

Unclassified

DAF/COMP(2015)13/FINAL

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

13-Apr-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**DISCUSSION ON COMPETITIVE NEUTRALITY**

**- Note by the Secretariat-**

**27-28 October, 2015**

*The Note was discussed and approved by the Competition Committee on 28 October 2015, and it includes observations received from Competition Delegates. This Note is part of the Competition Committee's work stream on Competitive Neutrality. More documents related to this discussion can be found at [www.oecd.org/daf/competition/competitive-neutralityin-competition-enforcement.htm](http://www.oecd.org/daf/competition/competitive-neutralityin-competition-enforcement.htm).*

Antonio CAPOBIANCO: [tel.: +33 1 45 24 98 08, Email: [antonio.capobianco@oecd.org](mailto:antonio.capobianco@oecd.org)].

**JT03393995**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP(2015)13/FINAL  
Unclassified

English - Or. English

## COMPETITION POLICY & COMPETITIVE NEUTRALITY

*Note by the Secretariat*

### TABLE OF CONTENTS

INTRODUCTION	3
1. WHY IS COMPETITION IMPORTANT?	3
2. MATERIAL SCOPE: WHAT IS SUBJECT TO COMPETITION LAW?	5
a. Anticompetitive agreements (a.k.a. collusion or conspiracy)	5
b. Abuse of dominance / monopolisation	5
c. Mergers and acquisitions lessening or impeding effective competition	6
3. SUBJECTIVE SCOPE: WHO IS SUBJECT TO COMPETITION LAW?	6
a. Substantive challenges	7
b. Institutional challenges	7
c. Practical challenges	8
4. ANY EXCLUSION FROM COMPETITION LAW?	8
5. GEOGRAPHIC SCOPE: WHAT IS THE REACH OF COMPETITION LAW?	10
6. COMPETITION POLICY & NON-ENFORCEMENT POWERS	11
CONCLUSION	13
<b>Boxes</b>	
COMPETITION LAW ENFORCEMENT IN PRACTICE	11

## INTRODUCTION

1. Broad and effective competition law enforcement is essential to ensuring a level playing field. Competitive neutrality in turn is critical to making competition policy effectual.

2. Competitive neutrality can be defined as a principle according to which all enterprises, public or private, domestic or foreign, face the same set of rules, and where government's contact, ownership or involvement in the marketplace, in fact or in law, does not confer an undue competitive advantage on any actual or potential market participant.<sup>1</sup>

3. Competition policy is about competition in the markets and how firms behave, namely pro- or anti-competitively. Markets can be local, national, regional or global depending on competition dynamics, while firms can be private or public enterprises. If the state steps into the marketplace, it is equally subject to competition law. In that sense, borders, nationality, status and ownership most generally do not matter. This makes competition law and policy a powerful tool, for its own good, and for supporting other government policies. That does not mean there are no challenges in enforcing competition law in a state-owned enterprise (SOE)<sup>2</sup> or a cross-border context. Competition policy tools and challenges to ensuring competitive neutrality, were discussed by competition authorities at the June 2015 Roundtable.<sup>3</sup>

4. The Competition Committee agreed to pursue the topic further through two Secretariat outputs:

i) This Note aimed primarily at other policy fields: it explains the fundamental principles and scope of application of competition law, how it can level the competitive field, and serve, while contrasting with, other policies.<sup>4</sup>

ii) An Inventory of the main categories of competitive neutrality distortions the Competition Committee is concerned with, and relevant competitive neutrality tools and policies found in various jurisdictions that can address such distortions.<sup>5</sup>

5. This Note examines (I) Why competition is important, (II) What is subject to competition law, (III) Who is subject to competition law and why ownership does not matter, (IV) Whether any exclusions apply, (V) The geographic scope of competition law and why nationality and borders do not matter, and (VI) Non-enforcement powers.

### 1. WHY IS COMPETITION IMPORTANT?

6. Competition is defined as “*the activity or condition of striving to gain or win something by defeating or establishing superiority over others*”.<sup>6</sup> Sound competition is competition on the merits. There can be competition *for* the market and competition *in* the market.

7. There is broad consensus that competition creates significant microeconomic and macroeconomic benefits. At the microeconomic level, competition creates dynamic business environments, in which economic players are incentivised to be more efficient, to invest, to innovate, and to attract customers by

<sup>1</sup> OECD, Issues Paper on Competitive Neutrality in Competition Policy (2015).

<sup>2</sup> SOEs are defined widely as in the OECD SOE Guidelines (2015 Update).

<sup>3</sup> OECD, Roundtable and Issues Paper on Competitive Neutrality in Competition Policy (2015).

<sup>4</sup> OECD Hearing on Competitive Neutrality (2015).

<sup>5</sup> OECD, Inventory of Competitive Neutrality Distortions and Measures (2015).

<sup>6</sup> Oxford dictionary; etymologically, to compete is derived from latin *competere*, meaning to strive for.

offering better goods and services at lower prices.<sup>7</sup> Consumers benefit from more choice, advanced products and services, higher quality, lower prices, and progress. Competition therefore enhances productivity growth and consumer welfare. At a macroeconomic level, this productivity growth leads to faster growth for the economy as a whole. Competition can also help promote a cleaner and fairer business environment, in which success comes to those firms best able to meet their customers' needs, rather than those with the best connections or the deepest pockets.<sup>8</sup>

8. Given these benefits, competition can play an important role in achieving other government policies, including policies promoting consumer protection, entrepreneurship, innovation, investment, corporate governance, equal opportunities, effective public procurement, open trade, growth and competitiveness. Competition benefits are also the very reason behind governments' liberalisation and de-regulation policies, notably in network industries.

