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COMPETITION LAW AND STATE-OWNED ENTERPRISES

Summaries of contributions

-- Session V --

29-30 November 2018

This document reproduces summaries of contributions submitted for Session V of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at oe.cd/csoes.

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Competition Law and State-Owned Enterprises

-- Summaries of contributions --

Abstract

This document contains summaries of the various written contributions received for the discussion on "Competition Law and State-Owned Enterprises" held during the 17th meeting of the Global Forum on Competition in Paris, France (29-30 November 2018, Session V). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Algeria

L'entreprise publique est « porteuse de risque » pour le jeu de la concurrence car elle évolue dans deux domaines principaux qui interagissent et souvent s'opposent :la poursuite de l'intérêt général et le comportement marchand.

Il est observé à l'échelle mondiale que les mouvements de privatisation ne sont pas constants ou définitifs car l'entreprise publique constitue pour l'action publique un outil d'intervention sur le marché et souvent un moyen de réponse à la crise

Dans le cas de l'Algérie, l'échec des privatisations menées durant les années 2000 impose de réemprunter avec plus de réalisme cette même voie sachant que certaines entreprises publiques non stratégiques demeurent encore sous le giron du secteur Etatique, amplifiant anormalement les risques de distorsions de la concurrence entre secteur public et secteur privé.

En Algerie, L'Etat actionnaire se désengage de l'activité économique par des réformes prudentes : caractérisées par le passage de l'Actionnariat unique dans les entreprises publiques à l'actionnariat majoritaire puis à l'actionnariat minoritaire récemment.

L'ordonnance 03-03 du 19 juillet 2003 modifiée et complété relative à la concurrence soulève deux contraintes ;

- L'article 2 limite la portée des dispositions de l'ordonnance en stipulant que « toutefois la mise en œuvre de ces dispositions ne doit pas entraver l'accomplissement de missions de service public ou l'exercice de prérogatives de puissance publique.
- La problématique des concentrations et fusion des entreprises publiques économiques qui semble exclure le Conseil de la concurrence du contrôle des restructurations du secteur public..

Pour cette raison, le Conseil de la concurrence a proposé aux pouvoirs publics des amendements à l'ordonnance susvisée.

En outre, force est de constater que certains textes législatifs et réglementaires accordent des l'année 1988, un traitement préférentiel aux entreprises publiques. Telle l'ordonnance n°01-04 du 20 août 2001 qui est venue régir l'organisation, la gestion et la privatisation des EPE et qui exclut du champ d'application du code de commerce les entreprises publiques dont l'activité revêt un caractère stratégique au regard du programme du gouvernement**. (voir article 6 de cette ordonnance**).

L'ordonnance 03-03 du 19 juillet 2003 modifiée et complétée relative à la concurrence ne s'oppose pas aux opérations de réhabilitation du secteur public, en revanche la prise en charge des opérations de restructuration financière d'entreprises publiques déstructurées au moyen de subventions du trésor peut s'interpréter comme aides d'Etat.

De telles aides peuvent avoir pour effet de fausser le jeu de la libre concurrence dans la mesure où elles favorisent les entreprises publiques en les protégeant indument contre la sanction du marché.

IL en découle à priori la possibilité d'opposer à l'Etat (dans ses relations d'aides financières aux entreprises publiques) le droit de la concurrence.

Les aides de l'Etat aux entreprises publiques tout en étant nuisibles à la concurrence n'en comportent pas moins certaines dérogations justifiées par les missions particulières qui peuvent leur être imposées par l'Etat

En Algérie, divers textes législatifs mettent à la charge des entreprises publiques un ensemble de sujétions publiques que justifient les missions de service public. On peut mentionner, à titre d'exemple, celles relevant du transport aérien ou celles relevant de services publics en réseaux (exemple électricité et gaz ainsi que transport ferroviaire ou télécommunications) .

Dans toutes ces situations, les compensations financières octroyées par l'Etat, qui faut-il le préciser, ne sauraient être considérées comme aides de l'Etat, ne sont pas de nature à fausser le jeu de la libre concurrence dans la mesure où il s'agit de sujétions de service public qui ne relèvent pas de l'activité économique propre à l'entreprise publique ni donc de son objet social.

Enfin, le Conseil de la concurrence est conscient que lorsqu'il enquête sur un comportement anticoncurrentiel d'une entreprise publique il peut se heurter, aux difficultés d'analyse découlant des objectifs alloués par l'Etat à l'entreprise publique en cause tels que la réalisation d'un objectif de politique publique

Dans le contexte algérien, l'Etat occupe une place importante dans l'économie, sa forte implication dans les entreprises publiques se traduit par le fait qu'il ne soit pas seulement actionnaire, mais également gestionnaire renforçant les risques de distorsion de la concurrence sur le marché.

