

8th United Nations Review Conference on Competition and Consumer Protection

19-23 October 2020

Room XIX, Palais des Nations, Geneva

Friday, 23 October 2020

Round Table - Competitive Neutrality

Competitive Neutrality: the Way Forward After COVID-19

Contribution of the Federal Competition Authority of Austria

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Competitive neutrality: the way forward after COVID 19

Contribution of the Federal Competition Authority of Austria to the 8th UN Review Conference on competition and consumer protection

A: What is competitive neutrality? What is at stake?

Some of the restraints to competition, particularly in developing countries and economies in transition, originate in certain practices of the State, are State-related or hybrid restraints. Competition law enforcement is inherently constrained in scope to the areas of application as defined by the relevant competition laws. Therefore, to the extent that State-related action is beyond the reach of competition law and policy, the purview for the idea of free and fair competition can be very small.¹

The idea of competitive neutrality is, at its simplest, a policy that aims to provide for a level playing field² for all commercial actors, whether they are public or private operators. Government businesses (or State Owned Enterprises - SOEs) should not find themselves in an advantageous position due to their particular structures, laws, responsibilities and/or objectives. Competition policy and its accompanying legal framework should, to be effective, apply across the whole economy. Exemptions should rather be the exception, not the rule, to ensure that competition and its benefits are protected.³

All definitions of competitive neutrality have at their core the idea that a business involved in commercial activities should face the same set of legal rules, no matter what their ownership status is. In other words, competitive neutrality is "a policy whose objective is to remove competitive advantages and disadvantages that may arise merely and exclusively due to the ownership differences between the public and private sector enterprises."⁴ If government businesses are allowed to operate protected from market disciplines and pressures, the final result is a distortion of the market with lower efficiency and associated productivity.⁵

¹ <https://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/TheState.aspx>

² [https://one.oecd.org/document/DAF/COMP\(2015\)8/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)8/FINAL/en/pdf)

³ Mark Pearson, 8 Seoul Competition Forum, p. 1

⁴ <https://unctadmena.org/wp-content/uploads/2019/07/Competition-Neutrality.pdf>

⁵ Mark Pearson, 8 Seoul Competition Forum, p. 2

Within the last decade, the notion of competitive neutrality has been intensely promoted by various international competition fora, such as UNCTAD⁶, OECD⁷ and ICN⁸. Many projects, such as the UNCTAD "Report on Competitive Neutrality Strategies to Enhance Synergies Between Industrial and Competition Policies in the MENA Region"⁹ have been set up to successfully implement competitive neutrality into national competition laws and policies in developing countries.

These discussions devoted much room to the analysis of State Owned Enterprises and made clear that SOEs often face advantages, but considerable disadvantages as well. Advantages may include direct subsidies, regulatory advantages, favourable taxation or borrowing arrangements.

Where a government business is involved in both competitive and non-competitive (regulated or monopoly) activities, cross subsidies and cost shifting between the subsidised and/or regulated parts of the entity's business with the competitive parts can give rise to similar advantages. In some situations, it may be that the entity has specific information advantages or even shares assets with other government entities or departments. In the case of a monopoly provider, this could involve the use of the monopoly business to provide advantages to downstream or upstream operations that may well be operating in a competitive environment. These entities may be able to use their power in the regulated market to restrict entry into markets that are potentially competitive.

Regulatory advantages to SOEs have often been granted as immunity from a range of laws and regulations that private sector companies do not enjoy. These have included, and in some cases still do include, immunity from competition laws. These entities may not be subject to the same taxation regimes as their private competitors, which is fundamentally a subsidy to the operator.

