

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

**Global Forum on Competition**

**COMPETITION LAW AND STATE-OWNED ENTERPRISES**

**- Summary of Discussion -**

**30 November 2018**

The attached document is a summary of the discussion held during Session V of the Global Forum on Competition on 29-30 November 2018.

More documents related to this discussion can be found at: [oe.cd/csoes](http://oe.cd/csoes).

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## *Summary of Discussion*

*By the Secretariat*

1. The **Chair** of the Global Forum, Professor Frédéric Jenny, opened the discussion on “*Competition Law and State-Owned Enterprises*” and welcomed the participants. He noted that the session received 21 written contributions, which showed the high level of interest in the topic from a number of jurisdictions.
2. The Chair introduced the session by outlining the key points emerged from the country contributions and the Secretariat’s background note. The Chair noted that SOEs are important players in the market, often competing with private entities in key sectors of the economy. Therefore, competition law enforcement is necessary to investigate the behaviour of SOEs’ engaging in economic activities, as it can be harmful to consumers. However, competition authorities can face different challenges when dealing with SOEs, such as political resistance, defining the SOE’s economic unit and establishing the appropriate turnover, choosing the most effective type of sanctions and the appropriate tests when analysing the SOEs’ behaviour.
3. The Chair welcomed the expert speaker, Professor Deborah Healey from the University of New South Wales.

### **1. Introduction**

4. To set the scene, the Chair gave the floor to the Secretariat for a brief overview of the Background Paper.
5. The Secretariat noted how neutral and rigorous antitrust enforcement is fundamental to level the playing field and outlined the challenges of investigations against SOEs. Following the background paper, the Secretariat concluded that although there is a risk that SOEs’ specific characteristics can lead to under or over enforcement, an effect based analytical framework is sufficiently flexible to accommodate these differences provided that agencies are empowered to follow it through.
6. The complex factors that create challenges for agencies have to be constantly taken into account and assessed on a case-by-case basis, as this will send a signal to SOEs on the market that their anti-competitive conduct will be prosecuted, thus creating trust and legal certainty in the market. Finally, limiting the use of exemptions, derogations and non-efficiency-based defenses is essential for the functioning of competitive markets.
7. The Chair then asked **Professor Healey** to address the different aspects of the problem.
8. **Professor Healey** started by suggesting that SOEs can be even more anti-competitive than private entities, as their conduct is likely to be more entrenched and more lasting. In addition, SOEs have advantages merely because they are owned by the government and historically many were monopolies, operators of essential infrastructures. The need for a level playing field is now even more pressing as SOEs are a growing force in international markets. The level playing field is affected by the number of exclusions and exemptions from competition law that can apply, and by the way different jurisdictions

distinguish SOEs' economic activities from their sovereign functions. China is an interesting example as what it is considered strategic and in the national economic interest is generally much broader than in other jurisdictions.

9. Professor Healey then addressed the issues related to enforcement against SOEs. The most relevant law provisions for SOEs are the ones on abuse of dominance, because of their weight, resources, legal status and relationship with the state. This is especially true if they have monopoly or quasi-monopoly privileges or if they operate in essential industries and may block access to upstream or downstream markets. Case law shows that a wide range of jurisdictions enforce against abuse of dominance by SOEs. With regard to SOEs engaging in cartel behaviour the most interesting issue is the definition of the single economic entity, as it determines if collusion can take place or not. The same considerations also apply to mergers and become more sensitive when foreign entities are involved.

10. Professor Healey concluded by noting that while state action defences create practical limits to agencies' enforcement powers, many other challenges are less transparent. In particular, there are two areas where competition agencies need to focus. The first is standards for assessment, as most competition law standards are based on the logic of the private sector and a profit maximizing economic player, different standards are necessary for SOEs, for example in predation cases. The second one is sanctions, as there is evidence that sanctions in some jurisdiction do not have a deterrent effect and SOEs are often repeat offenders.

