STUDY

Competition in WTO Trade Policy Reviews

How has it been addressed?

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Competition in WTO Trade Policy Reviews: How has it been addressed?

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Abbreviations

ACCC	Australian Competition and Consumer Commission
ACEA	European Automobile Manufacturers Association
ACL	Australian Consumer Law
AML	Anti-Monopoly Law
ANZCERTA	Australia- New Zealand Closer Economic Relations Trade Agreement
APEC	Asia-Pacific Economic Cooperation
APP	Aviation Partnership Programme
ASEAN	Association of Southeast Asian Nations
ASIC	Australian Securities and Investments Commission
BRICS	Brazil, Russia, India, China, and South Africa
CAAS	Civil Aviation Authority of Singapore
CBN	China Broadcasting Network
CBRC	China Banking Regulatory Commission
CCA	Competition and Consumer Act
CCS	Competition Commission of Singapore
CFIUS	Committee on Foreign Investment in the United States
CIRC	China Insurance Regulatory Commission's
CPC	Communist Party of China
CUTS	Consumer Unity and Trust Society
DSM	Dispute Settlement Mechanism
EECC	European Electronic Communications Code
EUTM	European Union Trademark Application
FCC	Federal Communications Commission
FDI	Foreign Direct Investment
FMC	Federal Maritime Commission
FTA	Free Trade Agreements
FTC	Federal Trade Commission’s
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
IDA	Infocomm Development Authority of Singapore
IMF	International Monetary Fund

IPR	Intellectual Property Rights
LDC	Least-Developed Countries
MIIT	Ministry of Industry and Information Technology
MOFCOM	Ministry of Commerce
MTS	Multilateral Trading System
NAFTA	North American Free Trade Agreement
NDRC	National Development and Reform Commission
NSW	New South Wales
OECD	Organisation for Economic Cooperation and Development
PSA	Port of Singapore Authority
RCEP	Regional Comprehensive Economic Partnership
RIS	Regulatory Impact Statement
SASAC	State Asset Supervisory Administrative Commission
SDT	Special and Differential Treatment
SoEs	State-owned Enterprises
STEs	State Trading Enterprises
TESSD	Trade and Environmental Sustainability Structured Discussions
TFEU	Treaty on the Functioning of the European Union
TPA	Trade Practices Act 1974
TPR	Trade Policy Reviews
TPRB	Trade Policy Review Body
TPRD	Trade Policy Review Division
TPRM	Trade Policy Review Mechanism
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TRPM	Trade Policy Review Mechanism
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
VBER	Vertical Block Exemption Regulation
WGTCP	Working Group on the Interaction between Trade and Competition Policy
WTO	World Trade Organization

Abstract

At the World Trade Organization (WTO), despite there being no explicit multilateral trade agreement on competition policy, several agreements have included provisions on anti-competitive behaviours, such as the Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Trade-Related Investment Measures (TRIMS) agreements. In national policies, competition policy and laws are generally legislations of general application which apply to all economic sectors. They hence entertain complex interrelationships with a wide range of other public economic policies and measures, which may influence or be influenced by competition rules.

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.

Against this backdrop, the study examines 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.

The analysis focuses 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.

It is found that, from 15 competition-related questions asked by members in 2002, their interest in raising such concerns followed an uptrend, culminating in 49 questions during the 2018 review of China. Besides chapters of the reviews dedicated explicitly to competition policy, related issues have made their way in discussions pertaining to other types of trade-related measures (e.g. intellectual property, state trading enterprises), as well as economic sectors where services such as telecommunications have attracted significant competition scrutiny.

Introduction

Competition Policy and Law aim to promote a level-playing field for firms competing on the market and avoid anti-competitive behaviour, which could harm consumer welfare through increased prices or reduced choice, quality, and innovation. Abuse of market power by dominant enterprises, as well as business practices such as bid-rigging, price-fixing, and market allocation amongst competitors, are examples of anti-competitive behaviours.

Although competition policy and international trade laws have historically evolved separately, national authorities are unable to efficiently tackle anti-competitive practices that affect their market which also originate from other countries (i.e. cross-border practices). This brings to light the strong nexus between cross-border competition concerns and international trade.

While a first attempt was made in 1948 through the stillborn Havana Charter, it was only during the Uruguay round that some competition-related provisions made their way in several WTO Agreements. Even though no explicit multilateral trade agreement exists on Competition Policy, provisions aiming at combating anti-competitive behaviour can be found in several WTO agreements. This includes the Trade-related Aspects of Intellectual Property Rights (TRIPS) and Trade-related Investment Measures (TRIMS) agreements.

Between 1996 and 2003, WTO members also established a Working Group on the Interaction between Trade and Competition Policy (WGTCP), which started initial discussions towards a possible competition-specific WTO Agreement. These efforts were eventually aborted over lack of consensus in the working group and, inter alia, the reluctance of developing countries to commit to rules in a policy area which was then new for many of them.

Since then, despite being no longer distinctly discussed at the WTO, competition policy has remained part of the international trade debate where competition policy-related rule-making has taken place through numerous Free Trade Agreements (FTAs), including those signed by developing countries. Two main approaches have been identified as underpinning FTA provisions on competition: (i) the European approach, focusing on detailed provisions on prohibited anti-competitive practices; (ii) the North American Free Trade Agreement (NAFTA) approach, which focuses on soft convergence through detailed provisions on cooperation and coordination, State-owned Enterprises (SoEs) and procedural fairness.

In a 2017 study, CUTS reviewed how some of the concerns expressed at the WGTCP have since been addressed in trade agreements, and found that competition policy and related issues such as SoEs and abuse of dominant position had gained prominence in FTAs. Nevertheless, some of the key concerns expressed at the WGTCP had continued to influence such competition-related provisions in FTAs, such as the need to secure policy space for promoting and protecting domestic industries.

In the absence of a multilateral framework, FTA provisions have contributed to shaping international relations on competition matters, and competition issues have gained increased importance in trade relations. To some extent, issues related to competition have also continued to be discussed at the WTO,

notably on the occasion of Trade Policy Reviews (TPRs).

WTO Trade Policy Reviews: What They can Tell Us

Transparency and predictability of competition laws and how they are enforced are essential for market players to effectively engage in international trade and ensure these are implemented in a consistent and non-discriminatory manner (e.g. not unduly favouring domestic firms over foreign ones). For instance, foreign investors willing to invest in a country through mergers and acquisitions (M&As) need readily-available information about the criteria and processes adopted by that country's competition authority for approving or rejecting mergers.

The WTO Trade Policy Review Mechanism (TPRM) aims to promote such transparency on a wide range of trade policy measures adopted by members, including competition, to facilitate the smooth operation in the Multilateral Trading System (MTS).

Every few years, every WTO member's trade policy is reviewed by other members through a process involving a report by the WTO Secretariat (as well as a policy statement by the government of the member concerned) and rounds of questions and answers with other members. The reviews examine the country's current policy landscape across various sectors (e.g. agriculture, services, intellectual property) and trade measures (e.g. competition policy, tariffs, anti-dumping, and safeguards).

In policy areas covered by the reviews, such as competition policy and other trade-related measures, TPRs can be useful to members, negotiators and trade policymakers in various ways. For instance, TPRs can: help minimising small and developing members' information disadvantage; help them learn from the policy experience of other members; provide an opportunity for other members to get clarifications or raise concerns over measures implemented by their trading partners; or raise the profile of an issue being addressed elsewhere such as trade disputes, trade negotiations or other regular bodies. It also provides developing countries with a platform for identifying more opportunities to better engage in the global trading system.

Study Objectives

Against the above backdrop, this study will examine the extent to which competition policy issues have been addressed in WTO TPRs over the past 20 years. It has a particular focus on the types of trade measures and economic sectors which have consistently been prone to competition-related concerns from members. It will also seek to identify changing and emerging trends of key competition issues impacting trade policy, and the level of scrutiny they have attracted from WTO members of different development levels. In particular, the study will aim to:

- Identify which competition issues have been frequently addressed in TPRs, indicating their sustained relevance to trade policy
- Identify changing trends in the key competition issues attracting trade official's attention, particularly new and emerging ones

- Understand which issues are under higher scrutiny of countries depending on their development levels and changing trends in this regard

- Suggest critical issues arising from the analysis which would merit closer attention by trade officials from small developing countries in the years to come

Scope and Methodology

The present study samples ten (10) Trade Policy Reviews based on the following criteria: (i) 5 countries among the main competition champions, both developed and developing; (ii) the study will analyse 2 TPRs of each country for time comparison, i.e. one in each decade; (iii) analysed TPRs should be evenly distributed in time. The rational for selecting the 10 specific countries is summarised below.

A study conducted by Laprévote et al. (2015), which evaluated 216 FTAs and RTAs with explicit competition provisions, identified three main model approaches usually adopted to address competition matters in FTAs: (i) the European Approach; (ii) the NAFTA approach (US, Canada, Mexico); and (iii) the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) approach. While champions of these models tend to be developed countries, some developing countries have played or are increasingly playing influential roles in trade and competition policy interaction globally. It concerns Singapore with the Association of Southeast Asian Nations (ASEAN) and China with the Regional Comprehensive Economic Partnership (RCEP).

Taking the above into account, the following 10 Trade Policy Reviews were sampled for the study: European Union (2002, 2020); United States (2003, 2016); Australia (2007, 2015); Singapore (2004, 2012); China (2010, 2018).

Due to competition legislation's cross-cutting nature, 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, a text-based analysis of the sampled TPR meeting and secretariat reports (list in Table 0a) was conducted, based on a list of keywords associated with competition law enforcement and anti-competitive practices. 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.

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Table 0a: Trade Policy Review documents sampled for the Study

TPR #ID	Member	Year	Document Type	Code	Access link
EUR2020	European Union	2020	Secretariat Report	WT/TPR/S/395/Rev.1	https://bit.ly/3fsLsFL
EUR2020	European Union	2020	Meeting Report (Q&A)	WT/TPR/M/395/Add.1	https://bit.ly/3ykfaWg
EUR2002	European Union	2002	Secretariat Report	WT/TPR/S/102	https://bit.ly/3bw9OgM
EUR2002	European Union	2002	Meeting Report (Q&A)	WT/TPR/M/102/Add.1-2	https://bit.ly/3v6ylka
USA2016	United States	2016	Secretariat Report	WT/TPR/S/350	https://bit.ly/3ymmLUn
USA2016	United States	2016	Meeting Report (Q&A)	WT/TPR/M/350/Add.1	https://bit.ly/3ftOOds
USA2003	United States	2003	Secretariat Report	WT/TPR/S/126	https://bit.ly/3uToa2q
USA2003	United States	2003	Meeting Report (Q&A)	WT/TPR/M/126/Add.1-3	https://bit.ly/3frGjOj
AUS2015	Australia	2015	Secretariat Report	WT/TPR/S/312	https://bit.ly/3bAr2JY
AUS2015	Australia	2015	Meeting Report (Q&A)	WT/TPR/M/312/Add.1	https://bit.ly/3fron6y
AUS2007	Australia	2007	Secretariat Report	WT/TPR/S/178/Rev.1	https://bit.ly/3otEUL7
AUS2007	Australia	2007	Meeting Report (Q&A)	WT/TPR/M/178/Add.1	https://bit.ly/3ftT8b2
SGP2012	Singapore	2012	Secretariat Report	WT/TPR/S/267/Rev.1	https://bit.ly/3eXvF2Y
SGP2012	Singapore	2012	Meeting Report (Q&A)	WT/TPR/M/267/Add.1	https://bit.ly/3yvyVdE
SGP2004	Singapore	2004	Secretariat Report	WT/TPR/S/130	https://bit.ly/3ow9bcj
SGP2004	Singapore	2004	Meeting Report (Q&A)	WT/TPR/M/130/Add.1	https://bit.ly/3tRRCoc
CHN2018	China	2018	Secretariat Report	WT/TPR/S/375/Rev.1	https://bit.ly/3bAOM0m
CHN2018	China	2018	Meeting Report (Q&A)	WT/TPR/M/375/Add.1	https://bit.ly/2QufLnh
CHN2010	China	2010	Secretariat Report	WT/TPR/S/230/Rev.1	https://bit.ly/3hAFMMQ
CHN2010	China	2010	Meeting Report (Q&A)	WT/TPR/M/230/Add.1	https://bit.ly/3uZNmEC

SECTION 1

Trade Policy Reviews: Mapping Nexus with Competition Issues

1.1 How are Trade Policy Reviews Organised?

The reviews are organised under the WTO's Trade Policy Review Body (TPRB), which conducts reviews based on a report from economists in the Secretariat's Trade Policy Review Division (TPRD) and a policy statement from the member under review.[1] The Secretariat requests the Member's participation in compiling its report, but is solely responsible for the presented information and opinions. The reports are divided into comprehensive chapters, which examine the Member's trade policies and practice, describe trade policy-making institutions, and the macroeconomic situation.[2]

The WTO General Council then meets as the TPRB to conduct trade policy reviews of the member, providing opportunities for other members to ask questions and seek clarifications from the reviewed member.[3] Following the review meeting, the Secretariat report and the Member's policy statement are released, as are the TPRB chairperson's concluding remarks.

Content of Secretariat Reports

There is a standard framework followed by the Secretariat's reports, typically divided into four main parts as described below.

Economic Environment

First, the country's economic environment is examined, emphasising output, trade, investment, employment, public finances, exchange rates, and other associated macroeconomic concerns.[4]

Trade and Investment Regime

Second, the report reviews the trade policy regime by identifying the institutional framework for trade policy formulation, trade policy objectives, preferential trade agreements, and nonreciprocal preference schemes.[5]

Types of Policy Measures

Third, the report provides an assessment of trade policies and practices by type of measures. It includes: (i) measures directly impacting exports and imports and, (ii) additional measures that impact production such as subsidies, standards, technical

[1] World Trade Organization, n.d. *wto.org.* [Online] Available at: https://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm [Accessed 1 June 2021].
[2] Ibid.
[3] World Trade Organization, 2021. *wto.org.* [Online] Available at: https://www.wto.org/english/tratop_e/tpr_e/tprbdy_e.htm#:~:text=POLICY%20REVIEWS%3A%20ORGANIZATION-,The%20Trade%20Policy%20Review%20Body%20(TPRB),open%20to%20all%20WTO%20Members. [Accessed 4 June 2021].
[4] Zahrnt, V., 2009. *ecipe.org.* [Online] Available at: https://ecipe.org/wp-content/uploads/2014/12/the-wto2019s-trade-policy-review-mechanism-how-to-create-political-will-for-liberalization-1.pdf [Accessed 2 June 2021].
[5] Ibid.

requirements, taxation, government procurements, intellectual property rights, SOEs, etc. This chapter usually contains a dedicated section on competition policy, which will be analysed in the next section of this study.

Trade Policies by Sector

Fourth, trade policy measures are often sector-specific, with considerable coverage of agriculture and services, where trade restrictions are common and complicated.[6] A number of measures taken in these sectors, particularly services, may interact with important aspects of competition policy. These will be explored in the last section of this study.

Participation of other WTO Members

The exchange of questions and answers among members is a crucial part of the review process, and there are procedures established to this effect. First, members are invited to submit their written questions to the member under review through the Secretariat, which should be carried out not later than two weeks before the TPRB meeting. The ideal period for a TPRB review is two sessions, each typically lasting half a day, separated by a day.[7] Before the meeting, the member under review responds to the questions in writing. Secondly, written questions submitted after the two-week deadline should be addressed by the Member under review as soon as possible, well before the commencement of the TPRB meeting's second session. Any unresolved questions and any new questions, asked verbally by Members during the meeting, will be replied to in writing no later than one month following the meeting, with some flexibility at the Chairperson's discretion for Members responding to a significant number of questions.[8]

The types of questions that members ask the reviewed member are varied and may address different areas covered by the report (e.g. policies in certain sectors like agriculture, types of measures like subsidies etc.). By asking questions to the reviewed member, other members may pursue different aims. For instance, they may want to assess whether a given measure is justified and not overly restrictive for their private sector constituencies; seek to learn lessons for strengthening their own policies; raise the profile of an ongoing trade complaint or negotiating position etc.[9]

[6] Ibid, 4.
[7] World Trade Organization, 2005. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=120450,99253,98713,45551,41303&CurrentCatalogueIdIndex=3&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [Accessed 6 June 2021].
[8] Matus, H. M. M., 2011. *wto.org.* [Online] Available at: https://www.wto.org/english/res_e/publications_e/ai17_e/tprm_parf_oth.pdf [Accessed 1 June 2021].
[9] Zahrnt, V., 2009. *ecipe.org.* [Online] Available at: https://ecipe.org/wp-content/uploads/2014/12/the-wto2019s-trade-policy-review-mechanism-how-to-create-political-will-for-liberalization-1.pdf [Accessed 2 June 2021].

1.2 Trade Policy Reviews: Identifying Competition Issues

Competition policy and laws are typically legislations of general application, which apply to all economic sectors. As a result, complex interrelationships exist between competition policy and a wide range of other public economic policies and measures, which may influence or be influenced by competition rules, be mutually supportive or sometimes conflicting with each other.

For instance, examples of government policies that interact with and can support or conflict with competition policy could include, inter alia: (i) Trade policy measures such as tariffs, quotas, subsidies, antidumping and safeguards; (ii) Industrial policy; (iii) Intellectual property policy; (iv) Privatization and regulatory reforms; (v) Investment and tax policies etc. Similarly, sector-specific policies and regulations in environment, healthcare, telecommunications, financial markets or agriculture can sometimes pursue objectives contrary to those pursued by competition policy. In this context, the priority attached to competition policy objectives in the overall framework of government policies becomes a central issue.[10]

Therefore, competition issues may be found across a large spectrum of trade-related policies, practices and sectors covered in WTO TPRs, besides chapters dedicated to competition policy per se.

