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

Please contact Ms. Lynn Robertson [E-mail: [Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)], if you have any questions regarding this document.

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## *Competition Law and State-Owned Enterprises*

### *Can the king do not wrong? Competition Law and Stated-Owned Enterprises: Perspectives from India*

**- Contribution from CUTS International-**

#### **Introduction**

1. In its 2015 State Owned Enterprises (SOEs) Guidelines, the Organisation for Economic Cooperation and Development (OECD) defines State owned enterprises as ‘any corporate entity recognized by the national law as an enterprise in which the state exercises ownership’.<sup>1</sup> This definition holds even in the case of joint stock companies, limited liability companies and partnerships limited by shares.<sup>2</sup> Corporations that are established by statutes would also qualify as SOEs if their purpose and activities, or parts of their activities, are of a largely economic nature.<sup>3</sup>

2. This implies that governments have an inherent interest in the functioning of their SOEs. The argument to exempt SOEs from regulatory regimes or to take a softer stance towards them may stem from the premise that regulating a government owned enterprise by another government body i.e. the competition authority might tantamount to the government regulating itself. This approach emanates from the old maxim: the “King can do no wrong”.

3. Some services by SOEs could be deemed ‘public interest’ driven, even if they are performing a service with a commercial interest and/or in competition with private sector players. Further, authorities may refrain from heavily penalising SOEs as the brunt will be ultimately borne by consumers as tax payers. Thus, the regulators may feel a need for leniency while dealing with SOEs.

4. Creation of SOEs is mainly guided by Industrial Policy, which brings out the reasons behind the same. One factor that is often argued is that private sector led initiative alone is often insufficient to foster the development of new sectors that might be profitable and that a temporary helping hand from government is required in order to speed up development and ensure profitability. Another very potent argument is to promote a national champion.

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\* This contribution was written by Swasti Gupta and Siddharth Narayan, CUTS International.

<sup>1</sup> <https://www.oecd-ilibrary.org/docserver/9789264244160-en.pdf?expires=1537337769&id=id&accname=guest&checksum=241BA4C9E6810899ED62F9E10614F9F>

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

5. The argument in favour of national champions is that size and market power are the main drivers of productivity and growth, and the national champions have an impact on their contributions, such as, increasing the overall skills of the work force, or generating complementary activities. Or even to serve goals such as successfully competing in global markets. Unlike the competition policy, which aims at protecting the competitive process, the industrial policy seeks to channel the market forces into working for particular national or industry interests. For instance, in early 2000s, the German Economics Ministry overruled, for the second time, a Federal Cartel Office (FCO) decision rejecting Eon AG's proposed \$10.2-billion takeover of Ruhrgas AG, Europe's largest gas importer. The Ministry argued that the takeover would create a powerful national champion to negotiate in international markets.<sup>4</sup>

6. Similarly, in Brazil, Embraer was created in 1969 as a government-owned company (it was privatised in 1994) and was supported through its early development (by means of subsidies and preferential procurement rules) before becoming a successful global player in the aeronautics sector. The Hyundai conglomerate in Korea was subsidised, and occasionally shielded from foreign competition by the government at every step of its diversification. In line with this view, many developing countries have followed and are still following policies which aim to encourage the development of specific sectors ranging from mining to tourism (in several Latin American countries), to software (in China and India, in particular) and shipping<sup>5</sup>.

7. Competition law regulation of SOEs forms an intrinsic part of governing the structure and conduct of SOEs in order to ensure economic efficiency, consumer welfare and to create a level playing field in the market. Against this backdrop, this paper aims to outline the competition law framework and jurisprudence in India with respect to the SOEs.

8. **Chapter I** sets the context for covering SOEs within the ambit of similar competition law principles as private enterprises in order to maximize their effectiveness and reduce the possibility of market distortions arising out of their privileged position. **Chapter II** elucidates the definition, form and role of SOEs in the context of India followed by the competition law framework applicable to them. **Chapter III** highlights the jurisprudential trends observed by the country's competition law regulator while dealing with complaints against the SOEs. **Chapter IV** brings forth the international experiences of select countries to showcase a global shift towards competitive neutrality of SOEs. **Chapter V** concludes the discussion by emphasizing the need to create a level playing field for all actors in the market including SOEs coupled with low entry barriers for ensuring market contestability.