11. SOEs should be treated similarly to private organisations, assuming that they have been fully corporatised, with regulatory functions separated from economic activities, and that there is a competitive neutrality framework in place.

## 2. Similar treatment of state owned enterprises and private enterprises

12. The **Chair** opened the discussion starting from those jurisdictions where SOEs are treated similarly to private entities. The Chair invited Argentina to provide examples of its experience.

13. **Argentina** described the IPF cases. The company was state-owned between 1922 and 1999, privatised between 1999 and 2012, and then nationalised again. IPF infringed competition law in different occasions throughout the 3 periods. However, its ownership status did not have an impact on the outcome of the investigations. The biggest fine was imposed on the company while it was state-owned.

14. The Chair thanked Argentina and turned to Singapore.

15. **Singapore** used the Sistic case to illustrate section 33.4 of the Competition Act, which excludes conduct on behalf of the government from the application of competition law, recognising that the government needs to exercise sovereign functions. At the time of the Competition Commission's investigation Sistic was fully owned by two government ministries and had a 90% market share in the market for ticketing services in Singapore. When the case for exclusive agreements was litigated, the government never claimed its sovereign function and the Commission won the case.

16. The Chair thanked Singapore and asked **Mexico COFECE** to describe the Pemex cases and its treatment compared to the treatment of private entities.

17. **COFECE** explained how Pemex, the state-owned oil company, and two of its subsidiaries were investigated in multiple occasions. In 2013, COFECE fined Pemex Refining for 651.6 million pesos and Pemex for 1.4 million pesos for anti-competitive practices. In 2017, the Mexican Supreme Court of Justice decided that the conduct for which Pemex was fined, tied sales, was part of a constitutionally granted monopoly for which they were not punishable. However, it stated that with the energy reform of 2013, the company no longer had its monopoly rights. Pemex was investigated again in 2015 and commitments were imposed. In 2018 COFECE then fined Pemex for failing to comply with one of the commitments. The settlement included annual presentation of external auditors' report on the conditions under which Pemex grants benefits of firsthand sales and commercialisation of all oil products. The report aimed to verify that all competitors receive equal treatment by the company. COFECE does in fact believe in the equal treatment of state-owned enterprises and private entities.

18. The Chair thanked **Mexico COFECE** and invited **India CUTS** to report on the treatment of SOEs in India.

19. India CUTS noted that the Competition Act from 2002 advocates for competitive neutrality. The Competition Commission of India has opened cases against SOEs in the past, with different outcomes. In some occasions these cases were later dismissed, while in others the Commission did not find any violation. Most importantly there have been a few cases where SOEs have been fined for a competition law infringement. Even though there is no exemption for SOEs under the Competition Act, in a few cases, for example in the oil and banking sector, the government has brought specific legislations to exempt the state-owned enterprises from CCI's merger control review, on the basis of the need to create national champions.

20. India CUTS concluded that there is a need to revisit the manner in which competition law applies to SOEs, particularly due to their distinct characteristics that may not fit within the realm of traditional competition law tools. Having a national competition policy could prove to be an effective tool in this regard. Such policy would not only help promote competitive neutrality but also guard against over-regulation that stifles development.

21. The Chair turned to **South Africa** asking the delegation to address the issue of deterrence in the choice of sanctions against SOEs.

22. **South Africa** explained that the Competition Commission has used fines as well as structural and behavioural remedies in cases involving SOEs. As shown by the Telecom cases, SOEs are often repeat offenders and financial penalties' deterrent effect is not strong enough, as SOEs are supported by the tax payers' money. The Competition Commission is of the view that well-thought-out behavioural and structural remedies may be more effective, as has been shown in the telecom example, where vertical separation removed the SOE's ability and incentive to leverage its upstream monopoly power into related markets and stimulated competition.

