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Joint UN-ESCWA, UNCTAD and OECD webinar on Understanding Competitive Neutrality

24 November 2021

09:00 - 11:00 hrs. CET, UTC+3 in Beirut (Online)

This webinar, organized jointly by the UN-ESWCA, UNCTAD, and OECD, aimed to cover issues relating to competitive neutrality, such as what it is and why it is important, using real case studies from across the regions.

OPENING

Welcome by Dr. Mahmoud Mumtaz

Head of the Egyptian Competition Authority

Dr. Mumtaz began by introducing the topic and its importance, as well as noting Egypt's recent experience with the steel sector. He then opened the ground for the following presentations.

PREMIER ON COMPETITIVE NEUTRALITY

Presentation by Professor Deborah Healy

Professor at the University of South Wales (Law), a Director at the Herbert Smith Freehills China International Business and Economic Law Centre

Professor Healy started by defining the overlapping aims of competition policy and competitive neutrality: to deliver efficiency, foster innovation, and benefit the economy and consumers. However, these aims may be undermined by the presence of anticompetitive conduct and laws, regulations, and policy decisions that may have an anti-competitive impact, as well as unfair competition by government businesses.

Solutions include ensuring application of competition law and enforcement; routine competition impact assessment; formal dealing with government businesses; fair, open, non-discriminatory government procurement; as well as transparent public service obligations and exemptions. For example, Australia started, in 1996, to carry out a routine assessment of any new legislation. However, this is not carried out by the competition regulator, which the OECD guidance suggests would be more effective. Similarly, China is proposing to include such a review process in its competition law.

It is also important to ensure that competition laws are actually applied vis-a-vis state-owned enterprises (SOEs). In Australia, there are issues regarding the enforceability of competition law to SOEs; recommendations go back to the minister overseeing the SOEs, but there is no compulsory action. There is also little transparency around how ministers make recommendations, as well as limited options for compensating harmed undertakings. Professor Healy noted that the solution for this is increased transparency.

Other solutions, or approaches, for ensuring competitive neutrality include having it as part of the competition policy framework (such as in the Philippines and Australia), including it in the competition law (such as China and the EU), or addressing it through advocacy. In regard to the latter, competition authorities can aim to give recommendations or commentary on laws and regulations while they are being created or amended. However, this will highly depend on the independence of the regulator. This may also result in conflict between the best interest of consumers and competition outcomes; there may be overarching public policy considerations to certain pieces of legislation. The solution is, therefore, ensuring this balance in a transparent fashion. As such, Professor Healy concludes that even when exemptions are given, they must be circumscribed and transparent.

When asked by Dr. Mumtaz on the impact of the measures taken by Australia, Professor Healy noted that a 2015 review by the Productivity Commission found a very positive impact on capacity and efficiency, which translated into benefits for consumers. Other, more specific, achievements included making the electricity industry more competitive; eliminating exemptions that had allowed various industry groups or corporate bodies to be exempted from the law, and selling off government businesses found inefficient. Some parties, such as farmers, complained that they were previously more protected due to the existence of regulated prices. However, the impact of competitive neutrality initiatives was found to be positive overall.

Presentation by Professor Arsenio M Balisacan

Chairman of the Philippines Competition Commission

Professor Balisacan began by sharing the Philippine experience in regard to competitive neutrality. In the Philippines, the state had introduced multiple harmful market distortions, which led to market inefficiencies. So, when the Philippine Competition Act was passed in 2015 and the Philippine Competition Commission (PCC) was established in 2016, a team of experts was set up to study the sectors with serious competition challenges, the roots of market inefficiencies, and the areas with a large impact on consumer welfare.

Moreover, a chapter on “levelling the playing field” was included in the Philippine Development Plan 2017-2022, as it is part of the state’s strategy in attaining sustainable development. This entails addressing government-owned monopolies, government-authorized private monopolies, government control of entry and expansion, and cases in which the government provides goods and services similar to those provided by private entities. Additionally, the President signed an administrative order mandating all government

agencies and SOEs to comply with national competition policy, which included, as a major pillar, the internalization of a competitive neutrality principle. This showed recognition of the need for a whole-of-government approach in ensuring competitive neutrality.