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<sup>4</sup> Mehta, Pradeep S., *National interest vs competition — Need to strike the right balance*, The Hindu Business line, 10 Dec 2002; <https://www.thehindubusinessline.com/2002/12/10/stories/2002121000050800.htm>

<sup>5</sup> <https://www.oecd.org/daf/competition/44548025.pdf>

## 1. Chapter I: Towards competitive neutrality for SOEs

9. As mentioned in literature, SOEs are not necessarily profit-making enterprises in their true sense i.e. they are entrusted with providing goods or services to the public without the ultimate goal of profit maximization. Be that as it may, due to the privileged position enjoyed by SOEs, they may exhibit an equal propensity of anticompetitive conduct as any other undertaking through cross-subsidising, pricing below competitive levels, arbitrary pricing in case of monopoly, collusive agreements, abuse of dominance etc.<sup>6</sup> In addition, they may also be reason for market distortions by virtue of their ownership and structure.

10. For instance, the state-owned telecom operator may coordinate prices with other operators to drive out competitors/new entrants from the market; state-owned airways or railways may engage in exploitative or predatory pricing; upstream producers in the power sector may compel distributors to charge a certain price or refuse access to infrastructure and inputs to others in the market.

11. The rationale of competition law enforcement is mostly argued from an overall welfare perspective. The enforcement of competition is not aimed at protecting competitors but to allow fair competition to prevail, which would result in favourable outcome for all actors. Given that SOEs can operate under conditions ranging from limited to no competition and might have an incentive to exploit customers, they can find their conduct being under the scrutiny of competition authorities. Departing from the fair competition and fair conduct norms could harm consumers or distort the market. This calls for the maintenance of ‘competitive neutrality’, which can be achieved *via* enforcing competition law and/or involving competition policy reforms. Competitive neutrality which is one of the core principles upon which competition policy hinges.<sup>7</sup>

12. The review and refining process of competition distorting policies and practices is termed as competition policy reform or simply competition reform, which is an aggregate of the following three components<sup>8</sup>:

- Policies: Enabling government policies (including legislation, programme etc.) designed to facilitate a level playing field (fair competition) in a sector.
- Regulation: A well designed regulatory framework with an adequately resourced regulatory agency that promotes healthy development of the sector and aims to promote competition in it.
- Competition regime: Presence of competition law with effective enforcement mechanisms to curb anti-competitive practices.

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<sup>6</sup> *Ibid.*

<sup>7</sup> Mehta, Pradeep S., *Competitive neutrality in public policy*, Business Standards, 20 Jan 2013; [https://www.business-standard.com/article/opinion/pradeep-s-mehta-competitive-neutrality-in-public-policy-111082200065\\_1.html](https://www.business-standard.com/article/opinion/pradeep-s-mehta-competitive-neutrality-in-public-policy-111082200065_1.html).

<sup>8</sup> *Framework for Competition Reforms: A Practitioners’ Guidebook*, (CUTS International, 2015), p5; [http://www.cuts-ccier.org/crew/pdf/FCR\\_Practitioners\\_Guidebook.pdf](http://www.cuts-ccier.org/crew/pdf/FCR_Practitioners_Guidebook.pdf) (accessed on 28 July 2017).

13. However, enforcement of competition law on SOEs carries certain distinct substantive and institutional challenges.<sup>9</sup>

- **Substantive Challenges:** Since most SOEs are not driven by the motive of profit maximization, it may be difficult to assess abuse even if the SOEs engage in anti-competitive conduct such as predatory pricing or margin squeezing to boost profits. It may also often be difficult to separate an SOE performing an economic activity from an SOE performing a non-economic activity as SOEs often operate in hybrid structures of enterprises performing public service duty alongside economic activity.
- **Institutional Challenges:** Although there is a presumption of impartiality in investigations by competition authorities, as regards SOEs it is possible that such investigation may be tainted with undue government influence. Further, competition authorities may not always have the requisite statutory power over an SOE. This may be the case where they provide general public services, such as postal services, railways, health care, etc. Exceptions of this nature should, however be accompanied by appropriate light touch regulations that would minimize the risk of resulting market distortions.

14. Similarly, bringing in or invoking competition reforms can face political economy constraints. But despite these challenges, economies must strive to march towards achieving competitive neutrality between SOEs and private players in order to protect competition and safeguard economic democracy.

## 2. Chapter II: SOEs in India and Competition Policy & Law

### 2.1. SOEs in India

15. SOEs in India form a subset of the vast Public Sector and are also referred to as Public Sector Undertakings (PSUs). These are companies where government owns majority shareholdings, statutory corporations set up by an act of Parliament and fully owned by the government.<sup>10</sup> Public sector in India refers to all government activities including administration, running utilities, financial system of the government and commercial enterprises.<sup>11</sup> Owing to the (quasi) federal set-up of the country, there are SOEs controlled by the central government, state governments and those being controlled by the City Municipalities.<sup>12</sup>

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<sup>9</sup> OECD policy roundtable on State Owned Enterprises and the Principle of Competitive Neutrality 2009, available at: <http://www.oecd.org/daf/competition/46734249.pdf>

<sup>10</sup> Ibid.