23. The Chair then invited the delegation from **Latvia** to address its experience with the issue of sanctions.

24. **Latvia** explained that the competition authority has enforced against nearly all largest SOEs and some of the dominant municipal companies. However, these cases can be complex due to different reasons, for example because of the mix of public and commercial activities or for the choice of the appropriate sanctions to impose in order to reach deterrence. The delegation made the example of an investigation in the passenger

transport service market in Riga. The municipal company and the private provider agreed on prices, and were consequently fined by the competition authority. In this case, the debate focused on the risk that the municipal company would pass on the fine to consumers and that the municipal budget would suffer due to the necessity of increasing subsidies for the municipal company. The case is now before the court.

25. The Chair thanked Latvia and closed this part of the discussion.

### 3. Analytical challenges: cases with SOEs may require different analysis than cases with only private firms

26. The **Chair** moved to the second part of the discussion, focused on experiences from jurisdictions where SOEs and private entities might not always receive the same treatment during investigations, due for example to analytical challenges. The Chair asked Brazil to clarify how public interest considerations are accounted for in investigations against SOEs.

27. **Brazil** noted that the competition authority provides the same treatment to both private and public companies. However, in two cases involving Petrobras, the merging parties invoked elements related to public interest considerations. The tribunal rejected public interest as a valid argument to grant clearance.

28. The Chair thanked Brazil and turned to Romania.

29. **Romania** started by underlining how Romanian competition law applies equally to both public and private enterprises, as well as to central and local public authorities, insofar as their activities have direct or indirect influence on competition, except for when such actions are carried out in order to enforce the law or for defense of a major public interest. Even in these cases, the Romanian Competition Council has specific powers to provide advice or make proposals to the government in order to ensure competitive neutrality, or at least minimise competition distortions.

30. The delegation then noted that the Romanian Competition Council incorporates public interest considerations indirectly in its assessment of anti-competitive conduct. Public interest is also taken into consideration when the Competition Council has to prioritise sectors of the economy that may have a greater socio-economic impact, such as energy, transport and telecommunications.

31. The Chair remarked how overall competition authorities' treatment of SOEs and private entities seems to be largely the same. However, the choice of the appropriate sanctions for SOEs and for private entities might differ, while in other cases SOEs' public service obligations might have to be considered during the analysis, as highlighted by some delegations. The Chair then asked Sweden to explain their approach when dealing with SOEs' costs during the analysis, for example in predatory pricing cases.

32. **Sweden** noted that, unlike the case of private entities, predatory pricing strategies implemented by SOEs do not necessarily envisage a recoupment period in which price is increased and monopoly profits are extracted from the consumers. The absence of recoupment does not however mean that exclusion or low prices in themselves are harmless. Low prices and foreclosure of private firms may affect economic efficiency in a number of ways. Moreover, the choice of which costs to consider when analysing an SOE's pricing strategy is not straightforward, in particular if the SOE carries out a public function together with economic activities or benefits from cost advantages due to its nature.

33. The Chair highlighted how the notion of recoupment for firms which do not maximise profit is not very clear and there is indeed a little bit of maladjustment between the legal theory and the economic practice when we deal with firms such as state-owned enterprises if they are not profit maximizers. Moreover, in the case of state-owned enterprises, the costs may reflect the legal environment and this has to be taken into account.

34. The Chair closed this part of the session.

#### 4. Legal challenges

35. The **Chair** then moved the discussion on to legal challenges in enforcing against SOEs and gave the floor to Botswana.

36. **Botswana** explained that the Competition Act does not apply to enterprises operating on the basis of a statutory monopoly. Therefore, the competition authority uses its advocacy powers to be able to intervene even in cases caught by this provision. Moreover, the authority is carrying out two impact assessment studies to push the government to amend the law and remove the provision that excludes statutory monopolies from the application of competition law.

37. The Chair commented that it is not common to find such successful examples of advocacy as a way to try to bypass the legal exemption that prevents an authority to enforce against statutory monopolies.

38. The Chair then turned to BIAC to ask what could be the possible legal and economic difficulties in cases involving SOEs.