Defining competition issues and anti-competitive practices

Anti-competitive practices are different types of practices that one or several firms may engage in to benefit from artificially limiting competition in the market (e.g. by exploiting their dominant market position to prevent other firms from entering the market). Such limited competition may result in higher prices as well as reduced consumer choice, product quality, economic efficiency etc. Business practices that may, either per se or under certain conditions, be considered as anti-competitive can be broadly classified as follows:

- Horizontal restraints: these generally entail other competitors in the market and include practices such as cartels, collusion, conspiracy, certain mergers, predatory pricing, price discrimination and price-fixing agreements.

- Vertical restraints: these generally entail supplier-distributor relationships and include practices such as exclusive dealing, geographic market restrictions, refusal to deal or sell, resale price maintenance, tied selling etc.

- Unilateral Conduct: this mainly refers to the abuse of dominant position by a firm, abusing its market power to increase further or maintain its market position and restrict competition. Depending on the jurisdiction, practices by dominant firms which may be considered as anti-competitive could include: charging excessive prices, price discrimination,

[10] https://documents1.worldbank.org/curated/en/977331468759588195/pdf/multi-page.pdf

predatory pricing, price squeezing, refusal to deal, tied selling etc.[11]

Keyword Analysis

Based on the above, and to identify how competition-related issues have been addressed in TPRs, a list of keywords associated with anti-competitive practices and competition law enforcement used in performing textual search and analysis across TPR documents of the sampled reviews was established. The analysis was performed both on reports by the WTO secretariat, as well as TPR meeting reports containing the rounds of questions and answers between the reviewed country and other members (cf. Table 0a for the list of documents sampled for analysis). The list of keywords used in the analysis is provided in Table 1a below.

Table 1a: Sample of Keywords Used in Analysing TPR Secretariat Reports and Member Questions

CATEGORY OF COMPETITION ISSUES	SAMPLE OF KEYWORDS USED IN ANALYSIS
General	competition policy, competition law, competition authority, competition commission, antitrust, restrictive business, anticompetitive, anti-competitive, competition authorities, pro-competitive, anti-trust
Horizontal Agreements	horizontal agreement, cartel, bid rigging, collusion, collusive, merger, concentration, M&A
Vertical Restraints	vertical restraints, selective distribution, vertical arrangement, exclusive distribution, selective distribution, Resale Price Maintenance, RPM, price parity, vertical integration
Unilateral Conduct	dominance, market power, monopoly, unilateral conduct, dominant firm, dominant position, predatory pricing, refusal to deal, oligopoly

Source: Authors

[11] https://stats.oecd.org/glossary/detail.asp?ID=3136

Based on the above-mentioned keyword analysis, the research identified **a total of 318 questions** asked by members to the reviewed countries over the past two decades, which have addressed concerns related to the application of competition policy and law in different areas of trade policy. Similarly, the analysis identified competition-related considerations **in over 100 sub-headings of secretariat reports** from the ten sampled TPRs.

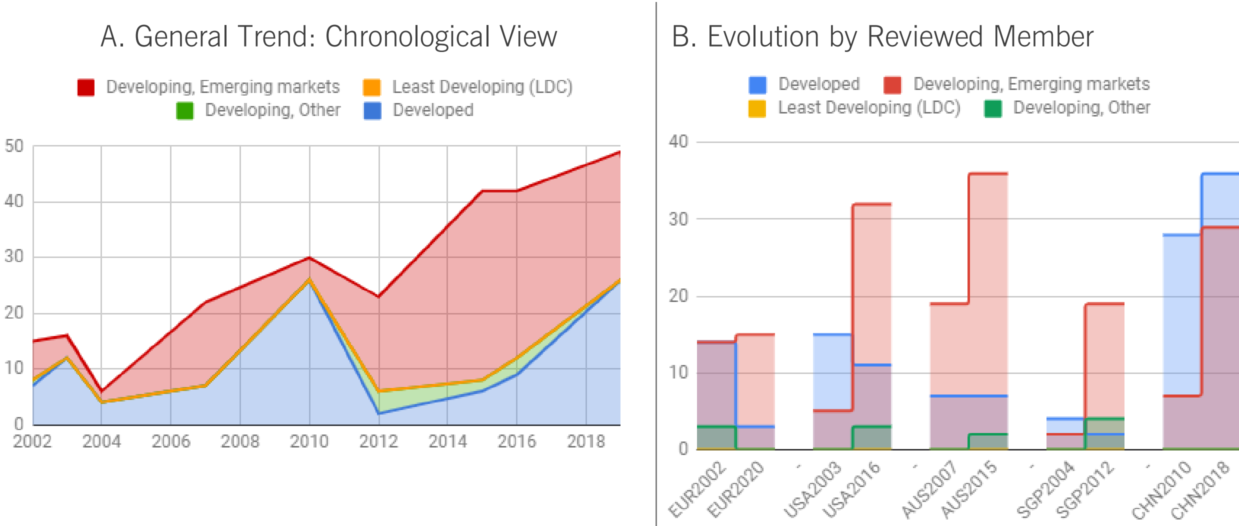
Below, is an overview of the trends emerging from the analysis in terms of a number of competition-related questions over time, representation of different development levels among members raising such questions etc.

An analysis of the main economic sectors and types of trade measures for which competition concerns have been addressed in secretariat reports and member's questions will also be provided before analysing in more details in dedicated sections of the study.

1.3 Participation Trends

Figure 1a below provides graphical representations of the number of competition-related questions asked by members, depending on their development level. For more granularity, and while no sub-division of developing countries exists at the WTO, the figure groups countries based on UNCTADStat categories: [12] (i) Developed regions (code 2205); (ii) Emerging markets (code 2510); (iii) Least Developed Countries, as defined by UN-OHRLLS; and (iv) Other developing countries (code 2200), excluding the aforementioned.

Figure 1a: Number of Competition-related Questions Asked by Members, by Askers' Development Level (2002-2020)



Source: Authors, based on data compiled from 10 TPRs

[12] https://unctadstat.unctad.org/en/Classifications/DimCountries_DevStatus_Hierarchy.pdf

As evident from Figure 1a.A, the number of questions addressing competition-related matters has followed an uptrend over the past two decades. From 15 questions in 2002 (EU review), the number increased to 23 by 2012 (Singapore review), and culminated in 49 questions during the 2018 China review.

For the sampled TPRs, the most active group of countries asking competition-related questions are emerging markets, particularly Mexico (53 questions), China (32 questions) and Brazil (16 questions). It may be partly explained by the fact that 3 out of 5 sampled countries are developed ones, which tend to attract more questions from emerging markets than from fellow developed countries (Figure1a.B). Conversely, China as a major emerging market attracted significantly more questions from developed members than from fellow developing ones during both reviews (Figure1a.B).

Apart from emerging markets however, other developing countries have been significantly less proactive in raising competition-related concerns. Only Costa Rica, Pakistan, Trinidad and Tobago and Dominican Republic raised such concerns, totalling only 12 questions since 2002.

Even more strikingly, no such competition-related questions have been asked by any Least Developed Country (LDC) during the period.

The few questions by non-emerging developing countries mainly addressed institutional arrangements of the reviewed country's competition framework; competition-related aspects of government procurement; as well as the interplay between competition and state trading, e.g. in the agricultural sector. Regarding the latter, for instance, Pakistan asked a question to Australia in 2015, provided in the box below.

CASE EXAMPLE: QUESTION ON STATE TRADING IN AGRICULTURE (AUSTRALIA 2015)

Question from Pakistan:
"Question: Paragraph 3.3.3 of the secretariat report indicates that according to Australia's STE (State Trading Enterprise) notifications under the review period, Australia's export of rice have witnessed a sharp increase, rice sector remains outside the domain of competition commission. Could Australia share its plan for phasing out the public sector role in rice exports?

Reply from Australia:
All rice grown in New South Wales (NSW) that is not sold domestically to an authorised buyer is divested from producers and becomes the property of the NSW Rice Marketing Board (the Board). The Board seeks to ensure the best possible returns from rice sold outside Australia, based on Australian rice's quality differentials or attributes. The Board has appointed Ricegrowers Limited (trading as SunRice) as its sole exporter. [...] Australia has progressively reduced the number of State Trading Enterprises (STEs) with export monopoly powers from seven in 2004 to one in 2015. The revised draft WTO modalities for agriculture (TN/AG/W/4/Rev.4) would require WTO Members to remove the export monopoly powers of STEs. Australia is committed to the removal of STE export monopoly powers as part of a final Doha Round outcome.

Source: WT/TPR/M/312/Add.1

1.4 Measures and Sectors: Where was Competition Discussed?

Due to competition legislation's cross-cutting nature, related discussions may be found across the full range of trade-related measures and sectors covered by WTO Trade Policy Reviews.

In Table 1b, the authors provide an analysis of competition-related keywords found in different sections of the sampled TPRs' secretariat reports, which are typically organised around: (i) Trade and investment regime; (ii) Types of trade measures; and (iii) Trade policies by sector. Similarly, Figure 1b provides a similar analysis focusing on questions asked by members to the reviewed country, based on the secretariat section they refer to. Both figures will be discussed thereafter.

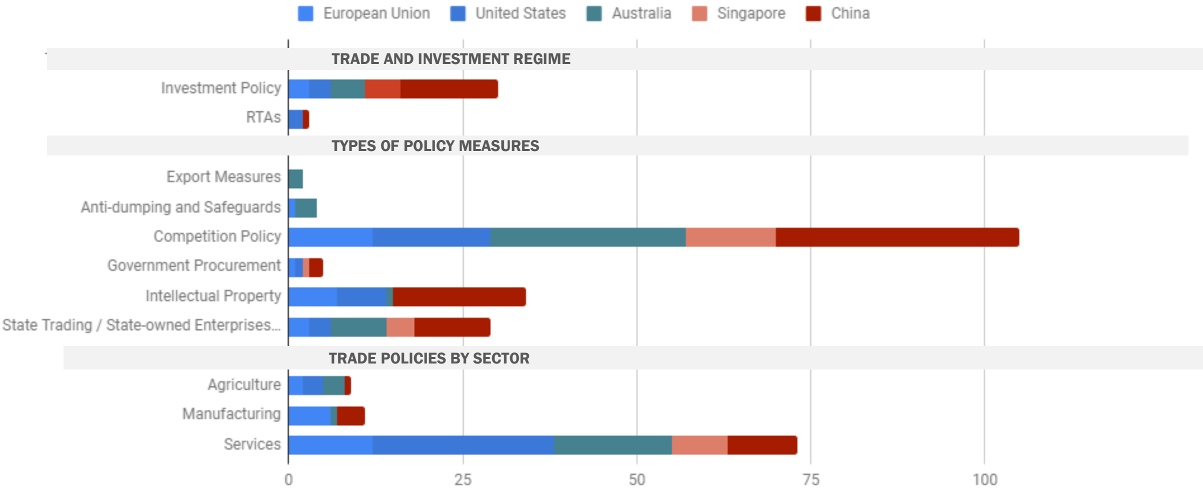
Table 1b: Count of Competition Keywords Found in Secretariat Reports, by Report Section and Trade Policy Review (2002-2020)

Secretariat Report Section	AUS2007	AUS2015	CHN2010	CHN2018	EUR2002	EUR2020	SGP2004	SGP2012	USA2003	USA2016
TRADE AND INVESTMENT REGIME										
Trade Regime: Investment Policy (M&E)						1			2	1
Trade Regime: RTAs	1	1			1	1		1		
TYPES OF POLICY MEASURES										
Export Measures										1
Import Measures		1								
Import Measures: Anti-Dumping and Safeguards	1	1			1					
Other Measures: Competition Policy	2	8	1	9	2	5		1	1	1
Other Measures: Government Procurement		1	1	1		1				
Other Measures: Intellectual Property		1	1	1		2			1	2
Other Measures: Standards										1
Other Measures: State Trading / State-owned Enterprises (SOEs)	1	2		1	2	1				
Other Measures: Subsidies and State Aid			1	1						1
TRADE POLICIES BY SECTOR										
Sector: Agriculture	1	1		1						
Sector: Manufacturing		1		1						
Sector: Mining		1		1						
Sector: Services - General							1		1	
Sector: Services - Energy	1	1	1	1		1				
Sector: Services - Financial and Insurance services		1	1	3	1			1	2	2
Sector: Services - Telecommunications		1	1	1	2	2		1	2	1
Sector: Services - Transport	1	1	1					1	2	2

Source: Authors, based on secretariat reports from 10 TPRs

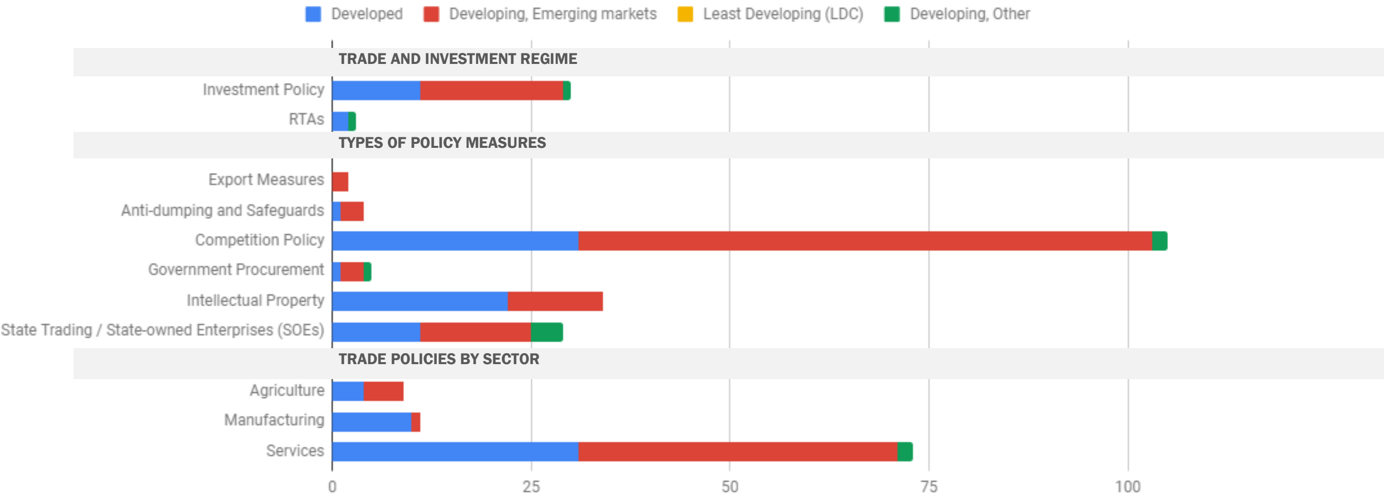
Figure 1b: Number of Competition-related Questions Asked by Members, by Section of Secretariat Report (2002-2020)

A. View by Reviewed Member



Source: Authors, based on data from 10 TPRs

B. View by Askers' Development Level



Source: Authors, based on data from 10 TPRs

Dedicated Section on Competition Policy

Logically, questions explicitly related to the reviewed member's Competition Policy and Law (as covered in the dedicated secretariat report chapters, see Table 1a) represented the bulk (34%) of all questions containing competition-related keywords in the sampled TPRs (Figure 1b).

The highest number of these questions was directed to China (33%), particularly during its 2018 review. Looking at the profile of members showing interest in raising questions on the Competition chapter itself, these were mainly emerging markets (69%). In terms of individual members, those raising questions on the subject most frequently were Mexico (33), China (14), and Switzerland (10).

Section 2 of this study will explore in greater details the content of dedicated sections on competition policy in WTO secretariat reports, particularly recent ones of the five sampled countries: European Union, United States, Australia, Singapore and China. It will also identify and analyse key issues raised in members' questions related to the competition chapter, e.g. focusing on institutional arrangements, exceptions, mergers and acquisitions, cooperation etc.

Other Types of Policy Measures

Besides sections dedicated to competition policy, other sections on policy measures have attracted notable attention from members, who have asked competition-related questions concerning measures such as intellectual property (11%) and STEs/ SoEs (9%) as reflected in Figure 1a.

Section 3 of this study will analyse in more details how secretariat reports and member's questions have brought to light the nexus between competition issues and certain types of trade measures. In particular, the section will focus on those which have attracted the most questions from the membership, such as intellectual property and SoEs. To a lesser extent, competition-related questions were also asked about the report sections on government procurement and anti-dumping and safeguards, which will also be analysed in section 3.

Trade Policies by Sector

In the sampled reviews, 73 questions by members addressed competition-related aspects of services. It represents nearly one quarter (23%) of all questions which have addressed competition-related aspects, and places services at rank n°1 (78%) among the economic sectors attracting most questions from members, far ahead of manufacturing (12%) and agriculture (10%) as is evident from Figure 1b.

The highest number of service-related questions was directed to the United States (36%), particularly during its 2016 review. Looking at the profile of members raising questions on competition-related aspects of services, these were mainly emerging markets (55%) such as China, Chinese Taipei, and Brazil. In terms of individual members, those raising questions on the subject most frequently were China (15), Japan (11), and the European Union (10).

The strong nexus between the services sector and competition policy is also evident from secretariat reports (Table 1b), with all but one report having discussed measures at the intersection of both issues. Most notably, it was discussed in both sampled TPRs from the United States (2003, 2016) as well as China 2018.

Indeed, owing to their often public interest and natural monopoly characteristics, services tend to be strictly regulated and prone to competition authorities' scrutiny. Moreover, incumbent firms in this sector – often former or current state monopolies – may have acquired dominant market positions, which may discourage new entrants.

Based on the above, section 4 of this study focuses on this sector by examining how TPRs have addressed the interaction between competition policy and services.It particularly looks at the types of services which have attracted most questions from the membership such as telecommunications (35%), transport (14%), financial and insurance services (12%).

SECTION 2

Competition Policy and Law

In this section, the main highlights and recent developments in the competition policy framework of the five sampled members are reviewed, as provided in the sections of WTO secretariat reports specifically dedicated to competition policy and law.

2.1 European Union

In the 2020 review, the section of the Secretariat's report dedicated to competition policy noted recent developments in the European Union's competition policy landscape, both in terms of general framework and approach to specific sectors.