<sup>11</sup> Geeta Gouri, "Privatisation and Public Sector Enterprises In India: Analysis of an Impact of a Non policy" Economic and political Weekly., November 30, 1996., Also, Y. Venugopal Reddy., Privatisation Approaches, Processes and Issues, Galgotia Publications, New Delhi, 1992.

<sup>12</sup> [https://unctad.org/meetings/en/Presentation/ciclp2012\\_RPP\\_SGaur\\_en.pdf](https://unctad.org/meetings/en/Presentation/ciclp2012_RPP_SGaur_en.pdf)

## 2.2. Forms of SOEs in India

SOEs may broadly be in the following forms in India<sup>13</sup>:

- **Departmental Organisations:** Under this form of organisation, a public enterprise is run as a department of the Government. It is organised, financed and controlled like any other Government department. A departmental undertaking self-contained but it is under the overall control of the departmental head and the ministry concerned. Examples include: administration of national services like posts and telegraphs and railways besides defence production units etc.
- **Public Corporations:** A public or statutory Corporation is an autonomous corporate body set up under a special Act of Parliament or State Legislature. Examples include: the Damodar Valley Corporation, the Industrial Finance Corporation, Life Insurance of India etc.
- **Government companies:** The definition of a government company (SOE) as given in section 2(45)<sup>14</sup> of the Indian Companies Act, 2013<sup>15</sup> may be referred in this regard. Examples include: Air India Ltd., Coal India Ltd. etc.

## 2.3. Growth, Role and Contribution of SOEs to the Indian Economy

16. In India, the SOE sector comprises of 270 enterprises with a corporate valuation of USD 338.5 billion and generates employment for about 3.3 million people.<sup>16</sup> Even during the ancient period, when India was one of the leading world economies, presence of SOEs was in good measure. State was present in almost all sectors, including enjoying monopoly in some.<sup>17</sup> After its independence from British Rule in 1947, India adopted a mixed economy (public and private enterprises) model to combat market failure and boost the economy.<sup>18</sup> However, post-1991 with the adoption of economic liberalisation there has been a trend of disinvestment, on the one hand, and facilitation of private sector, on the other.

17. Yet, SOEs constitute a significant segment of the Indian economy and account for about 26% of the gross domestic capital formation.<sup>19</sup> They also contribute to exchequer through dividend payment, interest payment on government loans and payment of taxes &

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<sup>13</sup> <https://www.scribd.com/doc/32031522/Different-Form-of-Public-Enterprise>

<sup>14</sup> Government Company means any company in which not less than fifty-one per cent. of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company

<sup>15</sup> <http://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf>

<sup>16</sup> OECD (2017), The Size and Sectoral Distribution of State Owned Enterprises, OECD Publishing, Paris, available at: [https://read.oecd-ilibrary.org/governance/the-size-and-sectoral-distribution-of-state-owned-enterprises\\_9789264280663-en](https://read.oecd-ilibrary.org/governance/the-size-and-sectoral-distribution-of-state-owned-enterprises_9789264280663-en)

<sup>17</sup> See for instance: Mehta, Pradeep S. "Economic Regulations, Competition, and Consumer Protection in Ancient India"; Antitrust Bulletin, Volume: 63 issue: 3, page(s): 316-329. <http://journals.sagepub.com/doi/pdf/10.1177/0003603X18780557>

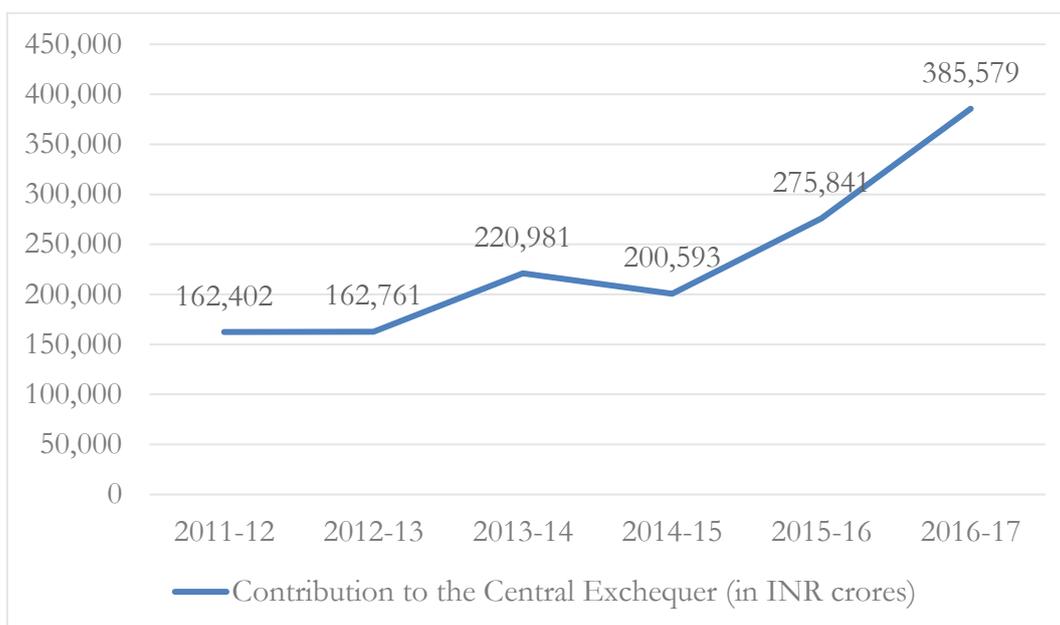
<sup>18</sup> [https://www.cci.gov.in/sites/default/files/presentation\\_document/CLandSOE\\_20100401142732.pdf](https://www.cci.gov.in/sites/default/files/presentation_document/CLandSOE_20100401142732.pdf)

