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

**ROUNDTABLE ON COMPETITION NEUTRALITY**

-- Issues paper by the Secretariat --

*This document was prepared by the OECD Secretariat to serve as an issues paper for Item 9 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.*

*The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm](http://www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm).*

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## COMPETITIVE NEUTRALITY IN COMPETITION POLICY

### *Issues paper by the Secretariat<sup>1</sup>*

1. Competitive neutrality is of critical importance to effective competition policy. As governments around the world are strengthening their laws and enforcement against competition violations, it is essential that states themselves do not unduly distort or restrict the playing field. Competitive neutrality also challenges the contours and limits of competition laws and enforcement.
2. Competitive Neutrality is not new on the OECD agenda. The OECD Ministerial Council statement of 2012 “*welcome[d] the OECD’s work to ensure competitive neutrality in public and private-owned businesses*”.<sup>2</sup> The OECD reported the same year on competitive neutrality between public and private business.<sup>3</sup> The Competition Committee has also explored competitive neutrality from specific angles, e.g. subsidies and public private partnerships.<sup>4</sup> In 2014, the Ministerial Council further “*support[ed] the OECD’s efforts to promote a global level playing field for business, involving non-member economies, including [...] competitive neutrality, responsible business conduct, international cooperation in regulatory policy and competition law enforcement*”.<sup>5</sup>
3. This issues paper examines (1) why competitive neutrality matters, (2) which state measures may distort the playing field, (3) how competition policy, law and enforcement contribute to enhance competitive neutrality in the market place, and what other rules and tools may be available, and (4) some concrete challenges arising for competition authorities in ensuring neutral competitive markets.

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<sup>1</sup> This paper was written by Mona Chammas of the OECD Competition Division, with a valuable contribution from Aranka Nagy.

<sup>2</sup> Ministerial Council statement (2012), see point 11 of the Chairman’s Summary.

<sup>3</sup> The Competition Committee launched a horizontal project with the Corporate Governance Committee in 2010, which resulted in a joint report on “*Competitive Neutrality: Maintaining a level playing field between public and private business*” presented at the OECD Global Competition Forum in 2012. Competitive neutrality was also recently the subject of special projects within UNCTAD and the ICN, see bibliography. For a full list of OECD work and publication on competitive neutrality, please see the bibliography.

<sup>4</sup> The Competition Committee has already explored Competitive Neutrality from various angles: it held e.g. two roundtables on SOEs and Competitive Neutrality in 2009; a roundtable on Competition, State Aid and Subsidies in 2010; a roundtable on Regulated Conduct Defence in 2011; and a hearing on Public Private Partnerships in 2014. Competitive Neutrality is also relevant to other areas of interest to the OECD Competition Committee: structural separation in regulated industries, competition authorities’ independence and new powers, competition impact assessment of restrictive regulations, evaluation of competition authorities’ interventions, regulated sectors (e.g. air transportation). For more information, see [www.oecd.org/daf/competition/](http://www.oecd.org/daf/competition/).

<sup>5</sup> Ministerial Council statement (2014), point 11.

## 1. “Competitive Neutrality”: What and why?

- What does competitive neutrality mean?
- What is the ultimate goal of promoting a level playing field and undistorted markets? Is competitive neutrality a goal in and of itself, or rather a means to achieving something else?
- Why does competitive neutrality matter to competition policy and enforcement?

### 1.1 *Definition*

4. 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>6</sup>

5. There is no universal definition of competitive neutrality. The focus of competitive neutrality has often been on state-owned enterprises (SOEs), as opposed to private players. This discussion aims to approach competitive neutrality more broadly, considering any state-induced distortion of the market place. Such distortions may arise between various types of market participants: e.g. public v. private,<sup>7</sup> foreign v. domestic, national v. local, one sector v. another, one specific company v. another. The “state” is also approached in the broadest senses, by looking at measures emanating from any level of government.

### 1.2 *Rationale*

6. Competitive neutrality matters both for its own good (economic and political rationales) and because it thereby contributes to effective competition.

- *Economic rationales.* Undue distortions come at a cost – for affected companies, markets, consumers and the economy as a whole. In a properly competitive market, consumers choose the producer who best meets their needs, for example, by most efficiently using inputs to produce the desired quality of outputs. When distortions are absent, under conditions of competitive neutrality, the economy will use resources efficiently (allocative efficiency) and also provide incentives to improve efficiency (productive or x-efficiency). In contrast, when one or more producers receives favours from the state, consumers might not face the real costs of their choices (this might fall on taxpayers, for example) resulting in inefficiency. The impact of state measures can be further magnified by the fact that the state usually intervenes in sectors involving essential goods and services for consumers.
- *Policy and political rationales.* There are other reasons for concern about state involvement in the market place. Firstly, this could blur the distinction between the state as provider, the state as a customer and the state as regulator. For example, regulatory rules might be set to protect state-owned industries. Secondly, in an international context, governments sometimes seek to negotiate over subsidies or other interventions, on behalf of their national producer interests. This might

<sup>6</sup> See also OECD publishing on Competitive Neutrality (2012), p 9.

<sup>7</sup> “Public” in this Paper means state- or government-related, thus drawing a distinction between the public and the private sectors. It does not mean publicly traded or quoted companies as opposed to privately held ones.

not always be a sensible policy, but it occurs – and so subsidies granted in one jurisdiction could lead to ‘retaliatory’ measures in another.

- *Competition policy.* Competition policy and competitive neutrality are inter-dependent: (i) competitive neutrality is possible only if there is room for actual or potential competition in the first place; (ii) competitive neutrality ensures effective competition by maximising competition on the merits and the benefits of competition (consumer welfare, economic efficiency, innovation); and (iii) broad and neutral competition law enforcement plays in turn a major role in ensuring a level playing field. As pointed below, there may be challenges, however, in enforcing competition law against practices or entities in which the government has a stake.

7. Of course, there are rationales for state intervention, too. The policy challenge is to identify ways in which the state can pursue its social and economic goals without unnecessarily distorting markets, or when this is impossible, at least to identify the costs of interventions to enable informed policy choice.

## 2. The role of the state in the market

- What state measures can distort competitive neutrality? Does state involvement in an economic activity mean advantages or disadvantages for those affected?
- Which state-induced distortions are competition authorities most concerned with?
- In which sectors is the degree and frequency of state intervention or influence the highest? What is the weight of state-controlled entities, regulated companies and/or public services in the economy? Is the state’s presence growing or decreasing?

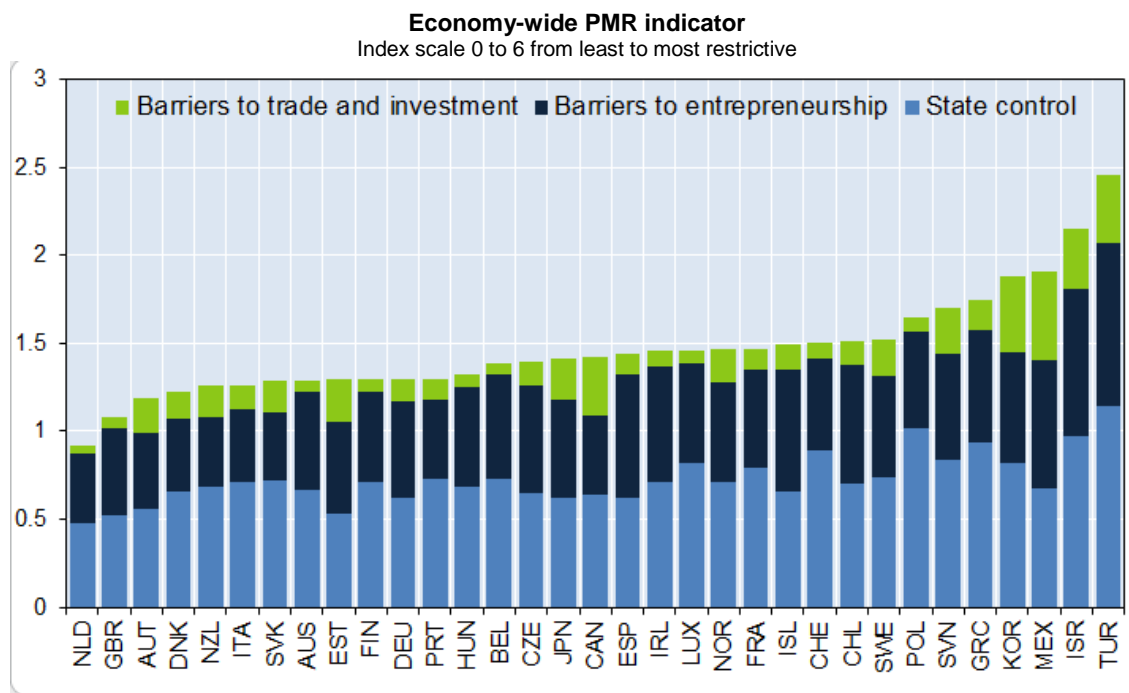
8. The state represents 40-50% of GDP in OECD countries.<sup>8</sup> Governments may intervene in the markets for various and legitimate reasons, such as correcting market failures,<sup>9</sup> ensuring universal access to public goods and services, setting labour and environment standards, promoting R&D and education. To achieve its public policy goals, there is a wide array of measures government can adopt *de jure* or *de facto*: e.g. ownership and control, public service obligations, subsidisation, sector regulation, tax and investment rules, special rights and privileges, public procurement, concessions, municipalisation, liberalisation, industrial policy or political involvement into strategic industries. Across these measures, the government may act as a market player, as a customer and/or as a regulator. The OECD product market regulation (PMR) database provides useful indicators as to the types and level of state presence in the market place.<sup>10</sup>

<sup>8</sup> Percentage of government expenditure in relation to GDP, ranging from 24% in Mexico to 58% in Denmark, with an average of 46% in 32 of the OECD countries (2009 statistics), OECD, *Government at a Glance*, 2011, Chap. 3.