9. Besides OECD recommendations, guidelines and instruments focusing on competition policy as such,<sup>9</sup> competition is an integral part of other OECD policy fields and instruments: e.g. the Policy Framework for Investment (PFI),<sup>10</sup> the Business and Finance Outlook,<sup>11</sup> the Guidelines for Multinational Enterprises,<sup>12</sup> the Guidelines on Corporate Governance of State-Owned Enterprises,<sup>13</sup> the Recommendation on Regulatory Policy and Governance,<sup>14</sup> the Recommendation on Competition Assessment,<sup>15</sup> the Recommendation concerning Structural Separation in Regulated Industries,<sup>16</sup> the Recommendation for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies,<sup>17</sup> and the Trust and Business Report.<sup>18</sup>

10. Sound and effective competition does not always arise naturally from private decisions. The temptation is strong for economic players to restrict competition: for greater profits and for an easier life.<sup>19</sup> Hence the need for "rules of the game" and government oversight. That is why governments around the world have adopted competition policies, consisting of competition laws and competition authorities to

---

<sup>7</sup> Competition raises productive efficiency within firms, which strive to be more productive and competitive. It also raises allocative efficiency among firms, by ensuring that goods and services are provided by those who can do it best, which may involve market entry, expansion or exit.

<sup>8</sup> OECD Macro-Economic Factsheet (Oct 2014).

<sup>9</sup> OECD Competition, all sources and materials: <http://www.oecd.org/daf/competition/>.

<sup>10</sup> PFI (2015 update).

<sup>11</sup> OECD Business and Finance Outlook (2015).

<sup>12</sup> MNE Guidelines (2011 update).

<sup>13</sup> SOE Guidelines (2015 update).

<sup>14</sup> OECD Recommendation on Regulatory Policy and Governance (2012).

<sup>15</sup> OECD Recommendation on Competition Assessment (2009); see also the PMR indicators.

<sup>16</sup> OECD Recommendation on Structural Separation (2011 update).

<sup>17</sup> OECD Recommendation on Cooperation between Trade and Competition (1986).

<sup>18</sup> OECD Trust and Business (2014-2015).

<sup>19</sup> 'An easier life' as remarked by the economist John Hicks. While laying down the foundations of free economy theory, Adam Smith himself pointed to the risk of anticompetitive strategies: "*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*" (The Wealth of Nations, 1776). Hence the need to "lend a hand to the invisible hand" through competition law and enforcement.

enforce them. Today, approximately 130 jurisdictions have a competition regime, most of which have been adopted in the last 20 years.<sup>20</sup>

## 2. MATERIAL SCOPE: WHAT IS SUBJECT TO COMPETITION LAW?

### What does competition law catch, require and prohibit?

11. Competition law, also known as antitrust law, aims to protect and to promote competition, competitive dynamics and markets.<sup>21</sup> Competition law essentially prohibits three categories of business strategies, deemed unlawful:

#### *a. Anticompetitive agreements (a.k.a. collusion or conspiracy)*

12. Anticompetitive agreements can occur among competitors (horizontal) and among players at different levels of the supply chain (vertical).<sup>22</sup> Horizontal agreements, a.k.a. hard core cartels, are treated as the most egregious infringement. Hard core cartels include agreements to fix prices, restrict output, allocate markets; collusion in public procurement (bid rigging); and sharing of competitively sensitive information.<sup>23</sup> An agreement does not need be formal to fall under competition law: it is enough for competitors to actively, passively, expressly or informally share information or coordinate their action so that they know how they will act in the markets (re: price, output, tender bid, etc.), thereby reducing or eliminating competition. Trade associations, for example, can be a cartel minefield. Two OECD Recommendations address cartel risks: the 2012 Recommendation on Fighting Bid Rigging in Public Procurement,<sup>24</sup> and the 1998 Recommendation Concerning Effective Action against Hard Core Cartels.<sup>25</sup>

#### *b. Abuse of dominance / monopolisation*

13. Under different names, most jurisdictions prohibit unilateral anticompetitive conduct by a firm enjoying market power. Absent such power, there is no abuse, hence no unilateral infringement possible under competition law. Approaches to this vary somewhat between jurisdictions, but there are several types of conduct that can be deemed anticompetitive, such as: charging predatory or exclusionary pricing, bundling distinct products, squeezing margins,<sup>26</sup> charging unfair or discriminatory prices or trading conditions, restricting access to necessary infrastructure or inputs owned or controlled by the dominant player, and raising rivals' costs or barriers to entry.

---

<sup>20</sup> Competition law is “public policy law”, it is binding, imperative and of general application.

<sup>21</sup> Competition law does not protect any competitor as such or the *status quo ante*, rather it protects the competition process and dynamics to the benefit of consumers.

<sup>22</sup> In certain jurisdiction resale price maintenance is one example of a potentially anticompetitive vertical agreement: it arises when an upstream firm – a manufacturer, producer, or importer of a good or service – limits or restricts the ability of a downstream firm – usually its distributor or retailer – to set the resale price downstream.

