competition provisions have binding commitments on the regulation of monopolies. Moreover, 95% of the agreements include binding commitments in the five sectors reviewed by the authors. In particular, sector-specific obligations “appear to be a major source of competition-enabling content” in trade agreements (page 41). Finally, nine trade agreements provide for direct applicability (i.e. “private firms can claim the application of competition provisions before the public bodies of the parties”).