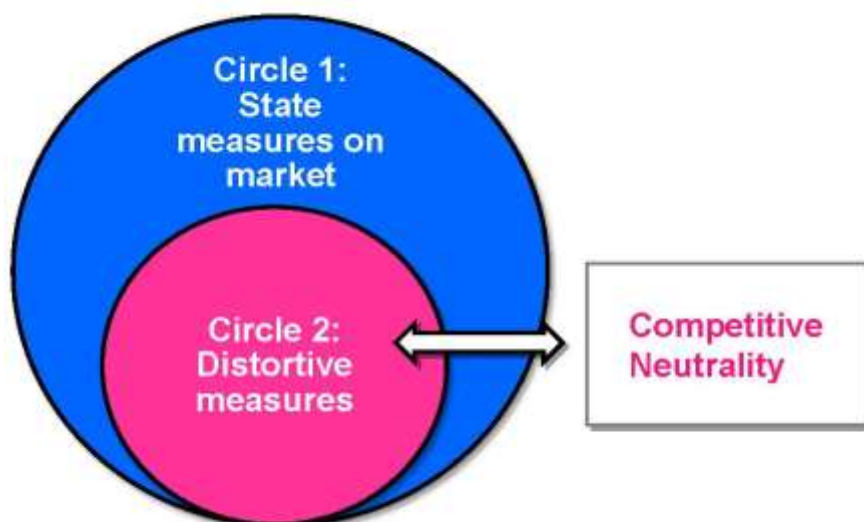
<sup>9</sup> Opinion is divided as to the extent of market failures – some governments pursue industrial policies aimed at changing the long-run character of the economy for example.

<sup>10</sup> OECD, *Indicators of Product Market Regulation*, 2013 (update).

PMR indicators – 33 OECD countries , 2013<sup>11</sup>



9. Not every state measure distorts competition, indeed some may correct distortions (this, after all, is what competition law aims to do). What matters for competitive neutrality is: (i) to identify state measures that affect the market or concern an economic activity in which private providers could compete (circle 1); and among such measures, to determine which ones distort that competition (circle 2).



10. Several questions need to be asked of any measure that might affect competition: (i) Is there a distortion? That is, does the measure confer a competitive edge, or conversely a competitive burden, which would otherwise not exist; and (ii) Is the distortion avoidable? That is, can the policy objective be

<sup>11</sup> OECD, PMR Indicators of Product Market Regulation (2013).

met through less distortionary means? If not, then a third question is (iii) Do the benefits of this policy outweigh the costs? This last is often a political rather than merely technical question, as it is for government to determine the relative importance attached to different outcomes.<sup>12</sup>

11. Below are some of the main state measures or interventions found in the market place, which could distort competition: (a) state ownership and control, (b) subsidies and public services (entrusted companies), (c) regulation and (d) industrial policy and state activism.

## 2.1 *State ownership and control*

12. There is no unanimous definition of what amounts to government control, which can take various forms.<sup>13</sup> The OECD Guidelines on Corporate Governance of SOEs (“OECD SOE Guidelines”) define control as the state being “*the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control*”.<sup>14</sup> Equivalent degrees of control may be found e.g. where the state exercises decisive or material influence over key decisions of the entity, if it enjoys effective control over the board of directors, or if its shareholding includes golden shares conferring special controlling rights.<sup>15</sup>

13. What matters to the competitive neutrality discussion is whether one or more of the SOE’s activities is of economic or commercial nature: whether the SOE is present in a market where other economic actors do or could compete. SOEs might be advantaged or disadvantaged vis-à-vis their private competitors, for example:

- SOE *advantages* can arise from lower capital cost from government financing, protection against hostile acquisitions and bankruptcy, privileged access to information and infrastructure, or favouritism in public procurement (as a buyer or seller).
- SOE *disadvantages* might arise from restrictive labour practices and bureaucracy, weak management due to lack of incentives, or requirements to carry out non-commercial functions.

14. Calculating the net competitive edge or hardship borne by an SOE in relation to actual or potential competitors is complex. The difficulty often stems from the hybrid nature of SOEs. The OECD SOE Guidelines provide principles to improve the public and corporate governance of SOEs including: transparency, accountability and efficiency principles, separate accountancy for SOEs’ economic and non-economic activities, and monitoring of the state and SOE impact on the market where it is active.<sup>16</sup>

15. The examination of SOEs’ impact on the market is often limited to the given market or sector in which the SOE operates, but competitive neutrality challenges may also arise in a broader context:<sup>17</sup>

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<sup>12</sup> As the OECD’s Competition Assessment Toolkit (2011) sets out in more detail.

<sup>13</sup> See ICN survey and report on SOEs and competition enforcement (2014). They illustrate the various definitional dimensions of SOEs among responding ICN members.

<sup>14</sup> Draft OECD SOE Guidelines (2014), p. 4.

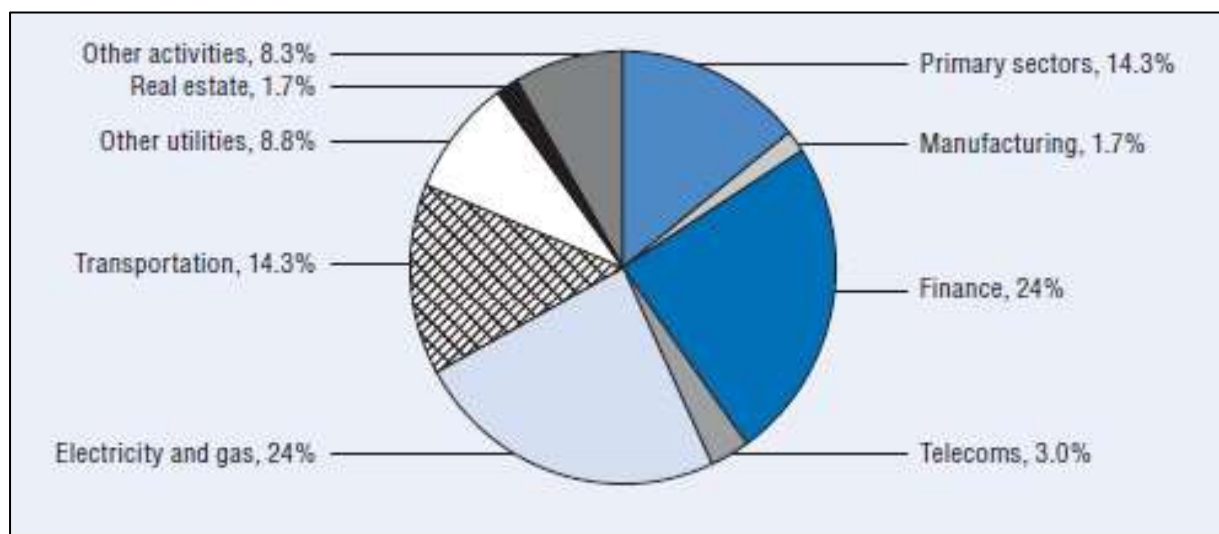
<sup>15</sup> Merger control rules can also provide useful guidance in defining effective control over an entity.

<sup>16</sup> Draft OECD SOE Guidelines (2014) Chapter III, and OECD, Competitive Neutrality (2012).

<sup>17</sup> For example, if railroad transportation is dominated by an SOE, potential distortions will usually be explored in the railroad sector, although distortions may also be found in coach and short haul air transportation.

- *Multi-market approach:* If an SOE significantly distorts a market (e.g. input prices), it could have effects down the supply chain and across related sectors and markets.<sup>18</sup>
- *Multi-SOE question:* Distortions and discrimination may also arise among SOEs themselves. In some industries (e.g. oil), the largest companies are state-backed.<sup>19</sup> Distortions may be easier to address where the SOEs are controlled by the same government, calling for streamlining and levelling of its policy. It gets more complex where SOEs active in the same markets are controlled by distinct governments or jurisdictions.

16. Addressing distortions due to state control is important as SOEs operate today in a broad range of markets and represent a significant part of national economies. Below is a chart showing the sectorial distribution of SOEs in 2014 based on company value across 34 jurisdictions:<sup>20</sup>



## 2.2 Subsidies and public services

17. There is no exhaustive list of subsidisation forms. Subsidies can include direct financing, tax breaks, debt forgiveness, loan guarantees, credit ease, below-market rates, soft budget constraints, etc. They may also consist of privileged access to inputs – such as energy, land, telecom and transport infrastructure. Governments can further subsidise companies by purchasing from them, or by forcing others to purchase from them, at above-market prices or through uncommercial terms that result in risk or costs being transferred from the subsidised business.

18. The EU and the WTO provide a legal definition of state aid<sup>21</sup> and subsidy<sup>22</sup> respectively. From a competitive neutrality perspective, two definitional criteria are relevant: (i) the subsidy must be selective,

<sup>18</sup> SOE distortions in the rail road market may have repercussions in fossil fuel subsidies and, for example, introduce distortions in much of the economy, not just the fuels markets.

<sup>19</sup> The 13 largest oil companies in world are state-backed, Bremmer (2010).

<sup>20</sup> OECD Publication on the size and sectorial distribution of SOEs across 34 jurisdictions (2014).

<sup>21</sup> Article 107 (1) of the Treaty on the Functioning of the European Union (“TFEU”) defines state aid as an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities.

i.e. favouring a specific economic actor as opposed to others; and (ii) it must emanate ultimately from the government, i.e. it is borne by state resources. Subsidies represent an important part of the economy: available EU statistics suggest that state aid across EU countries amount to 0.5% of their GDP.<sup>23</sup>

19. The driving test, from a competitive neutrality viewpoint, is two-fold: Can and will subsidisation attain the government's objective? Even if so, can such policy objectives not be attained through less or non-distortionary means (minimisation of competitive neutrality distortions)?<sup>24</sup> The OECD Competition Committee held a roundtable on competition, state aid and subsidies in 2010, discussing in depth e.g. the different types of subsidies, government rationales behind such interventions, and distortions resulting from subsidisation.<sup>25</sup>

20. In the context of public services – such as public transportation, water management, energy supply – it is normal that an enterprise subject to public service obligations be compensated, by users and/or the state. Yet, competitive neutrality challenges may arise regarding: (i) the selection of the public service provider (through an open competitive process or not), (ii) the privileges and powers attached to the public service (which may affect other providers, whether actual or potential), and (iii) how it is compensated.

### 2.3 Regulation

21. Government regulation generally is designed to promote and protect important public policy objectives, including norms to ensure quality, access, environment, health and safety, or to foster innovation, entrepreneurship, labour and education. Regulation (and de-regulation) may also serve to create a market in the first place (proactive regulation) or to address market distortions and failures (reactive regulation). In that sense, regulation plays a role in creating a competitive environment. Other regulations conversely may have distortionary effects and raise competitive neutrality concerns, as illustrated below.