<sup>19</sup> <http://www.oecd.org/daf/competition/46734249.pdf>

duties, foreign exchange earnings. They are (or were till recently) largely dominant in critical utility sectors such as railways, post and telegraph, petroleum, ports, airports, power, mining, shipping, banking, insurance etc.

18. The Central Public Sector Enterprises (CPSEs) contribution to the central exchequer has increased from INR 2,75,841 crores (USD 2758.41 Billion) in 2015-16 to INR 3,85,579 crores (USD 3855.79 Billion) in 2016-17. The growth trajectory of such contribution over the preceding few years has been depicted in the figure 1, given below.<sup>20</sup>

**Figure 1. Contribution of SOEs to the Central Exchequer**



#### 2.4. Competition Law Framework in India *viz-a-viz* SOEs

19. SOEs were exempt from the ambit of the erstwhile competition law in the country i.e. the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, until 1991, when economic reforms were launched in the country to embark towards a market based economy.<sup>21</sup> The removal of the immunity for SOEs (and the cooperative sector) from the MRTP Act in an amendment in 1991 also removed all merger regulations so that Indian enterprises could grow big and compete in the world. Another interesting backdrop for this was the Consumer Protection Act of 1986 (COPRA) which covered SOEs in spite of opposition that they are exempt under MRTP Act hence no need to cover them in COPRA itself. The argument to bring them under COPRA was that large number of SOEs are [were]

<sup>20</sup> <https://dpe.gov.in/publication/pe-survey/pe-survey-report>

<sup>21</sup> Mehta, Pradeep S., *Tailoring competition laws for state-owned enterprises*, Financial Express, 17 Feb 2014; <https://www.financialexpress.com/archive/tailoring-competition-laws-for-stateowned-enterprises/1226585/0/>

the sole provider of services like airlines, insurance, telecom, electricity, railways etc. and they needed to be accountable to their consumers.

20. The MRTP Act's successor, i.e. the Competition Act, 2002 advocates for competitive neutrality by treating SOEs and private enterprises at par.<sup>22</sup> The definition of the term 'enterprise', given under section 2(h)<sup>23</sup> of the act becomes important in this regard as it covers SOEs within its ambit. The Act covers all commercial activities of the Government except for activities pertaining to its 'sovereign' functions. The Act does not make any exemptions for state-owned, state-controlled or state-supported enterprises while enforcing competition law in the country.

21. For instance, in December 2013, the Competition Commission of India (the CCI) imposed a penalty on a SOE, Coal India Ltd (CIL), for abusing its dominant position as a fuel supplier<sup>24</sup>. In an earlier case<sup>25</sup>, the CCI charged Indian Railways, an SOE, with abusing its dominant position by increasing charges for various railroad services, not providing access to rail terminals, and imposing restrictions on carrying certain goods. The plea of Indian Railways that it was discharging "sovereign functions" was rejected by the Delhi High Court in appeal against the said CCI order.

22. The Competition Act, 2002, without any discrimination between SOEs and private firms, includes provisions dealing with "anti-competitive agreements", "abuse of dominant position" as well as "combinations" (Merger & Acquisitions etc.) above a certain threshold (size of parties/size of transaction). In addition, the Act also empowers the CCI for 'advocacy', which is a useful tool, in absence of a National Competition Policy, for inducing competition reforms.

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<sup>22</sup> <https://www.cci.gov.in/sites/default/files/ccipdf/competitionact2012.pdf>

<sup>23</sup> "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

<sup>24</sup> Maharashtra State Power Generation Company Ltd. v. Coal India Ltd. (*Case No. 03, 11 & 59 of 2012*).

