



# Briefing Paper

## When Trade Meets Competition Policy: Insights from WTO Trade Policy Reviews

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### Summary

This briefing paper summarises a study by CUTS International Geneva on “Competition in WTO Trade Policy Reviews: How has it been addressed?” available at <https://bit.ly/3yrWjyv>. The study looks at how competition policy issues have been addressed in WTO Trade Policy Reviews over the last 20 years, concentrating on trade measures and economic sectors that have regularly raised competition-related concerns among members.

## Introduction

Competition policy and laws are typically legislations of general application, which apply to all economic sectors. As a result, they engage in complex interrelationships with a broad range of other public economic policies and measures that may impact or be influenced by competition laws.

Covering the full range of trade-related policy measures adopted by all WTO members, WTO Trade Policy Reviews (TPRs) provide an ideal playground for examining such interrelationships, how they have evolved and the attention given to them by the WTO membership. The reviews also provide a valuable transparency mechanism covering members' competition policies, an area in which predictability is paramount for market players to effectively engage in international trade.

In a recent study, Grollier and Hirani (2021) examined how competition policy issues have been addressed in WTO Trade Policy Reviews over the past 20 years, focusing on types of trade measures and economic sectors that have consistently been prone to competition-related concerns from members.<sup>1</sup> This briefing paper summarises the main findings of the study.

The analysis focused on a sample of 10 reviews covering five developed and developing countries: European Union (2002, 2020); United States (2003, 2016); Australia (2007, 2015); Singapore (2004, 2012); and China (2010, 2018). The analysis provides an insight into the number and type of competition-related questions asked by members since the start of this century.

Owing to the cross-cutting nature of competition, related discussions may be found across the full range of trade-related measures and sectors covered by WTO Trade Policy Reviews. In order to identify where and how competition-related issues have been addressed in TPRs, the authors

conducted a text-based analysis of competition-related keywords found not only on TPR sections dedicated to competition policy, but also other chapters covering sectors (e.g. services, telecom) and types of trade policy measures (e.g., intellectual property, state trading enterprises).

The results were first analysed to identify the key types of measures and sectors which have most attracted members' attention from a competition perspective, before examining them in more details through dedicated sections of the study.

## Where was competition discussed?

Upon analysis of competition-related keywords found in the secretariat reports as well as in questions asked by members, the study logically found that questions expressly connected to the examined member's Competition Policy and Law made up the majority (34%) of questions from members.

Nevertheless, certain sections dedicated to types of trade policy measures also attracted member's attention, such as intellectual property (11%) and STEs/SoEs (9%). Competition-related questions regarding the reports' sections on government procurement, anti-dumping, and safeguards were also raised. Interestingly, almost one quarter (23%) of all questions addressing competition-related issues were also made in relation to the chapters of the reviews dedicated to services.

## Trade Measures by Type

Besides sections of TPR reports dedicated to competition policy and law, other sections covering different types of trade policy measures have attracted notable attention from members when it comes to their relationship with competition.

In particular, members have shown particular interest in raising questions about the interaction

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<sup>1</sup> Grollier, J. and Hirani, H. (2021). Competition in WTO Trade Policy Reviews: How has it been addressed?. Geneva: CUTS

between competition and intellectual property in the reviewed country. As shown in Figure 2, these represented over one third of all questions addressing the interplay of competition policy with other types of policy measures.

The other type of policy measures attracting particular attention for their interaction with competition were those related to State Trading and State-owned Enterprises (SoEs). To a lesser extent, Government Procurement (6%) and Anti-Dumping and Safeguards (5%) also attracted competition-related questions from members.

For each of these types of measures, we analyse below the typical concerns raised by members in their questions; which members have shown most interest in the interaction of competition with the subject measure; and which country attracted most scrutiny on the matter.

## Intellectual Property

Intellectual property rights (IPRs) and competition policy are interlinked. IPRs address the innovation problems firms face if they cannot protect their information advantages. In contrast, competition regulation addresses the market-access difficulties consumers and rival firms experience when strong monopolies exist. Therefore, conflicts between these two regulatory regimes are unavoidable because granting IPRs amounts to limiting competition by providing monopoly rights to the IPR holder. This may inhibit innovative investments by competing firms, reduce dynamic competition, and sometimes give the right-holder disproportionate market power.