39. **BIAC** addressed procedural and substantive challenges that competition authorities may face in merger cases. First of all, establishing control and calculating the appropriate turnover can be problematic. Secondly, BIAC underlined the matter of timing delays due to competition authorities' requests for information, which might be difficult for an SOE to answer. BIAC suggested that competition authorities should carefully assess if these direct requests are truly necessary or other alternatives can be found.

40. **BIAC** then touched upon two substantive legal issues. First, the identification of the SOEs to be considered part of the same group in the market concentration analysis, which can be challenging especially when foreign SOEs are involved. Secondly, the assessment of SOEs that are not fully owned by the state can be problematic, and authorities should carefully assess their incentives.

41. BIAC concluded by mentioning that there may be situations where the competition law authorities, in doing substantive analytical work, really have to drill into the real factual legal parameters that govern the conduct of the SOE to determine the true economic incentives as part of the market analysis. The final point is that, to the extent possible, competition law authorities should consider and try to apply a principle approach that is consistent and fair especially in multi-jurisdictional transactions. BIAC welcomed this kind of discussion, because it can lead to greater consistency in multi-jurisdictional transactions involving SOEs.

42. The Chair then turned to Mexico IFT, who raised the issue of how one can use advocacy when there are no real legal powers to intervene in cases involving SOEs.

43. **Mexico IFT** is in charge of regulation and competition in the broadcasting and telecommunications sector. The IFT explained that according to the law there are two types of SOEs. One type holds a public license and cannot engage in commercial activities, while the other type can. The IFT uses private public association models and establishes specific tools for compliance with competition law. The IFT assesses if operators are independent or part of the same economic entity even if they are SOEs. Right now in Mexico there is not the same regulation for OTT and traditional providers.

44. The Chair thanked Mexico IFT and turned to the United States, for a presentation of the exemption regime that exists for SOEs, domestic and foreign, in the US system.

45. The **US FTC** started by underlining how the term itself, state-owned enterprise, is not defined in US law and is not used by the courts. There are some exemptions from federal antitrust laws for government entities, but those exemptions are relatively limited because of the general principle in US antitrust law that exemptions from the antitrust laws are to be narrowly construed. As a general matter, federal agencies and instrumentalities of the US government are not subject to liability under the federal antitrust laws even when they engage in commercial activity. However, whether a federal government corporation can be subject to antitrust liability is fact dependent.

46. Moreover, the FTC explained that some federal government entities may qualify for status-based exemption. However, entities that are owned by but are not instrumentalities of the federal government cannot avail themselves of the status-based exemption. Under certain circumstances, such entities may enjoy conduct specific exemptions from federal antitrust laws, for the work they perform on behalf of the federal government.

47. When it comes to the state and local level, state and local government enterprises in the US do not enjoy automatic exemptions from the federal antitrust laws. However, they may still enjoy an exemption under the state action doctrine. In the US, the application of the state action doctrine requires two things: first the challenged conduct needs to be undertaken pursuant to clearly articulated and affirmatively expressed state policy to displace competition. Second, the entity seeking the exemption must show that the challenged conduct is actively supervised by the state.

48. The **US DOJ** provided a few comments on legal doctrines relevant for foreign SOEs in the antitrust context. Under the act of state doctrine, courts decline to adjudicate claims or issues that would require the court to judge the validity of the sovereign act of a foreign state in its own territory. However, the doctrine does not apply to every act taken by an individual or entity affiliated with a sovereign state. The doctrine protects a sovereign's acts only when performed within its own territory. The doctrine also does not apply to the acts of individual government officials acting outside their official capacity, nor to private actors, even when those acts are approved or condoned by the foreign government in question.