<sup>25</sup> Case No. 64/2010.

### 3. Chapter III: Analysing the jurisprudential trend observed by the CCI

23. In the past, not only has the CCI received a healthy number of complaints against the SOEs such as Railways, Coal India, Public Sector Undertaking Banks, State owned mining companies, Central Government Ministries (Health and Agriculture Ministry), Oil PSUs, State Governments (the State of Andhra Pradesh and Goa), State Industrial Corporation, Metro Rail Corporation, Steel PSUs etc.<sup>26</sup> but SOEs have also been informants (complainants) in various cases.<sup>27</sup>

24. Many of the cases where the CCI received complaint against SOEs were dismissed without an enquiry by the Director General (DG)<sup>28</sup>. However, even in many cases in which an enquiry was ordered by the DG, the CCI did not find a violation<sup>29</sup>. Irrespective of the above-stated, even in cases where the CCI found a violation of competition law against an SOE, its enforcement was not materialized in instances. A popular example (of a Provincial SOE against a Central SOE) has been discussed below:

- Maharashtra State Power Generation Company Ltd. v. Coal India Ltd. (Case No. 03, 11 & 59 of 2012)<sup>30</sup>: In December 2013, the CCI imposed a penalty of Rs 1,773.05 crore (USD 17.73 Billion) on the state run miner, Coal India Ltd (CIL), for abusing its dominant position as a fuel supplier. Since all members of the CCI who signed off on the ruling were not present during the hearings, in May 2016, Competition Appellate Tribunal (COMPAT) ordered a fresh investigation into the case.<sup>31</sup> Pursuant to the fresh investigations, in March 2017, the CCI reduced the penalty it imposed on CIL for abusing its dominant position to a third (Rs. 591

<sup>26</sup>[http://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research%20Papers/Competition%20Law%20in%20India.pdf](http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition%20Law%20in%20India.pdf)

<sup>27</sup> Coal India Limited v. GOCL Hyderabad and Ors (Case No 06/2011, decided on 16.04.2012); DDRS (G)-II, Railway Board, Ministry of Railways vs M/s RMG Polyvinyl India Ltd, New Delhi & Ors (Case No C-145/2008/DGIR, decided on 06/04/2011); Sh. S.K. Sharma, Deputy CMM-IV, North Western Railway, Hasanpura, Jaipur vs M/s RMG Polyvinyl India Ltd, New Delhi & Ors. (Case No RTPE 31/2008 decided on 06/04/2011); Ref. Case filed by Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata. vs M/s Orissa Concrete and Allied Industries Ltd. & Ors. (Ref Case No. 05/2011 decided on 21/02/2013)

<sup>28</sup> For instance, Shri Saurabh Bhargava v Secretary, Ministry of Agriculture and Cooperation & Ors. (Case No. 70 of 2011); All India Genset Manufacturer Association v Chief Secretary, Government of Haryana & Ors. (Case No. 38 of 2012); M/s NexTenders (India) Pvt. Ltd. v Ministry of Communication and Information Technology & Ors. (Case No. 63 of 2012); Vijay Rice & General Mills v Punjab State Civil Supplies Corporation Limited (Case No. 64 of 2012); M/s Mineral Enterprises Limited v Ministry of Railways, Union of India & Ors. (Case No. 47 of 2012); CSR Nanjing Puzhen Co. Ltd v Kolkata Metro Rail Co. Ltd (KMRCL) & Ors. (Case No. 54 of 2010); India Glycols Limited v Indian Oil Corporation Ltd. & Ors.

<sup>29</sup> For instance: Arshiya Rail Infrastructure Ltd. (ARIL) v Ministry of Railway (MoR) & Ors. (Case No. 12 of 2011); Explosive Manufacturers Welfare Association v Coal India Ltd & its Officers (Case No. 4 of 2010); All Odisha Steel Federation v Orissa Mining Corporation (Case No. 12 of 2012)

<sup>30</sup><https://www.cci.gov.in/sites/default/files/03%2C%2011%20%26%2059%20of%202012.pdf>

<sup>31</sup> <https://economictimes.indiatimes.com/news/economy/policy/competition-commission-imposes-rs-591-crore-fine-on-coal-india/articleshow/57814151.cms>

crores i.e. USD 5.91 Billion) of what the regulator had initially fined the SOE with.<sup>32</sup>

25. Apart from the issue of dominance, SOEs have also been exempted with respect to Combination (M&A) provisions. Select instances have been given below:

- Exemption from approval of the CCI in the Oil and Gas Sector: Through a notification dated November 22 2017, the Ministry of Corporate Affairs (MCA) exempted Central Public Sector Enterprises (CPSEs) operating in the oil and gas sector from seeking the nod of the CCI for Combinations including mergers, acquisitions and amalgamations for a period of five years.<sup>33</sup> The move was in line with the government's objective of undertaking key economic reforms in the Oil and Gas sector to fuel growth by consolidating government run oil companies and create a National Champion.<sup>34</sup> It enabled the acquisition of Hindustan Petroleum Corporation Limited (HPCL), a government owned fuel retailer by Oil and Natural Gas Corporation (ONGC), the largest oil and gas producer in the country, thereby paving way for the country's first vertically integrated public sector 'Oil Major' company.<sup>35</sup> This is the perfect example of the 'national champion' argument as discussed above.
- Exemption from approval of the CCI in the Banking Sector: Through a notification dated August 30 2017, the MCA exempted nationalised banks under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and Banking Companies (Acquisition and Transfer of Undertakings) Act from merger control scrutiny of the CCI for a period of 10 years for reconstitution, transfer of the whole or any part thereof and amalgamation of nationalised banks.<sup>36</sup> The exemption was aimed at fast-tracking consolidation in the PSU banking space.
- Approval of combinations involving SOEs by the CCI: Combination of Punjab National Bank and MetLife India Insurance Company Limited was unconditionally approved by the CCI within 20 days of receiving notice of the proposed combination.<sup>37</sup> Combination of Gujarat Gas Company Ltd and GSPC Distribution Networks Ltd. was approved by the CCI within 69 days of receiving notice of the proposed combination.<sup>38</sup>

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<sup>32</sup> Ibid.

<sup>33</sup> <https://competition.cyrilamarchandblogs.com/2017/11/mca-exempts-central-public-sector-enterprises-engaged-oil-gas-sector-cci-notification/>

<sup>34</sup> <https://www.thehindu.com/business/psu-oil-mas-exempt-from-cci-nod/article20721580.ece>

<sup>35</sup> <https://energy.economictimes.indiatimes.com/news/oil-and-gas/ongc-completes-rs-36915-crore-hpcl-acquisition-becomes-first-integrated-oil-major/62725587>

<sup>36</sup> <https://timesofindia.indiatimes.com/business/india-business/nationalised-banks-exempted-from-cci-approval-for-mergers/articleshow/60342342.cms>

<sup>37</sup> [https://www.cci.gov.in/sites/default/files/C-2012-12-98\\_0.pdf](https://www.cci.gov.in/sites/default/files/C-2012-12-98_0.pdf)

<sup>38</sup> <https://www.cci.gov.in/sites/default/files/C-2012-11-88.pdf>

#### 4. Chapter IV: International experience

26. SOEs represent significant economic activity across the world. In 2015, it was estimated that SOEs constitute about 20% of global investment; 5% of global employment; 5% of total OECD economy; 50% of GDP in Middle East and North Africa; 15% of GDP in Africa; 8% of GDP in Latin America and 6% of GDP in Asia.<sup>39</sup>

27. A recent OECD survey, which covered 40 countries, comprising of the OECD countries as well as Argentina, Brazil, China, India and Saudi Arabia (partially), unveils the size of the SOE economy.<sup>40</sup> Excluding China, governments in the sampled economies are the full or majority owners of 2,467 commercially-oriented enterprises valued at USD 2.4 trillion and employing over 9.2 million people.<sup>41</sup> China has the largest SOE sector, with about 51,000 SOEs valued at USD 29.2 trillion, followed by Hungary (370), India (270), Brazil (134), the Czech Republic (133), Lithuania (128), Poland (126) and the Slovak Republic (113).<sup>42</sup>

28. Given that the SOEs command such a significant presence in the economy, it is inevitable that once in a while they would tend to encroach upon the prohibited conduct of fair competition principles, in the same manner as their private sector counterparts. As a result, the manner in which competition laws in many jurisdictions across the world are applied to SOEs displays that SOEs are equally prosecutable for competition law violations.

29. A look across various jurisdictions shows that the activities of SOEs are not exempted from the application of national competition laws. This is true for countries such as France, Pakistan, Switzerland, Australia, Brazil, Kenya, Republic of Korea, Malaysia, Mauritius, Mexico, United States and European Union to name a few. However, there are some countries, whose provisions in terms of competition law appear ambiguous on the extent to which SOEs are covered by competition laws but enforcement history of their respective competition authorities confirms a pro-competition policy approach in dealing with SOEs. Examples include the following:

##### 4.1. China

30. In China, Article 7 of the Anti-Monopoly Law of China recognizes that there are some SOEs whose operations have a ‘bearing on the lifeline of the national economy or national security’, and would ‘exercise monopoly over the production and sale of certain commodities’. However, the Act mentions that only the lawful business operations of these undertakings would be protected while they would be supervised and regulated in terms of operations and prices. Although Article 7 had been interpreted by some scholars as