At the general framework level, main updates included: (i) improved communication with external stakeholders through launching eTrustEx (a tool allowing the entities to submit complaints, propose remedies in merger cases, replies to requests for information etc); and (ii) judgments on excessive pricing. The Court ruled that to determine whether prices are unfair, they must be compared to neighbouring member countries or other member countries after being adjusted in line with the purchasing power parity index.[13]

Regarding International cooperation: (i) the EU signed an agreement with Mexico's competition authority to exchange information on competition legislation and share non-confidential information about cases under investigation; (ii) the EU and Japan began negotiations reviewing the EU-Japan Agreement on cooperation on anti-competitive acts to improve information exchange between their respective anti-competitive bodies; and (iii) the Commission released a notice to curb the risk of uncertainty in competition policy enforcement and cooperation (following Brexit), highlighting that businesses headquartered in a third country are not exempt from EU competition laws.

2.2 United States

In the 2016 review, the section of the Secretariat's report indicated that, between 2013 and 2015, the Department of Justice (DoJ) and the Federal Trade Commission (FTC) screened several mergers and acquisitions as part of the Hart-Scott-Rodino Antitrust Improvements Act's pre-merger notification processes.[14] Under the Clayton Act, which prohibits mergers and acquisitions that are likely to reduce competition, the FTC and the Attorney General seek court orders to prevent a merger. The FTC may also issue cease and desist orders in administrative procedures.[15]

2.3 Singapore

During Singapore's 2012 review, the Secretariat report noted that the country's competition policy had remained essentially unaltered since 2008, notwithstanding enhanced enforcement measures and

[13] WT/TPR/S/395/Rev.1
[14] WTO, 2016. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S350.pdf&Open=True [Accessed 24 June 2021].
[15] WT/TPR/S/350, 80.

increasing enforcement action.[16] In particular, certain sectors continued to be exempt from competition laws.

Passed in 2004, Singapore's Competition Act adheres to the effects doctrine, which holds that actions that are not directed at or have the effect of blocking, limiting, or distorting competition inside Singapore are exempt from the Act's reach (for example, export cartels).[17] Vertical restraints are likewise expressly prohibited, and block exemptions exclusively apply to anti-competitive agreements, decisions, and practices (not an abuse of a dominant position).[18] The requirements for granting a block exemption necessitate that the agreement in question provides a clear net economic benefit without placing unnecessary restrictions on competition.[19] To encourage firms to adopt mergers and acquisitions as a growth and globalisation strategy, the government offers a merger and acquisition allowance (non-repayable grant).[20] Merger and anti-cartel measures are used to govern oligopolies.

The Competition Commission of Singapore (CCS) is the authority mandated with investigating anti-competitive conduct, adjudicating, imposing financial penalties, and ordering offenders to implement structural or behavioural remedies.[21] The structural or behavioural remedies are dependent on the redress required to stop the anti-competitive activity. The CCS may also levy a financial penalty on any party that violates the ban on anti-competitive agreements or abuse of dominance on or after January 1, 2006, if the violation was done knowingly or negligently. There are no prison penalties for such violations.[22]

With regard to cooperation on competition matters, the report notes that Singapore is a member of the International Competition Network (ICN), which provides a platform for anti-trust agencies to engage in informal conversation and cooperation.[23] The CCS is also a member of the ASEAN Competition Experts Group, which since 2007 acts as a platform for debating and organising regional cooperation in competition policy in ASEAN.[24]

2.4 Australia

In Australia's 2015 review, the section of the Secretariat's report dedicated to competition policy noted recent developments in the country's competition policy landscape. In December 2013, the government announced the launch of the first thorough review of competition laws and policies in more than 20 years to reinvigorate competition reform, broadening "durable benefits" (longstanding productivity gains) and establishing a "footing for exports" (fostering international competitiveness).[25]

Regarding the legislative framework, the Competition and Consumer Legislation Amendment Act 2011 articulated the provisions of the Australian Consumer Law concerning unconscionable behaviour, as well as the mergers and acquisitions requirements to address creeping acquisitions, and provided for prohibiting information disclosure of anti-competitive

[16] WT/TPR/S/267, 45.
[17] WT/TPR/S/267, 44.
[18] Ibid
[19] Ibid
[20] Ibid
[21] WT/TPR/S/267, 46.
[22] WT/TPR/S/267, 47.
[23] WT/TPR/S/267, 46.
[24] Ibid
[25] Ibid, 75.

pricing and other information.[26] On March 6, 2014, the Senate introduced the Competition and Consumer Amendment Bill 2014, submitted to the Senate's Economics Legislation Committee for investigation and report by December 4, 2014. It seeks to change the Competition and Consumer Act 2010 to allow the Federal Court of Australia to order a corporation to lower its market share or power within two years of being found to have abused such market share or power.[27]

The Competition and Consumer Act (CCA) condemns cartel conduct such as price-fixing, output restrictions, and bid-rigging. In addition, allocating customers, suppliers, territories and carrying out other anti-competitive conduct such as boycotts, misuse of market power, and mergers, among others that lessen competition are addressed by the CCA.[28] The CCA 2011, which applied to the banking sector, established prohibitions on anticompetitive price signalling and information disclosure, and the changes went into effect in 2012. [29] Four mandatory industry codes of conduct are established to promote successful compliance with the CCA: (i) the 1998 Franchising Code of Conduct; (ii) the 2007 Oilcode; (iii) the 2007 Horticulture Code; (iv) the 2009 Unit Pricing Code. Conduct that raises competition issues may be approved on a case-by-case basis through an Australian Competition and Consumer Commission (ACCC) managed procedure if it is in the public interest.[30]

The ACCC issued a new Compliance and Enforcement Policy in February 2013, identifying the sorts of harmful anti-competitive behaviour to be evaluated as a priority, regardless of the economic sector.[31] These are cartel conduct, agreements that significantly reduce competition, and the abuse of market power. Furthermore, competition and consumer concerns originating in highly concentrated sectors (e.g. supermarket and fuel sectors) and online competition were identified as additional areas of increased focus.[32]

It is also recalled that, in Australia, all legislation is subject to a Regulatory Impact Statement (RIS) review process, which necessitates the examination of several variables, including an assessment of competitive impacts.

2.5 China

In the 2018 review, the section of the Secretariat's report dedicated to competition policy reported that the Chinese authorities focused on structural economic reform during the 13th Five-Year Plan (2016-2020). It included encouraging private sector engagement in the economy and reforming SOEs while maintaining a predominance of public ownership. [33] The promotion of competition was also among the additional initiatives outlined in the Plan.[34]

A notable legislative development in competition policy since China's previous review was the revision to the Anti-Unfair Competition Law, which took effect on January 1, 2018. [35] The Law eliminated overlaps with the Anti-Monopoly Law (AML), by removing sections preventing public utility enterprises or monopolistic enterprises from requiring consumers to purchase specific

[26] WT/TPR/S/312, 76.
[27] WTO, 2015. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S312.pdf&Open=True [Accessed 28 June 2021].
[28] WT/TPR/S/312, 76.
[29] Ibid.
[30] Ibid.
[31] WT/TPR/S/312, 79.
[32] Ibid.
[33] WT/TPR/S/375, 9.
[34] Ibid.
[35] WT/TPR/S/375, 12.

items and prohibiting collusive tenders. Furthermore, the new Law included rules to prohibit unfair competitive activities on the Internet, such as malicious interference.[36]

The AML's main goals are to protect consumers and public interest while ensuring fair market competition and improving economic efficiency.[37] It has authority over anticompetitive acts that affect the Chinese domestic market, whether in China or elsewhere. It focuses on three types of monopolistic practices: (i) monopoly agreements, (ii) misuse of a dominating market position, and (iii) concentrations of undertakings that have or are expected to have the impact of eliminating or limiting competition.[38]

AML and its implementing laws prohibit six forms of horizontal agreements: (i) price-fixing, (ii) product availability restrictions, (iii) market splitting, (iv) restrictions on the purchase or development of innovative technologies, (v) joint boycotting of transactions, and (vi) other agreements confirmed by the authorities.[39] Vertical agreements fall into three categories: fixing the prices of products resold to a third party, restricting the lowest prices of products resold to a third party, and other agreements confirmed by authorities.[40] The prohibition applies to written or verbal monopolistic agreements and concerted behaviour among companies that are not expressly written or verbally agreed upon.[41]

Administrative monopolies are generally prohibited under the AML, including designated dealing, obstructing the free circulation of products across regions, restrictions in tenders, investment or branch establishment restrictions, forcing undertakings to pursue monopolistic conduct, and issuing rules with content that excludes or restricts competition.[42] AML provides that remedies against administrative monopoly include cease-and-desist orders from higher authorities and disciplinary sanctions for officials who have direct responsibility or others who are adversely affected.[43]

It also noted that China engages in competition cooperation efforts through the Asia-Pacific Economic Cooperation (APEC), the OECD, and UNCTAD. It maintains international competition policy collaboration with competition authorities from other countries or groups of countries. According to the authorities, China has signed memorandums of understanding on bilateral anti-monopoly cooperation with the United Kingdom, Brazil, and Spain since 2016.[44] China has also signed Memorandums of Understanding with Brazil, Russia, India, China, and South Africa (BRICS) on Competition Laws and Policy Cooperation.[45] The two countries agreed under the China-Korea FTA to carry out extensive cooperation and coordination in the implementation of competition policies.[46] The China-Australia FTA also highlights the importance of competition policy and agrees to enhance technical cooperation in this respect.[47]

[36] WT/TPR/S/375, 12.
[37] WT/TPR/S/375, 77.
[38] Ibid.
[39] WT/TPR/S/375, 80.
[40] Ibid.
[41] Ibid.
[42] WT/TPR/S/375, 83.
[43] Ibid.
[44] WT/TPR/S/375, 84.
[45] Ibid.
[46] Ibid.
[47] Ibid.

2.6 Key Issues Raised in Members' Questions

Mergers and Acquisitions

Nexus with Competition Policy

Mergers and Acquisitions (M&A) may, under certain circumstances, limit competition when they result in undertakings with excessive dominance in a market. From the standpoint of competition law and policy, concerns are not on mergers and acquisitions *per se*, but whether they result in monopolistic or dominating market positions.

Therefore, parties aspiring to an M&A may be required to notify and seek approval from competition authorities, which would approve it or not based on an analysis of the relevant market etc. Cross-border mergers may also result in firms operating under multiple national competition policy regimes at the same time. In this context, there is a risk that examinations conducted by several national authorities may yield contradictory or incompatible results.[48]

Highlights from Recent Secretariat Reports

Among other reviews, the European Union (2020) secretariat report brought to light several developments and measures in the area of M&As. In particular, the report discussed Foreign Direct Investment (FDI) screening mechanisms made in the context of mergers and acquisitions. There, one of the goals of the screening mechanism is to check whether a planned FDI will not adversely affect competitiveness in the market. It is noted that the EU prepared and implemented an EU-wide framework for FDI screening, resulting in a more coordinated European approach than the current variety of different national screening mechanisms.[49]

In the United States (2016), the report notes that foreign investment is not typically subject to review. On the other hand, the President has the authority to undertake national security reviews of "covered transactions" through the Committee on Foreign Investment in the United States (CFIUS).[50] A "covered transaction" is defined as "any merger, acquisition, or takeover by or with any foreign entity that might result in foreign control of any person engaged in interstate commerce in the United States."[51] CFIUS monitors transactions to ensure that a foreign undertaking does not gain control of certain U.S businesses, noting that this is done to protect national security and not to impede foreign investment.

According to the report, between 2013 and 2015, the Department of Justice (DoJ) and the FTC screened several mergers and acquisitions as part of the Hart-Scott-Rodino Antitrust Improvements Act's pre-merger notification processes.[52] Under the Clayton Act, which prohibits mergers and acquisitions that are likely to reduce competition, the FTC and the Attorney General seek court orders to prevent a merger, and the FTC may issue cease and desist orders in administrative procedures.[53]

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[48] Paasman, B. R., 1999. *repositorio.cepal.org.* [Online] Available at: https://repositorio.cepal.org/bitstream/handle/11362/4369/1/S9890697_en.pdf [Accessed 11 June 2021].
[49] WT/TPR/S/395/Rev.1, 47.
[50] WT/TPR/S/350, 35.
[51] WT/TPR/S/350.
[52] WTO, 2016. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S350.pdf&Open=True [Accessed 24 June 2021].
[53] WT/TPR/S/350, 80.

Similar issues are discussed in Australia's secretariat report (2015), noting that the CCA prohibits acquisitions that are likely to reduce competition significantly. The ACCC published revised Informal Merger Review Process Guidelines in September 2013, highlighting recent significant advances in the approach to merger reviews while also introducing changes to increase efficiency and transparency.[54] The ACCC unconditionally cleared 65 per cent of mergers that went through a public or confidential review in 2013/14, and 94 per cent of all mergers. Some of the more significant mergers proposed recently were in the air, banking, retail, and healthcare sectors.[55] All mergers that were publicly reviewed and approved were made public on the ACCC's website.

In China (2018), all concentrations above specific levels must be reported to the Ministry of Commerce (MOFCOM) for approval before any action can take place, according to the AML.[56] MOFCOM may initiate investigations to determine whether non-notified concentration activities should have been notified and subject to an anti-trust review under the 2008 State Council Provisions and the Interim Provisions on Investigation of Unnotified Concentrations of Undertakings.[57] According to the AML, MOFCOM must consider the following elements throughout a review: (a) the market share of the relevant market's business operators and their influence over that market; (b) the degree of market concentration in the relevant market; (c) the effect of concentration on market access and technological advancement; (d) the impact of concentration on customers and other business operators; (e) the impact of concentration on national economic development; and (f) other market competition-related factors.[58]

Also, FDI in the form of M&As is subject to anti-trust assessments, which are meant to examine the impact on the market.[59] During the period under review, several guiding documents were issued by China, such as the Guiding Opinions on Standardization of Names of Applications of the Concentration of Undertakings, issued on 14 February 2017, to provide clear guidance to involved parties and improve enforcement predictability.[60]

Finally, similar discussions are found in the secretariat report of Singapore (2012), noting that certain mergers are excluded or exempted from competition law such as mergers with net economic efficiencies. It includes cases where the merger stakeholders can show that, despite the loss of competition, the merger will result in, among other things, lower costs, more innovation, and greater choice or quality; and mergers based on public interest considerations.[61] The Competition Commission issues recommendations to assist firms to understand how it implements and enforces Act prohibitions.[62] The Commission developed recommendations to help government agencies identify and assess the possible impact of proposed measures on competition.

Analysis of Member Questions

The competition-related questions asked by members in the sampled reviews covered

[54] WTO, 2015. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S312.pdf&Open=True [Accessed 28 June 2021].
[55] WT/TPR/S/312, 78.
[56] WT/TPR/S/375, 81.
[57] WT/TPR/S/375, 82.
[58] WT/TPR/S/375, 81.
[59] WT/TPR/S/375, 40.
[60] Ibid.
[61] WT/TPR/S/267, 45.
[62] Ibid.

Mergers and Acquisitions, mainly focusing on the application of China's AML for SOEs. AML applies the same rules regarding monopolistic conduct to both domestic and foreign firms.

In China's (2010) review, both the EU and the USA asked questions regarding Chinese SOEs. The USA expressed interest in possible opportunities for foreign investors to purchase ownership interests in SOEs in China, as illustrated in the box below. In addition, the EU asked for the provision of guidelines covering all aspects of China's AML to enhance compliance and legal certainty for Business Operators.

CASE EXAMPLE: QUESTION ON MERGERS AND ACQUISITIONS (CHINA 2010)

Question from the United States:
"China noted that it will adopt measures to promote mergers and acquisitions involving large state-owned enterprises. Will this effort include any privatisation of state-owned enterprises or opportunities for foreign investors to purchase ownership interests in state-owned enterprises?"

Answer
The main polices and measures for promoting restructuring of large state-owned enterprises include to encourage private enterprises to participate in reform and restructuring of state-owned enterprises through merger, share-holding or equity participating, to accelerate the introduction of joint stock system into state-owned enterprises and promote the restructuring and listing of state-owned enterprises and improve the quality of listed companies, and to encourage the introduction of strategic investors, including overseas strategic investors.

Source: WT/TPR/M/230/Add.1

The concern regarding SOEs operating overseas has risen over the years as economies with major SOEs are rapidly expanding and have become more connected with the international system.[63]

Exemptions

Vertical Block Exemptions

While vertical restraints are typically under scrutiny by competition authorities due to their potentially competition-distorting effects, several reviewed countries adopted block exemptions for such agreements.

In the EU, for instance, the Vertical Block Exemption Regulation (VBER) exempts vertical agreements from EU competition rules set out in the Treaty on the Functioning of the European Union (TFEU) Art. 101, under certain conditions.[64] For instance, vertical agreements between buyers and suppliers may be exempted if none of its parties has a market share of more than 30%. The firms part of an undertaking eligible for exemption under the VBER are required to request such exemption to the European Commission, which will review the case before granting it.[65]

[63] OECD, n.d. *oecd.org.* [Online] Available at: https://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/44215438.pdf [Accessed 9 July 2021].

[64] EU, n.d. *eur-lex.europa.eu.* [Online] Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E101:EN:HTML [Accessed 8 July 2021]

[65] UNCTAD, 2002. *unctad.org.* [Online] Available at: https://unctad.org/system/files/official-document/ditcclpmisc25_en.pdf [Accessed 6 July 2021].

Investigations and prosecutions can occur when an agreement or practice is not reported and approved.

For other countries, such regulation may raise certain concerns, as evident from the eight questions and replies from the sample addressing such existing regulations in: (i) the EU, mainly focusing on the car manufacturing sector; (ii) Singapore, particularly looking at maritime transport and liner shipping conferences; and (iii) Australia. The box below provides an example of a question asked by Japan to the EU regarding the effects of vertical block exemptions in the car manufacturing sector.