#### 2.3.1 Liberalised and (de-)regulated sectors

- Liberalisation is incomplete or de-regulation is uneven, hence the competitive field is un-level from the start;
- The regulator or incumbent wears various hats (e.g. infrastructure owner, operator and service provider), and structural separation or behavioural conditions are lacking to prevent bias and conflicts of interests;<sup>26</sup>
- Lack of *domestic* co-operation between the government or sector regulator and the competition authority in addressing market failures and distortive conducts;
- Lack of *international* co-operation and co-ordination among governments liberalising those sectors with an actual or potential cross-border dimension.

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<sup>22</sup> A subsidy shall be deemed to exist if (a) there is a financial contribution by a government or any public body within the territory of a Member or there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) a benefit is thereby conferred.”, WTO SCM Agreement, Article 1.

<sup>23</sup> EU State Aid Scoreboard (2014).

<sup>24</sup> See *infra* for further developments on the tests laid down in the OECD Competition Assessment Toolkit (2011).

<sup>25</sup> OECD, Competition, State Aid and Subsidies (2010).

<sup>26</sup> OECD Recommendation on Structural Separation (2011).

22. These risks are exacerbated by the fact that (de-)regulation generally occurs in network industries and key sectors to consumers, such as the health, telecommunication, energy and transport sectors. OECD PMR indicators suggest that, among network sectors, regulation tends to be particularly strict in electricity, gas and rail transport, with the average score ranging between 2.5 and 4.7 for both OECD and non-OECD countries (on a maximum restriction level of 6).<sup>27</sup>

### 2.3.2 *Special professions and licensing regimes*

23. So-called special professions are another area which remains heavily regulated in various jurisdictions, often on grounds of ensuring quality and protecting consumers. This is the case of physicians, pharmacists, architects, engineers, lawyers, bailiffs, taxis, hotels, etc. Regulation of activities deemed special often occurs through government licensing regimes,<sup>28</sup> or professional boards entrusted with the power to control access to the profession and to set the conditions for practicing (self-regulation).<sup>29</sup> Competitive neutrality concerns arise where these regulatory mechanisms prove unduly restrictive or discriminatory.<sup>30</sup>

24. Regulatory impact assessments and market studies in regulated (and self-regulated) fields can be useful practices if they include competition and competitive neutrality impact analysis. The OECD Competition Assessment Toolkit provides a checklist and extensive guidance to identify, assess and address restrictive regulation of any kind.

## 2.4 *Industrial policy and state activism*

25. State activism<sup>31</sup> includes a wide range of, sometimes subtle, ways in which government can participate in and influence the markets: e.g. golden shares and shareholder's activism, investments by sovereign wealth funds, political involvement in strategic deals,<sup>32</sup> joint technological or industrial initiatives, public-private partnerships for infrastructure,<sup>33</sup> administrative hardship or ease on certain industries.<sup>34</sup> They may be adopted for investment purposes only, or as part of government's industrial policy to protect or stimulate a selected company or industry. When it creates or favours national

<sup>27</sup> OECD PMR indicators (2013), figures 10, 11 and 12.

<sup>28</sup> Taxi and hotel licencing regimes, for instance.

<sup>29</sup> For example, Orders and Colleges of physicians, and Bar Associations and Orders.

<sup>30</sup> The OECD held various roundtables on regulated professions: see *Competitive Restrictions in Legal Professions* (2007) and *Competition and Regulation in Auditing and Related Professions* (2009). The French competition authority, for example, found the Order of Architects liable under cartel rules for publishing standards fees which were found to distort and restrict competition. See Conseil de la concurrence, Decision n° 97-D-45, 10 June 1997, regarding practices adopted by the National Council of the Order of Architects, <http://www.autoritedelaconcurrence.fr/pdf/avis/97d45.pdf>.

<sup>31</sup> State activism is also described, to varying extents, as state entrepreneurship, state capitalism or state interventionism.

<sup>32</sup> For example through “buy national” obligations: the Mexican government decided to develop its automobile industry, by conditioning the operation of foreign firms’ plants on strict domestic content requirements, which led to a remarkable performance of the Mexican car industry; or through the creation of national champions, *ex nihilo* or through mergers: in France when GDF merged with Suez in order to form a national champion in energy, thereby fending off a bid from an Italian company. See OECD, *Industrial Policy and National Champions* (2009).

<sup>33</sup> OECD Roundtable on Public-Private Partnership (2014).

<sup>34</sup> Some may actually qualify as subsidisation or be taken through regulation, others may be more *sui generis*.

champions, industrial policy contrasts with competition policy, which aims to protect competition – not individual competitors. Industrial policy and state activism can lead to competitive neutrality distortions at two levels: at the level of the state measure and selection of the concerned market player (upstream), and at the level of this player’s conduct on the market (downstream). Interventions protecting or promoting a so-called national industry or champion, as opposed to foreign players and investors, have further distortionary repercussions at international level (as to foreign companies’ and foreign states’ reactions).

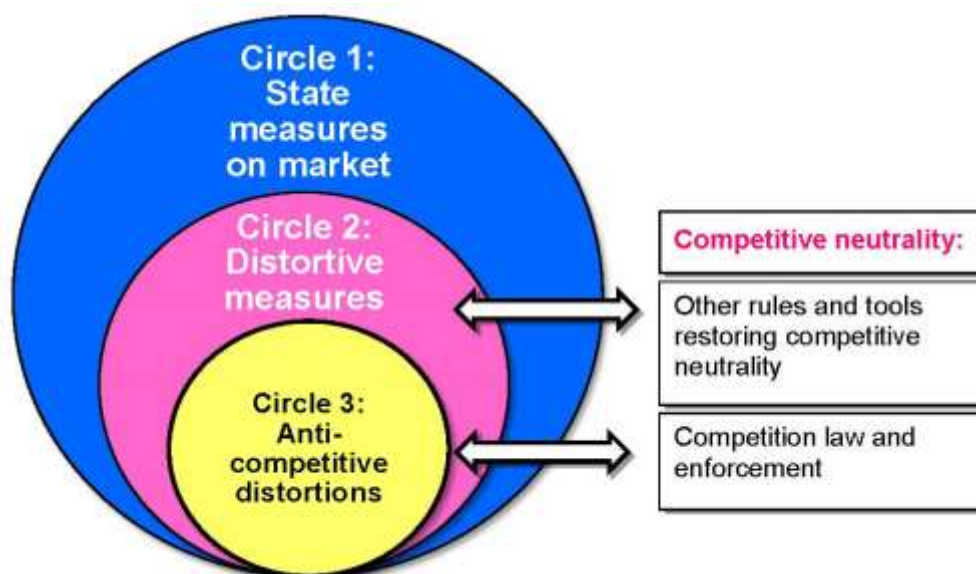
### 3. Competitive neutrality rules and tools

26. Competition authorities may not be able to tackle all competition distortions due to state intervention in the market. Distortions due, for example, to state control, subsidies, sector regulation, special rights, privileges, public service obligations, industrial policy, public procurement, concessions, municipalisation, re-nationalisation, sponsoring of national champions are often not directly caught by competition law. This section explores (a) useful rules and legal grounds, (b) various tools and powers competition authorities could be entrusted with, and (c) some institutional challenges due to the state’s link to and interest in the enforcement matter.

#### 3.1 Competitive neutrality rules

- Should competitive neutrality translate into an analytical and normative framework under which state-related distortions of competition can be identified, assessed and addressed?
- What rules can competition authorities use to address competitive neutrality distortions:
  - What is the scope of application of competition laws to state involvement in the market? What exemptions, exceptions, immunities or defences may limit this scope?
  - Which other rules and laws can be useful to address competitive neutrality distortions?

27. In the face of a competitive neutrality distortion, the first question for competition authorities is whether the distortion likely amounts to a competition law infringement (“anticompetitive distortion”): If so, what challenges arise in applying competition laws against state-induced violations (circle 3)? If not, can other laws or legal mechanisms be used to restore competitive neutrality (circle 2)?



### 3.1.1 Competition law

28. Does competition law apply to state measures and state-induced actions which likely violate competition rules? For example, a professional board entrusted with regulatory powers might adopt restrictive rules qualifying as an anticompetitive agreement. A subsidised company could use its government backing to dump the market with cheap product and force competitors out the market, in a manner that might qualify as predatory pricing. As far as SOEs are concerned, the OECD Guidelines establish that: “*Due to their privileged position SOEs may negatively affect competition and it is therefore important to ensure that, to the greatest extent possible consistent with their public service responsibilities, they are subject to similar competition disciplines as private enterprises.*”<sup>35</sup> This applies *mutatis mutandis* to any entity governed or supported by state intervention.

29. To ensure competitive neutrality, competition laws themselves should be origin-, ownership- and nationality-neutral. Broad applicability of competition laws is crucial to avoid two distortive dangers:

- Deepening market distortion by scrutinising some players only, as opposed to others, on mere grounds that the latter are state-backed although they compete in the same field.
- Adding another layer of distortion where the same anticompetitive distortion is subject to competition law in one jurisdiction but not in another, due to diverging scope of applicability.

30. OECD countries generally do not exclude public sector businesses from competition law.<sup>36</sup> However, differences across jurisdictions may arise (i) as to the criterion triggering the applicability of competition laws (e.g. what do undertakings, persons, economic or commercial activities actually encompass); and (ii) as to exclusion regimes barring the application of competition law.

#### 3.1.1.1 Competition law application criteria

31. Competition regimes around the world generally are based on a functional criterion, namely: any entity (undertaking, person) carrying out an economic activity, a commercial activity, a business.<sup>37</sup> Most jurisdictions concur that such activity means the provision of goods or services, regardless of the entity’s legal status, ownership or financing structure.<sup>38</sup> Under the OECD SOE Guidelines, “*an economic activity is one that involves offering goods or services on a given market and which could, at least in principle, be carried out by a private operator in order to make profits. The market structure (e.g. whether or not it is characterised by competition, oligopoly or monopoly) is not decisive for determining whether an activity is economic.[...]Economic activities mostly take place in markets where competition with other enterprises already occurs or where competition given existent laws and regulations could occur.*”<sup>39</sup>

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<sup>35</sup> Draft OECD SOE Guidelines (2014).

