Data-driven markets, Competition Policy and Trade: enhanced international cooperation as part of the solution?

Trade Dialogues Webinar series “The governance of data flows and trade”
Discussion on The economic characteristics of data and data-driven markets, 10 December 2020

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The trade – competition interface: positive synergies

- Trade liberalization
  - More competition
    - Markets offer more choice, better prices
  - Economic growth
    - Consumers benefit

The trade – competition interface: the need for competition advocacy & enforcement

- Reduction in economic growth
- Consumers lose out
- Markets offer less choice, better prices
- Public or Private restraints to competition
- Barriers to trade

Markets offer less choice, better prices
Consumers lose out
Reduction in economic growth
Barriers to trade
Public or Private restraints to competition
Data-driven Markets, Competition Policy and Trade

- Data-driven markets: relevance of cross-border business models
- International Cooperation for policy making, enforcement
- Trade
- Competition
Questions to be asked (later?)

• Are synergies automatic?
• What forms of cooperation between trade negotiators and competition authorities is needed?
• Any changes in the interaction between the fields of trade and competition over time?
  • Historic overview, present situation at the multilateral level.
  • RTAs as new emerging field of interest.
  • Can this help in addressing competition issues in data-driven markets?
**Historic perspective: competition policy and trade as a “new” issue?**

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<th>Havana Charter, * Chapter V, 1947-1948:</th>
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<td>“Each Member shall take appropriate measures ... to prevent ... business practices affecting international trade which restrict competition, limit access to markets, or foster monopolistic control ....”</td>
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<th>UN Set of Principles and Rules on Competition, 1972-1980</th>
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<td>Recognizing ... the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries...</td>
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<td>Doha mandate to study: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building</td>
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* The Havana Charter was the principal source of the original GATT (1947). Chapter V was included in the Charter but not carried over into the GATT.
Work on competition policy in the WTO

• Exploratory work programme commenced at Singapore Ministerial Conference (December 1996).
• Doha Ministerial Declaration (para. 23): recognized “case for a multilateral framework” and directed Members to develop “modalities for negotiations”.
• Subsequently, negotiations opposed by developing countries (key developed jurisdictions also had mixed feelings). No consensus reached on modalities at Cancun.
• July 2004 General Council Decision on the Doha Work Programme: no further work toward negotiations on competition policy (or investment or transparency in government procurement) for duration of the Doha Round.
• Working Group “inactive” – could be revived if desired by WTO Members (consensus needed).
Relevance of competition policy to specific elements of the WTO Agreements

**TRIPS, Articles 8 and 40:**
- Members permitted to take measures to deal with anti-competitive licensing practices, other abuses

**GATS, Article VIII:**
- Issues concerning conduct involving monopoly and exclusive service suppliers

**GATS, Article IX:**
- Consultations regarding anti-competitive business practices that restrain competition and thereby restrict trade in services

**GATS Telecoms Annex and Basic Telecom Negotiations, Reference Paper on Regulatory Principles:**
- Clear references to competition policy principles

**GPA:**
- Competition rules an essential counterpart
- Main aim to increase supplier competition

**TRIMS, Article 9:**
- Issue of whether to implement complementary provisions on investment and competition policy in the course of a review of the Agreement

**Implication:** competition policy present in the WTO framework, though in a piecemeal fashion.
Continued work areas with reference to competition policy in the WTO

• Considered as important policy area in the process of **accession to the WTO of new Members** (pursuant to Article XII of the Marrakesh Agreement)
  • In around 80% of cases, the acceding state is requested to provide information on its domestic competition policy regime. Growing importance/detail.

• **Trade Policy Reviews**: a comprehensive overview and analysis of the WTO Member's trade policies, including information on competition policy and the relevant laws and institutional framework.
  • Reports as important resource for information, trend to cover in more detail.

• **Discussions** in WTO Bodies administering WTO Agreements:
  • E.g. recent discussions on Competition and Public Health in TRIPS Council

• **Technical Assistance**:
  • National seminars available on request, Workshops in Geneva

• **Ongoing/future discussions**, e.g. on e-commerce may touch upon competition-related aspects, including with relevance to data-driven markets.
Multilateral cooperation continues in other fora…

• International Competition Network
  • competition authority contact, cooperation, framework for competition agency procedures.