En conformité aux préconisations de l'OCDE (voir lignes directrices de 2015) l'État doit agir dans le sens d'une séparation claire entre son statut d'actionnaire et ses fonctions de puissance publique, afin de garantir des règles du jeu équitables et un environnement économique concurrentiel indemne de conflits d'intérêts.

Argentina

Antitrust cases may lead to particular challenges in situations in which state-owned companies are involved. For example, the role played by the State in these situations can hinder the analysis of the affected market, especially when a state manages companies in different economic sectors. It can also occur that the involved state-owned enterprises have economic objectives which are different from profit maximization (for example, total welfare, consumer surplus or government revenue maximization) or other objectives that do not have an economic end, like national defence, public health or others. Finally, it can also occur that a state controls some firms that operate in places that are not under the jurisdiction of that state, as is the case of state-owned companies that operate abroad.

The first Argentine antitrust cases involving state-owned enterprises were analysed during the 80s and 90s and were useful to make clear that: a) Argentine competition law is applicable to all the firms that operate in the market (regardless of their ownership regime); and b) it does not apply to government agencies acting as market regulators rather than an economic agents. The same criterion is used for M&A operations in the sense that mergers in which there is participation of state-owned companies as buyers or sellers are subject to the merger control procedure, as long as they implied a change in the control of a pre-existing firm.

Regarding foreign state-owned enterprises, the main issue in Argentina relates to the definition of the economic group that controls the different companies involved in the case. This may have an impact on the decision of whether a merger should be notified, as well as if a merger has to be considered as horizontal, vertical or conglomerate. Several merger cases involving state-owned Chinese companies fell under this scope. In the past, the criterion used in those cases had been that firms controlled by the same state were not taken as independent economic agents. Recently, however, the CNDC changed the criterion, in a way that it now takes into account the management of the firm. Therefore, if the companies involved in the operation have separate managements, with independent decisions about commercial strategy, budgets and business plans, their merger is assumed to create a new entity.

Most cases related to public enterprises ended with no sanctions for those enterprises (and with no restrictions regarding the mergers in which those firms have been involved). However, there is at least one example of a state-owned company that had to pay a fine in an abuse of dominance case and another one where two public banks (and other private banks) had to divest their participation in a firm. Conversely, there are no instances in which the criteria to evaluate cases involving state-owned companies differs in any way from the criteria used when privately owned companies are involved.

Botswana

The law provides that State will only be regulated for competition issues to the extent that it engages in trade in any market that is open for participation by other enterprises. Competition regulation will apply to the State if it engages in trade in a market open for participation by other enterprises. The State can have agencies that are purely not for profit and only pursue public policy objectives, e.g. Competition Authority and Botswana Unified Revenue Services. This set of SOE are not involved in buying and selling of products and services and cannot be said to be market participants. Even when they merge they are not expected to notify the Authority as they are purely for public policy objectives.[1] State can be a major shareholder or sole ownership in a company registered with Companies Registry with a sole mandate of engaging in commercial activities. E.g. Okavango Diamond Company and Botswana Oil, and competition regulation apply as these SOEs meet thresholds for definition of an enterprise and are market participants. The Authority has also assessed mergers involving BCL[2] and Norilsk.[3] Competition regulation applies to all economic activity but this is subject to various exceptions, notably exception being to statutory monopolies. In terms of the Act, competition regulation does not apply to an enterprise operating on the basis of a statutory monopoly. These monopolies are in the utility services market and include, water, electricity, rail and the export of meat.

Law provides that statutory monopolies are immune from the application of competition law. The Act uses "State" in section 3 (2) of the Act and confers qualified immunity on conduct of SOEs. On other hand, it confers absolute immunity to enterprises operating on the basis of Statutory Monopoly. This dichotomy of definitions of State enterprises as implicated by the two sections and status of differing protection from application of competition Act is a challenge. A remedy is for absolute immunity of statutory monopolies to be lifted and the test set out in section 3(2) of the Act, be the only one to determine if a "State's" conduct fall within the ambit of competition regulation. Authority's interventions cannot be fully utilised to the extent of prosecution. Mostly Authority takes a calculated approach and sensitise monopolies about benefits of competition. E.g. BMC's refusal to supply companies that relied on tallow to manufacture soap. Botswana Power Corporation, a statutory monopoly and PPC Cement, a private Limited Company had entered into an exclusive agreement for purchasing of Fly Ash from BPC which is a by-product of burnt Coal. After engaging the parties BPC allowed access of Fly Ash to other cement producers. Impact of this intervention led to, local company Matsiloje Portland Cement being able to increase its market share by now being able to access Fly ash and increase its production of cement hence provide competition to the already dominant players. Before this intervention Matsiloje Portland Cement's production was greatly hampered and was unable to effectively compete in the market to the extent of almost closing its plant.