<sup>23</sup> Hard core cartels are generally deemed illegal as such (i.e. illegal by object or *per se*), whereas other agreements have sparked debate as to whether they could be deemed illegal as such or only if they have anticompetitive effects (i.e. illegal by effect). This debate occurs in e.g. the pharmaceutical sector regarding so-called ‘pay-for-delay’ agreements under which generic drug entry is delayed by virtue of an agreement (reverse payment) between the originator and the generic drug companies.

<sup>24</sup> OECD Recommendation on Fighting Bid Rigging (2012).

<sup>25</sup> OECD Recommendation on Fighting Hard Core Cartels (1998).

<sup>26</sup> Vertically integrated firms may squeeze the margins of the downstream competitors by increasing the cost to accessing the upstream essential input/infrastructure, which may drive even efficient competitors out of the downstream market.

14. Anticompetitive agreements and dominance abuses constitute the core of *ex post* public enforcement of competition law (a.k.a. antitrust enforcement). Anticompetitive agreements and abuses of dominance are subject to heavy fines,<sup>27</sup> which can be of administrative or criminal nature, as well as, in some jurisdictions, to professional disqualification or even prison sentences.

***c. Mergers and acquisitions lessening or impeding effective competition***

15. Mergers and acquisitions (M&As) are commonplace in business. The vast majority are not anti-competitive and can bring upon synergies and efficiencies. Some M&As, however, may well act to restrict competition – and it may be challenging to undo the ‘fusion’ once it is done. Merger control is the preventive arm of competition law enforcement: it seeks to prevent the emergence of a market position in which a company would have the incentive and ability to exploit market power or to coordinate its behaviour with remaining market players. Business transactions that qualify as ‘mergers’ or ‘acquisitions’ under competition law, must be notified in jurisdictions where notification thresholds are met (notification assessment).<sup>28</sup> The controlling competition authorities then assess whether the contemplated merger is likely to lessen or impede effective competition in the affected markets (substantive assessment). The same transaction may be reviewed by various authorities at the same time, creating a need for cooperation among enforcers to ensure coherent decisions.

**3. SUBJECTIVE SCOPE: WHO IS SUBJECT TO COMPETITION LAW?**

**Can anyone be subject to competition law?**

16. Yes. In most OECD jurisdictions and around the world, competition law applies to any “person” or “undertaking”, which are interpreted broadly as encompassing any entity engaged in a *economic activity*, regardless of its ownership, source of financing, legal status, place of business or nationality. An economic activity is also widely defined as the provision of good or services, for profit or not.

**Is it about government or business?**

17. Other fields – like trade, investment and tax policies – focus essentially on states and on country-to-country comparisons (e.g. harmful tax competition among states, or un-level foreign investment protection across countries). Competition law is different in that it applies straight to undertakings or economic activities. It focuses on how businesses behave among themselves, and vis-à-vis consumers, customers and suppliers, to determine whether these conducts affect competition in the markets. In many jurisdictions, government can fall under competition law to the extent it, too, engages in an economic activity.

**Does competition law apply to SOEs or subsidised enterprises?**

18. Yes, in most jurisdictions, competition law applies irrespective of ownership, legal status and source of financing. The fact that an undertaking is state-owned, state-controlled or state-supported, is mainly irrelevant for competition law enforcement purposes insofar as the undertaking carries out an economic activity. This makes competition law a powerful tool to addressing SOEs active in the marketplace. This generally holds true for both domestic and foreign SOEs, whether engaging in local or cross-border activities.

19. Thus an SOE can be held liable, like any other undertaking, if it engages in anticompetitive practices, for example:

---

<sup>27</sup> Up to 10% of the firm’s group’s worldwide annual turnover in some jurisdictions.

<sup>28</sup> Notification thresholds are established in each competition law. Threshold parameters generally consist in the size of the parties and/or the size of the transaction.

- An upstream producer in the energy sector that forces distributors to charge a certain price (so-called resale price maintenance);
- A state-owned airline coordinating fares or extra fees with competitors;
- A telecom SOE agreeing with competitors to partition the market, or to boycott certain providers or customers;
- A rail SOE charging predatory prices (so low that competitors cannot survive);
- A vertically integrated SOE in the electricity sector refusing access to essential infrastructure or input (e.g. the electricity grid) or squeezing downstream competitors' margin (by charging too high a price for the upstream input).

20. There are nonetheless challenges in enforcing competition law where an SOE is involved, which can be of substantive, political or practical nature:

#### *a. Substantive challenges*

21. Substantive competition rules, namely the ones determining what amounts to an abuse, a cartel or a merger, are based on the assumption that market players are essentially economic entities, seeking maximum profits. In addition, a cartel or a merger investigation assumes that it is taking place among separate entities. However:

- SOEs may not be driven by profit maximisation, so rules based on price, cost and profit for example (like predatory pricing and margin squeeze), may not conclusively show an abuse on the part of an SOE;
- SOEs are often hybrid, i.e. entrusted with a public service duty alongside economic activities, which sometimes makes allocation between economic and non-economic activities thorny, especially where accountancy is not clear, where both activities are interdependent, or where there is cross-subsidisation;
- Various SOEs belonging to the same government may, or may not, qualify as separate entities. That is why some jurisdictions, like the EU, have established criteria to determine whether SOEs are to be treated distinctly from the government they belong to, and from one another.<sup>29</sup> This is relevant to determine whether there is any possibility of a cartel or a merger being at stake, as well as to calculate turnover for merger notification purposes.