CASE EXAMPLE: QUESTION ON VERTICAL BLOCK EXEMPTIONS (EU 2002)

Question from Japan:
"Q101. Japan understands that the EU has received comments from the European Automobile Manufacturers Association (ACEA) on the new draft block-exemption regulation for motor-vehicle distribution and servicing agreements. One example is that the new draft regulation will have the effect of diminishing comforts enjoyed by car buyers by hampering the appropriate geographical location of car dealers and garages. The ACEA, therefore, requests that automobile manufacturers should be allowed to control or limit the number and the distribution of service garages designated by automobile dealers. Japan would like to have the response and view of the EU regarding such requests."

Answer:
Under EU law, distribution and servicing agreements in selective or exclusive distribution systems are taken to be restrictive and are not considered to be in line with the competition rules unless they have been "exempted" by the Commission. The Commission may exempt whole categories of agreements in this manner. Car distribution and servicing agreements have had their own such "block exemption" since 1985.

The Commission found in a November 2000 report that the last block exemption, number 1475/95 (please see our web site at http://europa.eu.int/comm/competition/car_sector/), had not had the required effects, and notably had not brought the required benefits to the consumer, especially as regards the Internal Market and the consumer's right to buy cars in other Member States. Much of the problem was that the old regulation allowed car manufacturers to give territorial exclusivity to distributors operating within a selective distribution system; this let them carve up the Internal Market along national lines.

The replacement for regulation 1475/95, adopted by the Commission on 17 July 2002, provides that when they appoint car distributors, manufacturers can no longer combine quantitative selectivity with a territorial element, such as an exclusive territory or a protected location ("location clause"). This means that if a manufacturer wants to give his distributors an exclusive territory, he will be able to stop them opening additional outlets, but will no longer be able to prevent them from selling cars to independent resellers. If, on the other hand, he wants to stop sales to independent resellers, he will not be able to use location clauses to prevent his authorised distributors from setting up additional outlets in areas where other distributors are situated. However, in all cases, manufacturers will continue to be able to fix a location for a distributor's first outlet, and distributors will not simply be able to close down this outlet and move elsewhere. This will allow carmakers to ensure that the density of their networks is maintained.

As far as authorised repair -only outlets are concerned, the manufacturer will no longer be allowed to limit the number of such outlets or restrict their location, and an authorised repairer will be able to set up shop wherever he wishes. By allowing repairers to be authorised by the manufacturer without having to sell new cars, the Commission has reinforced the density of the authorised repair network in two ways. Firstly, some repairers who are currently independent will choose to qualify as authorised repairers. Secondly, some authorised dealers who have their contracts terminated when

a car manufacturer re-organises his sales network will be able to stay on within the repair network as authorised repairers. This should ensure that consumers will continue to benefit from a dense network of repairers.

The Commission has given operators a three-year transition period to adapt to the ban on location clauses in selective distribution agreements for the sale of new cars. A one-year transition period applies to the other elements of the reform, including those relating to authorised repairers.

The new rules apply to all distributors, repairers, and car manufacturers operating in Europe. The Commission had many fruitful contacts with both JAMA and ACEA during the consultation period leading to the adoption of the new regime, and also had wide consultations with consumers and consumer groups.

Source: WT/TPR/M/102/Add.1

Other Exemptions

Other type of exemptions from competition enforcement can be granted in certain cases, especially for key national industries. For instance, under Article 7 of China's AML, industries under state control and that significantly impact the national economy are usually granted exemptions closely monitored by the law to protect consumers' interests, and prevent abuse of market positions.[66]

Anti-competitive situations may sometimes be permitted on a case-by-case basis, e.g. in cases where there is only one exporter for the supplier in the market or where the distributor is the exclusive distributor for the exporter, as evidenced in Australia's (2007) case. A provision of an export agreement that is notified to the ACCC may be exempt from the anticompetitive conduct provisions in Part IV of the Trade Practices Act 1974 (TPA) under section 51(2)(g).[67]

Cooperation

Cooperation on competition policy and its enforcement is an important part of competition authorities' work when it comes to addressing cross-border competition issues. Countries may enter into competition-specific cooperation agreements to ensure cooperation on tackling cross-border anti-competitive activities, fostering information exchange and efficiency while at the same time helping each other in identifying behaviours that harm consumers.

The USA has certain Competition Cooperation Agreements under Competition Law and Policy. During the USA (2016) review, Switzerland requested elaboration on the USA's Competition Cooperation Agreements, to which the USA responded as shown in the box below.

Some international bodies such as the International Competition Network (ICN), United Nations Conference on Trade and Development (UNCTAD) and Organisation for Economic Cooperation and Development (OECD) also provide platforms for such cooperation among authorities, particularly for mutual learning.

[66] MINISTRY OF COMMERCE PEOPLE'S REPUBLIC OF CHINA, 2008. *english.mofcom.gov.cn.* [Online] Available at: http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml [Accessed 9 July 2021].

[67] National Competition Council, 1999. *ncp.ncc.gov.au.* [Online] Available at: http://ncp.ncc.gov.au/docs/LESe-001.pdf [Accessed 9 July 2021].

CASE EXAMPLE: QUESTION ON COOPERATION IN COMPETITION ENFORCEMENT (USA 2016)

Question from Switzerland:
Q: "Could the USA (2016) please elaborate on the scope of its Competition Cooperation Agreements?"

Reply by the United States:
A: "The U.S antitrust agencies cooperate with non-U.S. counterparts pursuant to formal and informal bilateral and multilateral arrangements, although cooperation also takes place in their absence. These agreements serve as a catalyst for international cooperation, but they are not legally necessary for cooperation to take place. These arrangements generally promote practical enforcement cooperation through informal communications, underscore the importance of investigative assistance, including through the sharing of non-confidential information, and provide for confidentiality safeguards. Except for Mutual Legal Assistance Treaties (MLATs) and an antitrust-specific mutual legal assistance agreement (MLAA), they do not change the signatories' laws, including those concerning the treatment of confidential information."

Source: WT/TPR/M/350/Add.1

National Security

Competition policy and national security are closely linked, particularly in the context of foreign investments. For instance, certain SOEs may be closely linked to national interests, and foreign investments by them or into them may pose national security concerns. Therefore, foreign investors willing to invest in certain domestic enterprises may be subject to security review if the transaction risks affecting state security.

The box below provides two examples of member questions addressing such concerns in TPRs. It includes a question from Mexico to China (2018) regarding the conflict resolution processes by national security authorities; and a question from the USA to China (2010) expressing concerns regarding merger influence on national security.

CASE EXAMPLE: QUESTIONS ON NATIONAL SECURITY CONCERNS

Question from Mexico (China 2018):

"MOFCOM is responsible for concentration review, while the national security authorities take care of factors related to national security. In this case, how do both authorities reach a consistent outcome? If any, how are conflicts resolved?"

Question from the United States (China 2010):

"In its response to U.S. question 46, China stated that it will be issuing management regulations on foreign capital mergers and acquisitions involving national security, in accordance with the Anti-Monopoly Law. a.When does China anticipate issuing those regulations? b.Does China plan to provide for public notice and comment on a draft of the regulations, before they are finalized? c.Will the national security review being implemented by the new regulations allow China to limit the applicability of other reviews of foreign direct investment, which go beyond national security to broader policy?"

Source: WT/TPR/M/230/Add.1

Institutional Arrangements

In general terms, institutional arrangements can be defined as structures and agreements set forth in order to effectively divide different responsibilities between agencies. They represent the framework for coordination between institutional bodies to ensure coherent approaches. These vary depending on countries' institutional setup and their political, social, and economic realities.

Lack of strong institutional arrangements may contribute to inconsistent or unpredictable competition enforcement. Concerns may sometimes be raised regarding the division of responsibilities, as exemplified by Mexico's question to China (2018) reported in the box below.

CASE EXAMPLE: QUESTION ON COMPETITION INSTITUTIONAL ARRANGEMENTS (CHINA 2018)

Question from Mexico:

"(i) the AML's division of authority across three agencies diminishes coherence in law and policy; and (ii) the lack of autonomy of the three agencies creates the potential that competition policy may be influenced by industrial policies which sometimes conflict with competition policy. Will the new authority have full autonomy?

Reply from China:

"In order to improve the market regulation mechanism, create a market environment for further competition and further boost integrated law-enforcement in market regulation, the State Council has decided to integrate responsibilities of three antimonopoly law enforcement institutions and Office of the Anti-Monopoly Committee of the State Council to undertake centralised antimonopoly law-enforcement work. The merged State Administration for Market Regulation shall continue to carry out the anti-monopoly law enforcement work with effort in accordance with Anti-Monopoly Law."

WT/TPR/M/375/Add.1

SECTION 3

Trade Measures by Type

Besides report sections 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.

Figure 3a below shows the number of competition-related questions asked by members on trade measures, by measure type and member development level between 2002-2020. It comes out that members asking competition-related questions have focused on Intellectual Property (43%), STEs/SOEs (36%), Government Procurement (6%), and Anti-Dumping and Safeguards (5%).

In this section, the authors will analyse in more details how secretariat reports and member's questions have brought to light the nexus between competition issues and these types of trade measures that have attracted most questions from the membership.

For each measure, they start by outlining typical ways it can interact with competition, before providing an overview of how such interactions have been addressed in the secretariat reports of the sampled TPRs. Finally, questions asked by members in relation to such interactions will be analysed, identifying which country attracted most scrutiny on the matter and which members have shown most interest in the interaction of competition with the subject measure.

Figure 3a: Number of Competition-related Questions Asked by Members on Trade Measures, by Measure Type and Member Development Level (2002-2020)

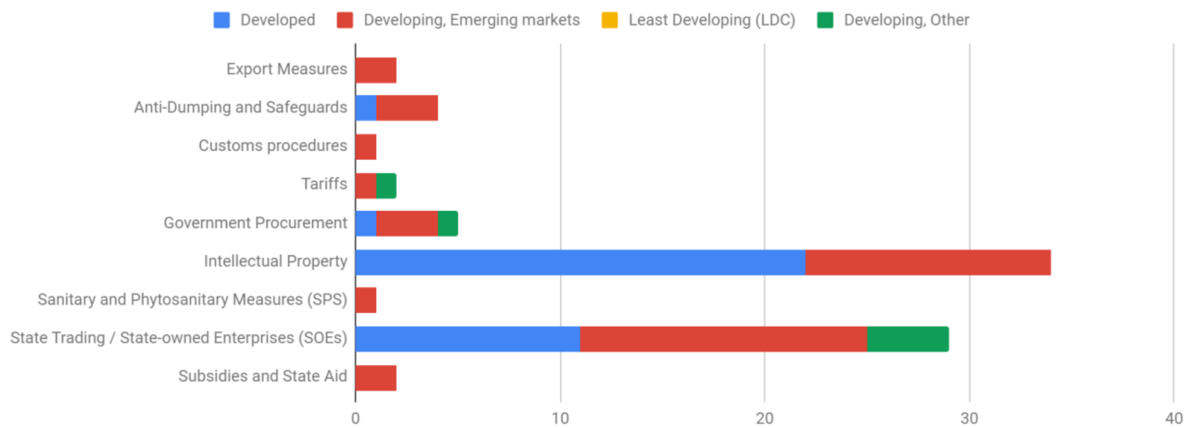
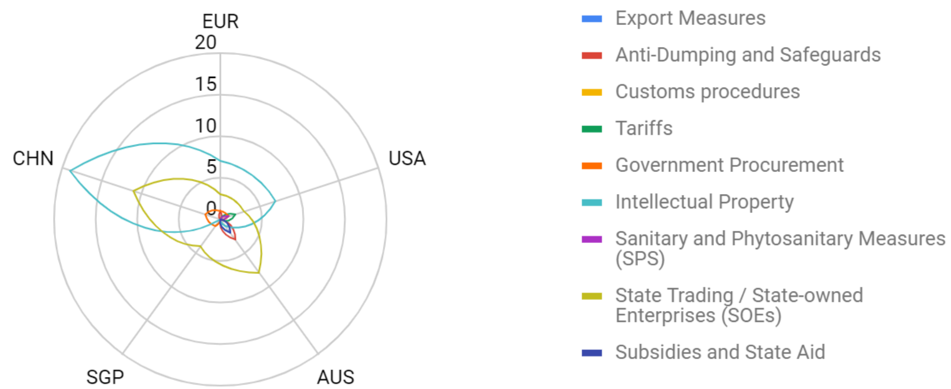


Figure 3b: Number of Competition-related Questions Asked by Members on Trade Measures, by Reviewed Country (2002-2020)



3.1 Intellectual Property

Nexus with Competition Policy

Intellectual property rights (IPRs) and competition policy are, in principle, complementary. 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.

Despite this complementarity, tensions inevitably exist between these two regulatory systems, mainly because granting IPRs amounts to reducing competition by giving monopoly rights to a firm. It may at times deter innovative investments by rival firms, diminish dynamic competition, and provide excessive market power to the right-holding firm. For instance, intellectual property-related practices such as blocking patents could threaten competition in particular cases.

The interface between the two issues is already recognised in existing WTO agreements, particularly the TRIPS agreement. Article 8 recognises that appropriate measures may be needed to prevent abuse of intellectual property rights by right holders or resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology. Other relevant provisions include TRIPS Articles 31 and 40, with the latter recognising the potential adverse trade effects of licensing practices or conditions pertaining to IPRs which restrain competition.

Geographical Indications

A Geographical Indication (GI) is a type of Intellectual Property Rights (IPR) indicating a product's origin where a specific feature is entirely or primarily attributed to that region. [68] These are commonly used for agricultural products, meals, wine and spirits, handicrafts, and industrial products.[69]

GIs pose minimal risks of limiting market competitiveness and, instead, can encourage competitive behaviour among producers seeking to differentiate their goods through improved quality.[70]

Section 3 of Part II of the TRIPS Agreement consists of three provisions that address the protection of GIs, i.e., Articles 22, 23, and 24. It is important to protect GI for consumer protection and protection of right-holding firms. Yet, GIs can sometimes cause concern under competition policy when it leads to cartels and oligopolistic behaviour.

Copyright

By restricting the exclusivity of a copyright, competition law may sometimes perform a "restrictive" role that conflicts with copyright objectives.[71] As a result, several competition frameworks either exclude copyright from their ambit, or only include it to a limited extent in the scope of guidelines on

[68] McDermott, N., n.d. *sites.google.com.* [Online] Available at: https://sites.google.com/site/349924e64e68f035/issue-5/balancing-geographical-indicators-and-eu-competition-law [Accessed 21 June 2021].
[69] WIPO, n.d. *wipo.int.* [Online] Available at: https://www.wipo.int/geo_indications/en/ [Accessed 21 June 2021].
[70] Bagal, M. N. & Vittori, M., 2011. *origin-gi.com.* [Online] Available at: https://www.origin-gi.com/images/stories/PDFs/English/OriGIn_publications/manual_acpcomplet.pdf [Accessed 21 June 2021].
[71] Ibid, 5.

technology transfer which are generally non-binding.[72]

However, competition law should not be regarded as an "enemy" of copyright law but rather a critical tool of a contemporary, more comprehensive copyright policy. Competition law can be used as part of a more practical approach to combat copyright piracy.[73]

Highlights from Recent Secretariat Reports

During the period covered under the EU's 2020 review, the European Union Trademark Application (EUTM) regime saw the adoption of a fundamental trademark reform package enacted in 2015. It took the form of a regulation updating the rules on EU wide trademarks handled by the EU, and a directive further consolidating national trademark law.[74] To better unify the national frameworks for trademark regimes in EU member states coexisting with the EU trademark regime, the European Parliament and council enacted Directive (EU) 2015/2436 to resemble member states' trademark laws.[75]

Regarding patents and trademarks, the 2016 USA review reported the following developments: (i) joint comments to the US Patent and Trademark Office on its initiative to improve the quality of granted patents; (ii) updated DoJ views to the Federal Communications Commission on its Mobile Spectrum Holdings proceeding; and (iii) comments presented by FTC staff to state legislators on proposed legislation affecting competition among local healthcare providers.[76]

Addressing IP, Trademarks and IP enforcement, the same review noted that the US administration views IP as a key source of economic development and high-quality jobs. The authorities utilise US trade policy to defend US invention and creativity, as promoting innovation and creativity is critical to US prosperity, competitiveness, and employment.[77] In the absence of federal registration, trademark protection in the United States is obtained from the actual use of the mark under state and federal unfair competition laws, i.e. federal registration is not required to establish a right to the mark.[78] To ensure fair competition and prevent monopolies, Section 337 of the Tariff Act of 1930 makes it unlawful to use "unfair methods of competition and unfair acts in the importation and sale of products in the United States, the threat or effect of which is to destroy or substantially injure a domestic industry, prevent the establishment of such an industry, or restrain or monopolize trade and commerce in the United States."[79]

Trade secrets

Trade secrets are intellectual property rights on confidential information which may be sold or licensed. In general, to qualify as a trade secret, the information must be commercially valuable, known only to a limited group of persons, and be subject to efforts by the rightful holder to keep it secret. Depending on the legal system, the legal protection of trade secrets forms part of the general concept of protection against unfair competition or is

[72] Ibid, 6.
[73] Max Planck Institute for Intellectual Property and Competition Law, 2013. *wipo.int*. [Online] Available at: https://www.wipo.int/export/sites/www/ip-competition/en/studies/copyright_competition_development.pdf [Accessed 21 June 2021].
[74] WT/TPR/S/395/Rev.1,153.
[75] Ibid.
[76] WT/TPR/S/350, 83.
[77] WTO, 2016. *docs.wto.org*. [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S350.pdf&Open=True [Accessed 24 June 2021].
[78] WT/TPR/S/350, 99.
[79] WT/TPR/S/350, 103.

based on specific provisions or case law on the protection of confidential information. In general, unfair practices in respect of secret information include breach of contract, breach of confidence, and industrial or commercial espionage.