The Authority in assessing the conduct of Statutory Monopolies above, was limited on the redress options available to it because of the immunity provision conferred on statutory

[1] The Mergers of Government parastatals, Botswana Export Development and Investment Agency with International Financial Services Centre into Botswana Investment and Trade Centre in 2013.

[2] Bamangwato Concessions Limited, a wholly owned state company involved in the mining of Copper and Nickel.

[3] A Russian company that mines nickel, platinum and copper.

monopolies and invariably would have wanted to proceed further to Tribunal stage and set case precedence. In conclusion competition law is applicable to SOEs provided: they are market participants; meet the threshold for definition of enterprise; and operate in the market open for competition by other enterprises. Competition regulation can be enhanced if the absolute immunity conferred on enterprises operating on basis of statutory monopoly can be lifted.

Brazil

This article aims to provide an overview of the competition law applicability regarding State-Owned Enterprises (SOEs) in Brazil. In general, there are no exceptions or immunities to SOEs or private companies with State participation under the current Brazilian Competition System, as the law establishes objective criteria for merger control and anti-competitive practices analysis without advantages to this type of companies.

The Brazilian Constitution establishes that the abuse of economic power related to dominance of markets, elimination of competition and arbitrary increase of profits, shall be repressed by the law, without exceptions or immunities for SOEs. In this sense, the Brazilian Competition Law (No. 12.529/2011) is applicable to all legal entities, public or private.

In some recent cases, CADE's Tribunal has analyzed mergers involving SOEs without adopting a differentiated regime; there are a few cases in which the authority considered that public interest matters related to SOEs (especially Petrobras) could affect the efficiencies analysis. CADE's Tribunal also adopted the regular regime when ruling about anti-competitive practices by SOEs and their subsidiaries; there was no preferred treatment to SOEs and CADE has applied sanctions, behavioral obligations, besides established Cease and Desist Agreements with the companies involved.

Costa Rica (SUTEL)

The explanations provided above lead to conclude the following:

- Costa Rica opted for a telecommunications market open to competition, in which one public operator, several private operators, and privately-owned enterprises co-exist and compete;
- The market liberalization model chosen brought about a series of challenges, particularly for State-owned enterprises, requiring adjustments to the regulatory scheme in force at the time.
- The telecommunications sector has one State-owned operator, ICE, which, in turn, owns three enterprises, namely RACSA, CVCR and CNFL; two other enterprises, although not directly owned by the State or government, are property of Municipalities (local governments), and these are JASEC and ESPH.
- SUTEL is the independent competition authority for all telecommunications service providers, and has acted normally, and in compliance with all internal procedures, when receiving and processing claims and *ex officio* investigations, regardless of the party under investigation.
- Of the cases examined by SUTEL to date involving abuse of dominant position, 30% have been filed against State-owned enterprises, and are mostly related to control of the essential facilities and infrastructure needed to deploy telecommunications networks.
- SUTEL has not dealt with cases or complaints against State-owned enterprises involved in absolute monopolistic or horizontal practices or cartels.
- SUTEL has processed eight applications for prior notification of a concentration involving at least one State-owned enterprise.
- Concerns continue with regards to State-owned enterprises in the telecommunications area. SUTEL has recognized the existence of actions by State or Municipal authorities that discriminate against operators or providers, particularly in government procurement contracts awarded directly to State-owned enterprises, and permits for the deployment of telecommunications networks.

Korea

State-owned enterprises should also comply with the competition law as a market participant. And if state-owned enterprises commit acts that distort competition, same set of rules should apply as to the private companies. Regarding the enforcement to the state-owned enterprises, it is necessary to review whether the state-owned enterprise corresponds to a business entity and whether an act by a state-owned enterprise correspond to "Lawful conduct pursuant to other laws". And as examples of the enforcement of the MRFTA for the state-owned enterprises, representative cases such as the abusing of market dominance and the unfair practices are introduced.

Latvia

In Latvia there is a large scale of companies which are state or municipally owned. Some of the SOE do maintain dominant position in the markets even after they have been liberalised. In addition, municipalities in Latvia are very eager to establish their own companies instead of creating an investment promoting environment. However, in Latvia, both state and municipal enterprises are treated just as any other market players and they are subject to the Competition Law.

By now, the Latvian Competition Council (the CC) has addressed to nearly all largest SOE – either through enforcement, sector inquiries or through competition advocacy. There have been cases on Latvian Railway, Freeport of Riga Authority, International Airport "Riga", Lattelecom, the only Latvian natural gas supplier Latvijas Gāze, the largest electricity supplier Latvenergo, the largest postal services provider Latvijas Pasts, etc.