In our sampled reviews, particular attention was given to the protection of trade secrets and its relationship with competition, which has been addressed in several secretariat reports and questions from members. During China's 2018 review for instance, the report noted that the National People's Congress Standing Committee issued a related amendment to the Anti-Unfair

Competition Law on November 4, 2017, which came into effect on January 1, 2018.<sup>2</sup>

On matters related to intellectual property more generally, the highest number of members' questions was directed to China (56%), particularly during its 2018 review. Looking at the profile of members raising questions on competition-related aspects of Intellectual Property, these were mainly developed countries (65%), most notably Japan (6 questions), Canada (6), and European Union (4). For instance, Canada asked the following question: "Have there been any trade secrets cases under the amended Anti-Unfair Competition Law and if so, can China please provide details?".

## State Trading and State-Owned Enterprises

In the sampled reviews, 29 questions by members addressed competition-related aspects of State Trading and State-owned Enterprises. This represents 9% of all questions which have addressed competition-related aspects.

Governments may grant SOEs exclusive or monopoly rights over certain activities, which can directly affect relative competitiveness and may give them the power to influence the admission requirements of potential competitors in a variety of commercial activities.<sup>3</sup> Today, SOEs have become important global players in key sectors of the economy which have undergone liberalisation such as telecom, transports, utilities etc. Engaging in commercial activities and competing with private firms, SOEs have come under enhanced scrutiny from competition authorities which have sometimes imposed sanctions on them. The advantages granted to SOEs in their home jurisdictions (e.g. subsidies, exemptions from antitrust laws etc.) have also raised concerns over competitive neutrality.

Secretariat reports sampled for the study noted recent policy developments on the interplay

<sup>2</sup> WT/TPR/S/375, 105.

<sup>3</sup> Ibid, 6.

between SOEs and competition. As of 2015 in Australia, several such entities were privatized (e.g. Mediabank), and all STEs were subject to competition law. While only the New South Wales (NSW) Rice Marketing Board maintained export monopoly rights, several sub-national public entities were still engaged in the production and trade of goods and services. Among the other sampled reviews, notable attention was given China's Anti-Monopoly Law (AML) and well as the intensification of mixed-ownership reforms which resulted in the integration of non-State owners in 68% of China's SOEs.

Looking at the profile of members showing interest in raising questions on competition-related aspects of STEs and SOEs, these were mainly emerging markets (48%) although individual members asking the most questions on the subject were developed countries: European Union (3), United States (3), and Canada (2). The highest number of these questions was directed to China (38%).

## Government Procurement

The third type of trade-related measures attracting competition-related questions from member was government procurement. The interaction between the two has long been a familiar subject for policy-makers and competition authorities. In particular, government procurements are especially prone to corruption and bid-rigging cartels among suppliers. Anti-competitive practices in government procurement may result in lower quality or availability of public infrastructure and services, with generally higher negative impact on the most disadvantaged members of society.

Among sampled reviews for instance, the secretariat report for Australia (2015) noted that, between 2011 and 2014, ACCC Federal Court action resulted in penalties of \$A 59.15 million on 10 firms for a series of cartel proceedings including bid-rigging in the provision of land

cables, construction, and automotive parts.<sup>4</sup>

Members showing interest in raising questions on competition-related aspects of government procurement were mainly emerging markets (60%) such as Mexico (3) and Costa Rica (1). For instance, Mexico asked the following during Singapore's 2012 review: *"Has it been determined whether the mechanisms for awarding government procurement contracts prevent collusion between competitors by taking into account facilitating factors such as: joint bids with no restrictions; frequency and fragmentation of bids; publication of bids; high reference prices; restrictions on foreign bids?"*

## Anti-Dumping and Safeguards

Although subject to only 4 questions from members, the sampled reviews addressed to some extent the interaction between competition policy and anti-dumping. This was mainly in the context of a 2011 reform made by Australia to its anti-dumping policy, and the fact that imports from New Zealand covered by the Australia - New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) are excluded from anti-dumping activities and dealt with under competition laws instead.

Although competition policy and anti-dumping are both concerned with evening the playing field on the market, they pursue different and sometimes conflicting objectives. Countries can use anti-dumping to shield domestic firms from foreign competitors. Conversely, while anti-dumping may lead to anti-competitive situations, national competition authorities, on the other hand, may allow certain export cartels which distort international trade to the benefit of their national firms. Such selective enforcement of competition law by competition authorities may also trigger other countries to resort to anti-dumping measures themselves.

During the reviews, 3 out of 4 questions

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<sup>4</sup> WT/TPR/S/312, 65.

addressing this issue were from emerging markets, namely Colombia, Chile, and Singapore. For instance, the latter asked: *“We note that imports from New Zealand covered by the ANZCERTA are excluded from anti-dumping actions and are dealt with under competition laws. We would appreciate if Australia could elaborate on how anti-dumping investigations and measures are dealt with under competition laws.”*

## Measures by Sector: Focus on Services

In the sampled reviews, services were the economic sector where competition issues have been most extensively discussed. Indeed, many services are heavily regulated and prone to linkages with competition-related measures. In particular, some services often started as state monopolies due to their public interest nature (e.g., energy, postal, transportation, audiovisual) or high setup costs (e.g., rail networks, airports), before they were progressively opened to competition. In this context, incumbent firms may continue to benefit from their acquired dominant market position, and to enjoy certain advantages which potential competitors may perceive as unfair.