<sup>36</sup> OECD Roundtable on Competitive Neutrality (2009).

<sup>37</sup> Such as Canada, the EU, France, Japan, Korea, New Zealand, Turkey and the US, among others.

<sup>38</sup> See e.g. Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-645 ; Case 118/85 *Commission v Italy* [1987] ECR 2599, para. 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, para. 36; Joined Cases C-180/98 to C-184/98 *Pavlov and Others*, para. 75.

<sup>39</sup> Draft OECD SOE Guidelines (2014).

32. Questions and divergences arise, however, as to:

- Whether the economic or commercial activity should be for profit or not;<sup>40</sup>
- Whether there must be a competitive market for an economic activity to exist;<sup>41</sup>
- What public prerogatives, as opposed to economic activities, encompass, and how hybrid entities (carrying out both economic and non-economic functions) are treated.

33. Political and economic choices evolve, so the qualification of a state prerogative may change over time in a given jurisdiction, and across jurisdictions. Yet, if an alleged state prerogative is found to consist in the provision of goods or services, can competition authorities and courts re-qualify it as an economic activity? In addition to applying widely, competitive neutrality prompts that competition laws adjust to competitive realities and apply consistently to multi-jurisdictional anticompetitive distortions.

### 3.1.1.2 *Competition law exclusions*

34. Competition law exclusions give rise to two main competitive neutrality obstacles:

- They prevent levelling of the playing field through competition law enforcement against anticompetitive distortions; and
- If the exclusion is due to the very fact the state is involved in the immunised conduct, the exemption might itself distort the market.

35. Still most jurisdictions around the world have adopted various categories of competition law exclusions: immunities, exemptions, exceptions, waivers, defences, etc.

36. Exclusions differ in many ways: notably as to their basis (law, case law, enforcement practice), their material scope (a whole sector, a specific activity or actor), what infringement is excluded (competition law generally, or abuse and cartel more specifically),<sup>42</sup> and their granting mechanism and authority (automatic or upon application, with or without involvement of the competition authority).<sup>43</sup>

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<sup>40</sup> In the *US Postal Service v. Flamingo Industries* case (540 U.S. 736 (2004)), the Supreme Court highlighted that "*the Postal Service has different goals, obligations, and powers from private corporations. (...) The most important difference is that it does not seek profits(...)*". While EU law applies to undertakings engaged in economic activity (see *Pavlov and others* (2000) ECR I-6451), e.g. there has to be a financial risk involved in the exercise of that activity, but profit seeking is not a requirement (See *C-35/96 Commission v Italy*[1998] ECRI-3851).

<sup>41</sup> Under EU law, the fact that a product or service is provided in-house (e.g. public health and education structures) should bear no relevance as to whether it is an economic activity: it is sufficient that "*other operators would be willing and able to provide the service in the market concerned.*", Communication from the Commission on the application of the EU State aid rules to SGEI compensation, OJ C 8, 11.1.2012, p. 4–14.

<sup>42</sup> For instance, German competition law exempts public fees from abuse control (see Germany's contribution to the OECD Roundtable on Competitive Neutrality, 2015), while export cartels are explicitly or implicitly exempted from cartel law in various jurisdictions, see MC Levenstein & VY Suslow, "The Changing International Status of Export Cartel Exemptions", (2005) 20 *American University International Law Review* 785, and F. Wegner-von Papp, "Competition law and extraterritoriality", in *Ezrachi* (2012).

<sup>43</sup> In the United States, for example, regulation may implicitly exclude application of antitrust law, see "Implied regulated exemption" in Kalinowski (2015); airlines may apply for antitrust immunity regarding certain agreements (e.g. alliances) to the Department of Transportation; and a state action defence may be

37. Regarding SOEs in particular, the International Competition Network (ICN)'s 2014 special project examined '*State-owned enterprises (SOEs) and competition law*'. A background report was prepared by the Moroccan Competition Authority,<sup>44</sup> following a questionnaire which was answered by competition authorities from 35 jurisdictions.<sup>45</sup> They reveal some of the reasons for granting competition laws exemptions to SOEs, which could apply to non-SOE actors similarly: 34% of the responding jurisdictions do not recognise any exemption for SOEs, 34% exempt SOEs not engaged in an economic activity and 34% grant exemptions to SOEs entrusted with public service obligations; a few jurisdictions also exempt SOEs exercising their activity in a regulated sector (17%) or in strategic sectors (6%).

38. Competitive neutrality needs be addressed at two levels in the face of competition law exclusion:

39. First, at the level of the *state measure* which serves as the basis for the exclusion (e.g. a statute or regulator's decision): Competition law is often excluded on the grounds that other societal goals would otherwise not be achieved. This can be a dangerous and counter-productive assumption. Often, public policies (including competition) do not exclude one another; they can rather complement and reinforce each other.<sup>46</sup> Therefore "*exemptions (...) should be avoided absent a clear and compelling reason why such an exemption is in the public interest despite an obvious loss in consumer welfare.*"<sup>47</sup> Such a question could be examined using the OECD's Competition Impact Assessment Toolkit framework, described earlier.

40. Second, at the level of the *immunised anticompetitive conduct*: Economic actors (whether public or private) may claim that their distortive and anticompetitive conduct is shielded because it was commanded by the state leaving it with no margin of discretion (state compulsion or action defence). 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. Recent US Supreme Court's *Dental Board* case law on state action defence makes clear that defences should be exceptional and their admissibility is subject to strict conditions.

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brought in courts. For an analysis and recommendations on antitrust exemptions, see Antitrust Modernization Commission, Report and Recommendations (April 2007).

<sup>44</sup> ICN survey and report on SOEs and competition enforcement (2014).

<sup>45</sup> Austria, Brazil, Canada, Colombia, Chile, Cyprus, Denmark, the European Union (EU), Finland, France, Germany, Hungary, Iceland, India, Israel, Italy, Jamaica, Japan, Kenya, Mexico, Morocco, the Netherlands, Pakistan, Poland, Russia, South Africa, Spain, Sweden, Switzerland, Taiwan, Tunisia, Turkey, the United Kingdom, United States of America, Zambia.

<sup>46</sup> For example, public service obligations can be awarded by competitive tender.

<sup>47</sup> C. Varney, U.S. DoJ, "Antitrust Immunities", Remarks as Prepared for the AAI's 11th Annual Conference 1–2 (June 24, 2010), <http://www.justice.gov/atr/public/speeches/262745.pdf>.

**Box 1. State action defence**  
**U.S. Supreme Court – NC State Board of Dental Examiners v. Federal Trade Commission**

On 25 February 2015, the Supreme Court of the United States (“Supreme Court”) released a landmark ruling rejecting state-action immunity for a state professional-licensing board that engaged in anticompetitive conduct.<sup>48</sup> The Federal Trade Commission (“FTC”) brought a complaint against the North Carolina State Board of Dental Examiners (“NC Board”)<sup>49</sup> charging it with anticompetitive and unfair method of competition in violation of the Sherman Act because it excluded non-dentists from the market for teeth-whitening services. The NC Board asked for the dismissal of the claim on grounds that its members were invested with state power and therefore their conduct enjoyed state-action immunity. The Supreme Court held that a state board, on which a controlling number of decision-makers are active market participants in the occupation the board regulates, must satisfy both *Midcal’s* requirements to successfully invoke state-action antitrust immunity<sup>50</sup>, namely (1) The authority to engage in the challenged restraint is clearly articulated and affirmatively expressed as a state policy,<sup>51</sup> and (2) The State has to exercise active supervision over the anticompetitive conduct.

**1. Regarding to *clear articulation* requirement, the Supreme Court pointed that:**

- Market participants cannot be allowed to regulate their own markets free from antitrust accountability.
- An entity may not invoke state-action immunity unless it can show that it is acting through the state and in the state’s sovereign power.
- The mere fact that it is a ‘state’ agency, or that the state delegated control over a market to a non-sovereign actor, public or private, does not suffice.

**2. As to the *active supervision* requirement, the Supreme Court held that:**

- The need for supervision is imposed precisely to avoid the risk that active market participants pursue private interests (self-dealing) in restraining trade.<sup>52</sup>
- Determination of active State supervision is performed on a case-by-case basis: the State’s review mechanisms must provide “realistic assurance” that the anticompetitive conduct “*promotes state policy, rather than merely the party’s individual interests.*”
- There are a few constant requirements to show active supervision: e.g. review must take place on the substance; the supervisor must have the power to veto or modify the particular decisions; mere potential for supervision is not adequate; and the state itself must not be a market participant.

<sup>48</sup> *North Carolina State Board of Dental Examiners v. FTC*, (574 U.S. 2015, No. 13–534).

<sup>49</sup> NC Board is a state agency entrusted with the principal duty to create, administer, and enforce a licensing system for dentists in North Carolina.

<sup>50</sup> See *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, (445 U. S., No. 97.) “[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.”

<sup>51</sup> In this case, North Carolina law barred the unlicensed practice of dentistry, but it was silent as to whether teeth whitening constituted the practice of dentistry.

<sup>52</sup> The NC Board did not claim any supervision over its conduct regarding non-dentist teeth whiteners, so the state-immunity claim must fail.

It is rare that a case challenging the state action doctrine reaches the Supreme Court, thus the Dental Board case was long awaited from many perspectives.<sup>53</sup> Key lessons may be drawn. First, it confirms that State-action immunity, like other antitrust exemptions, is disfavored.<sup>54</sup> Immunities ought to be strictly construed and applied and subject to restrictive conditions. Second, it clarifies that both ‘clear articulation’ and ‘active supervision’ prongs must be met where the entity is not sovereign, and in particular, where its members are market participants – carrying out the risk of self-serving restraints. In other words, un-supervised state regulatory boards controlled by market participants should be subject to antitrust scrutiny. This may have consequences for actions taken by professional boards and trade associations, regardless of their formal status or state power delegation. Third, it clarifies the articulation between federal antitrust law and state regulation: state regulation may foresee and authorise competition restraints in pursuance of specific policy goals only insofar as it fulfils the *Midcal* test, and now the *Dental Board* ruling.

