

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

Global Forum on Competition

COMPETITION LAW AND STATE-OWNED ENTERPRISES

-- Session V -- Call for country contributions

This document is a call for country contributions for Session V of the Global Forum on Competition to be held on 29-30 November 2018. GFC participants are invited to submit their contributions by 29 October 2018 at the latest.

JT03434971

TO ALL GLOBAL FORUM PARTICIPANTS

RE: Roundtable on “*Competition Law and State-Owned Enterprises*”

17th Global Forum on Competition (29 and 30 November 2018)

Dear GFC participant,

In November 2018, the OECD Global Forum on Competition will hold a roundtable on *Competition Law and State-Owned Enterprises*. I am writing to you in order to provide you with some background about the topic, and to invite you to submit a written contribution, if possible with relevant case examples.

The Roundtable will look at investigations into anticompetitive mergers, agreements and conduct by State-Owned Enterprises (SOEs), both those owned or controlled by a competition authority’s own government, and those owned or controlled by other governments. In particular it will examine the type of conduct that they have engaged in, the analytical questions that arose in these cases, the rationale for doing so, and the way in which their status affected those investigations. In doing so we aim to draw out the main challenges of enforcing competition law against SOEs and look for ways to address them.

The quality and utility of this roundtable will be greatly strengthened by written contributions. In order to assist you with the preparation of your contribution I suggest that it focuses on cases and the practical challenges, with a particular focus on developments in your jurisdiction. Below we provide a discussion of some of the potential challenges that might arise from the nature of these enterprises. However this is not exhaustive, and in particular there are likely to be common behaviours and strategies of these enterprises that arise not only from the nature of the enterprise but from the type of markets in which they operate and the opportunities that they face. Participants are therefore strongly encouraged to raise and address other issues and challenges that have arisen and to discuss and comment on their relevant enforcement experience on cases in this area.

Background

State-Owned Enterprises may, like other charities and social enterprises, offer products or services on markets without having the objective of making a profit from their participation in the market. Instead, their objective might be the expansion of their output (or an entirely different goal). This might mean that they are not interested in maximising profits by restricting output, and so the harm that their actions can cause may not stem from the abuse of market power and the transfer of surplus from consumers to producers. Nevertheless, their conduct while pursuing those goals may not constitute ‘competition on the merits’, or, as with rent-seeking by firms, may have the effect of distorting competition and reducing efficiency. In other cases, SOEs might seek to maximise profit in order to reinvest. Therefore competition law enforcement, perhaps with some adaptation of the traditional tools and standards, will be necessary to investigate instances where their behaviour risks harming consumers in that market.

With respect to both domestic and foreign SOEs, we can look at the different challenges that arise in treating these enterprises within the different actions that they can take: merger control, collusion, and abuse of dominance.

In **merger control**, challenges might include questions of when the state is able to control an enterprise, and when an SOE is part of a broader group of SOEs that might jointly control the enterprise. This might affect whether there has been a change of control as well as the calculation of turnover. Analytical questions might include whether reductions in fixed costs that are achieved through merger might be passed on to consumers and hence become relevant to an efficiency defence. There may also be institutional challenges, such as an SOE having a dual role as regulator, or having other routes into the decision-making process of government that may threaten the ability of the competition authority to make an independent decision on the case, or to enforce an effective remedy. For example, a merger might be consistent with a government's industrial policy or a divestment might amount to enforced privatisation which the government are unwilling to make. There may also be a question on whether merger with a foreign SOE creates different theories of harm (for example over public interest concerns such as national security).

On **collusive agreements**, there might be exemptions from competition law, or debate over whether the agreement is between separate entities. There may also be questions of whether fines create a deterrent effect, or whether they are simply passed-on to consumers (or taxpayers), all of which might affect the calculation of fines. Where a foreign SOE is involved this may complicate relationships between governments, make it difficult to obtain information, and carry effective, if not explicit immunity, creating an enforcement gap.

When investigating **anticompetitive conduct**, competition agencies may encounter a number of additional challenges, including analytical difficulties that arise from the objectives of the SOE. These might include meeting a different public policy objective, expanding or preserving the existence of the entity, increasing consumer welfare, or the welfare of certain vulnerable groups, or the welfare of staff. Given these objectives the rationale put forward to explain the conduct might differ. These differences may then affect the usual assumptions, tests or standards that are used in antitrust analysis. For instance:

- dominance of SOEs might be assumed on the basis of a privileged position, rather than ability to charge an uncompetitive price;
- the 'no business sense' test that seeks to imply the intent of an exclusivity or refusal to supply case might need to change;
- the recoupment prong of a predatory pricing test might become unnecessary (or need to be measured in non-monetary terms) if the offence is in any case incidental to achieving some other objective;
- mark-ups might no longer provide an indication of market power (and might be difficult to identify in any case if there is cross-subsidisation between market and non-market activities);
- where the firm enjoys subsidies or preferential treatment in its domestic market the relevant price-cost test might be for pricing below its cost in the absence of these subsidies or other support (potentially pre-empting the result of action against them where there is a framework under which to take action, or wishfully thinking that action will be taken where there is no such framework);

- or alternatively, might any preferential treatment be treated as efficiency advantages in the context of an as-efficient-competitor test?

There may also be particular challenges on conduct cases involving foreign SOEs. For example, setting licensing remedies on foreign SOEs, or in those markets in which a countries own SOEs compete, might risk creating concerns that antitrust enforcement is being used as a non-tariff barrier to favour domestic firms.

Furthermore, the behaviour of firms that are state supported (despite being fully or largely privately owned), their status and the goals they are pursuing, may create similar challenges for competition agencies which should not be overlooked.

The OECD webpage on Competition Law and State-Owned Enterprises (oe.cd/csoes) will be the primary vehicle for conveying documentation and related links on this subject. Unless explicitly requested not to do so, we will reproduce all written contributions on the site.

I would like to remind you that the Secretariat will compile short summaries of the written contributions to be distributed before the meeting. I invite you to submit such a short summary (no more than one page) together with your contribution. Alternatively the Secretariat will produce a summary, but given the time constraints you might not be in a position to check it before distribution on O.N.E.

In order to ensure an effective preparation of the roundtable discussion, I would be grateful if you could advise the Secretariat **by Monday 24 September 2018** at the latest if you are planning to make a written contribution on the topic. Written submissions are due **by Monday 29 October 2018** and failure to meet this deadline may result in your contribution not being distributed to delegates via O.N.E. in a timely fashion in advance of the meeting.

All communications regarding the documentation for this roundtable should be sent to Ms Angélique Servin (Email: Angelique.SERVIN@oecd.org). Please address all substantive queries relating to this discussion to Ms Lynn Robertson (Email: Lynn.ROBERTSON@oecd.org) and Carolina Abate (Email: Carolina.ABATE@oecd.org).