#### *b. Institutional challenges*

22. Although the majority of competition authorities are independent in their investigation and decision-making powers, they could be exposed to the risk of undue government influence or involvement where an SOE is at stake. This is true whether it is a domestic or a foreign SOE under scrutiny. Also, SOEs are often found even in liberalised utility sectors: in some jurisdictions, competition authorities and sector regulators may share concurrent or parallel powers, e.g. to review mergers (one under competition law, the other one under sector-specific principles).

---

<sup>29</sup> Recital 22 of Council Regulation (EC) No 139/2004, and section C.IV.5.4 of the Jurisdictional Notice, according to which: "In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them." For a recent case, see COMP/M.5655 - SNCF/LCR/Eurostar.

**c. Practical challenges**

23. To effectively control a merger or establish an anticompetitive practice, relevant information is needed foremost from the undertaking under scrutiny. Two hurdles may challenge investigation and information-gathering efforts: (i) hybrid SOEs with no clear accounting distinction between economic and non-economic activities, and (ii) government’s reluctance to respond to requests for information (whether a domestic or foreign government). Similarly, where fines or remedies are imposed following a violation finding, there can be practical hurdles in forcing them upon the SOE or its controlling government.

24. The above challenges have not deterred competition authorities from bringing competition cases against SOEs, as illustrated through the OECD in-depth research into SOEs in the marketplace and competitive neutrality between public and private enterprises.<sup>30</sup> The 2015 OECD SOE Guidelines further establish good governance principles, including disclosure and transparency, accountability and fair competition obligations.

**4. ANY EXCLUSION FROM COMPETITION LAW?**

**Competition law does not apply.**

25. Since competition law applies to any entity or person carrying out economic activities, the ones that carry out *non-economic* activities fall outside the ambit of competition law:

- Activities that belong to the core of *sovereign* government functions, such as judicial and police functions, are not economic. When contested, competition authorities and courts have to draw a line between economic and sovereign activities, as was the case for OPEC.<sup>31</sup>
- Various governments also consider that *public services*, even if supplied for payment, do not fall under competition law (e.g. public transportation or water supply). But others, like the EU, have established that services of general interest (i) can be of economic nature, and (ii) fall under competition law to the extent it does not jeopardise the fulfilment of the service.<sup>32</sup> This requires balancing between the benefits of competition law enforcement, on the one hand, and other policy goals, on the other. Where competition *in* the market is not an option (e.g. due to limited infrastructure), there could be at least competition *for* the market: open tendering by the government to select the best provider for a given period.

**Competition law applies, but can some players be exempted (subjective exclusion)?**

26. Governments may further decide that some players, although performing economic activities, should be exempted anyway, notably selected SOEs active in strategic industries, or so-called national champions. Municipalities are also raised by competition authorities as a growing concern, because municipality-owned enterprises not only are numerous but also may be shielded from competition law by municipal authorities.<sup>33</sup>

---

<sup>30</sup> See Bibliography for detailed references to OECD publications on Competitive Neutrality.

<sup>31</sup> A US Court considered that the establishment by Sovereign States (through OPEC) of the terms and conditions for the removal of a prime natural resource, to wit crude oil, from its territory was essentially a sovereign governmental function, and therefore as foreign sovereigns, the defendants were immune from suit in US courts: see *International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd* on other grounds, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). Similar questions may arise regarding e.g. government satellite activities, or granting a concession on the public domain.

<sup>32</sup> So-called ‘services of general economic interest’ (SGEI) under article 106 TFEU.

<sup>33</sup> Such concerns have been voiced by e.g. Germany and Italy.



27. What if a limitation in one jurisdiction is not recognised in another? If an entity is not subject to competition law in country A and is found to have abused its dominant position, or entered into a cartel, or plans to acquire a company, with effects in country B, the competition authority of country B is free to determine whether the entity is subject to competition law or not. In other words, country A's limitation is not binding upon country B's authority.

### **Competition law applies, but can some practices be excluded (material exclusion)?**

28. Market players cannot derogate from competition law, as it is imperative public policy law. Governments, however, may exclude certain practices from competition law, in two ways: exemptions (or immunities) and defences:

*a. Exemptions.* Government may, by law or executive order, exempt or immunise certain practices from competition law.<sup>34</sup> This is sometimes the case of restrictive agreements concluded in industries, in which government sees some strategic interest: airline alliances, for example, may seek antitrust immunity from the US department of transportation.<sup>35</sup> Certain mergers may also be exempted from merger control by the minister in charge, if government interests are at stake, like in Hungary, where merger control exemptions can be granted to mergers involving state assets or companies.<sup>36</sup>

*b. Defences.* Defences are case-law based. They are claims raised in courts by antitrust defendants trying to convince the court that, in their case, they should not be held liable under competition law. The so-called 'state action' or 'state compulsion' defence is the most commonly invoked one, although seldom successful. The defence consists in economic actors claiming that their anticompetitive conduct was commanded by the state, leaving it no margin of discretion. For instance, an infrastructure operator or a professional board may adopt self-serving restrictive measures by relying on its powers to regulate and control access to the infrastructure or profession respectively. Recently, the US Supreme Court's *Dental Board* ruling made it clear that defences should be exceptional and subject to strict conditions, denying the admissibility of the defence in this case.<sup>37</sup>