Overall analyzing the CC cases against SOE it should be remained that such cases in some sense will be more complicated due to different reasons – mixed public and commercial activities that create conflict of interest, advantages and restrictive regulations arising from legislative acts, justification for calculating the correct turnover that include economic activities, how to reach effective deterrence in case of SOE with the fines and remedies.

Mexico (COFECE)

There are different legitimate rationalities to promote the development of State Owned Enterprises. In this context, Mexican government recognizes that a modern economic development policy must include a transversal competition policy that treats SOEs as other economic agent in any given market, that is be subject to the regulatory framework.

COFECE has conducted competition advocacy and enforcement actions, with special attention to the sectors where SOEs prevail, to promote a competition culture and adherence to the applicable legal framework. The purpose is to deter and sanction practices contrary to competition principles that may harm markets and therefore the general public.

Mexico (IFT)

In this report, the Federal Telecommunications Institute (IFT) presents recent cases of the application of competition law and policy, acting as both competition and regulatory authority, regarding State-Owned Enterprises (SOE) in telecommunications and broadcasting sectors in Mexico.

The IFT employs the tools provided in both the competition and sectoral laws, in order to have a timely and more effective intervention preventing and remedying historical market conditions, especially in the spectrum management for telecommunications and broadcasting sectors.

This document highlights the relevance of the issuance of competition assessments before the granting of concessions to use radio electric spectrum in the public-private projects *Red Compartida* (wholesale shared network) and *Red Troncal* (trunking public national network), and the entry of SOE to the provision of OTT services.

Mongolia

Competition law of Mongolia has been approved in 1993 as "The Law of Prohibiting Unfair Competition". The revised law was adopted as a Competition Law in 2010 in order to improve the legal environment. The objective of the competition law is to establish conditions for fair competition in the entrepreneur's market, to prevent, prohibit, restrict and control any activities that are harmful to the market and regulate competition

- The Authority for Fair Competition and Consumer Protection of Mongolia have power to make conclusions on privatization of state-owned legal entities to the draft of proposals and proposals for the privatization of state-owned entities" to pursuant to Article 15.1.15 of Article 15 of the Law on Competition.
- In Mongolia operating over 100 state-owned legal entities, over 50 percent operates in the electricity and thermal industry. In this regard, the AFCCP is set up by the monopoly and dominant positions based on the market share and geographical location based on the "Regulation on Identifying Monopoly and Dominant Farmers" by Appendix to the Resolution No. 298 of the Government. Consistent with regards to its capacity to change the quantity and volume of the merchandise supplied to the credit and to review the price change for the goods concerned has been monitored by giving license.

Peru

Forthcoming

Romania

There are two main sources of competition distortions:

- SOE anticompetitive behaviour and
- Government or local authorities' interventions in the marketplace (e.g. in regulating markets; procuring public services and providing subsidies or other support).

RCC's competition enforcement powers allow it to address anti-competitive behaviour of both privately-owned enterprises as well as state-owned enterprises. RCC can and does apply the competition rules regarding anti-competitive agreements and abuse of dominance to both privately-owned enterprises and state-owned enterprises equally. In this respect, RCC uses the same standard of proof as in the cases where privately-owned enterprises are involved. Also, in both cases, RCC verifies whether the anticompetitive behaviour is generated or facilitated by regulation (regulated conduct defense).

RCC operates the following distinctions:

- If the behaviour is mandatory, RCC does not apply competition law for past regulated behaviours. In such situations, the regulated conduct defense may be used in response to RCC-initiated enforcement cases. Nevertheless, RCC sends its report (and binding opinion) to the regulatory entity in question to take appropriate measures in order to stop the incriminated practice and remove competitive concerns. Such measures must then receive an approval from the RCC before entering into force. If the regulatory entity does not comply with RCC's binding opinion, RCC will start legal proceedings against the regulator, including opening a judicial procedure to restore competition on the market;
- If the behaviour mentioned in the regulation is not mandatory or is rather vague, besides the cease-and-desist order, the undertakings may be fined by RCC. Regulated conduct defense may be used in response to RCC enforcement actions. However, such a defense would only be regarded as a mitigating circumstance, resulting in a reduction of the fines (up to 10% from the base level of the fine). In private enforcement cases, the undertakings in question will continue to be considered liable for damages. Where the undertakings in question are already subject to several obligations imposed by NRA, but those may be insufficient, ineffective (too general) or may address only some services due to the limited area of NRA's competences. In its decision RCC may impose supplementary obligations in order to restore the competitive environment. In that situation, RCC considers that it is inefficient to just duplicate the obligation in question; remedies imposed by RCC are, as much as possible, complementary to those already imposed by the regulator and cover only markets where the undertaking is dominant.