<sup>39</sup> Ethical Boardroom Magazine, 2015, available at: [https://www.ifc.org/wps/wcm/connect/1299668047f4ee8bae58ff299ede9589/EB\\_IFC\\_Phil\\_Ar\\_mstrong.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/1299668047f4ee8bae58ff299ede9589/EB_IFC_Phil_Ar_mstrong.pdf?MOD=AJPERES)

<sup>40</sup> [https://www.oecd.org/industry/ind/Item\\_6\\_3\\_OECD\\_Korin\\_Kane.pdf](https://www.oecd.org/industry/ind/Item_6_3_OECD_Korin_Kane.pdf)

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

exempting SOEs from the application of the law<sup>43</sup>, over the years the implementation of the law has demonstrated that SOEs are not exempt from competition enforcement.

31. In 2014, China's Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM)<sup>44</sup> fined a state-owned water company, Yiyuan Fresh Water Company, a sum of 3.2 million renminbi (€388,000) after it had been found to have abused its monopoly position. The company was bundling its water supply services with the construction of water meters and pipes, a practice which was deemed to be a tie-in. Over the years, the MOFCOM has also handled cases involving huge SOEs such as Shanghai Baosteel, Guangxi Yuchai Machine Group Co., Ltd, Baotou Beiben Trucks Group Co., Ltd, Guangxi Liugong Machine Co., Ltd and Sinopharm Group Co., Ltd.<sup>45</sup>

32. The National Development and Reform Commission (NDRC) has also investigated complaints involving giant SOEs such as concerns of abuse of market-dominant status by business operators involving China Telecom and China Unicom; concerns of vertical monopoly agreement towards giant SOE Kweichow Maotai Co., Ltd; penalty on horizontal monopoly agreement of Shanghai Gold & Jewellery Trade Association and of Zhejiang Insurance Association.<sup>46</sup>

## 4.2. Poland

33. The Poland Competition and Consumer Protection Act, 2007 generally make 'undertakings' which are defined under Article 4, subject to the provisions of the competition law. However, the central government and its officials are not bound by the provisions of competition law. However, the local government and its representatives (for example the municipalities) are identified as undertakings when they are managing public property and hence subject to the law but when they are exercising their governmental authority prerogatives of public authority, they are not considered to be undertakings<sup>47</sup>.

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<sup>43</sup> UNCTAD 2015, 'Competition Law And The State', Competition laws' prohibitions of anti-competitive State acts and measures-Volume 1: Summary of answers to questionnaire UNCTAD Research Partnership Platform, available at: [http://unctad.org/en/PublicationsLibrary/ditccelp2015d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditccelp2015d3_en.pdf)

<sup>44</sup> Prior to March 2018, three authorities were implementing the Anti-Monopoly Law (AML) of China, each with complete autonomy. The Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM) was responsible for merger control. The Price Supervision/Inspection and Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC) were responsible for regulating pricing and price-related violations. The Anti-Monopoly and Anti-Unfair Competition Bureau of the State Administration of Industry and Commerce (SAIC) was responsible for non-price-related violations of the AML.

<sup>45</sup> Fang Xiaomin, The Application of Chinese Anti-Monopoly Law upon State-Owned Enterprises, at, <http://ascola-tokyo-conference-2015.meiji.jp/pdf/ConferencePapers/Parallel%20Sessions/FANG%20Xiaomin.pdf>

<sup>46</sup> Ibid.

<sup>47</sup> UNCTAD 2015, 'Competition Law And The State', Competition laws' prohibitions of anti-competitive State acts and measures-Volume 1: Summary of answers to questionnaire UNCTAD Research Partnership Platform, available at: [http://unctad.org/en/PublicationsLibrary/ditccelp2015d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditccelp2015d3_en.pdf)

However, SOEs are considered to be legal persons and the provisions of competition law apply fully.

34. In 2014 for instance, Poland's Office of Competition and Consumer Protection (UOKiK) imposed a fine of 361,000 zloty<sup>48</sup> on the National Health Fund (NFZ) for preventing smaller companies from trying to enter the market.<sup>49</sup> Responsible for managing funding for all state medical services, the NFZ set unfair criteria in two separate government contracts which were against the principles of fair competition.<sup>50</sup>

### 4.3. Hungary

35. Hungary is also an example of a competition regime which does not pronounce directly whether SOEs are exempted or not. Article 1 of the Hungarian Competition Act, 1996 allows statutes to regulate some of the issues falling under the Competition Act differently, even though it makes no reference to ownership<sup>51</sup>. However, the manner in which the Hungarian Competition Authority (GVH) has applied the competition legislation shows that even SOEs are not exempt. In 2013 for example, the Competition Authority fined a group of banks about 9.5 billion forints (\$43.3 million) for cartelization of a mortgage scheme.<sup>52</sup> In 2018, following some appeals, the Competition Authority reduced the fines by almost half.<sup>53</sup> However, even state-owned banks, such as MKB Bank and Budapest Bank were fined HUF 405 million and HUF 275 million respectively.<sup>54</sup> Thus, SOEs are also given an equal treatment with the private sector despite lack of a clear provision demonstrating that SOEs are not exempted.