### **What should be done about exclusions?**

29. Competitive neutrality requires that all market players be equally subject to competition law. Otherwise, asymmetric enforcement distorts the competitive field. Exclusions – whether immunities, exemptions or defences – should therefore be restricted, if not eliminated, and narrowly construed:

- Exemptions often reflect a misunderstanding: competition law can support other government objectives (e.g. effective transportation and universal access), and competition policy can be compatible with other policies. Where various policy goals are at stake, balancing how to maximise both can prove more satisfactory to society than outright immunisation.
- Exemptions distort the playing field, as they may be granted to certain agreements (e.g. alliance) as opposed to others (e.g. merger) in the same market, or to some sectors (e.g. air transport) as opposed to others (e.g. rail transport).

<sup>34</sup> Or empower certain agencies or ministries to grant exemptions under certain conditions.

<sup>35</sup> With the idea that alliances may achieve important transport policy goals, and are worth authorising despite their anticompetitive effects.

<sup>36</sup> Article 24/A of the Hungarian Competition Act.

<sup>37</sup> For more, see OECD Roundtable on Regulated Conduct Defence (2011)

- Exemptions miss the benefits of effective and sound competition law enforcement, which allows that benefits and efficiencies of the agreement, abuse or merger under scrutiny, be taken into account and balanced against competition restriction concerns.<sup>38</sup>

30. Exclusions should therefore be regularly re-assessed as to whether they are worth it, and how to pursue other policy goals while maximising competition benefits and ensuring equal application of the law to all agreements, abuses and mergers that could prove anticompetitive.

## 5. GEOGRAPHIC SCOPE: WHAT IS THE REACH OF COMPETITION LAW?

31. Competition law has no borders. Competition law is adopted by parliament in each jurisdiction at national or supranational level, but unlike other policy areas (e.g. trade, investment, employment, tax, sector or industrial laws), distinctions between foreign and domestic players, national and cross-border activities, or home and host country, are mainly irrelevant in competition law. Competition policy is about markets, not about government-to-government relations. Why? Because the competition impact of possible cartels, abuses and mergers is assessed in relation to *relevant competition markets*, i.e. where competition takes place and where anticompetitive effects can be felt. Relevant markets can be local, national, regional or global depending on market conditions in each case.<sup>39</sup> So companies should be aware that they could face scrutiny wherever their activities and conduct may affect competition.

### So how to know which competition authority is in charge if borders do not matter?

32. A competition authority is generally competent to open and decide on a case if the matter has some *local nexus* (i.e. link) with its jurisdiction. In other words, there must be something in the case that relates to the jurisdiction of the competition authority: where the undertaking carries out its activities, has assets or customers, generates revenues, adopted or carried out the conduct under scrutiny (e.g. cartel meetings) and/or where the effects thereof were felt. Many jurisdictions have adopted an effect-based approach, i.e. they are competent to take action provided the anticompetitive practice has, or is likely to have, some effects there (such as a price surcharge, or customer boycott). That means that a cartel or dominance abuse may lead to various investigations and decisions around the world.

33. The ‘local nexus’ is also present in merger control rules. Most jurisdictions have adopted merger notification thresholds based on the asset value or turnover level generated by the merging parties or the target company within their territory. That is why a merger may be reviewed and need approval by various competition authorities before closing. For example, the GE/Alstom acquisition deal was subject to merger control in e.g. Brazil, Canada, China, the EU, Israel, South Africa, and the US.<sup>40</sup>

34. The OECD has long worked on international enforcement cooperation, which culminated with the adoption of the 2014 OECD Recommendation concerning International Cooperation on Competition Investigations and Proceedings.<sup>41</sup> The OECD has also collected model bilateral agreements, based on

---

<sup>38</sup> Except for *per se* violations of competition law (such as hard core cartels).

<sup>39</sup> Relevant markets include two parameters: (i) All products and services (hence all competitors), if any, deemed substitutable with the ones under scrutiny (product market delineation), and (ii) A geographic span, which depends on how far supply can be found and customers would go for substitutes (geographic market delineation). See e.g. European Commission, Notice on the definition of relevant market for the purposes of Community competition law (1997) and Competition Brief (2015).

<sup>40</sup> The last approvals came from the European Commission subject to remedies (e.g. divestments) on 8 September 2015 and from the U.S. DOJ on the same day, see “Mergers: Commission clears GE’s acquisition of Alstom’s power generation and transmission assets, subject to conditions”, IP/15/5606, and “Justice Department Requires General Electric to Divest Aftermarket Business in Order to Complete Alstom Purchase”, Press Release 15-1091.

<sup>41</sup> OECD Recommendation on International Cooperation (2014).

existing agreements between competition authorities around the world. The OECD Competition Committee and Global Competition Forum are arenas where competition authorities from around the world discuss common challenges, and where they share and develop best practices.<sup>42</sup>

### COMPETITION LAW ENFORCEMENT IN PRACTICE

The below examples illustrate the scope of competition law, how it in fact applies to any market player, regardless of ownership, nationality and geographic span.

*So, can competition law address the following scenarios:*

**a) A company, subsidised by its government, enters markets in its country and elsewhere by offering bundled products (e.g. cars and car insurance)?**

Since the company is said to enter markets, it means it provides goods or services (economic activity), which renders competition law applicable regardless of the type of company at stake.