The analysis of RCC takes also into consideration other aspects whenever this is necessary for the assessment of competitive conduct. This may be the case when a SOE or POE may be entrusted with the provision of public services or universal services or services of general economic interest, may be subject to the policy of government or local authorities related to a certain public interest (i.e. defense, public safety or public health etc.) or is entrusted with the regulatory powers.

Romanian competition law applies also to government or local authorities' interventions that may have anticompetitive impact on the markets. It is important to stress that the

interventions/administrative bills that are issued by the government or local authorities in application of a law or to protect a public general interest (i.e. universal services, protection of the environment etc.) are exempted from the application of national competition law. But even in these cases RCC has specific powers to provide advice and make proposals to the Romanian Government to ensure competition neutrality or at least for the minimum distortion of competition (i.e. proportionality) of the intervention.

It is worth to mention that the government and local authorities have the obligation to submit to RCC draft administrative acts that may have anticompetitive impact on the markets. RCC issues an opinion regarding the administrative measures in question including proposals to amend the bills in order to ensure compliance with the competition law.

RCC monitors government or local authorities' intervention on behalf of owned or controlled SOEs especially when: (i) it raises barriers to entry[4] and/or to expansion[5] in the market for competitors, (ii) creates a regulatory protection of SOEs[6].

[4] Typically, exclusive or special rights.

[5] I.e. undue direct or indirect subsidies and support (preferential access to credit and other financial services, information advantages) or other preferential treatment of SOEs that may lead to overcapacity and market distortions or through procurement policy.

[6] SOEs face different regulatory burdens than private own firms. Also, government may grant privileges and immunities for SOE. In this respect, SOEs may benefit from regulatory exemptions, lowering their operating costs or are not subject to the same costly regulatory regimes as private firms. These exemptions may range from compliance with disclosure requirements to securities regulators, to exemptions from building permit regulations or from zoning regulations, to exemption from local or national taxes.

Russian Federation

Principle of competitive neutrality is established in the fundamental law of the Russian Federation – the Constitution of the Russian Federation. It proclaims that "in the Russian Federation recognition and equal protection shall be given to the private, state, municipal and other forms of ownership".

Establishing of the common rules of competition for economic entities of all forms of ownership is the main principle of the FAS Russia and its goal.

The Russian antimonopoly legislation has no limits or exceptions for control over state enterprises actions in any area. Proceedings of proving of violations of antimonopoly legislation are the same in relation to entities of all forms of ownership.

Currently, the FAS Russia has developed a draft federal law on amending the competition law and certain legislative acts of the Russian Federation. This law prohibits the creation of enterprises with state or municipal participation in competitive markets.

According to the draft law, the FAS Russia proposes to allow the participation of state-owned enterprises in three cases only:

1. in markets that are in a state of natural monopoly;
2. if the founders are federal executive bodies that carry out functions for the development and implementation of state policy in the field of defense, state administration in the field of security of the Russian Federation, state and public security, the list of which is established by the Government of the Russian Federation, to ensure defense and security of the Russian Federation;
3. if the creation of such an enterprise is provided for by federal law, an act of the President of the Russian Federation, or an act of the Government of the Russian Federation.

Positive changes are occurring in the field of procurement. Thus, the Federal Law of July 18, 2011 No. 223-FZ "On the procurement of goods, works, services by certain types of legal entities" provides for special rules governing the procurement of companies with a share of state property. Large-scale amendments to this law, adopted in 2017, created a closed list of ways to conduct the procurement of state-owned companies from small and medium-sized businesses, as well as the procedure for their implementation - their full incorporation into electronic form. Such procurement will be carried out on universal trading platforms operating in accordance with the Federal Law of 05.04.2013 No. 44-FZ "On the contract system in the field of procurement of goods, works, services for state and municipal needs".

Singapore

Competition law in Singapore is administered and enforced by the Competition and Consumer Commission of Singapore ("**CCCS**"). The Competition Act expressly excludes the conduct of the Government or a statutory body as the purpose of competition law in Singapore is to regulate market players.

While state-owned enterprises and government-linked companies play a significant role in Singapore's economy, they are not treated differently under the Competition Act from other companies that engage in commercial economic activities. CCCS has enforced the prohibitions in the Competition Act against anti-competitive agreements and conduct against state-owned enterprises and government-linked companies.

In two abuse of dominance cases, CCCS found that the state-owned enterprises had infringed the Competition Act, and consequently imposed financial penalties in one case and accepted voluntary commitments in the other. There was no evidence that the state-owned enterprises were acting on behalf of the Government.

