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THE PROMOTION OF COMPETITIVE NEUTRALITY BY COMPETITION AUTHORITIES

Summaries of contributions

-- Session III --

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This document reproduces summaries of contributions submitted under Session III of the Global Forum on Competition to be held on 6-8 December 2021.

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

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Table of contents

The promotion of competitive neutrality by competition authorities	3
Bangladesh	4
Brazil	5
Finland	6
Japan	7
Kenya	8
Mexico	9
Russian Federation	10
Ukraine	11

*The promotion of competitive neutrality by competition
authorities*

-- Summaries of contributions --

Abstract

*This document contains summaries of the various written contributions received for the discussion on "the Promotion of Competitive Neutrality by Competition Authorities" held during the 20th meeting of the Global Forum on Competition (6-8 December 2021, Session III). 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 *.*

Bangladesh

Competitive neutrality is a regulatory framework within which public and private enterprises face the same set of rules bringing competitive advantage to any market participant. Proper implementation of a competitive neutrality framework ensures that government bodies do not obtain an advantage over private enterprises. This is essential for the effective use of resources within the economy and thus the achievement of growth and development.

Bangladesh Competition Commission (BCC) addresses competitive neutrality through Section- 15 & 16 of Bangladesh Competition Act, 2012. BCC intends to identify some tools and frameworks, non-enforcement actions, raising awareness enforcement to address competitive neutrality.

BCC is concerned with offering supports/advantages to some state owned enterprises. Uneven liberalisation and sector regulation can distort market competition. BCC applies competition law to all enterprises in its jurisdiction in an equal manner.

During Covid-19 pandemic Government of Bangladesh declared 23 stimulus packages to ensure recovery and development of economic and health sectors. BCC requested the government and Bangladesh Bank (Central Bank) to ensure proper utilization of stimulus packages while selecting the beneficiaries and distributing money to them. BCC observed that the state owned transportation departments, utility services providers and some other sectors sometimes enjoy trade liberalization, favourable tax treatment and some sort of compensation by the state authority.

BCC has also noticed that some public procurement events or instances in its jurisdiction distort competition in practice.

Thus, in order to avoid market distortion due to lack of competition neutrality BCC has been working with the government and other public authorities/sector regulators.

Brazil

Brazil is a complex country, with a significant history of groups of interest that receive state protection and benefits, ultimately lessening competitive neutrality. This paper describes how Brazil conducts competitive neutrality enforcement, providing some examples.

From a normative perspective, the Brazilian Antitrust Law offers mechanisms for competitive neutrality enforcement according to the parameters of antitrust literature, which include competition advocacy. Another law that regulates this matter is the Economic Freedom Law. This piece of legislation is expressly against regulatory abuses, such as protectionism, except when established otherwise by a specific legal provision. Moreover, the law sets forth that regulations must include a Regulatory Impact Analysis. Finally, there is the Regulatory Agencies General Act, which also includes similar stipulations.

Despite these enactments, protecting competition always demands steady enforcement, and the Brazilian Competition Defense System (SBDC) is in charge of leading this activity. The SBDC is comprised of CADE, i.e. the competition authority, and the Ministry of Economy's Secretariat for Economic Monitoring (SEAE), a body with considerable political power. Moreover, the same Ministry of Economy adopted, in May 2021, the OECD's Recommendations on Competitive Neutrality.

It is not uncommon that, aiming at other objectives, the Brazilian government adopts measures that undermine competitive neutrality in an undue or unnecessary way, doing more harm than good to society. This paper summarises a few SBDC's actions to avoid or stop undue restrictions that weaken competitive neutrality: (1) the taxis vs. Uber conflict; (2) payment of taxes through FinTechs; (3) protectionist measures for road passenger transport; (4) Petrobras's monopoly over the refined oil and natural gas market; (5) Direct-to-Home service providers' compulsory distribution of hybrid set-top boxes; (6) Brazilian shipyards' privileges; (7) Open banking's self-regulation approach; and (8) protectionist measures for family farming.

Finland

The Competition Act contains certain provisions with the explicit objective of ensuring competitive neutrality. These provisions grant the Finnish Competition and Consumer Authority (hereinafter referred to as the FCCA) the authority to intervene, primarily through negotiations, in the provision of goods and services in public sector business activities, if a business practice (such as pricing below cost) or organisational structure (such as undertakings controlled by the public sector) prevents or distorts competition on the market or is in contrast with the requirement of market-based pricing in the Local Government Act. If the desired results would not be achieved through negotiations, the FCCA has the power to prohibit the use of the business practice or organisational structure or impose such conditions on the continuance of the practice or operations, which ensure neutral competitive conditions on the market. The FCCA may enforce its order, conditions, prohibition or obligation by imposing a periodic penalty payment. In 2020 a further provision requiring accounting separation of the economic activity carried out in a competitive market environment was added to the provisions on ensuring competitive neutrality.