Currently, government agencies in the Philippines are working on reviewing the mandates of SOEs and recommending actions for structural measures to address anticompetitive behavior; assessing, monitoring, and establishing guidelines for existing and future subsidies; recommending the separation of proprietary and regulatory activities of SOEs; and neutralizing market distortions due to public ownership.

When asked about ensuring a balance between government agencies in the application of competitive neutrality principles, namely between PCC and the National Economic Development Authority (NEDA), Professor Balisacan noted that PCC, since its creation, had recognized the importance of working closely with other government agencies. This is crucial so that agencies can avoid contradicting policies. One of the ways PCC ensured this was by using the Chairman's personal network.

INTERNATIONAL EXPERIENCE AND BEST PRACTICES

Dr. Mumtaz opened the floor for representatives of different international organizations and agencies to share their experiences.

Ms. Teresa Moreira

Rational Officer in Charge of the Division on International Trade and Commodities and Head of the Competition and Consumer Policies Branch at UNCTAD

Ms. Moreira began by noting that due to the UNCTAD's wide membership, which includes all the ESWCA member states, the UNCTAD benefits from the advantage of interacting with all representatives from all member states. The UN recognizes that the application of competition policy to all sectors, including in relation to SOEs, is key. Applying competitive neutrality principles is especially important for all developing countries that are going through major or sector-specific reforms, including privatization or reform to public procurement and state aid policies. While this is even more challenging in light of COVID-19, the size of economic recovery plans shows recovery since the start of the pandemic.

Ms. Moreira also referred to guidance the UNCTAD disseminated in 2015-2018, aimed at assisting governments to mainstream competition policies. While the recommendations were not regional, the report, funded by the Swedish government, did include an annex on the specific experience of 7 MENA region states.

Ms. Moreira pointed out the importance of ensuring competitive neutrality in the region; while it may be seen as a sensitive topic, states in the region must be sure to work together to raise awareness on the topic. This may require reaching out to regulators and other government bodies and understanding the issue at the national and regional levels. It may

also require technical assistance from international partners. In relation to these points, Dr. Mumtaz pointed out that the UNCTAD MENA Regional Training Center has recently been inaugurated in Egypt.

Ms. Nathalie Khaled

Economics Affairs Officer at ESCWA

Ms. Khaled began by noting that while the MENA region is still weak on including competitive neutrality, ESCWA aims to focus on gaps in competition laws, providing recommendations or law amendments, and adjusting exemptions. A recent study on the business environment in the Arab region showed that there are gaps in the capability of stakeholders to access laws, so ESCWA studied legislative frameworks that could help stakeholders to better access information. The study also showed that while most Arab countries have competition laws, there are weaknesses in enforcement, especially in regard to SOEs. As such, it provided recommendations for 22 ESCWA member states, which included that the ESCWA revises Arab legislation to identify gaps. ESCWA is also currently developing a study to review competition provisions and underscore weaknesses, as well as an additional study to simulate legislative reforms and assess their potential impact.

Overall, recommendations for the region include creating an effective mechanism and improving the environment, especially to simplify administrative licenses through reforms; easing access to local markets through ensuring a level playing field and supporting competitive neutrality as a principle by explicitly including it in legislation.

Ms. Federica Maiorano, Mr. Wouter Meester

Senior Competition Expert at OECD, Competition Expert at OECD

Ms. Maiorano started with the OECD's definition of competitive neutrality: a principle according to which all enterprises are providing a level playing field with respect to a state's ownership, regulation, or activity in the region. Competitive neutrality does not only apply between SOEs and private entities but also between domestic and foreign entities, private and public entities, as well as undertakings of different legal forms. Competitive neutrality is especially important because it does not just affect competition within individual states, but also international competition.

For that reason, the OECD has over the years, recommended that competitive neutrality as a principle is included in a legal framework and that it is actually enforced. This may be through adopting and maintaining a competitively neutral competition law, subjecting undertakings to the same regulatory environment (without ruling out asymmetries between different industries that exist due to their special nature, such as network industries), and ensuring that public procurement processes are fair and transparent. Here, Mr. Meester continued that this could also be done by monitoring support measures or avoiding offering unfair advantages to some undertakings over others, as these could distort competition. Such support measures may include getting extra credit or loans with conditions that are not in line with market principles, getting favourable tax treatments or grants, or getting goods or services by

governments at favourable prices. While there may be public policy objectives for such special treatment, these should be both transparent and proportionate. Finally, compensation for public service obligations should also be appropriate and proportional, as to avoid giving undertakings providing public service obligations advantages in other areas.