CCCS is also exploring the impact of state-owned enterprises in the logistics sector as part of an ASEAN Experts Group on Competition study, which is supported by the OECD. The goal of the study is to recommend how restrictions on competition relating to the role of state-owned enterprises in ASEAN Member States can be amended to better facilitate competition.

South Africa

This note summarises the Competition Commission of South Africa's ("the Commission") response to the Organisation of Economic Cooperation and Development ("OECD") call for written submissions to inform the roundtable discussion on investigations into conduct by State-Owned Enterprises ("SOEs").

The Commission has investigated a number of SOEs for anti-competitive conduct. The results of which can be broadly grouped into outcomes which are considered either "good", "bad", or "ugly".

In an example of a 'good' outcome, the Telkom case, the Commission faced and overcame jurisdictional challenges to its mandate to enforce competition policy on firms which are overseen by regulatory bodies. Further, the imposition of well thought-out behavioural remedies into this telecommunications monopoly has resulted in effective competition.

The two 'bad' cases, SAA and Eskom, provide an insight into the difficulties faced by the Commission when investigating SOEs. Namely, SOEs tend to be repeat offenders, the Commission is unable to investigate government support (bailouts, regulations, etc.), and the challenges that arise when an SOE leverages its dominance as a natural monopoly into more competitive levels of the value chain.

Lastly, we provide the 'ugly' example of the Transnet case. This case study shows how the inability for the Commission to investigate government and regulatory bodies can result in detrimental market outcomes. In this case a new entrant was effectively foreclosed, resulting in: the SOE maintaining a monopoly, delays in the construction of an important pipeline, significant cost overruns, and the burden placed on consumers through higher fuel prices.

The submission concludes by suggesting behavioural remedies and a government backed competitive neutrality framework initiative may address some of these issues.

Sweden

In addition to the general antitrust prohibitions on anti-competitive agreements and abuse of dominance, the Swedish Competition Act[7] also includes specific provisions regarding state-owned enterprises (SOEs) and competitive neutrality. These provisions are purely domestic and have no foundation in the EU treaties.

Below-cost pricing that distorts competition is an example of conduct prohibited by the Swedish rules on competitive neutrality. The Swedish Competition Authority (SCA) receives many complaints from private firms concerning low prices charged by SOEs, and has therefore explored theoretical and practical issues regarding such pricing conduct.

In contrast with predatory pricing by private firms, SOEs' pricing conduct that forecloses the market might not be followed by a recoupment period with higher prices. Such conduct may nevertheless lead to economically inefficient outcomes.

In so far as SOEs benefit from cost advantages that do not reflect true productive efficiency, cost measures used for testing the effects of pricing conduct may need to be adjusted in order to take that into account.

Potential measures by SOEs to improve competitive neutrality in their pricing are in some ways restrained by local government legislation concerning prices. The prime-cost principle (*självkostnadsprincipen*) limits municipalities, when providing goods or services, to only charging enough to cover the local government´s total costs of the product offered. A competition law prohibition implying a price floor exceeding the level of the prime-cost is hence not possible.

In order both to define a competitively "neutral" price and to establish the level of the prime cost, the SCA needs to collect cost information from the SOE. However, in doing so, the SCA faces several challenges. Often the commercial activity of the SOE is not economically separated from non-commercial activities. The allocation of costs may also be inadequate, thus giving an incomplete picture of the costs of the commercial activity in question.

The commercial activities of an SOE may be closely integrated with non-commercial activities. The commercial activity could consist of the external sale of goods or services also produced for internal use by the SOE. The incremental costs of producing the extra volume for external sale might be low, even in the long run. Seen from a competitive neutrality perspective, therefore, an SOE setting prices strictly according to its incremental costs for external sales could find itself in a very different competitive situation on the market in comparison with private actors, which may not have the same advantages as the SOE.

[7] Konkurrenslag (2008:579)

Tunisia

Malgré l'adoption de la politique d'ouverture et de libéralisation économique en Tunisie, la présence de l'État dans l'économie à travers les entreprises publiques reste encore forte.

Ainsi, l'État est encore présent comme acteur économique dans différents secteurs.

La présence des entreprises publiques pouvant bénéficier de plusieurs avantages peut causer de sérieuses atteintes au principe de la neutralité concurrentielle.

Toutefois, les secteurs encore fermés à la concurrence et les entreprises jouissant d'avantages spécifiques, ne sont pas exceptés de l'application du droit de la concurrence qui se réfère à des critères relatifs à la notion de l'entité économique, de la nature de l'activité, et de la preuve des pratiques anticoncurrentielles. Le Conseil de la concurrence a toujours consacré ce principe à travers plusieurs arrêts dans des affaires impliquant des entreprises publiques.