• OECD Global Forum on Competition
  • exchanges on relevant subject areas.

• UNCTAD
  • UN Set, trade and developments links, technical cooperation.

• Regional Trade Agreements
  • Increasing integration of competition policy rules.

• Data-driven markets have emerged as topical issue in cooperation fora, e.g. currently ongoing 2020 OECD GFC!
Treatment of competition policy in RTAs, 1958-2019

Source: Anderson et al, id.
Inclusion of competition policy chapters in RTAs in the XX$^{\text{th}}$ and XXI$^{\text{st}}$ centuries (percent)
• **155 RTAs** (56% of the total 280 RTAs) have dedicated chapter on RTAs. Cooperation as a prominent topic! Specific provisions on data-driven markets absent.
Example: USMCA Chapter on Competition

• No reference to data, data-driven markets.
• Article 21.3: Cooperation
  • 1. The Parties recognize the importance of cooperation and coordination between their respective national competition authorities to foster effective competition law enforcement in the free trade area. Accordingly, the Parties’ national competition authorities shall endeavor to cooperate in relation to their enforcement laws and policies, including through investigative assistance, notification, consultation, and exchange of information. […]
  • 4. The Parties’ national competition authorities shall seek to cooperate with respect to their competition policies and in the enforcement of their respective national competition laws, which may include coordination of investigations that raise common law enforcement concerns. This cooperation shall be compatible with each Party’s law and important interests, in accordance with their law governing legal privilege and disclosure of business secrets and other confidential information, and within reasonably available resources. The Parties’ national competition authorities may cooperate on the basis of mechanisms that exist or may be developed.
• Reference to work of OECD, ICN.
EU-Mercosur Chapter on Competition

• Article 5 Exchange of non confidential information and enforcement cooperation
  • 1. With a view to facilitating the effective application of their respective competition laws, the competition authorities may exchange non-confidential information.
  • 2. The Competition Authority of one Party may request cooperation to the other Party's competition authority with respect to enforcement activities. This co-operation shall not prevent the Parties from taking autonomous decisions.
  • 3. Neither Party is required to communicate information to the other Party. A Party may require that information communicated pursuant to this Article be used subject to the terms and conditions it may specify.

• Article 6 Consultations
  • 1. A competition authority of a Party may request consultations with the competition authority of the other Party should it consider that the interests of that Party are being substantially and adversely affected by
    • (a) anticompetitive practices that are or have been engaged in by one or more enterprises situated in the territory of the other Party or
    • (b) concentrations between undertakings which significantly impede effective competition as referred to in Article 2 (2) (a) to (c) or
    • (c) the enforcement activities of the competition authority of the other Party.
    • (d) The EU Competition Authority shall endeavor to assist the Competition Authorities from the Members countries of MERCOSUR, in their contacts with the Competition Authorities from the EU Member States in relation to anticompetitive practices, concentrations between undertakings and the enforcement of competition activities, without implications at Community level. It is recognised that entering into such consultations is without prejudice to any action under its competition law and to the full freedom of ultimate decision of the competition authority concerned.
  • 2. A competition authority so consulted may take whatever corrective measures it deems appropriate, consistent with its laws, and without prejudice to its full enforcement discretion.
Summary: current situation and trends

• Most countries now have competition laws, agencies.
• Growing acceptance of the usefulness of provisions/chapters on competition policy in trade agreements. International cooperation (with limitations) as chore element of such chapters.
• Work by ICN, OECD, UNCTAD, WIPO, WTO and other international organizations – recent focus/breakthroughs on procedural framework for competition enforcement – can more be done?
• Data-driven markets as important topic for discussion in international fora. Cross-jurisdictional spill-overs, need for coherence widely recognized.
• A significant degree of convergence in national competition policies generally, through extensive and informative analytical, policy development and advocacy work.
• Ongoing learning process within competition and trade communities.