49. The Foreign Sovereign immunity Act ("FSIA") shields foreign states from the civil jurisdiction of the courts of the United States, subject to certain enumerated exceptions and to treaties in place at the time of the FSIA's enactments. The "commercial activity" exception is the most relevant exception for antitrust purposes, and as a practical matter, most activities of foreign state-owned enterprises operating in the commercial marketplace are "commercial." Finally, the third doctrine is the doctrine of foreign sovereign compulsion. It provides that if a foreign government compels an entity to carry out a specific conduct that is not in line with antitrust laws, the entity cannot be subject to the US antitrust laws.

## 5. The limits of competition law and the necessity of a competitive neutrality framework

50. The **Chair** introduced the last part of the session on the limits of competition law. The Chair indicated that some of the contributions make the point that competition law enforcement against SOEs is not enough to achieve a level playing field and that another instrument, such as a competitive neutrality framework, is a necessary complement.

51. The Chair gave the floor to Algeria to address this issue.

52. **Algeria** underlined three main elements of their legal system that would need to change in order to support the achievement of competitive neutrality. Firstly, although competition law applies to public companies, according to the law it should not hamper the exercise of public authorities' prerogatives or the provision of public services. This is a first issue. The second problem concerns the lack of state aid control. Finally, the last issue concerns mergers in the public sector. On this point, the competition authority has proposed to introduce a mandatory notification system for mergers in the public sector.

53. The Chair thanked Algeria and turned to the Russian Federation to address a proposed legislation that would prohibit the creation of enterprises with state or municipal participation in competitive markets.

54. The **Russian Federation** started by mentioning that in the Russian Federation the principle of competitive neutrality is established in the Constitution. The Russian anti-monopoly legislation has no limits or exceptions for control over state enterprises' actions in any area of activity. Moreover, Russian competition law covers not only the anti-competitive activity of enterprises, but anti-competitive activities of governmental authorities as well. The delegation mentioned as an example the so-called three waves of cases against oil companies, the biggest Russian vertically integrated oil companies. These companies have different forms of ownership. For instance, Rosneft is fully owned by the state, Gazprom-Neft is partly state-owned with a big share of private ownership, Lukoil is a fully private company and TNK-BP is a private company with a big share of foreign ownership. All of these cases were investigated in the same way, regardless of ownership and asset structure.

55. The **Russian Federation** then explained that, given the high number of SOEs in the economy, the competition authority proposed to introduce a so-called anti-monopoly test for all newly created SOEs. Under the test, state authorities should prove the necessity of the newly created SOE and that its creation is the most effective way to solve any specific public policy concern. In addition to this proposal, according to the national competition development plan approved by the decree of the President of the Russian Federation in December 2017, all governmental authorities must examine all of their legal acts to exclude any provisions establishing more favorable conditions for SOEs, or granting these enterprises exclusive rights or semi-governmental functions.

56. The **Chair** thanked the experts and the participants for their contributions. He noted that a number of contributions talked about the usefulness of having a competitive neutrality framework in addition to competition law applying to state-owned enterprises. The Chair then read a short extract from the South African contribution, which well summarised the benefits of having a competitive neutrality framework: "overall absent a government backed competitive neutrality framework initiative, the Commission (that's the South African Commission) can only investigate complaints after the activity has occurred. In terms of forward-looking enforcement, the Commission is limited to engaging in advocacy and conducting market inquiries. The development and acceptance of

competitive neutrality principles across government, and greater consideration of the benefits of competition in markets where state-owned enterprises are dominant, may diminish distortions arising from state ownership, and should thus remain an important area of competition advocacy going forward.”

57. **Professor Healey** shared her final thoughts on the discussion. She explained how, in a strictly national context, she would understand that it could be appropriate for individual jurisdictions to make their own decisions about the extent to which they allowed SOEs to operate under different rules, on the assumption that if the rules did not fully apply, they would not be the beneficiaries of the efficiencies which a fully competitive environment would have delivered to them. However, in an international context as the one we are currently facing, with SOEs operating in other jurisdictions, there are different implications for competition analysis and that is why it is important to address these issues.

58. The **Chair** formally closed the session.