41. Many jurisdictions have recourse to a similar instrument, the so-called “regulated conduct defence”. Under EU case law, an undertaking may invoke the regulated conduct defence if its restrictive conduct was in fact required by legislation or regulation depriving it of any autonomy in the way it behaved in the market.<sup>55</sup> The same rules apply at national level in several EU Member states (such as Bulgaria, Germany, Hungary and Romania) and other OECD jurisdictions such as Canada and Chile.<sup>56</sup>

42. Defences bar enforcement of competition law against the restrictive market conduct. The question remains as to whether action can be taken against the government’s compelling measure, to neutralise its distortionary effects. In the EU, the European Commission may lodge an action against the member state if the latter’s measure is running against EU law principles.<sup>57</sup> Also Italy and Spain, for example, grant the competition authority standing in court against anticompetitive legislation.<sup>58</sup>

<sup>53</sup> Twenty years passed since the decision in *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) until the recent ruling adopted in *FTC v. Phoebe Putney Health System*, 568 U. S. 11, 1160 (2013).

<sup>54</sup> *FTC v. Phoebe Putney Health System*, 568 U.S. (2013).

<sup>55</sup> EU, Court of First Instance (now General Court), case T-271/03, judgement of 10.4.2008, *Deutsche Telekom v. Commission*, paragraph 85: “It follows from the case-law that Articles 81 EC and 82 EC apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 81 EC and 82 EC do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings.”

<sup>56</sup> See e.g. OECD Roundtable on Regulated Conduct Defence (2011) p 11; and Canadian Competition Bureau, Bulletin on “Regulated Conduct” at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03273.html>. In its submission to the OECD Roundtable discussion, Chile emphasised that regulated conduct defence was frequently raised in its case law (see TDLC’s Ruling N° 34/2005 *Cauquenes*, 45/2006 *Voissnet I*, 88/2009 *Celulink*).

<sup>57</sup> The TFEU provides that Member states shall abstain from any measure which could jeopardise the attainment of the objectives of the Treaty. Therefore, Member states may not enact measures enabling private undertakings to escape from the constraints imposed by Article 101. See: EU, Judgement of the Court of 16 November 1977. - *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)*.

<sup>58</sup> Italy: According to the renewed article 21-bis of the law n.287/1990, the ICA may preliminary issue recommendations to local administrators with respect to administrative acts, regulations and provisions which are considered to be harmful to competition. If local administrations do not comply with these recommendations within 60 days, the ICA can propose appeal before the competent administrative Court within the following 30 days. (See Competition Committee, Methods for Allocating Contracts for the Provision of Regional and Local Transportation Services, 2012). Spain: See OECD Annual Report (2012),

### 3.1.2 Other laws

43. If the distortive measure amounts to a competition law infringement, it should be subject to competition law and enforcement along the lines developed in the previous section. Many competitive neutrality issues, however, do not qualify as competition law violations.<sup>59</sup> It is therefore important to consider other rules under which competitive neutrality distortions may be caught and addressed. The “rule-box” below provides a panorama of such rules, bearing in mind two caveats: (i) these rules do not exist everywhere; and (ii) they may not necessarily be entrusted with the competition authority.

#### Competitive Neutrality – Policy Frameworks

Distortive measures	Relevant rules
Competitive neutrality distortion (generally)	Competitive neutrality framework
Subsidisation (state aid)	Anti-subsidy and state aid control
Discriminatory selection of an entrusted player (special rights, public services)	Public procurement rules (open competitive process), PSC (public sector comparator) mechanism
Excessive or insufficient compensation of a public service	Public service compensation standards (cost and profit assessment) <sup>60</sup>
Distortive regulation	Regulatory impact assessment framework, including competition and competitive neutrality factors <sup>61</sup>
Cross-subsidisation and hybrid companies	Good corporate governance rules <sup>62</sup>
Conflicts of interests	Good public and corporate governance rules re: conflicts, independence and incompatibilities
Abuse of state power	Public laws against abuse of administrative powers
Discrimination and unfair treatment	Constitutional principles of equality, non-discrimination, fair competition

#### 3.1.2.1 Competitive neutrality framework

44. Australia was the first OECD country to develop a comprehensive policy framework articulated by the Commonwealth Competitive Neutrality Policy statement, as described below.<sup>63</sup> The framework allows for both *ex ante* and *ex post* assessment of government-induced distortions.

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in which Spain reported successful jurisdictional challenges by the CNC against restrictive regulations (intercity bus transport, and state-level legislative provision re: electricity systems of mainland Spain and the Balearic Islands).

<sup>59</sup> OECD Roundtable on Competitive Neutrality (2009), p 326.

<sup>60</sup> E.g. EU regime regarding state aid rules in the context of service of general economic interest (SGEI) – See 106 TFEU.

<sup>61</sup> E.g. OECD Competition Assessment Toolkit (2011), OECD PMR indicators (2013) and OECD Recommendation on Structural Separation (2011).

<sup>62</sup> E.g. Draft OECD SOE Guidelines (2014).

<sup>63</sup> Commonwealth Competitive Neutrality Policy Statement (1996).

### Box 2. Australia's competitive neutrality framework

The Australian Government' approach towards competitive neutrality is articulated by the Commonwealth Competitive Neutrality Policy Statement ("Policy Statement"), which establishes that "*Competitive neutrality requires that government business activities should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership*"<sup>64</sup>. The Policy Statement establishes two criteria for the framework to apply: (i) the entity must be conducting a *business activity*<sup>65</sup> and (ii) this business activity must be regarded as *significant*.<sup>66</sup>

*Competitive distortions.* The Policy Statement focuses specifically on those competitive advantages enjoyed by government businesses that are widespread, including exemptions from various taxes (tax neutrality), access to borrowings (debt neutrality), exemptions from regulatory requirements (regulatory neutrality) and other benefits associated with not having to achieve a commercial rate of return on assets (commercial rate of return requirements).

*Instruments.* The competitive neutrality framework translates into three main instruments, each of which is entrusted to a distinct authority: policy-making,<sup>67</sup> implementation<sup>68</sup> and complaints handling.<sup>69</sup> Since 1999, 15 formal complaints have been investigated by the AGCNCO, six of which since 2002.<sup>70</sup> The most recent report published by the AGCNCO relates to the investigation conducted in the *PETNET* case.<sup>71</sup>

#### PETNET case – *Ex ante* competitive neutrality assessment

The PETNET case is particularly interesting from the perspective of establishing an *ex ante* breach of competitive neutrality. The investigation was prompted a complaint alleging that PETNET Australia was not complying with competitive neutrality policy and had gained a commercial advantage due to government ownership (PETNET is a wholly owned subsidiary of the Australian Nuclear Science and Technology Organisation – "ANSTO"). The report concluded that revenue and expenditure forecasts over 10 and 15 years demonstrated that PETNET Australia's commercial operations were unlikely to achieve a commercial rate of return ("RoR")<sup>72</sup> on the equity invested over either time period, which represents an *ex ante* breach of competitive neutrality policy. AGCNCO recommended that ANSTO adjust PETNET Australia's business model so that it could achieve a commercial RoR reflecting its risk profile and the full investment in PETNET Australia.

<sup>64</sup> Commonwealth Competitive Neutrality Policy Statement (1996), p 4.

<sup>65</sup> To be considered a "business activity" the following criteria must be met: i) there must be user-charging for goods or services; ii) an actual or potential competitor; and iii) managers of the activity must have a degree of independence in relation to the production or supply of the good or service and the price at which it is provided.

<sup>66</sup> The following organisations are deemed to be "significant": i) all Government Business Enterprises ("GBEs") and their subsidiaries; ii) other share-limited trading companies; iii) all designated business units. Other activities which have commercial receipts exceeding \$10 million per year are assessed for significance on a case-by-case basis.

<sup>67</sup> By the Treasury. The latest Competition Policy Review Final Report ("Annual Report") was released on 31 March 2015 which includes competitive neutrality reporting material. The Annual Report contains recommendations concerning the status of competitive neutrality in Australia, including i) the necessity of separation of the remaining public monopolies from competitive service elements and ii) the necessity of ensuring that Government business activities do not enjoy a net competitive advantage as a result of government ownership.

<sup>68</sup> By the Department of Finance and Administration.

<sup>69</sup> By the Australian Government Competitive Neutrality Complaints Office ("AGCNCO"), see Australian Government Competitive Neutrality Guidelines for Managers (2004), p 5. It was established by the Government under the Productivity Commission Act 1998 to receive complaints, undertake complaints investigations and advise the Treasurer on the application of competitive neutrality to government business activities.

<sup>70</sup> Available at the AGCNCOs website: <http://www.pc.gov.au>.

<sup>71</sup> Australian Government Competitive Neutrality Complaints Office 2012, PETNET Australia, Investigation No. 15, Canberra, March.

<sup>72</sup> The Competitive Neutrality Guidelines for Managers (2004) underlines that all businesses that are subject to competitive neutrality policy are required to incorporate a rate of return into their operations.

### 3.1.2.2 Assessment standards for subsidies, public services & entrusted companies

45. To prevent or remedy *subsidisation* distortions, the EU and the WTO provide subsidy control regimes: an *ex post* control regime when a member state challenges subsidy granted by another before the WTO settlement body;<sup>73</sup> and an *ex ante* control regime in the EU under which a member state which contemplates granting state aid must notify it and seek clearance from the European Commission.<sup>74</sup> *Ex post* remedies are also possible in the EU, if the state failed to notify or where market circumstances have evolved.

46. The default rule under these control regimes is that subsidisation is in principle prohibited. Subsidisation and related competitive neutrality concerns still exist, however, and raise a number of questions: Are the current control regime comprehensive and effective? Do they subject state and companies (especially in the EU) to an undue advantage in relation to non-EU regimes which can subsidise more freely? Should subsidy control be encouraged worldwide, and under which basic principles and authority? There has been much debate lately about possible distortions in international air transportation stemming notably from Gulf carriers.<sup>75</sup> Below is an overview of recent findings on fair competition by the International Transport Forum, followed by reflections on unfair competition claims.

