



UNCTAD RPP Competitive Neutrality Project

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Never Stand Still

Faculty of Law

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Key issue: impact of government in the market

Government impacts markets even if competition laws apply to government bodies

- Laws and regulations
- Policy decisions
- Government business in markets



What is competitive neutrality and why is it important?

- Level playing field for competition means the most efficient competitor will deliver goods and services at the lowest price
- Significant government business in competition with the private sector should not have a competitive advantage because it is owned and controlled by government
- Competitive neutrality policy is the steps or mechanisms put into place to ensure that the market is “neutral”
- Both national and international implications
- Relationship with industrial policy and state capitalism



Potential competitive advantages of government businesses

- Immunity from taxes, charges and regulatory requirements
- Explicit or implicit government guarantees on debts
- Concessional interest rates on loans
- No accounting for depreciation expenses or achieving a commercial rate of return
- Effective immunity from bankruptcy
- Pricing policies which do not take full account of production costs



Potential disadvantages of government businesses

- Greater accountability, such as administrative review and reporting requirements
- Community service obligations
- Reduced managerial autonomy
- Compliance with government policy on wages, employment and industrial relations
- Other policy wishes of government/political influence



Australian National Competition Policy

- The most systematic distortions arise when government participates in competitive markets
- This should be dealt with in a systematic way
- Competitive neutrality policy introduced to “significant” government businesses
- Supported by corporatisation, pricing directions when supplying to other government bodies, tendering
- Full cost attribution for significant business activities
- Complaints processes



Competitive neutrality policy in Australia

- Comprehensive approach and relatively successful
- Built on reforms which had already begun to corporatise government businesses and separate commercial from regulatory and other activities
- Against the background of:
 - a well-established and enforced competition law
 - substantial commitment to an competition law and policy reform by all relevant jurisdictions
 - incentives to all jurisdictions in the form of payments as reward for implementation

For these reasons the Australian approach will not be suitable for all jurisdictions



Competitive neutrality policy in Australia

Review in 2006 found that

- Further commitment to better governance still required
- Complaints handling in all jurisdictions
- Rate of return still below commercial rates for most government businesses

Harper Review 2015 recommendations:

- Broader application of Competition and Consumer Act to activities of government- “all activities which have a trading or commercial character”
- Further separation of government businesses into smaller independent business activities to foster competition with private sector
- Increased choice in human services
- Called on governments at all levels to “recommit to competitive neutrality policy”
- Review policies and update; further specific issues to be addressed; overview by independent body such as proposed Australian Council for Competition Policy
- Independent adjudication of complaints; public responses and discussion in annual reports
- Procurement provisions should not restrict competition unless benefits outweigh costs and outcome can only be achieved by restricting competition.



OECD Recommendations 2012

Eight priority areas of reform:

- Operational form of government business;
- Cost identification;
- Rate of return requirements
- Public service obligations
- Tax neutrality
- Debt neutrality
- Regulatory neutrality
- Public procurement



Research project agenda: original volunteers 2011

- China

Prof Xu Shiyong

- Malaysia

Wan Khatina, May Fong Cheong

- Pakistan

Joseph Wilson

- Russia

Vladimir Kachalin

- Switzerland

Fabio Babey

responded to a range of questions about their jurisdictions

Plus contributions from Graham Mott and Alberto Gabriele of UNCTAD



1. What is the nature of government bodies within the jurisdiction?

China

- Report with substantial historical background to the establishment, operation and regulation of SOEs against the background of socialist public ownership and the State-owned economy- “socialist market economy”
- Wide range of categories of SOEs identified, only some of which are in markets with private businesses and have the purpose of making profits
- Much corporate restructuring
- Establishment of State-Owned Assets and Administration Commission (SASAC) in 2003
- Construction of systems of Boards of Directors
- Many recent attempts to create “mixed ownership”



What is the nature of government bodies within the jurisdiction?

Malaysia

Bodies privatised ; some bought back after Asian Financial Crisis 1997

- Government support to ensure that services available affordable prices
- There are bodies under direct government ownership, GLCs and GLICs
These also exist at state level
- Also statutory bodies
- Golden shares
- GLC Transformation Program commenced 2004 for 10 years aimed at the creation of regional champions



What is the nature of government bodies within the jurisdiction?

Pakistan

An SOE can be established through an Act of Parliament , Presidential Order or Executive Decree and government control varies from SOE to SOE

Gives examples of Pakistan National Airlines, Pakistan State Oil, National Logistics Cell, Pakistan National Shipping Corporation, Oil and Gas Development Company Limited and electric supply distribution companies, all of which are different



What is the nature of government bodies within the jurisdiction?