Unilateral conduct is caught by competition law through abuse of dominance or monopolisation rules. The question is (i) whether the company holds market power, depending upon e.g. its position in the relevant markets (to be delineated), and (ii) whether its bundling practices hamper or exclude competition (in the relevant car or car insurance markets).

If it is found to be abusing its market power, competition authorities in any jurisdiction where the activities or anticompetitive effects are felt, may take action, including injunctions, remedies and penalties.

Some may ask: what about the subsidised part of the equation? Competition law enforcement looks at how a company behaves in the market. Why it does so, or what allows it to behave so (e.g. subsidisation) is not caught as such. Subsidies may be a distortion, but it does not amount to a competition law violation. That is why competitive neutrality tools, such as subsidy control, are important.<sup>43</sup>

**b) Various SOEs belonging to the same government coordinate their activities in a way that affects the competitive environment?**

The first step is to determine whether the SOEs' activities qualify as economic, or rather amount to sovereign state acts. In the former case, they fall within the subjective scope of competition law; in the latter, they would not. These SOEs could be exempted from competition law by their state owner, but such exemptions do not bind competition authorities in other jurisdictions.

The second step is to determine whether coordination among them qualifies as a competition law infringement, namely a restrictive agreement (cartel) or a merger hampering competition. A cartel or a merger can only exist if the entities are distinct and independent from one another. The fact they all have the same owner (the state) does not mean they cannot be deemed independent in the market, notably if they hold independent decision-making power regarding their market strategy and behaviour:

- If they are independent players, the question then is whether their coordination brings them so closely together (similarly to a joint venture) that it could be deemed a merger and fall under *ex ante* merger control. If not, coordination could trigger *ex post* enforcement under cartel rules, notably if SOEs shared or agreed on sensitive competition information (e.g. price or output fixing).
- If they are deemed one and the same market player, the SOEs' coordinated market conduct should be assessed through the lens of restrictive unilateral conduct (abuse of dominance). Although many jurisdictions recognise the possibility of collective dominance,<sup>44</sup> only a few have laid down specific definitions or criteria to establishing collective dominance

<sup>42</sup> The International Competition Network (ICN) and the European Competition Network (ECN) are other arenas allowing for close cooperation among competition law enforcers.

<sup>43</sup> Some jurisdictions, like the E.U., have added such tools to their competition policy arsenal. See OECD Roundtable on State Aid and Subsidies (2010)

abuse,<sup>45</sup> and cases are rare.<sup>46</sup>

Ownership is irrelevant to competition law. Of course enforcing the rules against SOEs may bring challenges, e.g. if the SOE accounts are not clear or if the state owner does not cooperate. This holds true whether the competition authority taking action belongs to the same jurisdiction or is foreign. Such cases call for active implementation of the OECD SOE Guidelines, and the OECD Recommendation on International Cooperation if several competition authorities are involved.

**c) An SOE from country A invests in a strategic utility industry in country B?**

Investments, whether domestic or cross-border, fall under competition law provided they qualify as mergers according to merger control rules. For that, most jurisdictions require that control or decisive influence over the target enterprise be acquired. This often means acquiring a majority of the shares or voting rights. So, if the investment is of that nature, it will be subject to merger control in jurisdictions where notification thresholds are met. If merger review reveals that the investment has or could have anticompetitive effects, it can be barred or be subject to remedies.

A growing debate in the competition policy community is whether strategic minority interest and shareholding should also be caught (although not amounting to majority ownership or control): should they be subject to merger control at all, how to draw the line to catch and focus on the problematic ones, and is it worth the enforcement cost? A few jurisdictions do so, whereas others have opened public consultation before taking a stance.<sup>47</sup> Merger control extension to non-controlling interests means that more investments may be subject to competition law scrutiny.

**d) Two multinational enterprises enter into a cooperation agreement to coordinate their distribution efforts around the world and to keep prices under control?**

Enterprises should act in the market independently: competition law is precisely meant to avoid communication, cooperation or agreement among market players on market-sensitive information or strategy. This would in fact eliminate or soften competition among them:

- Price coordination amounts to price fixing, it is a hard core cartel prohibited as such. No justification is allowed. It is subject to heavy fines and, in some jurisdictions, to professional disqualification or even jail sentences.<sup>48</sup>
- Cooperation on distribution may be a hard core cartel if it amounts to market partitioning or output restriction. If coordination is more about maximising or expanding distribution efforts and better serving customers, various jurisdictions allow for weighing the competition pros and cons of such cooperation agreements, provided they do not include any hard core restriction.

Enforcement action can be taken in any jurisdiction where the activities or restrictive effects are felt. Multinational companies often face multi-jurisdictional investigations. To avoid heavy sanctions, one of the companies involved may self-report and cooperate with the relevant competition authorities in exchange for leniency or amnesty.<sup>49</sup>

<sup>44</sup> See e.g. the competition laws of Belgium, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Netherlands, Poland, Portugal, Romania, Spain, Sweden, the UK and Turkey.

<sup>45</sup> See e.g. the competition laws of Croatia and Russia.

<sup>46</sup> Collective dominance applies to situations where undertakings collectively have a dominant market position that enables them to act jointly and independently from other market players. The interpretation of the European Commission on the application Article 102 TFEU to joint dominance was tested in courts: for instance, in *Kali und Saltz*, the European Commission's criteria for assessing collective dominance were upheld by the European Court of Justice (C-68/94 and C-30/95).