**Box 3. Liberalisation of Air Transportation:  
ITF 2015 Policy Insights and Recommendations on “Fair Competition”<sup>76</sup>**

- Inequalities between airlines can arise as the result of many factors, including inequality of environment, public policies, more cost-efficient airports or state aid and subsidies can all lead to inequality between carriers. Views as to which of these factors should be considered relevant to establishing a level playing for competition in economic terms differ between jurisdictions. This contrasts with other global service industries.
- Whilst a commonly held definition of what constitutes a level playing field in international aviation has yet to be agreed internationally, the aim should be equality of opportunity, as set out in the Preamble to the Chicago Convention, rather than equality of outcome, an approach which tends to impose static results, preventing market entry and preserving inefficiencies.
- Liberalisation needs to be accompanied by an ICAO-endorsed framework that defines what forms of subsidies and the degree of harm they create are acceptable, that establishes how to report the presence of subsidies throughout the aviation value chain and that provides safeguards against anti-competitive practices through conflict-resolving instruments.
- ICAO has recommended that States recognise that subsidies that discriminate between carriers can distort trade and competition and recommended measures be taken to avoid distorting competition.<sup>77</sup>

<sup>73</sup> WTO SCM Agreement Part V.

<sup>74</sup> TFEU 107-108.

<sup>75</sup> See e.g. A. Halshey, “U.S. Airlines Seek Federal Help in Dogfight with Persian Gulf Carriers”, 11 May 2015, [www.washingtonpost.com](http://www.washingtonpost.com); E. Casinge, “Gulf airlines hit back at European competition complaints”, 1 April 2015, [www.euractiv.com](http://www.euractiv.com); J. Gapper, “Stop Trying to Ground the Gulf Airlines”, 18 March 2015, [www.ft.com](http://www.ft.com); and M. Schlangenstein, “Emirates Counters U.S. Airlines’ Persian Gulf Complaints”, 9 February 2015, [www.bloomberg.com](http://www.bloomberg.com).

<sup>76</sup> ITF, Liberalisation of Air Transportation, Summary: Policy Insights and Recommendations, 2015, <http://internationaltransportforum.org/Pub/pdf/15Air-Liberlisation-Summary.pdf>, p. 19-22. See also OECD Background Paper on Airline Competition (2014), Tretheway (2015), and J. de Wit (2013).

<sup>77</sup> The issue of how to ensure fair competition in an environment of liberalisation was discussed in 2003 at the ICAO Fifth Worldwide Air Transport Conference, which culminated in a model clause on “Safeguards against anti-competitive practices”. The clause was later incorporated in ICAO’s Policy and Guidance Material on the Economic Regulation of International Air Transport and analysed by ICAO in its Manual on the Regulation of International Air Transport.

- It would be noteworthy to closely examine fair competition rules that are in place at the WTO and govern most other industries and see which may be transferable to aviation.<sup>78</sup> If adopted, it would help the industry make significant progress towards regulatory convergence and would remove an important argument against liberalisation.

#### **Gulf carriers: Is unfair competition in the air?**

Gulf carriers – Emirates, Etihad and Qatar Airways – post the world's strongest growth rates and attract growing international demand.<sup>79</sup> These carriers have been depicted as the main threat and unfair destabilising factor to current alliances and legacy carriers, arguably due to government control and backing. The following considerations support further reflection when it comes to assessing unfair competition in international air transportation.<sup>80</sup>

- There is no common agreement on the rules of the game, no mechanism to monetise policy action or to collect comprehensive information as to the various advantages of any kind granted to air carriers.
- There is a difficult time element to any assessment: most legacy carriers complaining about Gulf carriers were themselves supported for decades by their government and some of them still are. Even where state support stops, benefits from it continue to accrue.<sup>81</sup>
- Competition law aims to protect competition (consumer welfare and economic efficiency), not individual competitors. Gulf carriers may stimulate other airlines to compete on price and quality (especially since competition can be weak within alliances), satisfy consumers and contribute to consumer surplus.<sup>82</sup> The question is whether there is risk that the short-term benefits they bring be offset by longer-term disincentivisation of competition (i.e. discouraging unsupported effective carriers from competing) if Gulf carriers enjoy an undue net competitive edge.
- The airline industry is dynamic, and characterised by regular entries and exits. Concerns twenty years ago focused on low-cost carriers, today they are targeted at Gulf carriers, while soon they may look at China's potential to compete vigorously, including against Gulf carriers.<sup>83</sup>
- Concerns of unfair competition stop being voiced by those entering into partnerships or equity arrangement with Gulf carriers, hence benefitting from their strengths. Gulf carriers have led notably to the rescue of legacy carriers, such as Alitalia in which Etihad acquired a 49% stake in 2014.<sup>84</sup> Gulf carriers also need to increase their connectivity, which often happens through partnerships.

47. Ensuring that a *public service* provider is not put at a competitive advantage or disadvantage represents a recurrent concern for governments. The most difficult competitive neutrality question consists in determining the right level of compensation for a public service: does it amount to distortionary

<sup>78</sup> Currently, air transport services are excluded from the WTO GATS.

<sup>79</sup> Emirates entered into partnership agreements with Qantas (Oneworld member) and Tap Portugal (SkyTeam member), whereas Etihad is developing its own alliance network through equity-based investments and code-sharing agreements. For further commentary on Gulf carriers' impact on alliances, see e.g. Parker (2013) and CAPA (2013), 'Airlines in Transition Part 1'.

<sup>80</sup> For further analysis, see OECD Background Paper on Airline Competition (2014).

<sup>81</sup> Such as fleet, network and brand. This suggests that not only subsidy flows but also competitive benefits should be weighed in.

<sup>82</sup> The air transport sector also brings wider economic benefits, beyond direct customers, notably through trade and tourism.

<sup>83</sup> Turkey is also emerging as a strong competitor, with better geography playing in their favour.

<sup>84</sup> Also Qatar has invested in IAG (BA/Iberia/Aer Lingus). In Germany, Lufthansa has expressed serious concerns against Gulf carrier while Air Berlin is partially owned by Etihad and increasingly connecting the EU to Abu Dhabi.

subsidisation or is it fair compensation? Almost all countries provide some form of compensation to undertakings (public or private) which deliver public services alongside their economic or commercial activities. Compensation methods vary depending on the jurisdiction, the type of public service and the entrusted provider.<sup>85</sup> Calibrating compensation to avoid undue distortions is critical: insufficient compensation puts the provider at an unfair disadvantage, whereas excessive compensation unnecessarily favours it. Additional distortion concerns arise where there is a risk that compensation be used for cross-subsidisation of market activities. Various OECD instruments, guidelines and best practices address competitive neutrality challenges arising in the context of public services.<sup>86</sup> Guidance includes the following principles:

- Ensure a sufficient degree of transparency and accountability around public service providers' use of public budget to fulfil public service objectives
- Ensure that adequate compensation is provided for in the discharge of public service obligations
- Compensation for public service obligations should be disbursed and spent in a manner which can be accounted for separately.
- Public service providers should neither be put at a competitive disadvantage, nor have their competitive activities effectively subsidised by the state.<sup>87</sup>

48. The EU regime and *Altmark* case law provide a useful framework to assess so-called services of general economic interest (SGEI) under state aid law, and to draw the line between warranted and distortive compensation schemes, based on four cumulative conditions:<sup>88</sup>

- The recipient undertaking must have public service obligations, which must be clearly defined;
- The parameters for calculating the compensation must be objective, transparent and established in advance;
- The compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit;<sup>89</sup>
- Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure, which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

49. If one or more of the *Altmark* conditions is not fulfilled, the public service compensation will be examined under EU state aid rules and may be prohibited and subject to reimbursement of any excess.

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<sup>85</sup> OECD, *Competitive Neutrality* (2012).

<sup>86</sup> See summary of OECD instruments in OECD, *Competitive Neutrality* (2012), p. 67-68.

<sup>87</sup> OECD, *Competitive Neutrality* (2012), p. 67-68.

<sup>88</sup> See ECJ, *Altmark*, 24 July 2003, C-280/00; and EU package which includes a revised Decision (2012), a revised Framework (2012) and a new Communication (2012).

<sup>89</sup> The Framework (2012) describes two methods for calculating the compensation: the “*net avoided cost methodology*” which is deemed the most accurate method for determining the cost of a public service obligation, and the alternative “*methodology based on cost allocation*”.

### 3.2 *Competitive neutrality policy options*

- What tools do, or could, competition authorities use to neutralise competitive neutrality distortions?
  - Competition law enforcement powers: are they applicable against state-induced violations?
  - Other tools: when distortions do not amount to competition law violations, which other tools and powers are available to address them? Are these other powers part of competition policy?

50. Different types of state-induced distortions may call for different instruments and enforcement powers. For such powers to be effective, they require the necessary legal basis and guidance, a dedicated authority in charge, with sufficient resources and adequate skills.

#### **Competitive Neutrality – Policy Options**

<b>Anticompetitive distortions</b>	<ul style="list-style-type: none"> <li>• Overall enforcement against anticompetitive distortive conducts and agreements, regardless of ownership, nationality, legal status or financing.</li> <li>• Hold SOEs and government agencies or activities to the same standards as private companies regarding anticompetitive behaviour.</li> <li>• Initiation of case: <i>ex officio</i>, upon complaint, self-reporting, notification.</li> <li>• Broad and effectual investigation powers against individuals, companies, government bodies, third parties.</li> <li>• Commitment and remedy powers to lift distortive and anticompetitive concerns: structural or behavioural remedies; interim measures.</li> <li>• Monitoring and revision powers: controlling remedy compliance, and adaptation to economic reality.</li> <li>• Sanction powers: fines, jail and/or professional disqualification (depending on the jurisdiction).</li> </ul>
<b>Limitations to competition law application</b>	<ul style="list-style-type: none"> <li>• Advocacy re: importance of wide and neutral competition law scope, risks and costs stemming from limitations and exclusions.</li> <li>• Litigation and <i>amicus curiae</i> in court where state action defences unduly raised by economic actor against competition law enforcement.</li> <li>• Competition authority's right to go to courts against government for unjustified or distortive limitations of competition law application.</li> <li>• Broad interpretation of applicability scope, strict interpretation of limitations, exclusions and defences.</li> </ul>
<b>Market 'abnormalities'</b>	<ul style="list-style-type: none"> <li>• Market studies and sector inquiries for in-depth understanding of competitive dynamics, conditions and challenges in a specific field.</li> <li>• Structural or behavioural measures; interim measures.</li> <li>• Co-operation with relevant sector regulators and government; advocacy.</li> <li>• International co-operation when multi-jurisdictional markets or distortions.</li> </ul>
<b>Distortive legislation/regulation/standards</b>	<ul style="list-style-type: none"> <li>• Regulatory impact assessment: including distortive effects on competition and competitive environment, <i>ex ante</i> and <i>ex post</i>.<sup>90</sup></li> <li>• Advocacy re: adverse regulatory impact and barriers to neutrality.</li> <li>• Competition authority's opinion re: market regulation – optional or mandatory (with government justification if departure).</li> <li>• Competition authority's right to go to courts (e.g. administrative courts) against distortive state rules and actions.</li> <li>• Enforce structural separation in regulated industries where possible.</li> <li>• Co-operation with government/legislator/regulator.</li> </ul>

<sup>90</sup> OECD Competition Assessment Toolkit (2011).