Cette contribution se propose de montrer que l'application du droit de la concurrence ne peut constituer à elle seule, la solution aux problèmes de concurrence posés par la présence des entreprises publiques dans la vie économique.

Ukraine

1. Introduction

According to the Ukrainian Law on Protection of Economic Competition a general definition of an undertaking also covers state-owned enterprises (hereinafter –SOEs) which means that SOEs fall within the scope of competition law to the same degree as private entities.

This contribution reviews the experience of the Antimonopoly Committee of Ukraine (hereinafter – AMCU) in cases involving SOEs in merger control and antitrust investigations.

2. Merger control

AMCU considered the application of the Ministry seeking permission for the reorganization of SOEs of maritime transport through the allocation of assets in the form of integral property complexes (port infrastructure objects, other assets, rights and obligations related thereto, and creation of a state enterprise A as a result of the spin-off.

The purpose of the concentration was to streamline the system for collection and distribution of port fees, the distribution of administrative functions for the safety of navigation and the economic activities of state enterprises of maritime transport.

As a result of the concentration, the newly created state enterprise A founded by the Ministry, would receive the right to use assets in the form of integral property complexes of SOEs of maritime transport, which are intended to perform administrative functions for the collection of port fees.

Consequently, participants in this concentration - SOEs of maritime transport were considered by AMCU as business entities that were competitors, notwithstanding the fact that they were under the general management of the same ministry.

In 2006, AMCU forbade the creation of the State Concern, since such a concentration might have led to monopolization in the national market of sea and river ports (berths) for cargo handling.

Participants of the State Concern were 20 maritime trade ports, which are SOEs that are part of the management of the Ministry of Transport.

Handing down a negative decision the AMCU took into consideration the following:

- The purpose of the State Concern would be to coordinate and centralize the economic activity of the enterprises that are part thereof, to ensure the proper conditions for their functioning, to develop physical infrastructure of the participants, with the centralization of the functions of scientific and technical and industrial development, investment, financial, foreign economic and innovation activities;
- According to the draft Concern charter, the State Concern would function as a single economic entity;

- The merger of all commercial sea ports within the Concern, which will develop, approve and implement general schemes, strategic plans, feasibility studies for development, reconstruction, modernization and technical re-equipment of sea merchant ports etc., would eliminate competition between sea trading ports;
- As a result of the formation of the State Concern, the structure of the market would undergo significant changes: a significant part of the market will belong to the State Concern in the form of commercial sea ports, and the rest of the market would be include a large number of other economic entities having an incomparably small share in the market and being incapable of competing with the state owned sea ports;

The total share of sea merchant ports in the market of services of sea and river ports (berths) for the handling of cargoes exceeded 35 percent.

AMCU considered a merger clearance application of the city council seeking approval of a transaction of merging 11 municipal enterprises into a municipal utility company.

AMCU established that merging of 11 enterprises into the utility company would effectively discontinue their activities. 11 communal enterprises belonged to the communal property of the city, subordinated to the housing department and the distribution of residential areas, but at the same time were separate legal entities with independent balance sheets.

AMCU did not find the above enterprises as linked to any other economic entities.

As a result, the declared concentrations were not deemed as negatively affecting competition in the local (city) market of services for maintenance of buildings and adjacent territories, as the applicants were granted permission.

3. Anticompetitive conduct

Recently, AMCU passed a decision in a case of dominance abuse by a SOE. 'Artemsil' state enterprise (a major national manufacturer of salt with a market share ranging from 75% to 83% depending on a type of product) was found to have abused its dominance by arbitrarily applying different prices to equivalent sale contracts and created barriers to market access by refusing to conclude agreements with potential buyers without any reasonable justification.

Another dominance abuse case involving a SOE is pending before the AMCU. Ukrspirt, a state 100% monopoly for manufacturing spirit (rectified ethanol) is alleged of having abused its dominance by maintaining discriminatory prices and applying arbitrary discounts to the buyers with no objective justification. A statement of objections in the case is expected to be released in December, 2018.

United States

Forthcoming

BIAC

Competition law authorities around the world face unique issues when reviewing transactions involving state owned-enterprises (SOEs). A SOE is a public enterprise, owned partially or completely by a state government rather than by private investors.[8] SOEs have become increasingly common on the world stage, and in 2014 represented 23% of the Fortune Global 500 list.[9] SOEs may pursue strategic goals other than or in addition to profit maximization (which is what private enterprises are presumed to pursue). For example, SOEs may be tasked with providing public goods (e.g., electricity and gas, or transportation), increasing employment, providing affordable services (e.g., postal services or telecommunications), and limiting private and foreign control of a national economy.[10] SOEs are often an invaluable tool for economic development and the implementation of industrial policy and can serve as major sources of employment.[11] Developed countries have historically and developing countries continue to use SOEs to mobilize capital and provide infrastructure.[12]

As SOEs become increasingly prevalent in world markets, competition law authorities will undoubtedly confront the unique challenge of reviewing transactions in which they are involved.