The lack of incentive to price efficiently is a likely outcome that prioritizes revenue over profits. Businesses in this position may gain a competitive advantage on their private sector competitors, as they are in a position to compete with prices that would not be supportable in a competitive environment

To sum up, when competitive neutrality is not enforced potential anti-competitive practices that may flow from the fact that a business is publicly owned include: the ability to raise rivals' costs; price in a predatory fashion; raise barriers to entry; cross-subsidise; and make strategic use of inefficient technology to gain advantages from a lower marginal cost base.¹⁰

⁶ please see, inter alia, <https://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/TheState.aspx>; <https://unctadmena.org/wp-content/uploads/2019/07/Competition-Neutrality.pdf>

⁷ please see, inter alia, <https://www.oecd.org/daf/competition/competitive-neutrality.htm>; [https://one.oecd.org/document/DAF/COMP/GF\(2018\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf)

⁸ please see, inter alia, <https://centrocedec.files.wordpress.com/2015/07/soe-and-competition2014.pdf>; https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_RP_SCMonopolies.pdf

⁹ <https://unctadmena.org/wp-content/uploads/2019/07/Competition-Neutrality.pdf>

¹⁰ Capobianco, A. and H. Christiansen (2011), Competitive Neutrality and State-Owned Enterprises: Challenges & Policy Options, OECD Corporate Governance Working Papers, No. 1, OECD Publishing

On the downside, a number of objectives may be imposed on government businesses by governments to achieve wider aims, including environmental, industrial policy and other social obligations. These may divert the focus of the business management from the more profit driven motives that generally underlie private sector businesses and make them successful.

All the aspects mentioned above, especially industrial policy considerations and other social obligations, can play a role if we discuss the way forward after the COVID 19 crisis and how the concept of competitive neutrality could/should play an important role in meeting the challenges all economies face today, but particularly economies in transition.

B: Challenges

After the spread of the COVID 19 crisis all over the world in spring 2020, the idea of competitive neutrality is not central to 1st response and (at least temporarily) is challenged by countless measures not only to protect human beings, but also to stabilize and safeguard the economy. In March 2020, governments of almost all States and regional organizations, such as the European Union, affected by the crisis have engaged in announcements to invest billions and trillions to prevent undertakings from bankruptcy and large-scale unemployment.¹¹ In addition, discussions arose on potential answers by competition policy on the further strengthened market position of companies in the digital economy. It would also be particularly important to make sure that in and after these difficult and turbulent times the idea of free and fair competition and of competitive neutrality is not lost sight of and is protected.

Already before the heavy turbulence due to COVID 19, UNCTAD (MENA) has outlined that competitive neutrality covers areas that go beyond competition law and policy, by incorporating other factors which distort the level playing field between SOEs and private enterprises. Examples are uneven accountancy rules, taxation policies, public procurement, State aids, State guarantees and bankruptcy rules.¹² Similarly, Professor Deborah Healey pointed out that "it is likely that competitive neutrality issues will be prominent in jurisdictions which have a large number of SOEs, but the nature of other government market interventions will also be important in determining the significance of competitive neutrality issues in a jurisdiction."¹³

Taking into account that many markets are bigger than national in their geographic scope, the economic support one State offers to its undertakings will differ in amount and scope to benefits another State may offer and would therefore create an advantage / disadvantage. Although these

¹¹ See for example, the announced economic aid of several billions in USA, EU, Germany, India, <https://www.consilium.europa.eu/en/policies/coronavirus/covid-19-economy/>, <https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Schlaglichter/Corona-Schutzschild/2020-03-13-Milliarden-Schutzschild-fuer-Deutschland.html>, <https://economictimes.indiatimes.com/news/economy/policy/fm-nirmala-sitharaman-announces-rs-1-7-lakh-crore-relief-package-for-poor/articleshow/74825054.cms?from=mdr>

¹² <https://unctadmena.org/wp-content/uploads/2019/07/Competition-Neutrality.pdf>

¹³ D. Healey, COMPETITIVE NEUTRALITY AND THE ROLE OF COMPETITION AUTHORITIES: A GLANCE AT EXPERIENCES IN EUROPE AND ASIA-PACIFIC, RDC, Vol. 7, n° 1. May 2019.

considerations exceed the traditional idea of competitive neutrality, which focuses on States favouring SOEs or private firms over others, these potential distortions of the level playing field and therefore of competition need to be taken into consideration.