The Local Government Act contains provisions directing municipal activities in a market environment. The main rule establishes that municipalities must incorporate their activities, whenever they are carried out in a competitive market environment. The provision contains several examples of situations when the municipality is not considered to carry out a task in a competitive market environment. These relate e.g. to the municipality's legislated tasks. Certain situations of activity in a competitive market environment are also exempted from the incorporation obligation. In these situations the municipality is however obliged to adopt market-based pricing.

The FCCA may also promote competitive neutrality through different advocacy measures. The FCCA may prepare proposals and initiatives to promote competition and eliminate regulations and provisions that restrict competition as well as conduct research, studies and comparisons within its area of responsibility. The FCCA is often requested by legislative bodies to comment on preparations of legislation with the perspective of ensuring competitive neutrality.

Japan

Japan's Antimonopoly Act (hereinafter referred to as the "AMA".) regulates anticompetitive conducts by enterprises, etc. If the national government or the local governments operate business activities, they are subject to the AMA in the same way as private enterprises. In order to achieve policy objectives other than competition policy, exemptions from the application of the prohibition provisions of the AMA are provided for certain activities in some fields, but they are limited.

The AMA does not have rules on government regulations or subsidies from the viewpoint of competition neutrality, but the Japan Fair Trade Commission (hereinafter referred to as the "JFTC".) has been making various efforts to ensure competition neutrality in markets.

The JFTC has been applying the AMA to enterprises regardless of their form of ownership, and has been reviewing the scope of the exemption systems in accordance with changes in the economic structure. Government policies, such as regulations and subsidies, are not subject to legal measures based on the AMA, but the JFTC has been conducting advocacy activities persuasively by analyzing the effects of government policies on competition, taking into account the viewpoint of competition neutrality, or by grasping the facts in detail and clarifying how adverse effects on competition could occur in fact-finding surveys. Such tools will continue to be useful in ensuring competitive neutrality.

In the contribution paper from Japan, we will explain the relations between the AMA and competition neutrality in Section 2, and then explain the JFTC's efforts to ensure competition neutrality in Section 3 through Section 5. In Section 3, we will explain "Checklist of Competition Assessment" established by the JFTC as an example of the JFTC's efforts to ensure competition neutrality when establishing, revising or abolishing regulation. In Section 4, we will explain the outline of the "Survey on Cashless Payments with QR code and barcode" published by the JFTC. Finally, we will explain the outline of the "Guidelines for Public Support for Revitalization in view of Competition Policy" in Section 5.

Kenya

The concept of competitive neutrality in enforcement implies that no enterprise, either in the public or private sector is advantaged or disadvantaged primarily because of its ownership. This paper examines the concept of competitive neutrality within the Kenyan context and highlights Kenya's experience in competition enforcement that aims to promote a level playing field for enterprises regardless of ownership. Markets that have state owned enterprises (SOEs) continue to raise red flags for potential anti-competitive practices. SOEs have made it difficult for new entrants to enter markets for competition to thrive in those sectors. As a young Competition Agency (CA) celebrating its decade of competition law enforcement, the Authority does not under any circumstance use a different yardstick in assessment of competition in markets where SOEs operate. Equally, the Authority does not use a different wand in sanctioning enterprises that have infringed the Act – whether publicly or privately owned. Some of the sectors dominated by SOEs in Kenya include the aviation industry, electricity distribution, banking sector, agricultural sector, among others.

This paper highlights the regulatory benefits of a level playing field, the role of the Authority in promoting the principle of competitive neutrality, the cases and tools that Authority has used to ensure no enterprises is advantaged than the other and pose enforcement challenges. The paper concludes by urging CAs to embrace competition advocacy (with SOEs) to deal with legislative distortions of competitive neutrality focusing on subsidies only to specific companies (SOEs); market access limitations and “public services” entrusted in a specific discretionary way.