### 4.4. Italy

36. Under Article 8 of the Italian Competition Act (Law No. 287/1990), it is mainly the ability to undertake economic activity that determines whether or not a firm is subject to the competition law rather than ownership.<sup>55</sup> However, when the SOEs perform activities based on solidarity (the inherently non-commercial act of involuntary subsidisation of one

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<sup>48</sup> Equivalent to €86,000 at the time

<sup>49</sup> <https://globalcompetitionreview.com/tag/poland-s-court-for-competition-and-consumer-protection>

<sup>50</sup> Ibid.

<sup>51</sup> UNCTAD 2015, 'Competition Law And The State', Competition laws' prohibitions of anti-competitive State acts and measures-Volume 1: Summary of answers to questionnaire UNCTAD Research Partnership Platform, available at: [http://unctad.org/en/PublicationsLibrary/ditccpl2015d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditccpl2015d3_en.pdf)

<sup>52</sup> <https://www.reuters.com/article/us-hungary-cartel/hungarys-competition-watchdog-fines-banks-for-cartel-idUSBRE9AJICE20131120>

<sup>53</sup> [https://bbj.hu/finance/gvh-reduces-fines-on-banks-for-cartel-activity\\_153890](https://bbj.hu/finance/gvh-reduces-fines-on-banks-for-cartel-activity_153890)

<sup>54</sup> Ibid.

<sup>55</sup> UNCTAD 2015, 'Competition Law And The State', Competition laws' prohibitions of anti-competitive State acts and measures-Volume 1: Summary of answers to questionnaire UNCTAD Research Partnership Platform, available at: [http://unctad.org/en/PublicationsLibrary/ditccpl2015d3\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditccpl2015d3_en.pdf)

social group by another) and activities that are done for the State connected with the exercise of the powers of a public authority can be exempted.<sup>56</sup>

## 5. Chapter V: Conclusion

37. The vast presence of SOE sector globally (the only country without an SOE is perhaps the USA) is indicative of their significance in fueling the market economies. They are too prevalent to not account for their possible anti-competitive practices and market distortions. Not only are they in a position to defy competition principles in the market, but they also exhibit direct harm to the consumers owing to their responsibility to balance between public interest and profit motives.

38. Additionally, fulfilling public service obligations is a cumbersome process and the SOEs may be utilizing their profits towards subsidizing these obligations.<sup>57</sup> While this may ultimately benefit the consumers, it also makes it difficult to assess the SOEs for competitiveness by applying traditional competition law tools such as recoupment theory in predatory pricing or even the small but significant non-transitory increase in price test, particularly when their aim is not necessarily profit maximisation.<sup>58</sup>

39. Therefore, there is a need to objectively apply competition laws to SOEs on the same footing as other private enterprises. However, there may be a need to revisit the manner in which such laws are applied to the SOEs, particularly due to their distinct characteristics that may not fit within the realm of traditional competition law tools.<sup>59</sup> Having a national competition policy, therefore, can be an effective option. Such policy would not only help promote ‘competitive neutrality’ but also guard against over-regulation that stifles with development.

40. In a developing economy like India, the government must employ a light touch regulation coupled with low barriers to entry and enabling market conditions to ensure market contestability. This would also enable the SOEs to remain on their toes in terms of service delivery and at the same time operate within the contours of regulation.

41. Since SOEs also operate as natural or legally created monopolies in their operational sector, the chances of them engaging in anti-competitive conduct and ultimately impacting the consumers become more pronounced. Realising the same, most countries across the globe have chosen to adopt a pro-competitive approach in dealing with the SOEs, if not in theory then in application.

42. Competition law and policy should envisage an economy where the laws and government policies are applied equally to all market players, SOEs and private players alike, so as to enable overall welfare and sustain healthy competition in the market.

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<sup>56</sup> Ibid.

<sup>57</sup>Mehta, Pradeep S. “Tailoring competition laws for state owned enterprises”. <https://www.financialexpress.com/archive/tailoring-competition-laws-for-stateowned-enterprises/1226585/0/>

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.