

Primer on Competitive Neutrality

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Competition and competitive neutrality

The basic proposition:

A level playing field for competition that delivers efficient supply of goods and services to consumers at the best prices and fosters innovation benefits the economy and consumers

Problem areas in relation to government:

- Anticompetitive conduct
- Laws, regulations, and policy decisions
- Unfair competition by government businesses in markets just because they are owned by government: SOEs and others

Formal developments: essential elements

- Recommendations of the OECD Council on Competitive Neutrality May 2021 an important step to global implementation
- Competitive neutrality in the broad sense requires multiple initiatives which are included in the Recommendations:
 - Application of competition law to government and its enforcement as necessary
 - Routine competition impact assessment: policies, laws and regulations
 - Government business: SOEs and other entities – adjustment for advantages of government ownership and control
 - Fair, open and non-discriminatory government procurement
 - Clear policy for transparent public service obligations

Basic proposition

- The competition law must apply to SOEs and other government bodies when they are competing in the market

Competition Impact Assessment

- Formal system of review of all laws, regulations and policies for anticompetitive impact
- Prior to enactment or adoption; review under an ongoing timetable
- Australia, China
- Some exemptions for public interest/ public benefit

CN: Typical issues re SOEs

- Immunity from taxes, charges and regulatory requirements
- Explicit or implicit guarantees on debts
- Concessional interest rates on loans
- No accounting for depreciation expenses
- Effective immunity from bankruptcy
- Pricing policies which do not fully account for production costs
- Granting government bodies preference in tendering over commercial enterprises
- There are also potential disadvantages of government businesses: greater accountability, community service obligations, reduced managerial autonomy, compliance with other government policies
- None of these are issues which the competition law itself can solve

Focus on SOEs: 'adjustment systems'

- Subject them to the same laws etc as private companies
- Adjustments for other advantages they have because of government ownership
- Adjustments for disadvantages they have because of government ownership
- Australia

Approaches to dealing with CN: implementation on a continuum

- As part of a formal Competition Policy framework or its own?- Philippines, Australia
- May be by law or agreement- EU
- As part of an administrative monopoly law or other regulation - China
- May be enforceable or not - Australia
- Addressed by advocacy

Advocacy

- Key activity of competition regulators
- Focus on administrative activity of government including business operations via SOEs
- Regulators participate in lawmaking and policy activities or give other advice commentary and recommendations
- Advocacy has political challenges – independence of regulator may be an important factor in success
- Ultimately, conflict between the right of government to implement laws and policies in what it considers to be the best interests of citizens and competition outcomes
- This requires balancing multiple policy goals of which competition is just one

Exemptions from competitive neutrality: public benefit

- Recitals to Recommendations recognise that achieving public policy objectives will in certain circumstances require exemptions to competitive neutrality
- Public policy objectives are objective befitting the public interest in the jurisdiction
- Stage of development, other considerations of political economy
- To ensure the benefits of competition are fully achieved, exceptions should be circumscribed, transparent and carefully considered
- Philosophical balance between sovereignty of individual governments and the policies they deliver to benefit the public, and the weighting to be given to competition in the particular case
- May be some disconnect between the two