Mexico

COFECE

Since 2013, a constitutional reform in Mexico elevated the right to competition in markets to constitutional status and made its principles cross-cutting to the actions of the entire government. It also introduced competition in the electricity and hydrocarbon sectors. In addition, the Constitution mandates that procurement must be governed by certain principles of efficiency to be achieved through competition. Competitive neutrality is a necessary condition for all of the latter, as it allows and motivates participation both in energy markets and procurement procedures. However, since 2019 there has been a significant swift away from competition principles in these sectors. Pursuant to its mandate, in its role as competition ombudsperson, the Federal Economic Competition Commission (COFECE or Commission) has enacted diverse advocacy actions to promote and defend competition and competitive neutrality in these activities. The first section provides a brief account of the shift away from competition that has taken place since 2019 in these activities. The second part describes some of COFECE's most relevant interventions to counteract regulatory interventions with negative effects in the energy sector (electricity and hydrocarbons industries) that have raised competitive neutrality concerns with respect to *Petróleos Mexicanos* [PEMEX]¹ and the *Comisión Federal de Electricidad* [CFE]². The third section describes the Commission's advocacy efforts to address the distortionary effects of the Mexican public procurement regulatory framework that favours some firms over others.

Federal Telecommunications Institute (IFT)

This note aims to share the legal framework under which the Federal Telecommunications Institute (IFT), as competition and regulation authority, assesses, monitors, fosters and enforces Competitive Neutrality, to ensure that all economic agents in the telecommunications and broadcasting sectors enjoy a level playing field and undistorted markets.

In addition, it provides information on three recent case studies, which demonstrate how the IFT has established conditions to prevent conducts that might unduly restrict or distort the competitive market conditions of State-Owned Enterprises participating as telecommunications services providers, including: i) CFE Telecommunications an Internet Access for all (CFE-TEIT, by its acronym in Spanish); ii) Wholesale Broadband Shared Network (*Red Compartida*), and iii) the IFT's economic opinion on Access to Poles and Rights-of-Way of the National Electricity System.

¹ *Petróleos Mexicanos* (PEMEX): Since 1971, PEMEX was considered a decentralised body of the Federal Public Administration. Naturally, the federal executive retained control and absolute discretion over the most important positions. The New Law of PEMEX that arose as a result of the 2013 energy reform establishes the new regime applicable to PEMEX as the exclusive property of the federal government, with legal personality, its own assets and technical, operational and managerial autonomy.

² *Comisión Federal de Electricidad* (CFE): From its creation on 14 August 1937, had the purpose of organising and directing a national system for the generation, transmission and distribution of electricity. The commission was given the status of an official agency and was made up of three members, including the Minister of the Economy as president, an executive member and a secretary member appointed by the federal executive. The above is evidence of the tight control that the federal government has had over the commission since its inception, despite the fact that it was given certain powers which gave it the flexibility to carry out all kinds of operations related to the fulfilment of its purpose.

Russian Federation

The legal foundations of competitive neutrality are contained in the country's fundamental act – the Constitution of the Russian Federation, which establishes equality in the recognition and protection of all forms of ownership.

Antimonopoly legislation, based on the assessment of the presence of market power, contains the same requirements for both organizations with state participation and private organizations.

Thus, the legislation of the Russian Federation, including in the field of antimonopoly regulation, establishes the same requirements for economic entities of private, state, municipal and other forms of ownership.

The main authority carrying out activities to protect competition and ensure competitive neutrality is the Federal Antimonopoly Service (the FAS Russia).

In order to ensure competitive neutrality, the competition authorities, represented by both the FAS Russia and its Regional Offices, actively cooperate with law enforcement authorities and the Prosecutor's Offices of the Russian Federation, which, among other things, can conduct prosecutorial inspections.

In addition, the FAS Russia carries out its activities in cooperation with other federal executive authorities, the Central Bank of the Russian Federation, state authorities of the constituent entities of the Russian Federation, local authorities, public associations and other organizations.

Ukraine

The analytical process of determining the monopoly (dominant) position consists of several stages: market definition, calculation of market shares of economic entities, the level of market concentration, the presence of barriers to entry and determination of the presence of market power of economic entity with a monopoly (dominant) position. As part of identifying and proving the abuse committed by economic entity, the economists are involved in:

- Determining of competitive price that could exist in conditions of significant competition, as well as in analyzing the setting of “predatory” prices by dominant firm;
- Analysis of the cost-benefit ratio;
- Evaluation of the discriminatory effect of applying different prices or different acquisition conditions to an equivalent good;
- Analysis of the nature of the discounts granted, whether or not they are economically justified, or just intended only to discourage customers from purchasing the relevant goods from other suppliers;
- Evaluation of the damage to economic entities or consumers from exploitative actions such as limitation of production or technological development;
- Analysis of the exclusive contract conditions in terms of economic pressure or financial incentives, which lead trading partners or consumers to refuse from dealing with third parties, in particular actual or potential competitors of the dominant firm etc.