Therefore, competitive neutrality has both national and international implications. In a jurisdiction where SOEs are advantaged, more efficient competitors may be driven out of the market because of the advantages of their SOE competitor, and benefits of effective competition are reduced. Internationally, SOEs supported by their government may enter foreign jurisdictions and disadvantage or drive out more efficient local competitors.¹⁴ Thus, with globalisation, impacts of missing competitive neutrality policies have gone from inside the jurisdiction to another jurisdiction.¹⁵

Recently, national competition authorities of the European Union, gathered in the European Competition Network (ECN), published a joint statement, in which they outlined, inter alia, that the "ECN understands that this extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers. In the current circumstances, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply"¹⁶.

In addition, the European Commission has adopted its "Temporary State Aid Framework" to support the economy in the current COVID 19 framework. It will provisionally be in place until the end of December 2020 and provides for various types of aid:

- Direct grants, selective tax advantages and advance payments;
- State guarantees for loans taken by companies from banks;
- Subsidised public loans to companies;
- Safeguards for banks that channel state aid to the real economy;
- Short-term export credit insurance.

These and similar actions by many competition authorities around the globe¹⁷ show that the crisis has an impact on competition enforcement, and that merger and State Aid control mechanisms could be loosened to tackle the impact of the COVID 19 crises.

In this regard, UNCTAD urged competition authorities to use all their tools to combat the adverse consequences of COVID 19 in markets, as in the fight against the virus, where collaboration has

¹⁴ D. Healey, COMPETITIVE NEUTRALITY AND THE ROLE OF COMPETITION AUTHORITIES: A GLANCE AT EXPERIENCES IN EUROPE AND ASIA-PACIFIC, RDC, Vol. 7, n° 1. May 2019.

¹⁵ D. Healey, COMPETITIVE NEUTRALITY AND THE ROLE OF COMPETITION AUTHORITIES: A GLANCE AT EXPERIENCES IN EUROPE AND ASIA-PACIFIC, RDC, Vol. 7, n° 1. May 2019.

¹⁶ please see: Joint statement by the European Competition Network

¹⁷ please see: <http://www.oecd.org/competition/competition-policy-responses-to-covid-19.htm>; Covington Competition, COVID 19, <https://www.lexblog.com/2020/05/29/covid-19-us-and-eu-competition-law-implications-29-may-2020/>; <https://www.covcompetition.com/>; UNCTAD webinar on international cooperation in times of Covid-19: https://unctad.org/meetings/en/SessionalDocuments/ccpb_compet_WebReport.pdf

taken precedence. One of the actions UNCTAD recommended was to ensure equal conditions between companies for a level playing field, and that remains relevant even in a crisis period.¹⁸

The COVID crisis comes at a time where, at least in Europe, there have been heated debates lately about realigning competition policy and industrial policy. Against the backdrop of a supposed rise in competition pressure from other jurisdictions, one of the proposals was that it should be possible for anti-competitive mergers to be cleared by EU merger control if such mergers improve the competitiveness of European undertakings.

More in detail, the European Commission blocked the planned acquisition of Alstom by Siemens in February 2019¹⁹ as the merger would have harmed competition. Soon afterwards, the economy ministers of Germany and France published a manifesto for a European industrial policy. They were calling for EU merger control to be relaxed, allowing the approval of potentially anti-competitive mergers in individual cases to enable the creation of European champions. The idea is that this would help maintain European competitiveness in the face of competition from China and other nations.²⁰ On the other hand, UNCTAD MENA and many others have criticized the idea of national champions as “in the long-term the advantages afforded to specific sectors, or enterprises, are always detrimental to the economy as a whole”.²¹

All the developments outlined above strengthen the impression that the idea of competitive neutrality, and moreover of free and fair competition, are at the center of worldwide policy discussions. At this point, it seems timely to go back to the idea of competitive neutrality, to take stock of actions already done to promote and implement competitive neutrality also in developing countries, and to discuss the way forward in the future.

¹⁸ please see: UNCTAD, Defending competition in the markets during COVID-19, <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2325>

¹⁹ please see COMP/M.8677

²⁰ please see https://www.bwb.gv.at/en/news/news_2019/detail/news/bwb_publishes_position_paper_on_debate_about_european_champions_and_the_call_to_relax_eu_merger_control/

²¹ <https://unctadmna.org/wp-content/uploads/2019/07/Competition-Neutrality.pdf>