<sup>47</sup> Competition laws of Austria, Germany, the UK and the US also cover the acquisition of non-controlling minority shareholding. As to the European Commission, it has consulted on a possible extension of the EU Merger Regulation scope to acquisitions of non-controlling minority shareholding: see White Paper Towards more effective EU merger control (COM/2014/0449 final).

<sup>48</sup> The transport sector used to feature some major exemptions granted to tariff conferences (i.e. price coordination), in particular in the air transportation and liner shipping sectors. These exemptions have to a large extent been repealed.

<sup>49</sup> Self-reporting, through leniency application, is a successful and widely used cartel detection tool. It is subject to close, genuine and continuous cooperation in exchange for immunity or a fine reduction. See e.g. the US DoJ Corporate and Individual Leniency Policies: <http://www.justice.gov/atr/leniency-program>.

## 6. COMPETITION POLICY & NON-ENFORCEMENT POWERS

35. Some important competition restrictions or distortions might not qualify as breaches of competition law. For example, high barriers to entry, favouritism by the state towards some market players, excessive regulation, lack of competitive selection for essential infrastructure or public services, or cross-subsidisation from SOE activities. Effective competition and competitive neutrality therefore requires that somebody, such as competition authorities, have advocacy, market study and advisory powers to remedy the distortions.

36. Non-enforcement powers are increasingly used by governments and competition authorities, recognising that their role in promoting competition in the economy goes beyond law enforcement.

37. Disruptive innovation – such as Uber for taxis, or AirBnB for hotels – is a good example of how competition authorities can affect the wider policy debate. Competition impact assessment and advice from the relevant competition authorities can help design and adapt competition and regulatory frameworks to new realities, to achieve the policy goals that may still justify some regulation (e.g. safety) while ensuring the maximum benefits from competition and innovation (e.g. choice, price, service, novelty).

## CONCLUSION

38. Competitive neutrality is a topic of growing concern across OECD policy areas, including trade, investment, tax and regulated industries. Many of these policy communities are mainly concerned about whether foreign SOEs benefit from special treatment, or whether cross-border activities generate distortions due to distinct national treatments. As explained in this Note, competitive neutrality matters to competition policy, too, but not limited to the SOE or cross-border context.

39. Where other policies tend to focus on countries and state-to-state comparisons, competition policy is about public law governing firms' conduct in their relation among them and vis-à-vis their customers and suppliers. Any market player can be subject to enforcement action and sanctions, regardless of ownership, nationality, origin, financing or legal status. This means that SOEs, MNEs and SMEs, whether engaged in local or cross-border activities, can equally be disciplined under competition law. This is not always easy, but the OECD Competition Committee frequently discusses the ways in which law enforcement and non-enforcement powers can be used to optimise competition benefits, and to enable government to pursue their policy objectives without unduly distorting competition.

40. Where a practice raises concerns in one jurisdiction, its competition authority will likely act. But where the concern extends to a practice or market that spans across several jurisdictions, several competition authorities may be looking into the same or related concerns and seeking to address them. The OECD is working to improve multi-jurisdictional enforcement and help competition authorities work together more effectively.

## BIBLIOGRAPHY

### A. OECD Sources Referenced in this Note

OECD Competition webpage and sources: <http://www.oecd.org/daf/competition/>

OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings (2014): <http://www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm> (OECD Recommendation on International Cooperation).

OECD Recommendation on Regulatory Policy and Governance (2012):  
<http://www.oecd.org/gov/regulatory-policy/49990817.pdf>

OECD Recommendation on Fighting Bid Rigging in Public Procurement (2012):  
<http://www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm>

OECD Recommendation concerning Structural Separation in Regulated Industries Recommendation (2011 update):  
<http://www.oecd.org/daf/competition/recommendationconcerningstructuralseparationinregulatedindustries.htm>.

OECD Recommendation on Competition Assessment (2009) and Toolkit (3 volumes):  
<http://www.oecd.org/daf/competition/assessment-toolkit.htm>.

OECD Recommendation concerning Effective Action against Hard Core Cartels (1998):  
<http://www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainstharcocartels.htm>.

OECD Recommendation for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies (1986):  
<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=190&InstrumentPID=186&Lang=en&Book=>.

OECD Guidelines on Corporate Governance of State-Owned Enterprises (2015 update):  
<http://www.oecd.org/daf/ca/revisionoftheoecdguidelinesoncorporategovernanceofstate-ownedenterprises.htm> (SOE Guidelines).

OECD Guidelines for Multinational Enterprises (2011 update): <http://www.oecd.org/corporate/mne/> (MNE Guidelines).

OECD, Hearing on Competitive Neutrality (2015): <http://www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm>.

OECD, Roundtable on Competitive Neutrality in Competition Policy (2015):  
<http://www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm>.

OECD, Secretariat Issues Paper Competitive Neutrality in Competition Policy (2015):  
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2015\)5&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)5&docLanguage=En).

OECD, Inventory of Competitive Neutrality Distortions and Measures (2015) (online publication forthcoming).

OECD Policy framework for Investment (2015 update): <http://www.oecd.org/investment/pfi.htm> (PFI).