Finally, they noted that the OECD is carrying out multiple projects relating to competitive neutrality, such as peer reviews and roundtables.

Ms. Alanoud Alfahad

Director of the Monopolistic Investigations Department at the Competition Protection Agency (Kuwait)

In Kuwait, states play a significant role in different markets, whether through SOEs or through ministries. This led to some imbalances in some markets, primarily due to a lack of understanding of the principle of competitive neutrality. In turn, this led to the occurrence of anticompetitive practice. In fact, SOEs were originally exempt from the first version of Kuwait's competition law, which was then amended in 2020. These amendments gave the Competition Protection Agency more power to monitor more markets, including SOEs, except those exempt by the Cabinet of Ministers for producing essential products and services. This list of exempt SOEs is reviewed periodically.

However, Ms. Alfahad noted that problems remain in regard to how the government treats SOEs versus private entities when it comes to licensing, access to contracts, and financial conditions. However, competitive neutrality has become one of the main pillars for sustainable development in Kuwait; ongoing advocacy efforts are aimed at raising awareness of competitive neutrality among stakeholders.

Mr. Mohammad Almaziad

Economist at General Authority for Competition (Kingdom of Saudi Arabia)

The Kingdom of Saudi Arabia also finds that competitive neutrality is important in improving the economy and promoting competitiveness. In fact, an impact assessment showed that interventions have generally led to positive indicators.

Specifically, GAC is carrying out a study aimed at giving equal opportunities, maintaining competitive neutrality, promoting competition law and policies, and reaching international standards in these areas. The study will begin by understanding the current situation, followed by identifying barriers to entry in different sectors, and finally, making recommendations and suggesting legislation aimed at promoting competitive neutrality.

FINAL REFLECTIONS AND CLOSING

Closing Remarks by Professor Frederic Jenny

Chair of OECD Competition Committee

Professor Jenny began by laying out why the topic of competitive neutrality is important; SOEs account for 20% of the investment, 5% of employment, and 40% of output in countries around the world. They are especially fundamental in the MENA region, as they operate across a wide range of sectors and often provide important public services. As such, the two main concerns in the region are to ensure dynamic economic development as well as ensure diversification. An additional concern is low foreign direct investments, possibly due to increased legal uncertainty and fear of uneven competition landscape in the face of SOEs. This may generally undermine the faith consumers have in competition policy; when competition between public and private entities is unfair, it becomes difficult to support the idea that more competition is an important goal.

Advantages SOEs may receive in the area include that they may not face the same constraints as private undertakings. For example, subsidies may allow bankrupt SOEs to continue in the market even if they are inefficient. Governments must hence aim to review the scope of advantages to find if they are justified. For example, in Egypt, there are currently serious attempts to identify which SOEs are inefficient and which should be kept. Additionally, SOEs may have an influence on the regulatory environment in which they operate. SOEs may also receive benefits regarding public procurement. While these issues are not unique to the MENA region, they do mean that MENA countries must promote competitive neutrality, and that competition authorities must play an active role in this endeavour.

This requires having more data on SOEs, such as on their objectives and performance. This can also be done through competition authorities advocating regulatory changes when they identify discrimination, such as in relation to access to public procurement. Additionally, competition authorities should enforce competition laws in a way that ensures competitive neutrality.

Concluding Remarks by Dr. Mahmoud Mumtaz and Question by Attendees

Dr. Mumtaz concluded by pointing out the importance of cooperation between government entities in ensuring competitive neutrality. Dr. Mumtaz then opened the floor for questions, which included:

- A question on how states can begin opening up industries, to which Professor Jenny replied that the answer lays in a wider issue of regulatory reform.
- A question on regulatory reform in public procurement, to which Professor Jenny replied that one of the difficulties, is getting access to public procurement. Professor Jenny and Mr. Meester pointed out the importance of transparency and maintaining an open dialogue with public procurement officers, but not in a way that risks collusion.