The protection of trade secrets and its relationship with competition 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.[80]

Geographical indications

It was noted during the EU's 2020 review that the EU commissioned a study on the economics of Geographical Indications (GI) protection at the EU level, focusing on the case of non-agricultural products. Non-agricultural GIs may be protected as collective EU trademarks as well as under unfair competition laws.[81]

Analysis of Member Questions

In the sampled reviews, 34 questions by members addressed competition-related aspects of Intellectual Property. It represents 11% of all questions which have addressed competition-related aspects, and places Intellectual Property at rank n°1 (46%) among types of trade measures (other than competition policy itself), attracting most questions from members.

The highest number of these 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), Canada (6), and European Union (4).

CASE EXAMPLE: QUESTION ON INTELLECTUAL PROPERTY (CHINA 2018)

Question from Canada:
"Have there been any trade secrets cases under the amended Anti-Unfair Competition Law and if so, can China please provide details?"

Response from China:
"The new Anti-Unfair Competition Law that entered into force on 1 January 2018 has modified and improved the provisions on trade secret protection and strengthened the protection of trade secrets. It further defines trade secret, no longer emphasizing the practical utility; makes more scientific and reasonable provisions on the extent of operators taking of confidentiality measures; adds the provision, the supervision and inspection departments and their employees shall have an obligation to keep the trade secrets known in their investigations confidential; and imposes stricter administrative punishment for acts infringing upon trade secrets, to a maximum of CNY three million."

Source: WT/TPR/M/375/Add.1

[80] WT/TPR/S/375, 105.

[81] WT/TPR/S/395/Rev.1, 154.

3.2 State Trading and State-owned Enterprises

Nexus with Competition Policy

SOEs are firms fully or partially controlled by a state. Reasons for their original creation may be diverse, although often related to the provision of public services or goods. In emerging economies, SOEs have regularly played a role in national development strategies, e.g. as a tool for implementing industrial policy, creating jobs, or protecting national security.SOEs may enjoy advantages linked to their government ownership, such as direct and indirect subsidies, tax exemptions, preferential access to credit, and exemptions from antitrust laws or regulatory regimes. In markets where SOEs compete with private firms, such preferences can give them substantial competitive advantages that can have widespread effects on markets and competition in different jurisdictions. [82]

Governments may grant SOEs exclusive or monopoly rights over certain activities they are tasked with carrying out. For example, this is evident in postal services, utilities, and other universal services pursued by the state through state-controlled organisations. In addition, several SOEs in the network industries operate as vertically integrated organisations, with emerging monopolies in parts of their value chains. It 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.[83] Therefore, establishing a fair playing field is critical to allowing competition to function efficiently and bring advantages to consumers and the economy as a whole.

In recent years, SOEs have become important global players in key sectors of the economy which have undergone liberalisation. With an increasing number of them 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. These recent developments have also posed challenges for competition investigations, such as taking into account the SOEs' public service role, calculating turnover, and defining the limits of the SOE entity.[84]

In addition, concerns regarding competitive neutrality are raised due to the market entry of SOEs situated in countries where the corporatisation process has not been completed.[85]

Highlights from Recent Secretariat Reports

In Australia (2015), the secretariat report noted that Government Trading Enterprises (GTEs) continued engaging in the production of goods and services, typically as monopolies and were expected to pay their costs either partly or entirely. [86] All government-owned firms are subject to competition laws. The government may impose price limits on GTEs that provide products and services in a monopolistic market or identify other targets

[82] OECD, 2018. *oecd.org.* [Online] Available at: https://www.oecd.org/daf/competition/competition-law-and-state-owned-enterprises.htm [Accessed 22 June 2021].
[83] Ibid, 6.
[84] OECD, 2018. *oecd.org.* [Online] Available at: https://www.oecd.org/daf/competition/competition-law-and-state-owned-enterprises.htm [Accessed 22 June 2021].
[85] Capobianco, A. & Christiansen, H., 2011. *oecd-ilibrary.org.* [Online] Available at: https://www.oecd-ilibrary.org/docserver/5kg9xfgjdhg6-en.pdf?expires=1624345785&id=id&accname=guest&checksum=A72BF6BEAB43DBC72224DB3F6FB61850 [Accessed 22 June 2021].
[86] WT/TPR/S/312, 81.

such as Community Service Obligations (CSOs).[87]

According to a Productivity Commission assessment from 2008, the poor financial performance of many GTEs highlighted a long-term inability to run these enterprises on a truly commercial basis in compliance with competition policy.[88] The Commonwealth Government privatized Medibank Private health insurance company during the review period. Other privatizations carried out by the government of New South Wales (NSW) included: Port Botany and Port Kembla, two of Australia's largest ports (May 2013); Eraring Energy (electricity generation), and two Delta Electricity power facilities (July 2013).[89]

Regarding State Trading in Australia (2015), in the agricultural sector, the Rice Marketing Board in the State of New South Wales, which has export monopoly rights, was the sole state trading organisation operating during the review period, according to Australia's WTO notification on state trading in 2014.[90] At the Commonwealth, state, and territory levels, there were still a comparatively substantial number of additional public enterprises, with or without monopoly or exclusive trading rights, engaged in the production and trade of goods and services.[91]

Regarding STEs and SOEs in China (2018), mixed-ownership reforms, which enable private capital to be invested in government-run companies, have resulted in progress. 68% of central SOEs controlled by the State Asset Supervisory Administrative Commission (SASAC) have integrated non-State owners by the end of 2016.[92] Several SOEs have also announced restructuring plans, with the emphasis appearing to be on mergers and consolidation rather than operational restructuring.[93]

Additionally, China’s AML enables SOEs to engage in exclusive operations in sectors deemed critical to China's economy and national security. According to Article 7 of the AML, exclusive production and sales rights may also be granted.[94]

Regarding agriculture in China (2018), despite the removal of price limits on tobacco leaf, the State retains the monopoly on administering the right to produce, manufacture, sell, transport, import and export tobacco and tobacco products.[95] The State Tobacco Monopoly Administration/China National Tobacco Corporation issues licenses to private businesses to import and export tobacco products.[96]

Analysis of Member Questions

In the sampled reviews, 29 questions by members addressed competition-related aspects of STEs and SOEs. This represents 9% of all questions which have addressed competition-related aspects, and places STEs and SOEs at rank n°2 (39%) among types of trade measures (other than competition policy itself) attracting most questions from members. The highest number of these questions was directed to China (38%).

Looking at the profile of members showing interest in raising questions on competition-

[87] WT/TPR/S/312, 81.
[88] Ibid.
[89] Ibid.
[90] WT/TPR/S/312, 66.
[91] Ibid.
[92] WT/TPR/S/375, 23.
[93] Ibid.
[94] WT/TPR/S/375, 89.
[95] WT/TPR/S/375, 123.
[96] Ibid.

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).

CASE EXAMPLE: QUESTION ON STATE TRADING AND SOES (CHINA 2018)

Questions from USA: "Please describe the efforts of the central government regarding mixed-ownership reform during the review period. For these reform efforts, please indicate what share of the state-owned enterprises remain majority state-owned or state-controlled after state share divestiture."

Response from China: "There are no one-size-fits-all quantitative standards on the proportion of state-owned share holdings and the retained shares of state-owned shares, and the mixed ownership reform on experimental basis is still underway. Therefore, we cannot provide the share of the state-owned enterprises remain majority state-owned or state-controlled after state share divestiture."

Source: WT/TPR/M/375/Add.1

3.3 Government Procurement

Nexus with Competition Policy

Government procurement and competition policy are closely linked, and several concerns may arise when it comes to their interaction. First, government procurement is particularly prone to bid-rigging cartels among the suppliers because of the repeated nature of procurement and the transparency regulations that make it quite simple for cartel members to identify and prohibit deviations from collusive methods.[97]Second, corruption may occur in government procurement, for instance when public officials exploit their public positions for personal benefits, such as taking a bribe to approve a tender.[98]

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. They rely on public provision to the greatest extent.[99]

At the WTO, the plurilateral Government Procurement Agreement (GPA) of 1996 broadly aims to protect consumers through transparency in government procurement regimes, foster competition, and provide market access to foreign suppliers. As a trade liberalization agreement, the GPA works indirectly, but relevantly to increase the number and diversity of competitors for procurements, which in turn alleviates supplier collusion and market confining schemes. This agreement provides a basis for further development of competition policy; there are connections to competition, however the agreement leaves room for practices like bid-rigging to occur, which could be prevented with competition policy.[100]

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[97] Spagnolo, G., 2009. *konkurrensverket.se*. [Online] Available at: https://www.konkurrensverket.se/globalassets/forskning/lankar-forslag-pa-uppsatsamne/open-issues-in-public-procurement.pdf [Accessed 21 June 2021].

[98] OECD, 2010. *oecd.org*. [Online] Available at: https://www.oecd.org/daf/competition/cartels/46235399.pdf [Accessed 21 June 2021].

[99] Ibid, 10.

[100] http://www.cuts-geneva.org/pdf/STUDY%20-%20Trade%20and%20Competition%20Policy.pdf

Highlights from Recent Secretariat Reports

Under the government procurement strategic priorities for the European Union (2020), the new EU strategy aimed to increase transparency, integrity, and better data by establishing a database on irregularities and providing guidelines on the practical use of new integrity provisions and exclusion grounds linked to collusion.[101]

As reported in Australia's 2015 review, the Trade Practices Amendment (Cartel Conduct and Other Measures) Act of 2009 addresses, among other things, criminal liability for cartel conduct, such as bid-rigging arrangements between competitors.[102] Major construction contracts have been identified as susceptible to supplier misconduct. Between 2011 and 30 June 2014, ACCC Federal Court action resulted in penalties of $A 59.15 million on ten (10) firms for a series of cartel proceedings including, among other things, bid-rigging in the provision of land cables, construction, and automotive parts.[103]

In China, the 2018 review reported that the Law on Implementing Regulations of the Government Procurement reiterated that the Budget Law, the Contract Law, the Product Quality Law, the Price Law, and the Anti-Monopoly Law are all legislation that may influence government procurement.[104]

Analysis of Member Questions

In the sampled reviews, five (5) questions by members addressed competition-related aspects of Government Procurement. It represents 2% of all questions which have addressed competition-related aspects. It places Government Procurement at rank n°3 (7%) among types of trade measures (other than competition policy itself), attracting most questions from members. The highest number of these questions was directed to China (40%).

Looking at the profile of members showing interest in raising questions on competition-related aspects of Government Procurement, these were mainly emerging markets (60%) such as Mexico (3) and Costa Rica (1).

CASE EXAMPLE: QUESTION ON GOVERNMENT PROCUREMENT (SINGAPORE 2012)

Question from Mexico:
"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?

Answer from Singapore:
"Open and fair competition is one of the key principles governing government procurement and this is applicable to all government agencies across the board. CCS works with government agencies to improve on their tender/procurement design to minimise risk of bid -rigging and to promote greater competition. CCS also conducts talks at the Singapore Civil Service College to procurement officers. The talks cover spotting bid rigging behaviour and some advice on how the tender/procurement design can be improved to prevent bid-rigging and to promote greater competition. If suppliers are found to be involved in bid-rigging, they can also be debarred or disqualified from being awarded contracts by the government."

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[101] WT/TPR/S/395/Rev.1, 137.
[102] WTO, 2015. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S312.pdf&Open=True [Accessed 28 June 2021].
[103] WT/TPR/S/312, 65.
[104] WT/TPR/S/375, 91.

3.4 Anti-Dumping and Safeguards

Nexus with Competition Policy

Although competition policy and anti-dumping are 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 (who may sometimes benefit from advantages as part of their home country's industrial policy, e.g., subsidies, tax exemptions etc.). When used as a competition tool, anti-dumping measures are more narrowly concerned with domestic firms' interests and may sometimes undermine competition. In such cases, anti-dumping can be abused as a protectionist tool to shield domestic firms from foreign competitors, particularly in the absence of effective cross-border competition rules.

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 (e.g., not prohibiting some export cartels) may at times trigger other countries to resort to trade defence measures such as anti-dumping.

Highlights from Recent Secretariat Reports

In Australia's 2015 review, reported changes were made to the anti-dumping and countervailing measures under the Streamlining the Anti-Dumping System Policy, which was announced on June 22 2011, and was a fundamental reform to Australia's anti-dumping policy in more than a decade. [105] Because of the unique convergence in business practices and bilateral application of competition legislation between Australia and New Zealand, imports from New Zealand covered by ANZCERTA continued to be excluded from anti-dumping activities and were dealt with under competition laws. Nevertheless, competition legislation had never been used in this regard at the time of the review.[106]

Analysis of Member Questions

In the sampled reviews, 4 questions by members addressed competition-related aspects of Anti-dumping and Safeguards. It represents 1% of all questions which have addressed competition-related aspects, and places Anti-dumping and Safeguards at rank n°4 among types of trade measures (other than competition policy itself), attracting most questions from members.

The highest number of these questions was directed to Australia (75%), particularly during its 2015 review. Looking at the profile of members showing interest in raising questions on competition-related aspects of Anti-dumping and Safeguards, these were mainly emerging markets (75%), most notably Colombia, Chile, and Singapore.

[105] WT/TPR/S/312, 52.

[106] WT/TPR/S/312, 52.

CASE EXAMPLE: QUESTION ON ANTI-DUMPING AND SAFEGUARDS

Question from Singapore: "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."

Response from Australia: "Section 46A of the Competition and Consumer Act 2010 was introduced following the ANZCERTA and is intended to act as a safeguard against dumping-type conduct. Section 46A prohibits a firm taking advantage of substantial market power in a trans-Tasman market (a market in Australia, New Zealand or both) with the purpose of harming a competitor in an Australian market (other than a market for services, reflecting the dumping origins of the section). Competition laws, including section 46A, are administered by the Australian Competition and Consumer Commission (ACCC)."

Source: WT/TPR/S/312

SECTION 4

Measures by Sector: Focus on Services

As discussed in the first section of this study, services are the economic sector where competition aspects have been most prominently addressed in the sampled reviews. It is evident from the content of secretariat reports, and from analysing the questions asked by members during the reviews. This section examines in more details how TPRs have addressed the interaction between competition policy and services, particularly the types of services that have attracted most questions from the membership.

In fact, many services are highly regulated and prone to linkages with competition-related measures. Owing to their public interest nature (e.g., energy, postal, transport, audiovisual) or high establishment costs (e.g., rail networks, airports), many services started as state monopolies (airlines, electricity companies, postal, telecommunications etc.). With liberalisation, these sectors were gradually opened to competitors (national and foreign).

However, incumbent firms may continue to benefit from certain advantages or exceptions, which potential competitors may perceive as entry barriers or unfair. Moreover, the incumbent firms have acquired a dominant market position over the years, which may discourage new firms from competing.

Figure 4a below shows that members asking competition-related questions in the area of services have overwhelmingly focused on telecommunications (49%), particularly directed to the United States and to a lesser extent, the European Union (Figure 4b). The next most-debated services sectors were respectively financial and insurance services (16%), transport (10%), and energy (7%).

In this section, for each of the aforementioned services, the study starts by introducing its nexus with competition policy; before identifying relevant highlights from recent secretariat reports of sampled reviews. Finally, it analyses questions asked by members, including the profile of those showing the most interest in the subject and the content of their questions.

Figure 4a: Number of Competition-related Questions Asked by Members on Services, by Service Type and Member Development Level (2002-2020)

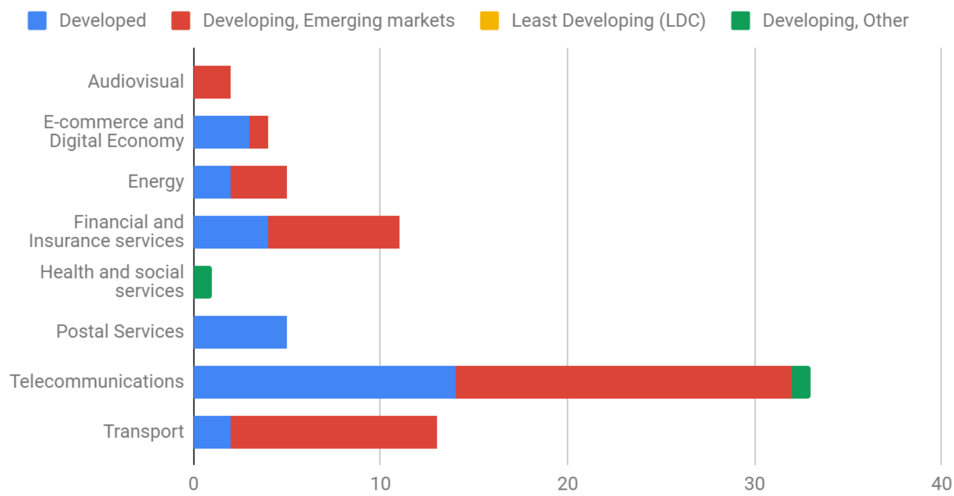
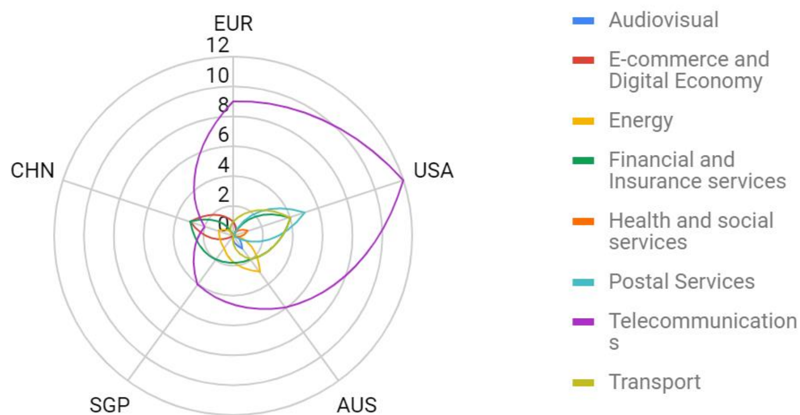


Figure 4b: Number of Competition-related Questions Asked by Members on Services, by Reviewed Country (2002-2020)



4.1 Telecommunications

Nexus with Competition Policy

The telecommunications sector is rapidly changing with the emergence of new technologies and competitors, leading to fierce competition. In this sector, firms often seek access to their competitors' networks, and rules for connecting networks can have significant effects on competitive relationships and investment.[107]

At the WTO, the General Agreement on Trade in Services (GATS) incorporated a separate Annex on Telecommunications, designed as a competition-related safeguard that guarantees reasonable access to and use of public telecommunications by all suppliers in a given market. Participating WTO members have also committed to the regulatory principles spelt out in a dedicated Reference Paper, which responds to particular structural and market access concerns of this sector, often subject to extensive monopolization. These obligations strike a balance between users' needs for fair terms of access and the needs of the regulators and public telecommunications operators to maintain a system that works and meets public service objectives.[108]

Mergers in the sector may also be a subject of competition concern. Vertical mergers, for instance, may attract antitrust focus because of concentration operations involving major vertically connected firms in technology, media, and the telecommunications industries.[109] Vertical mergers may harm competition by exploiting market power by price discrimination. 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.[110]

Highlights from Recent Secretariat Reports

In the EU 2020 review, the secretariat report discussed the reform of telecoms rules and the European Electronic Communications Code (EECC), which has provided certain incentives for private investments while regulating market power by: (i) ensuring that the authorities take into consideration the undertaking's investment in very high-capacity networks;[111] (ii) stating that undertakings with considerable market power that meet specified conditions should not face additional access obligations regarding elements of high-capacity networks by regulatory authorities; (iii) lowering access obligations for wholesale market players with large market power who make private investments in networks and sell or rent access to the networks without providing services to end users;[112] (iv) providing investors with more stability by increasing the review from three to five years to determine whether an undertaking has significant market power, which national regulators carry out.[113]

Telecommunications in the context of the DSM strategy was also addressed in the EU 2020 review. One of the major priority areas

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[107] OECD, 2001. *oecd.org.* [Online] Available at: https://www.oecd.org/daf/competition/sectors/1834399.pdf [Accessed 22 June 2021].