<b>Selection of an entrusted player (e.g. public concession, special rights, PPP)</b>	<ul style="list-style-type: none"> <li>• Enforce open and competitive selection process, on transparent and objective criteria (public procurement, auction and tender).</li> <li>• Enforce conflict of interest and incompatibility rules if favouritism or bias risks (whether government as auctioneer and/or bidder).</li> <li>• Develop and use Public Service Comparator (PSC), including competitive distortion indicator.</li> </ul>
<b>Subsidisation</b>	<p>Presumption that subsidisation is distortive and should be avoided: admissible only in exceptional circumstances on clear and restrictive grounds (e.g. major crisis, market failure in essential industry).</p> <p>Enforce <i>ex ante</i> control mechanism:<sup>91</sup></p> <ul style="list-style-type: none"> <li>• Establish and enforce preventive screening mechanism to identify subsidisation objective, determine whether subsidy able and likely to achieve it, verify whether least distortive and discriminatory means, power to prohibit or impose revision if undue, excessive or inadequate.</li> </ul> <p>Enforce <i>ex post</i> neutralisation mechanism:</p> <ul style="list-style-type: none"> <li>• Monitor authorised subsidisation, evaluation and revision powers to minimise distortive effects and address market evolution;</li> <li>• Litigation process and powers against undue and unscreened subsidisation; broad standing rights: e.g. by competition authority, disfavoured competitors, suppliers, customers.</li> </ul>
<b>Public service obligations</b>	<p>Subject public service regimes to control over two essential aspects:</p> <ul style="list-style-type: none"> <li>• Selection of the public service provider (see above re: selection processes for entrusted players);</li> <li>• Compensation of the service: enforce clear parameters to determine fair compensation. If exceeds: undue subsidisation and reimbursement; if below: adjust compensation or obligations.</li> </ul>
<b>State activism (strategic shareholding, mergers and industries, national champions)</b>	<ul style="list-style-type: none"> <li>• Subject state activism in competitive environments to overall competitive neutrality assessment mechanism: weigh rationale and pro's and con's of state manoeuvre, enforce necessity and proportionality tests to minimise or neutralise distortive effects.</li> <li>• Prevent and remedy harmful protectionist strategies, avoid state activism race: to the benefit of both domestic and cross-border industries.</li> <li>• Hold and monitor record of state stakes and associated powers in private companies, enforce good corporate governance principles.<sup>92</sup></li> <li>• Default rule that state activism should not trump competition law enforcement, and prevent state from jeopardising competition authority's powers.<sup>93</sup></li> </ul>

51. Competitive neutrality tools can be established either as part of an overall competitive neutrality framework, or piece by piece, taking into account the economic, legal and institutional reality of each jurisdiction. Priorities in such tools may also be set according to the most pressing distortion risks and most important industries. International co-operation on competitive neutrality mechanisms can also be encouraged to develop best practices, especially as distortionary effects can cross borders.

<sup>91</sup> OECD GFC on Subsidies (2011).

<sup>92</sup> Draft OECD SOE Guidelines (2014).

<sup>93</sup> E.g. state-imposed conditions on M&As should generally not trump, and should be subject to, merger control.

#### 4. Specific challenges in competition enforcement

- What are the most common competition law violations occurring through state-influenced activities? Are they more frequent or likely in certain sectors? Why?
- What institutional challenges arise in competition law enforcement against state-induced distortions?
- Do particular challenges arise from jurisdictional and substantive standards being ill-suited to assess state-related anticompetitive distortions (abuses of dominance and restrictive agreements)?
- What difficulties arise in controlling mergers in which the government is a party or interferes?
- Do standards and burden of proof vary when the state is involved when a public service is at stake?
- What obstacles do competition authorities encounter in designing and monitoring effective remedies against state-related entities? Which remedies have proven more or less effective in this context?
- Is usual antitrust fining policy suited to deter anticompetitive conduct by state-supported companies?
- Is it more or less difficult for consumers to seek private redress against a state-related entity?
- Where an immunity or state compulsion defence is successfully invoked, does it bar private enforcement, too? Can action be taken against the state?

##### 4.1 Institutional challenges

52. Even where competition law applies broadly, and competition authorities have the necessary powers, skills, resources and impartiality to carry out their tasks, a case involving a state-induced activity or state-owned entity presents enforcers with special challenges. Some of these challenges, identified below, are institutional. They may serve as a checklist for enforcers and governments willing to preclude undue influence, and support international discussion regarding common institutional challenges:

- *Institutional design & conflicts.* Does the competition authority's institutional design allow for effective enforcement when the state has a stake in the case and outcome? What powers can bar government's influence? Can rules on incompatibilities and conflict of interest address such risk?
- *Investigation.* Are investigation efforts easier or harder when the company or activity is linked to government? Can government block investigations? Can authorities sanction governments or related entities for non-cooperation? What specific difficulties arise from asymmetry of information, lack of transparency or lack of structural or accounting separation in the entity at stake?<sup>94</sup>
- *Concurrent powers.* Do regulators enjoy competition law enforcement powers in the industry they regulate? Are such powers exclusive or concurrent with the competition authority's? How can co-operation or allocation of powers be more effectual? In jurisdictions with a competitive neutrality framework and dedicated enforcer, how are the latter's powers articulated with the competition authority's?
- *Selectivity.* Do competition authorities exert, in practice, any form of self-restraint or -censorship when a competition concern involves government interest or influence (e.g. fearing retaliation or knowing it will be complicated)? Is there a risk of over-enforcement against private sector players as opposed to state-supported ones, or against foreign players as opposed to domestic ones?
- *Foreign stakes.* What happens concretely when the distortion under scrutiny involves a foreign government (e.g. predation by a foreign SOE)? What specific obstacles do competition authorities face in this context? Do international comity and foreign sovereign immunities bar enforcement?

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This risk is particularly worrisome in the context of hybrid SOEs, subsidised actors and public service providers.

53. The very challenge of ensuring competitive neutrality comes from the fact that it depends on the state's willingness and resources to make effective and unbiased enforcement possible, while the ultimate target of enforcement actions is the state itself. Political will, good faith, independent enforcement and international stimulus cannot be underestimated in fostering competitive neutrality.

#### 4.2 *Competition analysis*

54. Where the economic actor is supported or influenced by the state, the following characteristics may bear an impact on the incentives and ability to behave anti-competitively:

- The entity may not necessarily be profit-maximising, and be concerned instead with expanding sales and revenues (market share) even if not profitable;
- It may have a sense of immunity, of government protection and assistance (actual or perceived);
- It may have deep pockets and the possibility of cross-subsidisation;
- It may enjoy soft budget and management constraints, special powers and privileges.

55. Most competition standards are based on the logic of private sector and profit-maximising economic players: are they meaningful and practicable in establishing whether a state-related distortion is anticompetitive? Further questions arise when hybrid actors do not have separate structure or accounting, as well as when general interest grounds (other than competition) percolate the competition law enforcement process. Below are some illustrations of these challenges emerging from (i) abuse, (ii) cartel and (iii) merger cases.

##### 4.2.1 *Abuse of dominance*

56. Despite liberalisation efforts, many former state monopolies still enjoy dominant positions, privileged access to infrastructure and financing.<sup>95</sup> To assess and remedy unilateral distortions under competition standards, the following questions arise:

- *Predatory pricing.* Predatory pricing is deemed abusive when the dominant company charges below-cost prices for its products and services so as to exclude actual or potential competition:
  - Is the below-cost benchmark practicable where the company is state-owned, subsidised, privileged or provides a public service so that cost allocation between its economic and non-economic activity may be uncertain or unreliable?<sup>96</sup>
  - Is the recoupment test (applicable in some jurisdictions<sup>97</sup>) sensible if the company is not driven by profit-maximisation?<sup>98</sup>

<sup>95</sup> In fact, abuse of dominance or monopolisation claims often pertain to state-related activities and companies, and various key international abuse of dominance cases have involved SOEs or semi-state owned enterprises, Aroskie (2014). E.g. European Commission, COMP/36915 - *Deutsche Post AG*; COMP/39525 - *Telekomunikacja Polska*, COMP/40089 - *Deutsche Telekom*, COMP/39816 - *Gazprom*; US Supreme Court, *US Postal Service v. Flamingo Industries, (US) LTD* 540 U.S. 736 (2004); South Africa, *Competition Commission v. Telkom SA Ltd*, Case 11/CR/Feb04 and *Competition Commission v Telkom SA SOC Ltd* (016865) [2013] ZACT 62 (18 July 2013); and Chinese Taipei, Fair Trade Commission, *Taiwan International Ports Corporation (2014)* in Chinese Taipei's contribution to the OECD 2015 Roundtable on Competitive Neutrality.

<sup>96</sup> For further details, see OECD publication on Identifying Cost (2012).