Russia

Federal, State and Municipal unitary enterprises

Detailed oversight with annual publicly tendered and transparent audit process

Commercial bodies but also serve public needs

Switzerland

Many SOEs have been privatised



2. Does competition law apply to SOEs?

China

Theoretically yes but issue more complex in practice

Malaysia

Yes

Pakistan

Yes

Russia

Yes

Switzerland

Yes



3. Analysis of advantages/disadvantages of government ownership

China Advantages

- Since 2007 only SOEs in certain sectors are subsidised for reasons which include the public interest
- Advantages of credit finance
- Advantages of personal relationship with Government
- Advantages of policy support
- Advantages of land-use rental
- Advantage of mineral resource rental
- Advantage of Enterprise Income Tax

Disadvantages

- Broader Corporate Social Responsibility
- Public welfare oriented functions
- Inefficiency of corporate governance



Analysis of advantages/disadvantages of government ownership

Pakistan

Advantages

- Turnover tax for Pakistan International Airlines is .5% but 1% for private competitors
- Concessions in regulatory fees
- Sovereign guarantees for loans

Disadvantages

Interface with government in their operations/lengthy decision-making/red tape



4. Is CN addressed at all? Corporatisation? Governance? Some type of framework?

- All respondents are at some stage of major reform through corporatisation-
developing countries are further back
- The level of transparency in government varies greatly
- No mandated frameworks exist
- Some respondents assumed that application of the competition law in itself would
solve problems of competitive neutrality
- Pakistan and Russia have advocacy options
- Pakistan and Russia also have complaints mechanisms



5. Analysis of selected bodies

China

Oil industry (Xu)- move from planned production to 3 SOEs
(CNPC,SINOPEC,CNOOC)

Cement industry (Xu)

Conclusions on approach in China (Xu):

Priorities:

- At the policy level, developing a strong competition policy and assisting the exit of SOEs from competitive markets
- At enforcement level, strictly curb administrative monopoly by governments and economic monopoly by SOEs, taking into account the benefits, costs and reality.

Telecommunications in China (Gabriele)



Analysis of selected bodies

Malaysia

- Telecommunications- Communications and Multimedia Act 1999 (CMA)
- Industry has 5 players, 3 are GLCs
- Same rules apply to all
- CMA contains competition provisions which apply
- Enforced against all



Analysis of selected bodies

Pakistan

Pakistan International Airline disadvantaged by over-employment

Employee ration of 1: 537

Air India is 1:241 and Singapore Airlines is 1:136

Has regularly made losses over 30 years

Allowed to fly even if license fees are overdue



Analysis of selected bodies

Russia

Post of Russia -complaint about the cost of delivery of legal periodicals

10 competitors sought legal assessment of government subsidies

- Regulator found that they were delivered at a loss because the delivery was socially important

Says that competitive neutrality should be applied having regard to the nature of particular market conditions

Switzerland

Swiss Post and Swisscom AG both prosecuted for high prices



Overall approach: we further developed the approach and put the detailed reports into a book

- Basic consideration of the advantages which might accrue to SOEs is useful in itself in all jurisdictions
- Given the various states of development and exposure to competition law, and presuming that corporatisation has reached an advanced stage of transparency and good governance in a jurisdiction, a complaints-based process involving the competition regulator is likely to be the most effective tool (It is assumed that this would not involve the detailed formal processes of the Australian system)
- This would have the advantage of allowing competitors to complain where they believed that playing field was not level for them and the competition regulator could make the call



Competitive neutrality: the global picture

- Material by Wan Khatina and Graham Mott (UNCTAD) addresses the issue of “competitive neutrality” in the global forum
- Concerns by developed countries over the national and cross border activities of SOEs of developing countries
- Fears of uneven playing field in domestic markets of host countries between SOEs and domestic corporations
- Evolution of SOE provisions in international agreements
- Sensitive topic due to the role SOEs play in the economies of developing countries



Developing the book

- China

Professor Xu Shiyong

Alberto Gabriele

- Malaysia

May Cheong and Pushpair Nair

Wan Khatina and Sovanee Chan Somchit

- India

Seema Gaur

- Vietnam

Anh Tuan Nguyen

- International

Wan Khatina and Graham Mott

- Australia

Deborah Healey



Book on output: “Competitive neutrality and its application in selected developing countries”

- Next stage was to invite selected countries to research and develop the issues further
- Focus on Asian developing countries
- China, Malaysia, India, Vietnam, global focus
- All developing countries at different stages
- Non-OECD members
- All recognise impact of competition on market efficiency and have competition laws
- All have reformed government business to some extent



Research findings

- Differences in stages of competition law development affected approach of the participants
- All recognised the impact of competition on market efficiency
- All had reformed government businesses to some extent by methods such as corporatisation, governance, transparency and accountability
- Application of the competition law to SOEs was an important feature as a law “on the books” and in some cases in action as well
- Those from jurisdictions with a powerful commitment to industrial policy were understandably a little perplexed about the importance of the concept of the research and less concerned about a lack of competitive neutrality in their jurisdiction
- Raising awareness of governments about the issue of competitive neutrality and its impact on markets is an end in itself



On-going research

- Presentation in Sydney at Pre-ICN UNCTAD conference in May 2015
- Expert symposium at UNSW in October 2015 in conjunction with UNCTAD with some of the contributors in attendance
- Invitation to other UNCTAD members: Day 2 will involve discussion about other jurisdictions
- Further research article and book going forward arising from the proceedings
- Great thanks to UNCTAD RPP for facilitating the interaction and publishing the book