In particular, members have shown particular interest in raising questions about the interaction between competition and telecommunications in the reviewed countries. As shown in Figure 3, these counted for over one third of questions addressing the interplay of competition policy with different services sectors. The other services attracting particular attention for their interaction with competition were those related to transportation, financial and insurance services, and energy.

For each of these services categories, we analyse below the typical concerns raised by members in their questions; which members have shown most interest in the interaction of competition with the subject service, and which country attracted most scrutiny on the matter.

## Telecommunications

In our sampled reviews, the telecommunications sector stands out for attracting a high number of competition-related questions from members. Indeed, 33 questions from members addressed this subject, accounting for 10% of all competition-related questions identified in the reviews. These were most often directed to the United States and the European Union.

In the telecommunications industry, firms often seek access to their competitors' networks, and rules for connecting networks can have significant effects on competitive relationships and investment. Other competition issues prevalent in the telecommunications sector also include various types of abuse of dominant position, such as denial of access to essential facilities, predation, tying, and bundling, as well as risks associated with concentrations.

Recent developments in this sector reported in secretariat reports also shed light on its interaction with competition. For instance, the EU's 2020 review noted that one of the major priority areas under the recent Digital Single Market (DSM) strategy is to comprehensively reform EU telecoms rules to address concerns raised about the market power of some online platforms. In Australia (2015), the government created NBN Co. to increase competition in the broadband market dominated by Telstra.

In the United States review (2016), the report notes that the Federal Communications Commission (FCC) implemented various safeguards (such as dominant carrier requirements and the “no special concessions” rule) with a view to, *inter alia*, prevent certain agreements between large US and foreign carriers which could harm competition on the US market. During the review, these safeguards sparked questions from members such as China, which asked: *“[...] Does the ‘conduct by a foreign carrier that could result in harm to competition in the U.S. telecommunications market’ include conduct that may have potential Internet safety threat or hidden danger? Or does it only refer to*

*commercial conduct such as monopoly, dumping and unfair competition?”*

Members who expressed an interest in raising questions about competition-related elements of telecommunications were mainly developing markets (55 %) such as Chinese Taipei (5), China (4), and the Republic of Korea (3). It is however worth mentioning that Japan was the individual member asking the most questions on this subject (7).

## **Transport**

In the sampled reviews, 13 questions by members addressed competition-related aspects of transport services. This represents 4% of all questions which have addressed competition-related aspects, and places transport at rank n°2 (14%) among the services sectors attracting most questions from members. The highest number of these questions was directed to Australia (54%), particularly during its 2007 review.

In this sector, the study reviews competition concerns found in relation to specific modes of transportation. In particular, the authors identified many questions focusing on air transport (54% of transport-related questions), as well as liner-shipping services (46%).

### **Air Transport**

The air transport market structure has changed dramatically in recent decades, liberalisation and deregulation resulting in large mergers, increased competition and innovation. Competition authorities have strived to ensure that prior regulatory barriers are not replaced by anti-competitive airline mergers, alliances, agreements, unilateral actions etc. For instance, antitrust scrutiny has been needed in relation to airport slot availability, airline loyalty programs, drip pricing methods etc.

In sampled reviews, most questions in this area were directed to the United States (57%), particularly during its 2016 review. All members raising questions on competition-related aspects

of air transport were emerging markets, most notably China, Brazil, and Singapore. For instance, China asked in 2016: *“Please introduce how the Transportation Security Administration (TSA) protects competition in the allocation of air and flight schedule resources. How does the TSA distribute its responsibility and cooperate with other departments (such as the Fair Trade Commission) in anti-monopoly work? Please give examples.”*

### **Maritime Transport**

Over 70% of world merchandise trade by value is carried by sea, with liner shipping carriers transporting its majority. Liner shipping conferences, in which liner shipping companies fix prices and other conditions on a specific route, have historically been a widespread practice and were for a long time exempt from antitrust laws. With recent massive mergers, concentration in the sector has significantly increased (the five largest firms now account for over 60% of global vessel capacity), leaving limited choice and altering the balance of power in negotiations.