[108] https://www.wto.org/english/res_e/reser_e/ersd201812_e.pdf

[109] OECD, 2019. *oecd.org.* [Online] Available at: https://www.oecd.org/daf/competition/vertical-mergers-in-the-technology-media-and-telecom-sector.htm [Accessed 22 June 2021].

[110] Ibid, 8.

[111] WT/TPR/S/395/Rev.1, 246.

[112] WT/TPR/S/395/Rev.1, 257.

[113] WT/TPR/S/395/Rev.1

under the EU's DSM strategy is a comprehensive reform of EU telecoms rules to address concerns raised about the market power of some online platforms.[114]

In the 2016 USA review, the report noted that the Federal Communications Commission (FCC) implements various regulatory safeguards such as the "no special concessions" rule, the benchmark settlement rates policy, and dominant carrier requirements. It is to dissuade foreign carriers from engaging in activity that could affect competition in the US telecommunications market.[115] The "no special concessions" rule prevents US international carriers from entering into exclusive agreements with foreign carriers with significant market power to negatively harm competition in the US market. The Foreign Participation Order established a presumption that carriers with less than a 50% market share in a foreign market had such market dominance.[116] On 12 June 2015, a new Open Internet Order came into effect whereby broadband internet access service providers are subject to some of the same laws as common carriers, such as prohibiting unjust or unreasonable conduct or unreasonable discrimination.[117]

In Australia's 2015 review, it was noted that the previous government made significant changes to the structure of the telecommunications sector to respond to consumer demands for better broadband capacity and encourage competition.[118] Despite implementing pro-competitive policies, the firm Telstra had a significant market strength with dominating positions in fixed-line, mobile and internet, which raised competition concerns.[119] The government formed NBN Co., a new state-owned corporation, to develop and manage a nationwide next-generation broadband network.[120] It was done to promote competition in the market, preventing a firm from exploiting market power and providing consumers with better services.

China's 2018 review reported that the Ministry of Industry and Information Technology (MIIT) granted the state-owned broadcaster China Broadcasting Network (CBN) a fourth basic telecom licence in May 2016. CBN will not offer voice-calling services but will instead provide domestic data transfer services through the Internet and domestic communication facility services. The goal is to encourage integrating three networks (telecom, radio and television, and the Internet).[121]

Finally, the secretariat's report for the 2012 review of Singapore highlighted that because the Infocomm Development Authority of Singapore (IDA) has its own Telecom Competition Code, Singapore's Competition Act does not apply to telecommunications and postal services.[122] To promote competition in the market, the IDA created the Code of Practice for Competition in the Provision of Telecommunication Services (Telecom Competition Code) in September 2000.[123] It addresses both ex-ante (e.g., price regulation, interconnection, mergers and acquisitions) and ex-post (e.g., completion rules) regulations.[124] Revisions to the Code (every three years) see a greater reliance on market

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[114] WT/TPR/S/395/Rev.1, 242.
[115] Esteva, C., 1997, 136.
[116] Ibid.
[117] Ibid.
[118] WT/TPR/S/312, 120.
[119] Ibid.
[120] Ibid.
[121] WT/TPR/S/375, 148.
[122] WT/TPR/S/267, 67.
[123] Ibid.
[124] Ibid.

dynamics and self-regulation as more effective long-term methods of preserving competitiveness.[125]

Analysis of Member Questions

Telecommunications is by far the service sector that has attracted the most attention from members regarding its interplay with competition policy. Indeed, 33 questions by members addressed this topic, representing 10% of all competition-related questions identified in sampled reviews; and 45% of questions related to services. The highest number of these questions was directed to the USA (36%) and the European Union (27%), particularly during its 2002 review.

Looking at the profile of members showing interest in raising questions on competition-related aspects of Telecommunications, these were mainly emerging markets (55%), most notably Chinese Taipei (5), China (4), and Republic of Korea (3). However, it is worth noting that Japan was the individual member asking the highest number of questions on this subject (7).

CASE EXAMPLES: QUESTIONS ON TELECOMMUNICATIONS

Question from Japan: "A foreign carrier providing international telecommunications services, which has "market power" in its own market, is regulated more strictly than other carriers, being imposed additional rules. Such regulations have no rationale and may result in unjustified discriminatory treatment against foreign carriers. These regulations may also have the effect of unfairly restricting foreign direct investment. What is the U.S. view on our comments?"

Response from USA: "The United States is surprised and disappointed that Japan does not appear to understand the importance of dominant carrier regulation, particularly in light of its own WTO obligations. The United States cannot always be assured that a foreign regulator will prevent its carriers from abusing their position to the market to the detriment of U.S. consumers. The United States has a legitimate interest in ensuring that its domestic rules adequately protect its consumers."

Source: WT/TPR/M/126/Add.1-3

Question from China: "The FCC maintains several regulatory safeguards to deter conduct by a foreign carrier that could result in harm to competition in the U.S. telecommunications market. These safeguards include the "no special concessions" rule, the benchmark settlement rates policy, and dominant carrier requirements. The no special concessions rule prohibits U.S. international carriers from agreeing to enter into exclusive arrangements with foreign carriers that have sufficient market power to affect competition adversely in the U.S. market. The Foreign Participation Order adopted a presumption that carriers with less than 50% market share in the foreign market lack such market power…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?"

Response from USA: "The "no special concessions" rule concerns competitive conduct. Specifically, it addresses the ability of a foreign carrier with market power in its home market to leverage that market power into the U.S. international services market to the detriment of U.S. carriers and U.S. consumers."

Source: WT/TPR/M/350/Add.1

Question from Chinese Taipei: "Please provide us the reason for increasing the threshold of SMP (significant market power) from 25% to 40% of the market share?"

[125] WT/TPR/S/267, 67.

Response from the EU: "The SMP threshold has been aligned with the competition law concept of dominance, and is defined as follows: An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. Note that this is not a simple market share test."

Source: WT/TPR/M/102/Add.1

4.2 Transport

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

Looking at the profile of members raising questions on competition-related aspects of Transport, these were mainly developing, emerging markets (85%), most notably China (6), Brazil (1), and Singapore (1).

Air Transport

Nexus with Competition Policy

Air transport has changed significantly in recent decades, with liberalisation and deregulation enabling the entry of new firms that have boosted competition and innovation. Deregulation and liberalisation also substantially impacted the market structure, resulting in mergers of flag airline carriers and different types of partnerships.[126]

It triggered enhanced scrutiny of the sector by competition authorities to ensure that anti-competitive airline mergers, alliances, agreements, and unilateral actions do not replace prior regulatory barriers.[127] Airport slot availability (structural obstacles), airline loyalty programs, and drip pricing methods (strategic barriers) are three barriers to entry that have been scrutinised. At the intersection of competition, consumer protection, and transportation policy, such barriers need antitrust enforcement or regulatory solutions in some cases.[128]

Highlights from Recent Secretariat Reports

The USA 2016 review noted that airline mergers and alliances can lead to significant cost savings and benefits for consumers. However, concerns may arise when a merger or alliance could limit or eliminate competition on the affected routes.[129] In the United States case, restructuring of the airline industry began in 2001 and continued during the review period. On October 17, 2015, U.S Airways merged with American Airlines to form the world's largest carrier in terms of

[126] OECD, n.d. *oecd.org.* [Online] Available at: https://www.oecd.org/daf/competition/airlinecompetition.htm [Accessed 22 June 2021].
[127] Ibid.
[128] Ibid.

[129] European Competition Authorities, n.d. *ec.europa.eu.* [Online] Available at: https://ec.europa.eu/competition/publications/eca/report.pdf [Accessed 25 June 2021].

revenue, passengers flow, and fleet size.[130] After a decade of industry mergers, four major airlines were established, notably American Airlines, Delta Air Lines, Southwest Airlines, and United Airlines, which operated 82 percent of the domestic market's scheduled seat capacity in 2016.[131]

Competition-related issues in this sector were also addressed in Singapore's 2012 review, reporting that the airport operator is required to follow the license requirements as well as the Civil Aviation Authority of Singapore (CAAS) rules of practice. These regulations control the airports' service performance requirements as well as fair competition in the airport market.[132] The Airport Competition Code, enacted in July 2009, forbids Changi Airport Group from entering into anti-competitive agreements and abusing its dominant position, as well as mergers and acquisitions that reduce competition in the airport sector.[133] In addition, the Aviation Development Fund's Aviation Partnership Programme (APP) promotes the adoption of industry-level standards or practices that improve overall productivity, effectiveness, and competitiveness.[134]

Analysis of Member Questions

In the sampled reviews, seven (7) questions by members addressed competition-related aspects of Air Transport. It represents 54% of questions related to transport services. The highest number of these questions was directed to the USA (57%), particularly during its 2016 review. All members raising questions on competition-related aspects of Air Transport were emerging markets, most notably China (5), Brazil (1), and Singapore (1).

CASE EXAMPLE: QUESTION ON AIR TRANSPORT (USA 2016)

Question from China

"U.S. Department of Transportation. 172. Please introduce how 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."

Answer from the United States:

The question appears to be what role the U.S. Department of Transportation plays in the oversight of air and flight operations and how its responsibility is split with other U.S. Federal Government agencies. The U.S. Department of Justice has the primary responsibility for overseeing airline mergers and acquisitions, as well as the conduct of airline firms in the marketplace. The U.S. Department of Transportation plays a secondary role in reviewing airline transactions. The U.S. Department of Transportation also has authority to review, and if warranted, grant antitrust immunity to U.S. and foreign airlines engaging jointly in foreign air transportation (49 U.S.C. § 41308-41309), as well as prohibit unfair and deceptive practices and unfair methods of competition in the airline industry (49 U.S.C. § 41712).

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[130] WTO, 2016. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S350.pdf&Open=True [Accessed 24 June 2021].

[131] WTO, 2016. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S350.pdf&Open=True [Accessed 24 June 2021].

[132] WT/TPR/S/267, 74.

[133] Ibid.

[134] Ibid.

Maritime Transport: Liner Shipping

Nexus with Competition Policy

A competitive liner shipping sector is essential for global transportation. In terms of the implementation of competition law, this industry has had a unique history. Liner shipping conferences, in which liner shipping companies fix prices and other conditions on a specific route, have been a widespread practice since the industry's inception in the late nineteenth century. For a long time, these agreements were exempt from antitrust laws.

Over 70% of world merchandise trade by value is carried by sea, with liner shipping carriers transporting its majority. Recent massive mergers in this business, where the five largest firms currently account for more than 60% of global vessel capacity, have resulted in greater concentration, which may have negative consequences. The number of companies providing overseas trade services has fallen by 40% due to mergers, ship sizes have risen by 270 per cent, and more limited choice alters the balance of power in negotiations.[135]

Several reviews and studies conducted over the past decades by organizations and individual countries have suggested that liner shipping may not be unique. Its cost structure does not differ significantly from that of other industries, or at least not sufficiently to justify that it needs an exemption from competition laws.

Highlights from Recent Secretariat Reports

In the United States 2016 review, the report noted that the independent Federal Maritime Commission (FMC) regulates ocean-borne liner transport, including ocean transportation intermediaries. It also oversees the collective activities of shipping lines not subject to antitrust laws in the USA, for both domestic and foreign operators of fixed-scheduled liner shipping services.[136] Also worth noting is that exemptions from antitrust laws, including the Sherman and Clayton Acts, apply to the U.S. and foreign operators of liner shipping services and marine terminal operators in the United States in connection with their activities in U.S. international ocean-borne trade.[137]

Regarding maritime transport sector in Australia, as reported in the country’s 2015 review, the government enacted a number of legislative and regulatory changes to make the Australian shipping industry more internationally competitive by expanding the size of the shipping fleet and encouraging employment in the sector. The government's reform plan, “Stronger Shipping for a Stronger Economy”, was launched in 2011 and came into effect in July 2012.[138] Liner shipping conferences are still governed by a distinct portion of the CCA of 2010, supervised by the Registrar of Liner Shipping. Under this Act, shipping lines have limited exemptions from the CCA's anti-competitive conduct provisions, enabling them to engage in

[135] CUTS (2018). “Challenges Faced by Developing Countries in Competition and Regulation in the Maritime Transport Sector”. Conference Reporting: UNCTAD Intergovernmental Group of Experts on Consumer Protection.

[136] WT/TPR/S/350, 142.
[137] WT/TPR/S/350, 143.
[138] WT/TPR/S/312, 125.

agreements to offer shipping services to Australian exporters and importers.[139]

Analysis of Member Questions

In the sampled reviews, six (6) questions by members addressed competition-related aspects of shipping services. It represents 46% of all questions related to transport services. The highest number of these questions was directed to Australia (83%), particularly during its 2007 review. Looking at the profile of members raising questions on competition-related aspects of shipping services, these were mainly emerging markets (67%) such as Malaysia, China, and Chinese Taipei. Other interested members also included Switzerland and Canada.

CASE EXAMPLE: QUESTION ON SHIPPING SERVICES

Question from Malaysia: "What is the basis for allowing exemption to the TPA on international liner cargo shipping and export contracts?"

Response from Australia: "Part X of the of the Trade Practices Act 1974 (TPA) provides international cargo shipping with an exemption from the general provisions of the Act. It was introduced as a mechanism to ensure the efficient supply of liner cargo shipping services, on the basis that collusive agreements between ocean carriers was necessary to prevent market instability, and that benefits would be provided by the coordination of operations, spreading of risk, economies of scale and reduction of costs of obtaining regulatory approval for agreements. As recommended by the review, the Government will amend Part X to remove discussion agreements (which provide the greatest anti-competitive risk) from its scope, protect individual confidential service contracts between carriers and shippers and introduce a range of penalties for breaches of its procedural provisions. The Government considers that the amendments will ensure that Australian exporters and importers in all jurisdictions have stable access to high quality liner cargo shipping services of adequate capacity, frequency and reliability, and that a range of ports are served at freight rates that are internationally competitive."

Source: WT/TPR/M/178/Add.1

Maritime Transport: Port Services

Nexus with Competition Policy

One of the primary functions of ports is to facilitate large-scale domestic and international trade. Competition in maritime ports and port services is fundamental in countries with large maritime commerce volumes. Inland and river ports can also play significant roles in intra-country transportation, particularly for large or bulky products where alternative modes of transportation are more expensive.[140] Ports are thus critical to the operation of the world economy, and successful competition in ports and port services influences the final pricing of many items.[141]

The intrinsic characteristics of ports make them susceptible to possessing – and hence potentially abusing - market power. Possible abuses of market power in port services can lead to consumer harm in the form of higher

[139] Ibid.
[140] OECD, 2011. *oecd.org*. [Online] Available at: https://www.oecd.org/daf/competition/sectors/48837794.pdf [Accessed 22 June 2021].
[141] Ibid.

prices, reduced output, reduced service quality, reduced innovation etc. Given the scale of port activities, any harm from anti-competitive practices in the industry could have a large impact on end-users and impact the wider economy. [142]

Highlights from Recent Secretariat Reports

Singapore's 2012 review reported that the country liberalized (i.e. issued more than one licence) certain port services, including towage and bunkering. For navigational safety reasons, only one licensee, the Port of Singapore Authority (PSA) Marine Private Limited, provides pilotage services. Private companies/shipyards offer maintenance and repair services. The competition legislation of Singapore extends to marine service providers. [143] In response to increased competition among major ports in the area, Singapore's government has taken a number of initiatives to improve the port's competitiveness. Among the measures are simplifying the favourable corporate tax environment for the maritime sector (Maritime Sector Initiative) and increased expenditures in port infrastructure.[144]

[142] https://www.oecd.org/daf/competition/48837794.pdf
[143] WT/TPR/S/267, 70.
[144] Ibid.

4.3 Financial and Insurance Services

Finance and Banking

Nexus with Competition Policy

The financial sector comprises various financial institutions such as commercial banks, finance companies, securities companies and insurance companies, that play an essential role in the economy. However, they are exposed to a great variety of risks; such as liquidity and default risks, market failures etc. Given the unique role they play in the financial system's stability, financial institutions have received special regulatory attention and were often exempted from general competition law.[145]

Yet, competition in banking is inherently imperfect, with high barriers to entry. For instance, it is characterised by high switching costs for customers, making them hesitant to transfer all or part of their business between banks. Without effective regulation, these characteristics present enormous potential for rent-seeking behaviours.

