



BALANCING PUBLIC POLICY CONSIDERATIONS: APPLICATION OF COMPETITION RULES TO SOE

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Overview

1. SOEs and Competition in context – the Wider Picture
2. Competitive Neutrality - Competition Policy and the State
3. Exceptions to the application of Competition law to the State
4. Competition Issues arising from SOEs
5. Challenges in competition enforcement against SOEs



Wider context



BETTER POLICIES FOR BETTER LIVES

The OECD is interested in the multidimensional nature of wellbeing

The OECDs work shows that Competition has links to many policy areas:

- Consumer welfare
- Corruption
- Economic growth
- Industrial policy
- Innovation
- Investment
- Poverty and inequality
- Taxation
- Trade
- State owned enterprises (SOEs)



Competitive Neutrality

General principle:

State Owned Enterprises (SOEs) may harm competition and consumer welfare in the same way (or more) as private enterprises

→ Competition laws should, and generally do, apply to both private and state-owned enterprises, subject to limited exceptions

→ Most OECD countries do not exclude public sector businesses from competition law

Essential features of competition law:

Ownership neutral

Scope: any person or undertaking that engages in economic or commercial activity

Regardless of: ownership, legal form, financing

Nationality neutral

Scope: effect-based application to any activity with anticompetitive effects in the jurisdiction

Regardless of: nationality, flag, place of establishment



Exceptions to the application of competition law to SOEs

Exceptions specific to SOEs:

Exemptions: formal exclusion from the law

- SOE may be formally exempted/immune from the application of competition rules
- Usually when close proximity to the State, when provide general public services (postal services, railways, health care, etc.)
- Should be accompanied by appropriate regulation to minimize the risk of market distortions.

Defences: regulated conduct and state action doctrine

- Question whether enforcement is warranted when SOE action regulated, compelled or authorised by law or government
- State action defence: no antitrust liability if challenged conduct is determined by lawful public measures
- Strict interpretation and conditions (case law):
 - Must result from clearly articulated, affirmative state policy and active state supervision (US); currently before the Supreme Court (NC Dental Board 2014)
 - Must be required by the state with no room for autonomous action or appreciation (EU)
- Impact: bars overall enforcement or as mitigating factor in the fine

Can advocacy help?



Competition issues arising from SOEs

Why should we worry?

- Many SOEs provide products and services in competition with private sector businesses, or in areas where private sector businesses could potentially compete.
- Anticompetitive harm may be even greater when caused by SOEs, due to the privileges conferred upon them and the high reliance of customers on their goods/services
- Public policy goal may be pursued through SOE, but to be balanced against consumer welfare loss due to competition harm
- Could SOE purpose be achieved through less competition-restrictive means through:
 - **Competition enforcement?**
 - **Regulatory intervention?**

Competition concerns arise where SOE has:

- a. **Incentives** to behave anti-competitively
- b. **The ability** to behave anti-competitively



Competition issues arising from SOEs (cont'd)

A. Incentives to behave anti competitively:

- SOEs less concerned than private firms with generating profits, hence stronger incentives to engage in anti-competitive conduct.
- Looking for economies of scale and scope: more concerned about expanding its revenues:
 - May find it advantageous to pursue anti-competitive strategies to expand its output and revenue even if raise costs and do not generate profits.
 - Most likely SOE's competition violations: through unilateral conduct
- Sense of immunity, protection, gov't protection and assistance



Competition issues arising from SOEs (cont'd)

B. Ability to behave anti competitively:

- Not or less subject to profit-maximising results
- Able to sustain prices below cost for extended periods of time (or even indefinitely), as loss-making strategy can be supported by prices above cost in other segment or by other source of funds
- Recoupment of the losses is not necessary for an SOE to find benefit in predation.
- Enjoy a number of privileges and immunities...



Some common issues with SOEs' practices

A. Abuses of dominance

1. Predatory pricing
2. Raising entry barriers and rival costs:
2. Cross-subsidisation

B. Public procurement / bid rigging

SOE as bidder and/or public procurement authority (gov't as customer or provider), information asymmetry, competitive advantage

C. Issues in merger control

- Merger control rules relevant to SOES: notion of undertaking, concentration, determination of control, turnover calculation,...?



Challenges in competition enforcement against SOEs

Solutions to enforcement challenges?

Institutional

- Reinforce independence of competition enforcers (nominations, incompatibilities, own budget, secluded decision making)
- Sufficient resources and powers for authority to investigate any industry and conduct
- Sanction undue government influence and SOE retaliation

Substantive

- Increase SOE accounting requirements and **transparency**
- Give sufficient **information gathering** powers to competition authority
- Reflect on suitability of **legal tests** in SOE context: more effect-based approach, less rigid price-cost benchmarks
- Shift standard and/or **burden of proof**?
- **Commitments** and settlement procedure: foster collaboration, effective remedies & antitrust monitoring
- Adapt **sanctions**: focus more on remedies than pecuniary sanctions (fines would hurt taxpayers and SOE not much affected by sanction cost)?



Some final remarks

- Competition policy can help achieve many macroeconomic goals via better functioning markets
- Restricting competition in order to achieve a broader policy objective, whether economic or not, will have anti-competition side-effects
 - It is important to understand those restrictions and then try and understand what competition can bring to the discussion
- SOEs can have an important role
 - But it is important to understand that in many contexts they not only have the incentives but also the ability to harm the competitive process
- Competition agencies may have a role to play therefore



Thank you!

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ADDITIONAL MATERIAL



Competitive neutrality – other policy frameworks

Distortive Measures	Corretive measures
Subsidisation	Anti-subsidy and state aid control
Discriminatory selection of an entrusted player (special rights, public services)	Public procurement rules (open competitive process), public service comparator mechanism
Excessive or insufficient compensation for a public service	Public service compensation standards
Distortive regulation	Regulatory impact assessment framework, including competition and competitive neutrality factors
Cross-subsidisation and hybrid companies	Good governance rules
Conflicts of interests	Good public and governance rules
Abuse of state power	Public laws against abuse of administrative powers
Discrimination and unfair treatment	Rules on equality, non-discrimination and fair treatment



Further OECD references

- Competitive Neutrality in Competition Enforcement (2015)
- Guidelines on Corporate Governances of SOEs (2015 revision)
- State-Invested Enterprises in the Global Marketplace: Implications for a Level Playing Field (2014)
- The Size and Sectorial Distribution of SOEs in OECD and Partner Countries (2014)
- International Playing Field between Public and Private Business: What Have We Learnt So Far? (2014)
- Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business (2012)
- Compendium of OECD recommendations, guidance and best practices bearing on competitive neutrality (2011)
- SOEs and the Principle of Competitive Neutrality: (i) Application of antitrust law to SOEs and (ii) Corporate governance and the principle of competitive neutrality (2009)
- Roundtables: Regulated Conduct Defence (2011) – Competition, State Aid and Subsidies (2010) – Competitive Restrictions in Legal Professions (2007) – Regulating Market Activities by the Public Sector (2004)