OECD Business and Finance Outlook (2015): [http://www.oecd.org/daf/OECD-Biz-Fin\\_Highlights-2015.pdf](http://www.oecd.org/daf/OECD-Biz-Fin_Highlights-2015.pdf).

OECD Factsheet on how competition policy affects macro-economic outcomes (October 2014):  
<http://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf>.

OECD Product Market Regulation (PMR) indicators:  
<http://www.oecd.org/eco/growth/indicatorsofproductmarketregulationhomepage.htm>.

OECD “Trust and Business” project and materials (2014-2015):  
<http://www.oecd.org/daf/ca/trust-business.htm>.

OECD Roundtable on Market Studies (2008), <http://www.oecd.org/regreform/sectors/41721965.pdf>; and  
Competition and Market Studies in Latin America (OECD report and recommendations) (2015),  
<http://www.oecd.org/daf/competition/competition-and-market-studies-in-latin-america2015.pdf>.

OECD “Regulatory Impact Analysis” materials: <http://www.oecd.org/gov/regulatory-policy/ria.htm>.

## **B. OECD Sources on Competitive Neutrality**

OECD, Issues Paper, Competitive Neutrality in Competition Policy (2015),  
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2015\)5&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)5&docLanguage=En).

OECD, Inventory of Competitive Neutrality Distortions and Measures (2015).

Hearing and Roundtable on Competitive Neutrality (2015),  
<http://www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm>.

Guidelines on Corporate Governance of State-owned Enterprises (2015),  
<http://www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf>.

OECD Ministerial Council, Levelling the International Playing Field between Public and Private Business: What Have We Learnt So Far? (2014),  
[http://olisweb.oecd.org/vgn-ext-templating/C-MIN\(2014\)20-ENG.pdf?docId=JT03356796&date=1398887000383&documentId=618715&organisationId=1&fileName=JT03356796.pdf](http://olisweb.oecd.org/vgn-ext-templating/C-MIN(2014)20-ENG.pdf?docId=JT03356796&date=1398887000383&documentId=618715&organisationId=1&fileName=JT03356796.pdf).

OECD Council, Maintaining a Level Playing Field between Public and Private Business for Growth and Development: Background Report (Note by Secretary General) (2013),  
[http://olisweb.oecd.org/vgn-ext-templating/C\(2013\)44-ENG.pdf?docId=JT03337592&date=1365094802783&documentId=610221&organisationId=1&fileName=JT03337592.pdf](http://olisweb.oecd.org/vgn-ext-templating/C(2013)44-ENG.pdf?docId=JT03337592&date=1365094802783&documentId=610221&organisationId=1&fileName=JT03337592.pdf).

State-Owned Enterprises - Trade Effects and Policy Implications (2013),  
<http://www.oecd.org/daf/ca/name,230852,en.htm>.

Competitive Neutrality: Maintaining a level playing field between public and private business (2012),  
<http://www.oecd.org/competition/competitiveneutralitymaintainingalevelplayingfieldbetweenpublicandprivatebusiness.htm>.

Competitive Neutrality: National practices (2012), <http://www.oecd.org/daf/ca/50250966.pdf>.

SOEs and Competitive Neutrality, Global Forum on Competition (2012),

<http://www.oecd.org/competition/globalforum/2012globalforumoncompetition-programmeanddocuments.htm>.

Compendium of OECD recommendations, guidance and best practices bearing on competitive neutrality

(2012), <http://www.oecd.org/daf/ca/50250955.pdf>.

OECD Publishing, Competitive Neutrality and SOEs: Challenges and Policy Options (2011),

<http://www.oecd-library.org/docserver/download/5kg9xfghd6.pdf?expires=1417531358&id=id&accname=guest&checksum=A7647A965BC1EA33301086D38C3A5DBC>.

Competitive neutrality and state-owned enterprises in Australia (2011),

[http://www.oecd-ilibrary.org/governance/competitive-neutrality-and-state-owned-enterprises-in-australia\\_5kg54cxkx36-en](http://www.oecd-ilibrary.org/governance/competitive-neutrality-and-state-owned-enterprises-in-australia_5kg54cxkx36-en).

Roundtable on Regulated Conduct Defence (2011), <http://www.oecd.org/regreform/sectors/48606639.pdf>.

Government at a Glance (2011), <http://www.oecd.org/gov/governmentataglance2011.htm>.

Competition Assessment Toolkit (2011), <http://www.oecd.org/competition/assessment-toolkit.htm>.

Competitive Neutrality and State-Owned Enterprises, Corporate Governance Working Papers (2011),

<http://www.oecd.org/daf/ca/name,222835,en.htm>.

Competitive Neutrality and SOEs: Challenges and Policy Options (2011),

<http://www.oecd-library.org/docserver/download/5kg9xfghd6.pdf?expires=1417531358&id=id&accname=guest&checksum=A7647A965BC1EA33301086D38C3A5DBC>.

Roundtable on Competition, State Aids and Subsidies (2010),

<http://www.oecd.org/competition/sectors/48070736.pdf>.

Roundtables on 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),

<http://www.oecd.org/daf/competition/46734249.pdf>.

Roundtable on Industrial Policy and National Champions (2009),

<http://www.oecd.org/daf/competition/44548025.pdf>.

Roundtable on Regulating Market Activities by the Public Sector (2004),

<http://www.oecd.org/daf/competition/sectors/34305974.pdf>.