Procedurally, a common inquiry will be whether sibling entities owned by a state government should be included in the threshold analysis. This issue was considered in *EDF/CGN/NNB Group*, where the EC assessed CGN's level of autonomy and the ability of the Chinese government to facilitate coordination, ultimately finding that the sibling entity revenues in the energy industry should be included in the threshold analysis. Another procedural issue that may arise is a timing delay in regulatory approval, which could have significant consequences in a multi-jurisdictional review. Competition law authorities should be cautious when issuing RFIs to SOEs and/or their sibling enterprises, keeping in mind that SOEs may not have direct access to the information being requested and there may be significant delays in obtaining it.

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8 David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L.J. 479 (2003).

9 Jan Sturesson, Scott McIntyre & Nick C Jones, *State-Owned Enterprises: Catalysts for public value creation?* 9 (PwC, Public Sector Research Centre, Apr. 2015), *available at* www.pwc.com/gx/en/psrc/publications/assets/pwc-state-owned-enterprise-psrc.pdf.

10 Sappington & Sidak, *supra* note 8, at 479-480; Sturesson, *supra* note 9, at 14.

11 OECD, COMPETITIVE NEUTRALITY: MAINTAINING A LEVEL PLAYING FIELD BETWEEN PUBLIC AND PRIVATE BUSINESS 11 (2012), *available at* www.oecd.org/daf/competition/competitiveneutralitymaintainingalevelplayingfieldbetweenpublicandprivatebusiness.htm; OECD, GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES (2015), *available at* www.oecd.org/corporate/guidelines-corporate-governance-SOEs.htm; OECD, WORKING PARTY ON STATE OWNERSHIP AND PRIVATISATION PRACTICES–COMPENDIUM ON SOE GOVERNANCE (Mar. 7, 2017), *available at* http://biac.org/wp-content/uploads/2017/03/DAF-CA-SOPP20162-REV2-En.pdf.

12 Sturesson, *supra* note 9, at 14.

Substantively, authorities will often have to assess whether an SOE's sibling enterprises should be considered part of the SOE's market concentration. Applying *EDF/CGN/NNB Group* to the question of which sibling entities can be considered rivals, authorities should assess whether strategic decisions, business planning and budgeting are independent, and whether commercial conduct can be coordinated. Finally, competition law authorities should tailor their examinations depending on the extent to which a state government controls a certain SOE. For example, a higher level of scrutiny would be appropriate if circumstances suggest that the SOE lacks independence or that the government exercises de facto control over the SOE.

CUTS International

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.[13] SOEs in the country are generally insulated from market forces and receive benefits, such as, government-imposed barriers to entry, tax rebates, preferential loans, concessional financing and capital injections, purchase price preference in public procurement, subsidies etc. Given their prevalence and the position of privilege enjoyed by them, they exhibit an equal propensity of anticompetitive conduct as any other undertakings through cross-subsidising, pricing below competitive levels, overpricing in case of licensed monopolies, collusive agreements etc.

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. However, the successor of MRTP Act, i.e. the Competition Act, 2002 advocates for competitive neutrality by treating SOEs and private enterprises at par with each other. The Act covers all commercial activities of the Government in enforcing Competition Law except for activities pertaining to its Sovereign functions.

In the past, not only has the Competition Commission of India (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 Industrial Corporation, Metro Rail Corporations, Steel PSU etc. but cases against private players have also been taken up on the complaints of SOEs. While some cases were dismissed without an enquiry, in others enquiry was ordered but the CCI did not find any violation. Most importantly there has been few cases where activities of SOEs were found to be violative of the Competition Act of India, and such SOEs were fined accordingly. Interestingly, even though there is no exemption for SOEs under the Competition Act, in few cases (in the Oil and Banking sectors), government brought specific legislation to exempt SOEs from CCI's merger control review.

Considering the ability of SOEs to negatively affect competition and distort the market, combined with the sensitive nature of public service responsibilities entrusted upon them, it is pertinent that SOEs be subjected to similar competition law principles as private enterprises. However, there is 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. Having a national competition policy could prove to be an effective tool. Against this backdrop, the submission prepared by CUTS International advocates for competitive neutrality where laws are applied to all market players, SOEs and private players alike, so as to create a level playing field, enhance consumer welfare and sustain healthy competition in the market.

[13] 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