In addition, advances in technology spurred fast internationalisation and integration of the financial sector, with increased cross-border M&As, increased substitutability between various types of financial instruments, etc. Financial services have also been increasingly dependent on networks, now resembling other network industries such as telecommunications, transportation and energy, with comparable anti-competitive

[145] https://www.oecd.org/daf/competition/prosecutionandlawenforcement/38820123.pdf

issues and hence scope for applying competition law. 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.[146]

Highlights from Recent Secretariat Reports

In the USA, as reported during the 2016 review, interstate branching is permitted by US law under certain conditions, whether through mergers or the formation of new branches. Domestic banks, including those controlled by foreign banks, may join into an interstate merger if certain conditions are met.[147] To prevent mergers from having leverage in the market, certain size restrictions apply on a non-discriminatory basis. The merged bank should not control more than 10% of the total deposits of insured depository institutions in the United States, and there are also limitations on the merged bank's total deposits within a state.[148] To protect the financial sector, the Dodd-Frank Act amended banking laws regarding mergers. It has made it compulsory for the Federal Reserve Board to "take into consideration the extent to which a proposed acquisition, merger, or consolidation would result in greater or more concentrated risks to the stability of the United States banking or financial system" when considering the acquisition, merger, or consolidation.[149]

According to the same report, the DoJ continued to prosecute collusion and fraud in the financial services industry. It has led to criminal fines of more than US$2.5 billion for price-fixing in the foreign currency markets for US dollars and euros, as well as manipulation of key reference interest rates.[150]

The Australia 2015 review reported that the ACCC and the Australian Securities and Investments Commission (ASIC) are responsible for financial consumer protection enforcement at the Commonwealth level.[151] The ACCC and the state and territory consumer protection agencies collectively administer and enforce the Australian Consumer Law (ACL), with ASIC involved in relevant matters.[152] In 2013, a major Financial System Inquiry was initiated to plan for the future of Australia's financial sector. Among other findings, it recommended eliminating barriers to competition, citing high concentration and rising vertical integration in several sectors.[153]

During China's 2018 review, it was reported by the International Monetary Fund (IMF) and World Bank that, while market entry for new products and business lines is strictly controlled, the expansion of financial groups and cross-sectoral activities pose the most significant obstacles to the China Banking Regulatory Commission (CBRC's) effectiveness.[154] Furthermore, they believe that, while the CBRC has done well in terms of developing its regulatory requirements to match the system's rising complexity, certain elements of credit risk, including the treatment of issue assets, concentration risk, and related party exposures, remain challenging.[155]

[146] Ibid.
[147] WT/TPR/S/350, 127.
[148] WTO, 2016. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S350.pdf&Open=True [Accessed 24 June 2021].
[149] WT/TPR/S/350, 128.
[150] WT/TPR/S/350, 83.
[151] WTO, 2015. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S312.pdf&Open=True [Accessed 28 June 2021].
[152] WT/TPR/S/312, 80.
[153] WT/TPR/S/312, 114.
[154] WT/TPR/S/375, 157.
[155] WT/TPR/S/375, 157.

Insurance services

Nexus with Competition Policy

Similar to other financial services, insurance services have long received specific exemptions from competition regulations.[156] In this sector, regulation has traditionally tended to limit the extent of competition between insurers through controls on entry (e.g. licensing), prices (e.g. price floors), terms and conditions, or even explicit promotion of cartels. [157]

Also, cooperation among insurers is frequent in the industry. Such cooperation may have anti-competitive effects (e.g. in case of cooperation between direct competitors), and could theoretically fall within the prohibition on anti-competitive agreements under competition law. Such collaboration is nevertheless typically permitted, e.g. benefitting from block exemptions in a number of jurisdictions.

Highlights from Recent Secretariat Reports

In the USA, the 2016 review noted that standard insurance policies, in theory, allow consumers to compare the terms offered by each insurer, potentially increasing competition. Nonetheless, excessive harmonization of insurance products may restrict competition and insurers' flexibility to fulfil their clients' demands.[158] According to the McCarran-Fergurson Act of 1945, the insurance services industry in the United States is predominantly controlled at the state level, as insurance is exempt from Federal Antitrust statutes to the degree that the states regulate it.[159]

In China (2018), the review reported some regulatory developments for insurance services. In particular, the China Insurance Regulatory Commission's (CIRC) Insurance Company Mergers and Acquisitions Regulations came into effect on 1 June 2014. Under this regulation, the purchaser of an insurance company may control two insurance companies operating in similar businesses upon completion of the acquisition with the CIRC's approval. [160] While the regulations provide opportunities for foreign investors, foreign investors who hold more than 25% of the equity or shares in a target insurance company following an acquisition or merger must still act in accordance with the existing qualification requirements under the Administrative Regulations of Foreign-Invested Insurance Companies.[161]

Analysis of Member Questions

In the sampled reviews, 11 questions by members addressed competition-related aspects of Financial and Insurance services. represents 3% of all questions that have addressed competition-related aspects and places Financial and Insurance services at rank n°3 (15%) among questions related to services. The highest number of these questions was directed to the USA (36%).

Looking at the profile of members showing interest in raising questions on competition-

[156] OECD, 1998. *oecd.org.* [Online] Available at: https://www.oecd.org/daf/competition/sectors/1920099.pdf [Accessed 2 July 2021

[157] https://www.oecd.org/daf/competition/sectors/1920099.pdf

[158] Esteva, C., 1997. *ec.europa.eu.* [Online] Available at: https://ec.europa.eu/competition/speeches/text/sp1997_019_en.html [Accessed 25 June 2021].

[159] Esteva, C., 1997, 128.

[160] WT/TPR/S/375, 158.

[161] Ibid.

related aspects of Financial and Insurance services, these were mainly developing, emerging markets (64%), most notably China (3), Hong Kong, China (2), and India (2).

CASE EXAMPLE: QUESTION ON FINANCIAL AND INSURANCE SERVICES

Question from Republic of Korea: "Para 3.178 stipulates that 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?"

Response by USA: "The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, is a legislative exemption for insurers from U.S. federal antitrust laws provided that (1) the challenged practice is part of the "business of insurance," and (2) the practice is regulated by State law. Acts or agreements of boycott, coercion or intimidation are not exempted. The Act recognizes that insurance is regulated by the individual U.S. states (and is subject to state antitrust laws) and that cooperative ratemaking efforts may be necessary to the business of insurance."

Source: WT/TPR/M/350/Add.1

4.4 Energy

Nexus with Competition Policy

In the energy sector, markets such as electricity are susceptible to the exercise of market power. It is due to a number of factors such as inelastic demand, lack of extensive practical storage of electricity, transmission congestion, transmission loop flows, etc.[162] Regarding electricity transmission, challenges include minimising discrimination against third-party generation, efficient transmission of network access, and establishing incentives for fast and efficient investments in transmission network enhancement.[163]

Like in other network sectors, regulatory reform has been linked with a rise in the number of competition enforcement cases, notably abuse of dominance charges on the one side and mergers on the other.

Regarding natural gas, the growth of competition in the natural gas industry's competitive components necessitates the adoption of a regulatory framework capable of ensuring access to the non-competitive components, notably the pipeline network. Furthermore, it is critical to provide downstream consumers with a choice in their upstream gas supplier and have a system for distributing scarce capacity.[164] Vertically integrated operations create numerous barriers for potential rivals. It includes, but is not limited to: restricting the available channels so that competitors cannot enter the market; setting technological obstacles, such as having expensive processes for consumers who want to switch providers; and market manipulation through access to private

[162] OECD, 2002. *oecd.org*. [Online] Available at: https://www.oecd.org/daf/competition/sectors/6095721.pdf [Accessed 22 June 2021].
[163] Ibid.

[164] OECD, 2000. *oecd.org*. [Online] Available at: https://www.oecd.org/daf/competition/sectors/1920080.pdf [Accessed 22 June 2021].

information, such as contract rates, which are examples of market manipulation.[165]

Highlights from Recent Secretariat Reports

According to the EU's 2020 review, promoting competitiveness is an objective of the EU's energy policy under the Energy Union Package 2015. In addition, by reforming energy and climate policy, the Energy Union Package 2015 aimed to provide EU consumers secure, sustainable, competitive and affordable energy. [166] Regarding completion of the internal energy market, Directive (EU) No. 2019/944 "establishes common rules for the generation, transmission, distribution, energy storage, and supply of electricity, with consumer protection provisions, intending to create a truly integrated, competitive, consumer-centred, flexible, fair and transparent electricity market in the EU."[167] It ensures fair competition by ensuring that consumers have choices and can acquire and sell electrical services regardless of their electricity supply contracts. The complete adoption of the circular economy strategy is also important for decarbonizing the EU economy, particularly in energy-intensive industries such as steel, cement, and glass, while maintaining or improving competitiveness.[168] Competition is one of the seven strategic building blocks of the Commission's efforts to curb global warming.

The EU Commission also took steps to promote competition in gas supply markets, including adopting a commitment decision involving the Russian firm Gazprom. [169] Competition policies for the gas and digital sectors are critical as these sectors are expanding at a fast pace. In the report, the Secretariat highlights Gazprom's commitments to removing barriers to the free flow of gas, integrating gas markets by ensuring competitive gas prices and removing demands obtained through market leverage.[170]

In Australia, the 2015 review reported that imported oil accounts for 40% of Australia's overall supply. Anti-competitive behaviour in the fuel sector is a key concern for the ACCC as a slight rise in prices will have an impact on competition in the fuel market.[171] This is because approximately 54% of petrol prices in Australia are made up of the international price of refined petrol, 34% are fuel taxes, and the remaining 12% are made up of local costs and wholesale and retail margins. Only this last component can be influenced by local competition (12% of the petrol price).[172]

In China (2018), under Article 18 of the Price Law of the Peoples Republic of China, competent authorities are authorised to carry out, when necessary, price controls over products of natural monopoly. [173] Some competitive services have been removed from the central government pricing catalogue and are no longer subject to government pricing since January 2017. [174] For instance, regarding electricity, the coverage of government pricing covers electricity transmission and distribution grid rates at the provincial level or above and feed-in and

[165] Halkos, G., 2020. *core.ac.uk.* [Online] Available at: https://core.ac.uk/download/pdf/286783179.pdf [Accessed 22 June 2021].
[166] WT/TPR/S/395/Rev.1
[167] WT/TPR/S/395/Rev.1, 203.
[168] WT/TPR/S/395/Rev.1, 206.
[169] WT/TPR/S/395/Rev.1, 126.
[170] WT/TPR/S/395/Rev.1
[171] WT/TPR/S/312, 105.
[172] WT/TPR/S/312, 105.
[173] WT/TPR/S/375, 84.
[174] WT/TPR/S/375, 85.

users' sales tariffs where there is no market competition. The rationale is based on public utilities and natural monopolies whereby the government anticipates that the pricing will be gradually liberalised.[175]

In terms of foreign capital participation, pipelines are classified as an "encouraged industry" in China's 2017 Investment Catalogue, and wholly foreign-owned pipelines are permitted.[176] If this acquisition falls within the scope of the Notice of the General Office of the State Council on Establishing a Security Check Mechanism for Foreign Investors Merging with or Acquiring Domestic Enterprises, it will be subject to national security review.[177] The joint guidelines issued by the State Council and the Communist Party of China (CPC) central committee in May 2017 on "measures for deepening the reform of the oil and gas sector" established eight "tasks" to reform the oil and gas industry.[178] It also included a comprehensive plan to strengthen sanctions in the event of denial of open access, as well as an unbundling strategy in which midstream pipeline owners would be "encouraged" to separate gas sales from pipeline transportation business in order to prevent a monopoly and channel more capital into pipeline construction.[179]

Analysis of Member Questions

In the sampled reviews, five questions by members addressed competition-related aspects of energy, representing 7% of questions related to services. The highest number of these questions was directed to Australia (60%), particularly during its 2015 review. Members showing interest in raising questions on competition-related aspects of energy services were mainly emerging markets (60%) including Chinese Taipei and China. However, Japan also asked a question addressing competition issues in this sector.

CASE EXAMPLE: QUESTION ON ENERGY SERVICES (AUSTRALIA 2015)

Question from China: “Please provide details on the price regulation in the electricity, natural gas and other energy pipeline networks, e.g. institutional arrangement, staffing, working mechanism, approval of costs, and the decision-making process, etc.”

Response by Australia: “The Australian Energy Regulator (AER) is Australia's national energy market regulator. The AER
has an independent Board, with its staff, resources and facilities provided by the Australian Competition and Consumer Commission… Formal decisions of the AER are made through its Board. The AER Board has one Commonwealth member and two state/territory members. These members are Government appointees.”

Source: WT/TPR/M/312/Add.1

[175] WT/TPR/S/375, 85.
[176] WT/TPR/S/375, 167.
[177] Ibid.
[178] WT/TPR/S/375, 168.
[179] Ibid.

4.5 E-commerce and Digital Economy

Nexus with Competition Policy

E-commerce and the Digital Economy are advancing at a rapid rate, with new technologies emerging constantly. Consumers are typically seen to gain from digital marketplaces because they provide more options, cheaper costs, greater transparency, and higher product quality. However, they may also upset existing norms, create entry barriers, display market concentration, and impede competition.[180]

Big data, artificial intelligence, platform-based business models, multi-sided marketplaces, network effects and tipping, user feedback loops, deep pockets, and shared institutional investments characterize digital markets, that are fuelled by the fast growth of digital innovation. [181] Market dominance, and possible abuse of it, is a key concern for competition authorities in the digital economy, particularly with network effects and "data advantage" phenomena.[182]

Highlights from Recent Secretariat Reports

The EU 2020 review reported that several rulings involving significant corporations in the digital industry, including Google, Amazon, and Qualcomm, were adopted by the Commission during the review period. In addition, the EU passed a law addressing geo-blocking issues to stop discriminatory practices that impede e-commerce and improve cross-border competitiveness in online trade.

Analysis of Member Questions

In the sampled reviews, 4 questions by members addressed competition-related aspects of E-commerce and Digital Economy. It represents only 1% of all questions that have addressed competition-related aspects, and places E-commerce and Digital Economy at rank n°6 (5%) among questions related to services. This seemingly small number is due to the long period covered by samples TPRs and the relatively recent advent of e-commerce and digital economy. Most of these questions were directed to China (75%), particularly during its 2018 review.

Looking at the profile of members showing interest in raising questions on competition-related aspects of E-commerce and Digital Economy, these were mainly developed countries (75%), namely Japan (2), and Switzerland (1).

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[180] CUTS, 2020. *cuts-geneva.org.* [Online] Available at: http://www.cuts-geneva.org/News?id=BUL-181212-01 [Accessed 22 June 2021].

[181] Ibid.

[182] Ibid.

CASE EXAMPLE: QUESTION ON DIGITAL ECONOMY (CHINA 2018)

Question from Japan: "The amendment to the Anti-Unfair Competition Law in November 2017 revised the provisions on commercial bribery, Could China explain whether there exists a law or regulation that prohibits the provision of wrongful gains to foreign public officials… With regard to the revision of the provision on confusion acts to include domain name protection in the Anti-Unfair Competition Law, could China explain whether there is any law or regulation for prohibition of wrongful registration of the domain name?"

Response from China: "There is no such penalty in China's Anti-Unfair Competition Law as prohibiting the provision of wrongful gains to foreign public officials. Article 6 of the Anti-Unfair Competition Law stipulates that operators shall not commit the following confusing acts, which may be misunderstood as being a product of another person or having a specific connection with others: Unauthorized use of the main body of others domain names, website names and web pages that have certain influence."
Source: WT/TPR/M/375/Add.1

4.6 Other Services

Health and social services

Nexus with Competition Policy

In the healthcare and pharmaceutical industries, complex and sophisticated anti-competitive activities have been observed. These include, for example, excessive and unfair prices of patented drugs, pay-for-delay arrangements between patent holders and generic manufacturers to postpone generic entry and artificially raise medication costs, strategic mergers resulting in monopolies or duopolies, decreasing competition and resulting in price increases and a loss of innovation, exclusive supply or distribution agreements, resale price maintenance agreements, and "refusal to deal" agreements.[183]

Despite the need for regulatory limitations, competition enforcement can contribute to ensuring that the pharmaceutical distribution market functions effectively for customers, allowing them to benefit from improved quality, greater choice and variety, more innovation, and lower pricing.[184]

In this sector, forward integration by manufacturers and backward integration by drugstore chains are altering the conventional structure of the pharmaceutical supply chain and posing new competition challenges.[185]

Among possible competition-related concerns arising in the health and pharmaceutical industry are: (i) the use or misuse of IPRs; (ii) barriers to entry of cheaper alternatives, such as collusion among established pharma companies; and (iii) excessive or unfair pricing resulting from anti-competitive behaviours. Competition authorities around the world are working to address these competition-related challenges to provide affordable healthcare to all.[186]

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[183] CUTS, 2020. *cuts-geneva.org*. [Online] Available at: http://www.cuts-geneva.org/News?id=PR-201204 [Accessed 22 June 2021].
[184] OECD, n.d. *oecd.org*. [Online] Available at: https://www.oecd.org/daf/competition/competition-distribution-pharmaceuticals.htm [Accessed 22 June 2021].
[185] Ibid.
[186] Ibid.

Highlights from Recent Secretariat Reports

In the USA, the 2016 review reported that the FTC contested 22 proposed transactions in areas vital to consumers, including healthcare, pharmaceuticals and hospitals, in FY2015. In the healthcare sector, the Commission contested transactions because concentrated provider markets tend to result in higher pricing and less care for patients.[187] It ensures the protection of consumers accessing healthcare services. In addition, the FTC submitted advocacy letters voicing concerns regarding efforts to grant antitrust immunity to hospitals and other healthcare providers that engage in practices that harm competition in the pharmaceutical industry and engage in occupational licensing practises that negatively affect competition.[188]

Analysis of Member Questions

In the sampled reviews, only one member addressed competition-related aspects of Health and social services, namely the Dominican Republic. The question was directed to the USA in 2016.