- *Margin squeeze.* It is not uncommon for state-entrusted entities to be vertically integrated, enjoying a dominant position at the essential input or infrastructure level, and competing downstream for the provision of products or services. This occurs e.g. in liberalised network industries. To establish margin squeeze, the competition authority may rely on wholesale and retail price levels.<sup>99</sup> To determine what a reasonable and viable wholesale price could be, the integrated company's cost structure needs to be examined – this may not always be feasible in the face of a hybrid or state-supported actor.<sup>100</sup>
- *Cross-subsidisation.* Competition distortion concerns are often raised regarding cross-subsidisation between a privileged public activity and an economic activity. While cross-subsidisation may clearly distort the playing field (as an advantage or a disadvantage depending on the financing direction), does it and should it qualify as an antitrust violation or merely as a facilitating factor (e.g. enabling predatory pricing)?<sup>101</sup>

57. As a practical matter, the investigation of any such case will be rendered easier if governments do not blur the lines in the accounting management of hybrid actors.<sup>102</sup>

#### 4.2.2 Restrictive agreements

58. Various types of agreements bearing a state or public policy factor present competition authorities with some difficult questions:

- *Single economic entity.* Which criteria can establish (i) whether state-controlled entities acted independently from the state and as distinct entities from one another, and (ii) whether and to what extent co-ordination among them is anticompetitive?
- *Neutrality-enhancing cartels.* What if, because the state distorts the playing field or fails setting minimum welfare standards, companies agreed on certain competition rules: e.g. collectively boycotting any corruption attempt in public tenders where it is common business practice, or agreeing on e.g. minimum wages, pollution quota, or quality and safety standards? Can agreements be anti-competitive while promoting competitive neutrality at the same time? How should competition authorities treat them?<sup>103</sup>

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<sup>97</sup> See e.g. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) under US law, *contra* ECJ, *France Télécom SA v. Commission*, (2009).

<sup>98</sup> These companies may thus (i) never recoup their loss, (ii) recoup it much later, at a different pace than other market players, or (iii) recoup it in adjacent activities in which they are subsidised or protected. See e.g. OECD Roundtable on Competitive Neutrality (2009).

<sup>99</sup> Margin squeeze is generally illegal where the margin between the integrated provider's own downstream price (i.e. retail price) and the price for selling essential inputs to rivals (i.e. wholesale price) is so narrow that the latter cannot survive or compete. OECD Roundtable on Competitive Neutrality (2009).

<sup>100</sup> A recent settlement reached between South Africa's Competition Tribunal and Telkom, the integrated telecom incumbent, highlights the portfolio of structural and behavioural commitments undertaken and monitored to address exclusionary margin squeeze. *Competition Commission v. Telkom SA Ltd*, Case No. Case 11/CR/Feb04 and *Competition Commission v Telkom SA SOC Ltd* (016865) [2013] ZACT 62 (18/07/13).

<sup>101</sup> Country contributions to the OECD 2015 Roundtable on Competitive Neutrality raise cross-subsidisation among their competitive neutrality concerns, but no abuse case was found on such grounds only.

<sup>102</sup> Draft OECD SOE guidelines (2014).

<sup>103</sup> For further analysis, see OECD, *Competition Law and Responsible Business Conduct*, 3<sup>rd</sup> Global Forum on RBC, 18-19 June 2015, to be published.

### 4.2.3 Mergers

59. “The question of the criteria and outcomes regarding state presence or intervention in merger control, is an open question worldwide.”<sup>104</sup> Government can play a role in mergers as an insider when it is part of the merging parties (e.g. an SOE), or as an outsider by intervening in a merger and interfering with the merger control process, for example if a strategic industry is at stake. Merger control where the state is present may be complex:

- *Threshold calculation.* Notification thresholds in many jurisdictions are based on turnover or asset thresholds. When a merging party is owned or controlled by the state, how are turnover and asset levels computed – just for the immediate assets or for a larger measure relating to the State? Useful guidance is found e.g. in EU law: “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.”<sup>105</sup>
- *Single v. separate entities.* When a merger or joint venture takes place between two entities ultimately controlled by the state, does it qualify as a merger among distinct parties, or would it escape merger control as a transaction within a single entity?
- *Public-private involvement.* Do or should competition authorities have merger control power over: (re)nationalisation of a business or industry (including municipalisation at local level), strategic investment, minority shareholding or shareholding activism by the state, and/or public-private partnerships?<sup>106</sup>
- *Barrier analysis.* The analysis of barriers generally focuses on barriers to entry. In a state-influenced context, do other types of barriers deserve scrutiny? While state intervention may not always raise entry barriers, it could nonetheless create barriers to exit, mobility or change (e.g. innovation), which would not have occurred in a neutral competitive environment.<sup>107</sup>

### 4.3 Remedies and sanctions

60. Remedies and sanctions have been unexplored so far in the context of competitive neutrality distortions. Specific challenges may arise in imposing effective redress and sanctions when the government is present. Also questions arise as to whether remedies and sanctions under competition law can be used to ensure competitive neutrality.

#### 4.3.1 Remedies

- Should remedies address the competition harm only, or could they be far-reaching to restore competitive neutrality more broadly?<sup>108</sup>

<sup>104</sup> Sokol (2014), p 84.

<sup>105</sup> Recital 22 of Council Regulation (EC) No 139/2004, and section C.IV.5.4 of the Jurisdictional Notice. For a recent case, see COMP/M.5655 - *SNCF/ LCR/ EUROSTAR*.

<sup>106</sup> See e.g. Damgé (2014); and OECD Roundtable on Public-Private Partnership (2014).

<sup>107</sup> Government intervention may raise exit and mobility barriers through e.g. the cost of negotiating with the government (often sunk), labour requirements, obligations to retain existing facilities, activities or products in the market, the state acquiring shares to maintain an inefficient company or activity in a strategic sector. For further analysis of barriers to exit and mobility, see Petit (2015), Gilbert (1989).

<sup>108</sup> Regarding the remedies imposed onto the American/US Airways merger, the US DoJ pointed that “the remedy in many ways improves the competitive structure of the industry compared to the status quo prior

- How do public interest grounds or public policy objectives affect the scope and types of remedies imposed? Which remedy mechanisms have proven most effective to address these objectives while maximising competition?
- Can remedies be imposed on the state itself? In particular, where a state compulsion defence is successfully invoked, it prevents remedial action against the economic player, but can remedies be taken against the state? There are different approaches, such as advocacy to prompt government to shift approach (e.g. in the US), through the authority having direct powers against the restricting state action or regulation (e.g. in the EU), being entrusted with regulatory powers through legally binding opinions (e.g. in Mexico) or having standing in court against restrictive government regulation (e.g. in Italy).
- What hurdles do competition authorities face in imposing remedies (e.g. in ‘strategic’ mergers) where the government has already ‘sealed’ the deal and imposed its own conditions?
- What challenges arise in imposing remedies against distortions in which a *foreign* government played a role? Do comity or sovereignty grounds bar remedial action?<sup>109</sup>

#### 4.3.2 *Sanctions*

- To what extent are usual fining policies suited to deter anti-competitive conduct by privileged or state-controlled companies? Operationally, it might simply be difficult to calculate an appropriate turnover-based fine, for a state-owned company. More fundamentally, however, if a fine on a state entity is merely a transfer from one budget line to another, it might not have deterrent power.
- When state action or regulated conduct defences were not successful in barring enforcement, should they serve as a mitigating factor in the fine determination?<sup>110</sup>

#### 4.3.3 *Civil redress*

- Is it more or less difficult for harmed consumers to seek recovery against a state-related entity? Could they take action against the state itself (alternatively or jointly)?
- Where competition law exemptions or state action defences are successfully invoked, does this also bar private recovery?
- What role can competition authorities play in facilitating civil redress from the state?

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to the merger, when LCCs were largely locked out of key airports. Placing scarce assets in the hands of LCCs will strengthen these carriers at a network level and provide substantial benefits to passengers throughout the United States.”, see US country contribution, OECD Roundtable on Airline Competition (2014) on *United States v. US Airways Grp.*, N.o. 1:13 – cv – 01236 (D.D.C. AUG. 13, 2013). Very recently, regarding remedies imposed on the SNCF/Eurostar concentration, the European Commission “found that the proposed remedies lower barriers to entry for new providers and thereby contribute to securing the benefits of the liberalisation of international passenger rail services for consumers.”, see EU Press release (2015) on Case No COMP/M.5655 - *SNCF/ LCR/ EUROSTAR*. See also OECD Recommendation on Structural Separation (2011) and Draft OECD SOE guidelines (2014).

<sup>109</sup> OECD Recommendation on International Co-operation (2014), see also European Commission, COMP/39816 – *Gazprom*.

<sup>110</sup> OECD Roundtable on Regulated Conduct Defence (2011).

## 5. Conclusion

61. This paper has surveyed a number of aspects of competitive neutrality as it relates to competition law and policy. Rather than being exhaustive in the approach it flashes out areas where the Committee could engage in further work in light of the complex policy and enforcement questions. Competitive neutrality is a superficially simple concept that might be easy to sign up to in principle. In practice, however, an effective regime for competitive neutrality must tackle some difficult problems. There are some very broad principles at stake: such as how to balance governments' acknowledged rights to establish priorities and to choose between different social outcomes, against the need to provide certainty and equal treatment to providers in markets affected by government. There are some technical matters as well, such as to effectively assess whether a distortion exists, in the absence of fully transparent accounting and market-based costing for state-owned inputs (such as capital, or insurance). Finally, there are some complex legal questions, which might be compounded when dealing with cross-border cases.

62. There are, however, existing tools that can help to deal with this complexity. The OECD Guidelines on State-Owned Enterprises provide some good practices for transparency and accountability, with a particular focus on good corporate governance. The OECD's Competition Assessment Toolkit provides a structured approach to assessing whether interventions have anti-competitive effects, whether any such effects are inevitable (or the policy objectives could be achieved in a less distortionary way) and how to assess the costs of such distortions, to enable government to make an informed policy choice if no better alternatives than repeal exist. Different jurisdictions have dealt with the practical problems of enforcing competition law in different ways, but almost all proclaim at least an intention to subject state entities to competition law, even if exemptions and differing practices exist in individual cases.

63. The Committee might therefore like to consider what is missing, for its future work. It could, for example, seek to establish a good shared understanding of some rather technical principles – for example on how to treat implicit subsidies arising from government guarantees, or how to assess state ownership and control in merger cases. It could also consider broader more systematic approaches, such as developing the taxonomies presented here for policy options into a more coherent set of informal guidance. Finally, it could consider whether there are any broad principles here that the OECD could develop into Recommendations. This is an area of great sensitivity for many governments, but it is also a topic that causes increasing concern so perhaps the time is right to explore whether there is common ground, at least on objectives and methodologies for assessing the role of the state in the marketplace.

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