

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

**Global Forum on Competition**

**COMPETITION LAW AND STATE-OWNED ENTERPRISES**

**- Executive Summary -**

**29-30 November 2018**

This executive summary by the OECD Secretariat contains the key findings from the discussion held under Session V at the 17<sup>th</sup> 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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## Executive Summary

*By the Secretariat\**

Considering the discussion at the roundtable held during the Global Forum on Competition on 30<sup>th</sup> of November 2018, the panellists' presentation and the delegates' submissions, the following points emerged:

- (1) *Behaviour of SOEs engaging in economic activities in competitive markets should be subject to competition law enforcement in the same way as the behaviour of privately owned competitors.*

State-owned enterprises (SOEs) are important players in many markets, often competing with private entities in key sectors of the economy. If SOEs enjoy advantages or disadvantages in performing their economic activity, that can result in a lack of competitive neutrality. Neutral treatment when it comes to competition law enforcement is one element of ensuring competitive neutrality. In recent decades, competition agencies and governments have come to recognize that SOEs can engage in anti-competitive behavior, which can be as harmful as restrictions put in place by private entities. For this reason, competition authorities have increasingly engaged in rigorous antitrust enforcement against SOEs.

- (2) *Competition authorities can face a number of different challenges when investigating SOEs' anti-competitive behaviour. Calculating the appropriate measure of costs, determining if the state-owned entity constitutes an undertaking or not, assessing its degree of independence from other SOEs, and deciding who exercises control over it, could be problematic due to SOEs' state ownership and control.*

One of the main challenges for competition authorities is to define the limits of the corporate group to which an SOE belongs. This can be a complex assessment as SOEs are ultimately owned by the State but the extent of the State's involvement in the SOE's decision-making is not always clear-cut and control over the SOEs is often in the hands of a line Ministry or of dedicated public holding entities. Issues with identifying the SOE's controlling entity affect in turn the calculation of the appropriate turnover for a variety of purposes related to antitrust enforcement. These considerations are particularly relevant when foreign SOEs are involved in an antitrust investigation, as governance systems might vary across jurisdictions and obtaining information from a foreign government could be burdensome.

Moreover, in the case of SOEs, public service obligations (PSO) may play an important role in the investigations. In particular, competition authorities have to take into account how PSO affect the SOE's market behavior, the SOE's cost structure and its incentives to compete. One difference between private firms and SOEs that can affect the way competition authorities analyse the SOE behavior has to do with their costs.

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\* This executive summary does not necessarily represent the consensus view of the Global Forum on Competition. It encapsulates key points from the discussion at the roundtable, the delegates' written submissions, the panellists' presentations and the Secretariat's background paper.

In the case of state-owned enterprises, the costs may reflect SOEs' specific advantages, which can include direct and indirect subsidies or tax breaks, softer budget constraints and preferential access to credit. Corrections to reflect SOEs' true costs may therefore be necessary, for example when assessing if pricing below cost amounts to a predatory strategy.

- (3) *Competition authorities' treatment of SOEs and private entities throughout investigations seems to be largely the same. However, competition authorities may need to adapt their tests and analyses to account for the fact that SOEs pursue multiple objectives, some of which are not driven by profit maximisation.*

In many cases, SOEs are instructed by governments to pursue goals other than commercial ones. This may require the adoption of strategies, including pricing strategies, incompatible with profit-maximisation. If SOEs are not mandated with generating profits, they may have stronger incentives than private firms to engage in anti-competitive conduct. For example, SOEs may find it beneficial to foreclose competitors and expand the scope of the SOE's operations and its revenues, even if such strategies generate losses. Examples of these strategies include pricing products below cost, cross-subsidisation between reserved and competitive activities raising rivals' operating costs, or erecting barriers to preclude entry of more efficient rivals in the market.

In predatory pricing cases, for instance, the notion of recoupment for firms that do not maximize profit is not very clear, and there can thus be a disconnect between the legal practice and the economic theory when dealing with firms such as state-owned enterprises if they are not profit maximizers. For example, SOEs that can cross-subsidise may be able to price below marginal cost and to sustain losses through monopoly profits in other markets, thereby removing the need to recoup profits in the post-predation period. However, the absence of recoupment does not mean that exclusion or low prices in themselves are harmless, as low prices and foreclosure of private firms may affect economic efficiency in a number of ways.

- (4) *The choice of the appropriate sanctions for SOEs and for private entities can sometimes differ. Determining the appropriate sanction or remedy for an anti-competitive behavior of an SOE is important to ensure an effective degree of deterrence.*

Intrinsic differences between private entities and SOEs can also affect competition agencies' choices in terms of the most appropriate sanction. In the case of SOEs the deterrent effect of monetary sanctions' is likely to be weaker, as SOEs that are not profit maximizers might be indifferent to monetary fines that affect their economic performance. Moreover, deterrence is reduced if the burden of monetary fines is borne by the state, with no direct harm to the SOE and its managers.

For this reason, in unilateral conduct case, well-thought-out behavioural and structural remedies may be more effective. In cases where remedies cannot be imposed and the SOE has to be sanctioned with a monetary penalty, the authority needs to evaluate the fact that the public budget could suffer due to the costs brought about by the fine, and the related burden on taxpayers.

- (5) *In a number of jurisdictions SOEs benefit from legal exemptions, which prevent a fully neutral competition law enforcement system.*

Exemptions that shield specific conducts, sectors, or certain undertakings, such as SOEs, from competition law can be found in different jurisdictions, with adverse effects on competitive neutrality. Examples include exemptions for enterprises operating on the basis of a statutory

monopoly, exemptions for government entities, exemption under the state action doctrine or under the act of state doctrine.

In the absence of an explicit general exemption, SOEs may more easily than POEs justify their anti-competitive actions as having been directed by the state. While the state action defence can be used by domestic SOEs to avoid liability for anti-competitive conduct if it was imposed or authorised by law, the act of state doctrine is relevant for foreign SOEs. 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.

(6) *A competitive neutrality framework is necessary to complement competition law enforcement and achieve a level playing field.*

Under competition law competition authorities can only investigate anti-competitive behavior by SOEs, but have no (or limited) powers to remove the advantages (or disadvantages) that SOEs might enjoy from the state and are the reasons why they can behave anti-competitively. In these cases, agencies should engage in advocacy and conduct market studies. These activities, however, often have non-binding outcomes and entail that the agency may not be able to undertake any follow-up actions to resolve the identified problems.

The development and acceptance of competitive neutrality principles across the government, and greater consideration of the benefits of competition in markets where state-owned enterprises are active and/or dominant, may diminish distortions arising from state ownership, and should thus remain an important area of competition advocacy going forward. In addition to these benefits, having a competitive neutrality framework in place can also help to overcome some of the economic and legal obstacles to the treatment of state-owned enterprises previously identified. This is particularly important in the current international context in which SOEs operate.