CASE EXAMPLE: QUESTION ON HEALTH SERVICES (USA 2016)

Question from the Dominican Republic:
"In the healthcare arena, the Federal Trade Commission (FTC) challenged the transactions, claiming that concentration in provider markets tends to drive up prices and reduce the quality of care patients receive. For example, the FTC won a significant victory when the Ninth Circuit Court of Appeals upheld the district court's judgment in St. Luke's Health System vs. St. Alphonsus Medical Center, acknowledging that the acquisition violated antitrust laws. In the FTC's case against Sysco Corporation and US Foods, the parties cancelled the transaction after the FTC applied to a federal court for an injunction to prevent the acquisition from going ahead. In the Staples / Office Depot case, the parties dismissed their proposed merger when the district court accepted the FTC's request for a preliminary injunction. Question: Can the authorities clarify the issue of health care reform from a trade perspective?"

Answer from the United States:
"A basic purpose of the recent reforms of the U.S. health care system was to ensure increased access to health care services by providing insurance coverage to previously uninsured individuals. With respect to trade, the U.S. private health services sector is open to foreign participation, and cross-border trade in health services continues to grow in the United States, with total trade exceeding $5.4 billion in 2105, and imports more than doubling since 2009."

Source: WT/TPR/M/350/Add.1

[187] WTO, 2016. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S350.pdf&Open=True [Accessed 24 June 2021].

[188] WT/TPR/S/350.

Postal Services

Nexus with Competition Policy

The majority of postal operators have historically been state-owned and shielded from competition. Competition-related concerns may exist when dominant operators are engaged in other sectors open to competition where they can utilise revenues from their protected services to distort or restrict competition through cross-subsidization.[189]

Today, some jurisdictions have gradually liberalised postal services and opened entry to competitors. Incumbent operators may still enjoy dominant positions, which they may abuse by engaging in anti-competitive practices such as predatory pricing, selective discounting, tying, or bundling etc.[190]

Highlights from Recent Secretariat Reports

Competition-related issues in postal services were addressed in Singapore's 2012 secretariat report, noting that the Postal Competition Code 2008 and Postal Services Operations Code 2008 were introduced by the IDA to encourage market entry and competition [191] Furthermore, SingPost is required to develop a Reference Access Offer in order to provide downstream delivery services to all requesting licensees, as well as to adopt a Reference Offer to address common inter-operator issues that are likely to arise between SingPost and other licensees in Singapore's basic letter services market.[192]

Analysis of Member Questions

In the sampled reviews, five questions by members addressed competition-related aspects of Postal Services, representing 7% of questions related to services. All these questions were directed to the USA during its 2003 review. They were asked by developed countries, namely the EU and Switzerland.

CASE EXAMPLE: QUESTION ON POSTAL SERVICES (USA 2003)

Question from the European Union:
"Does the Postal Office also operate in fields outside its monopoly (in particular, express delivery services)? If so, do its competitors get a similar treatment in these fields of activity? How is this ensured?"

Reply from the United States:
"Yes, the U.S. Postal Service operates in sectors that are open to competition, including express delivery services. Although there is no regulator of hard copy communications that directly oversees the state of competition in U.S. postal markets, the Postal Rate Commission, an independent agency of the federal government, helps ensure that competition is fair by setting the rates of the U.S. Postal Service prospectively, and by selecting rates that are designed to prevent cross-subsidization of competitive services by monopolized services."

Source: WT/TPR/M/126/Add.1-3

[189] OECD, 1999. *oecd.org*. [Online] Available at: https://www.oecd.org/daf/competition/sectors/1920548.pdf [Accessed 22 June 2021].
[190] OECD, 2001. *oecd.org*. [Online] Available at: https://www.oecd.org/regreform/sectors/34343050.pdf [Accessed 22 June 2021].
[191] WT/TPR/S/267, 69.
[192] Ibid.

Conclusion

The study examines how competition policy issues have been addressed in WTO Trade Policy Reviews over the past 20 years, focusing on the types of trade measures and economic sectors that have consistently been prone to competition-related concerns from members. The analysis focuses on a sample of 10 reviews covering five of the most influential developed and developing countries on competition matters: the European Union, the United States, Singapore, Australia, and China.

At the WTO, despite there being no explicit multilateral trade agreement on competition policy, several agreements have included provisions on anti-competitive behaviours, such as the TRIPS and TRIMS agreements. The WTO Trade Policy Review Mechanism promotes transparency on a wide range of trade policy measures adopted by members, through update reports by the WTO secretariat, which are then discussed between the reviewed country and other members through questions and answers. Covered aspects include competition policy, an area in which transparency and predictability are paramount for market players to engage in international trade effectively.

The Secretariat's reports of the TPRs are typically divided into: (i) economic environment; (ii) trade and investment regime, (iii) types of policy measures, including a dedicated section on competition policy; and (iv) trade policies by sector. The participation of other WTO members during the review process is critical as the questions asked by members to the reviewed member cover different areas providing an opportunity to address identified issues and learn lessons from each other's competition policy approaches.

As pointed out by Pradeep S. Mehta, Secretary General of CUTS International, "Competition is meant to be a part of the very fabric of various policies and legislations across sectors. It is not just limited to the competition authorities to act as the custodian of competition, ensuring 'well-functioning' competitive markets. It is the collective effort and responsibility of all branches of the government and development partners as a whole."[193]

This implies that 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 order to identify where and how competition-related issues have been addressed in TPRs, a text-based analysis of the sampled TPR documents was conducted based on a list of keywords associated with competition law enforcement and anti-competitive practices.

As a result, the analysis identified competition-related discussions in over 100 sub-headings of secretariat reports from the sampled countries; and a total of 318 competition-related questions asked by members over the past two decades.

[193] Pradeep S. Mehta (2016). "Promoting Competition Reforms for the Benefit of Ordinary People in the Developing World". Speech at Conference on "Competition Policy at the Intersection of Equity and Efficiency", June 8, 2016, Brussels, Belgium.

From 15 questions in 2002, member's interest in asking competition-related questions followed an uptrend culminating in 49 questions identified during the 2018 review of China.

Logically, questions explicitly related to the reviewed member's Competition Policy and Law represented the bulk (34%) of competition-related questions identified in the sampled TPRs. Section 2 of the study explored the content of the secretariat report sections dedicated to competition policy, and analysed key issues raised in members' questions about this competition chapter. These included inter alia institutional arrangements, exceptions, mergers and acquisitions and cooperation.

In addition, other sections covering types of trade policy measures have attracted notable attention from members when it comes to their relationship with competition. These were analysed in section 3 of the study, mainly focusing on the types of measure that have attracted most questions from the membership: IP and SOEs.

In terms of economic sectors, services were by far the most addressed. They represented over three quarters (78%) of competition-related questions addressing sector-specific policies, far ahead of manufacturing (12%) and agriculture (10%). In its last section, the study examined in more details how TPRs have addressed the interaction of competition policy with certain types of services, particularly those which have attracted most questions from the membership. These included inter alia telecommunications (35%), transports (14%) as well as financial and insurance services (12%).

Owing to their often public interest nature (e.g., energy, postal, transport, audiovisual) or high establishment costs (e.g., rail networks, airports), many services started as state monopolies, making them prone to competition scrutiny. Indeed, despite liberalisation, incumbent firms may continue to benefit from dominant market positions, or enjoy certain advantages or exceptions which potential competitors may perceive as entry barriers. Much attention has recently been given to the telecommunications sector, at a time when the emergence of new technologies and digitalisation of the economy are spurring global competition in the industry.

In terms of country participation, it was found that emerging markets were by far the most active group of countries asking competition-related questions (57%), followed by developed members (40%). However, other developing countries have been significantly less proactive in raising competition-related concerns (3%).

In particular, no LDC showed interest in raising competition-related concerns in their questions. Yet, some questions raised by other 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 countries such as Colombia, Mexico, Brazil and Thailand.

References

1. Bagal, M. N. & Vittori, M., 2011. origin-gi.com. [Online] Available at: https://www.origin-gi.com/images/stories/PDFs/English/OriGIn_publications/manual_acpcomplet.pdf [Accessed 21 June 2021].
2. Brusick, P., 2018. cuts-geneva.org. [Online] Available at: http://www.cuts-geneva.org/pdf/KP2018-Study-Competition_Concerns_in_Cross-border_E-Commerce.pdf [Accessed 11 June 2021].
3. Capobianco, A. & Christiansen, H., 2011. oecd-ilibrary.org. [Online] Available at: https://www.oecd-ilibrary.org/docserver/5kg9xfgjdhg6-en.pdf?expires=1624345785&id=id&accname=guest&checksum=A72BF6BEAB43DBC72224DB3F6FB61850 [Accessed 22 June 2021].
4. CUTS, 2001. cuts-ccier.org. [Online] Available at: http://www.cuts-ccier.org/pdf/Competition_Policy_and_Law_Made_Easy.pdf [Accessed 11 June 2021].
5. CUTS, 2018. cuts-geneva.org. [Online] Available at: http://www.cuts-geneva.org/News?id=BUL-180712-03 [Accessed 22 June 2021].
6. CUTS, 2019. cuts-geneva.org. [Online] Available at: http://www.cuts-geneva.org/News?id=BUL-190711-01 [Accessed 22 June 2021].
7. CUTS, 2019. cuts-geneva.org. [Online] Available at: http://www.cuts-geneva.org/News?id=BUL-190710-02 [Accessed 22 June 2021].
8. CUTS, 2019. cuts.geneva.org. [Online] Available at: http://www.cuts-geneva.org/News?id=BUL-190712-01 [Accessed 22 June 2021].
9. CUTS, 2020. cuts-geneva.org. [Online] Available at: http://www.cuts-geneva.org/News?id=BUL-181212-01 [Accessed 22 June 2021].
10. CUTS, 2020. cuts-geneva.org. [Online] Available at: http://www.cuts-geneva.org/News?id=PR-201204 [Accessed 22 June 2021].
11. Esteva, C., 1997. ec.europa.eu. [Online] Available at: https://ec.europa.eu/competition/speeches/text/sp1997_019_en.html [Accessed 25 June 2021].
12. European Commission, n.d. ec.europa.eu. [Online] Available at: https://ec.europa.eu/competition-policy/sectors/financial-services/legislation-competition-insurance-sector_en [Accessed 2 July 2021].
13. UR-Lex, 2018. eur-lex.europa.eu. [Online] Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Acc0009 [Accessed 6 July 2021].
14. European Competition Authorities, n.d. ec.europa.eu. [Online] Available at: https://ec.europa.eu/competition/publications/eca/report.pdf [Accessed 25 June 2021].
15. GROLLIER, J and SOMASUNDARAM, K (2017). “Trade and Competition Policy: Has Past WTO Work Stood the Test of Time?” Geneva. CUTS International, Geneva.
16. Halkos, G., 2020. core.ac.uk. [Online] Available at: https://core.ac.uk/download/pdf/286783179.pdf [Accessed 22 June 2021].
17. Levitt, M. & Citron, P., 2017. competitionlawblog.kluwercompetitionlaw.com. [Online] Available at: http://competitionlawblog.kluwercompetitionlaw.com/2017/02/20/rail-sector-comes-eu-antitrust-regulatory-spotlight/ [Accessed 22 June 2021].

18. Matus, H. M. M., 2011. wto.org. [Online] Available at: https://www.wto.org/english/res_e/publications_e/ai17_e/tprm_parf_oth.pdf [Accessed 1 June 2021].
19. Max Planck Institute for Intellectual Property and Competition Law, 2013. wipo.int. [Online] Available at: https://www.wipo.int/export/sites/www/ip-competition/en/studies/copyright_competition_development.pdf [Accessed 21 June 2021].
20. McDermott, N., n.d. sites.google.com. [Online] Available at: https://sites.google.com/site/349924e64e68f035/issue-5/balancing-geographical-indicators-and-eu-competition-law [Accessed 21 June 2021].
21. Mehta, Pradeep S and Taimoon Stewart (2013), "Should Competition Policy & Law be Blind to Equity? The Great Debate", Book, CUTS International, Jaipur
22. Mehta, Pradeep S (2012), "Evolution of Competition Laws and their Enforcement: A Political Economy Perspective", Book, CUTS International, Jaipur
23. Mehta, Pradeep S and Evenett, Simon J (2009), Politics Triumphs Economics?, Book 292 pp, CIRC, Jaipur
24. MINISTRY OF COMMERCE PEOPLE'S REPUBLIC OF CHINA, 2008. english.mofcom.gov.cn. [Online] Available at: http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml [Accessed 9 July 2021].
25. Modrall, J., 2021. competitionlawblog.kluwercompetitionlaw.com. [Online] Available at: http://competitionlawblog.kluwercompetitionlaw.com/2021/01/11/eu-commission-scales-vertical-block-exemption-mountain/ [Accessed 6 July 2021].
26. OECD, 1998. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/sectors/1920099.pdf [Accessed 2 July 2021].
27. OECD, 1999. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/sectors/1920548.pdf [Accessed 22 June 2021].
28. OECD, 2000. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/sectors/1920080.pdf [Accessed 22 June 2021].
29. OECD, 2001. oecd.org. [Online] Available at: https://www.oecd.org/regreform/sectors/34343050.pdf [Accessed 22 June 2021].
30. OECD, 2001. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/sectors/1834399.pdf [Accessed 22 June 2021].
31. OECD, 2002. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/sectors/6095721.pdf [Accessed 22 June 2021].
32. OECD, 2004. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/sectors/33691325.pdf [Accessed 22 June 2021].
33. OECD, 2006. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/abuse/37981556.pdf [Accessed 22 June 2021].
34. OECD, 2010. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/cartels/46235399.pdf [Accessed 21 June 2021].
35. OECD, 2011. ec.europa.eu. [Online] Available at: https://ec.europa.eu/competition/international/multilateral/2011_jun_ports.pdf [Accessed 22 June 2021].

36. OECD, 2011. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/sectors/48837794.pdf [Accessed 22 June 2021].
37. OECD, 2011. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/sectors/47836843.pdf [Accessed 22 June 2021].
38. OECD, 2018. *oecd.org.* [Online] Available at: https://www.oecd.org/daf/competition/competition-law-and-state-owned-enterprises.htm [Accessed 22 June 2021].
39. OECD, 2019. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/vertical-mergers-in-the-technology-media-and-telecom-sector.htm [Accessed 22 June 2021].
40. OECD, n.d. oecd.org. [Online] Available at: https://www.oecd.org/daf/competition/competition-distribution-pharmaceuticals.htm [Accessed 22 June 2021].
41. Paasman, B. R., 1999. repositorio.cepal.org. [Online] Available at: https://repositorio.cepal.org/bitstream/handle/11362/4369/1/S9890697_en.pdf [Accessed 11 June 2021].
42. Spagnolo, G., 2009. konkurrensverket.se. [Online] Available at: https://www.konkurrensverket.se/globalassets/forskning/lankar-forslag-pa-uppsatsamne/open-issues-in-public-procurement.pdf [Accessed 21 June 2021].
43. Stehmann, O. & Mackay, I., 2003. ec.europa.eu. [Online] Available at: https://ec.europa.eu/competition/publications/cpn/2003_3_21.pdf [Accessed 22 June 2021].
44. UNCTAD, 2002. unctad.org. [Online] Available at: https://unctad.org/system/files/official-document/ditcclpmisc25_en.pdf [Accessed 6 July 2021].
45. UNCTAD, 2012. unctad.org. [Online] Available at: https://unctad.org/system/files/non-official-document/ciclp2012_RT_PP_Lithuania_en.pdf [Accessed 21 June 2021].
46. UNCTAD, 2018. unctad.org. [Online] Available at: https://unctad.org/system/files/official-document/ciclpd50_en.pdf [Accessed 22 June 2021].
47. WIPO, n.d. wipo.int. [Online] Available at: https://www.wipo.int/geo_indications/en/ [Accessed 21 June 2021].
48. WORLD TRADE ORGANIZATION, 2005. docs.wto.org. [Online] Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=120450,99253,98713,45551,41303&CurrentCatalogueIdIndex=3&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True [Accessed 6 June 2021].
49. World Trade Organization, 2021. wto.org. [Online] Available at: https://www.wto.org/english/tratop_e/tpr_e/tprbdy_e.htm#:~:text=POLICY%20REVIEWS%3A%20ORGANIZATION-,The%20Trade%20Policy%20Review%20Body%20(TPRB),open%20to%20all%20WTO%20Members. [Accessed 4 June 2021].
50. World Trade Organization, n.d. wto.org. [Online] Available at: https://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm [Accessed 1 June 2021].
51. WTO, 2012. *docsonline.wto.org.* [Online] Available at: https://docsonline.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=((@Symbol=%20wt/tpr/s/*)%20and%20(%20@Title=%20singapore%20))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true# [Accessed 25 June 2021].
52. WTO, 2015. *docs.wto.org.* [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S312.pdf&Open=True [Accessed 28 June 2021].

53. WTO, 2016. docs.wto.org. [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S350.pdf&Open=True [Accessed 24 June 2021].
54. WTO, 2016. docs.wto.org. [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S350.pdf&Open=True [Accessed 24 June 2021].
55. WTO, 2018. docs.wto.org. [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S375R1.pdf&Open=True [Accessed 26 June 2021].
56. WTO, 2020. docs.wto.org. [Online] Available at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/S395R1.pdf&Open=True [Accessed 24 June 2021].
57. Zahrnt, V., 2009. ecipe.org. [Online] Available at: https://ecipe.org/wp-content/uploads/2014/12/the-wto2019s-trade-policy-review-mechanism-how-to-create-political-will-for-liberalization-1.pdf [Accessed 2 June 2021].
58. National Competition Council, 1999. ncp.ncc.gov.au. [Online] Available at: http://ncp.ncc.gov.au/docs/LESe-001.pdf [Accessed 9 July 2021].