During the reviews, questions from members addressing this sector were mainly directed to Australia (83%), notably during its 2007 review. Although other members also showed interest such as Switzerland and Canada, the majority of members asking such questions were emerging markets (67%) such as Malaysia, China, and Chinese Taipei. For instance, Malaysia asked Australia in 2007: *“What is the basis for allowing exemption to the Trade Practices Act (TPA) on international liner cargo shipping and export contracts?”*

### **Financial and Insurance Services**

Another category of services attracting members' attention for its relationship with competition are financial and insurance services, which represented 15% of questions addressing services.

Commercial banks, finance businesses, securities companies, and insurance companies

are examples of financial institutions that play an essential role in the economy and in the financial system's stability. They are however vulnerable to a wide range of risks (e.g. liquidity and default risks, market failures etc.) with potential far-reaching consequences. While they have received special regulatory attention, they were frequently exempted from general competition legislation. Yet, a number of characteristics make the sector worthy of cross-border antitrust scrutiny. Spurred by technology and cross-border M&As the sector has fast internationalised; substitutability between financial instruments has increased; and relies increasingly on networks to a point that it now resembles other network industries from the point of view of competition policy. In particular, different areas of relevance for competition authorities in the financial sector include: merger review; investigating problems of market power and dominance of institutions; and assessment of restrictive agreements.

Also, similar to other financial services, insurance services had long been excluded from competition rules. Traditionally, regulation in this industry sought to limit the scope of competition among insurers through controls on entry (e.g., licensing), price floors or even outright promotion of cartels. In addition, collaboration among insurers is common in the sector. Yet, such collaboration may sometimes have anti-competitive implications such as cooperation between direct competitors.

In our sampled reviews, competition-related questions on financial and insurance services were mainly asked to the United States (36%) by emerging markets (64%) such as China, Hong Kong, and India. For instance, the Republic of Korea asked the United States (2016): *“specific aspects of agriculture, fisheries, and insurance are exempted from federal anti-trust legislation. Then, what is the reason that insurance is exempted from anti-trust legislation?”*

## Energy

Finally, the last category of services attracting notable attention from members with regard to its

interaction with competition-related matters was the energy sector. Most of the five questions addressing this issue were directed to Australia, particularly during its 2015 review.

Like other services of public interest nature, the energy industry often started as state monopolies which benefitted from their acquired dominant position when the sector was later opened to competition. In addition, energy services are typical network industries, susceptible to the exercise of market power and other potentially anti-competitive behaviour.

Among sampled reviews, the secretariat report for the EU (2020) noted that competition was one of the seven strategic building blocks of the Commission's efforts to curb global warming, as well as an important part of the Energy Union Package 2015 which reforms the union's approach to energy and climate change. It is also noted that steps were taken to promote competition in the gas supply markets, including through a commitment decision involving the Russian firm Gazprom.

For China (2018), the report recalled that some competitive services were removed from the central government's pricing catalogue in 2017, although price controls remained for products of natural monopoly including electricity. Foreign investment in pipelines was encouraged, subject to national security review. In Australia (2015), the secretariat report noted that anti-competitive behaviour of cross-border nature in the fuel sector is a key concern for the Australian Competition and Consumer Commission (ACCC), as only 12% of the petrol price can be influenced by competition on the domestic market.

In total, five questions by members addressed competition-related aspects of energy during the sampled reviews. These were mainly asked by emerging markets (60%) including Chinese Taipei and China.

## Conclusion

Competition policy and laws are typically

legislations of general application, i.e. applying to all economic sectors. Hence, competition issues may be found across a large spectrum of trade-related policies, practices and sectors covered in WTO TPRs.

In a study titled “Competition in WTO Trade Policy Reviews: How has it been addressed?”, Grollier and Hirani (2021) examined how competition policy issues have been addressed in 10 WTO Trade Policy Reviews over the past 20 years. The study focused on the types of trade measures and economic sectors that have consistently been prone to competition-related concerns from members.

The research found that, while the bulk of competition-related questions were logically linked directly to the reviewed member's Competition Policy and Law, other types of trade-related measures as well as certain services sectors also attracted significant scrutiny from

members for their interaction with competition policy. In particular, intellectual property, STEs /SoEs, telecommunications and transportation stand out in this regard.

Emerging economies asked the most competition-related questions (57 %), followed by developed members (40%). However, other developing countries (non-emerging) have been significantly less proactive in raising competition-related concerns (3%), while no LDC showed interest in raising competition-related concerns in their questions. Yet, certain questions raised by some members suggest that competition-related concerns may exist with regard to certain measures and sectors which are of particular interest to LDCs. This is the case of agriculture for instance, which was the subject of a few competition-related questions by developing or emerging countries such as Colombia, Mexico, Brazil and Thailand.



## **CUTS International, Geneva**

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