



Competitive Neutrality Toolkit

PROMOTING A LEVEL PLAYING FIELD



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Foreword

In 2021, the OECD Council adopted the Recommendation on Competitive Neutrality providing a set of principles to ensure that government actions are competitively neutral and that all enterprises face a level playing field, regardless of factors such as the enterprises' ownership, location or legal form. The Recommendation aims at guaranteeing that competition is not unduly prevented, restricted or distorted.

In line with the instructions from the Council, the Competitive Neutrality Toolkit was developed to support OECD Members and non-Members having adhered to the Recommendation (hereafter the "Adherents") interested in implementing the competitive neutrality principles. Moreover, it may be useful to non-Adherents that wish to follow competitive neutrality principles. The Toolkit thus often refers generically to jurisdictions and not necessarily to Adherents.

The Competitive Neutrality Toolkit deals with the legal framework, including competition law and enforcement, the regulatory environment and public procurement; and with measures that may enhance a competitor's performance, such as state support and compensation for public service obligations. It consists of good practice approaches based on examples drawn from international experience from OECD Members and non-Members, complemented by a set of questions (Competitive Neutrality Checklist) and a framework of analysis.

The Toolkit provides competition authorities and other public officials with tools to identify government policies that may distort the level playing field and to develop alternatives that minimise such distortions. It was developed to be used by both competition authorities and other bodies, such as government departments that are responsible for developing new regulations or central units in charge of regulatory impact assessment. It also supports the assessment both of new regulations and policies as they are being developed and of existing ones.

The Toolkit was developed by the Working Party 2 on Competition and Regulation and was approved and declassified by the OECD's Competition Committee by written procedure on 4 June 2024. It benefitted from consultation with the OECD's Trade Committee, Corporate Governance Committee (through its Working Party on State Ownership and Privatisation Practices) and Regulatory Policy Committee.

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Executive summary

The OECD Recommendation on Competitive Neutrality [[OECD/LEGAL/0462](#)], hereafter the “Recommendation”, defines competitive neutrality as “a principle according to which all Enterprises are provided a level playing field with respect to a state’s (including central, regional, federal, provincial, county, or municipal levels of the state) ownership, regulation or activity in the market”. It recommends that government intervention, for instance through regulation or state support, not distort competition in markets, i.e. that it not tilt the playing field in favour of certain market participants.

Competitive neutrality allows firms to compete on the merits regardless of factors such as ownership, nationality or legal form, so that competition is not unduly prevented, restricted or distorted. In turn, this makes it possible for consumers and the economy to reap the benefits of competition. Competition delivers greater consumer welfare by promoting lower prices, greater choice and higher quality of goods and services. Competition also increases productivity and economic growth, multiplying business opportunities and employment.

The Competitive Neutrality Toolkit was developed to support the implementation of the competitive neutrality principles set out in the Recommendation. It provides a set of good practice approaches based on examples drawn from international experience on competitive neutrality measures. It covers the legal framework, including competition law and enforcement, the regulatory environment and public procurement; and measures that may enhance a competitor’s performance, such as state support and compensation for public service obligations. To assist public officials in identifying policies that potentially distort competition, in each of these areas a set of questions (Competitive Neutrality Checklist) complements the good practice approaches and the related examples.

The Toolkit also suggests a framework of analysis for identifying and assessing regulations and policies that may distort competitive neutrality and for developing alternatives to avoid or reduce such distortions. This methodology comprises five steps:

1. Screening the policy intervention using the Competitive Neutrality Checklist.
2. Identification of the objective and benefits of the policy intervention.
3. Analysis of the impact of the policy intervention on competition.
4. Identification of alternative policy options.
5. Balance of benefits and competition distortions and selection of the least distortive option.

Selected good practices from each of the areas covered by the Toolkit are reported below.

The regulatory environment should be competitively neutral and should be enforced with equal rigour, appropriate deadlines and equivalent transparency with regard to all current or potential market participants. Indeed, all market players, both current and potential, should receive uniform treatment not only in terms of the legal framework but also its enforcement. This includes **a competitively neutral competition legal framework**, so that competition rules are applied to all competitors in the same manner.

Exempting certain players from regulations may be necessary to achieve policy objectives that could not be accomplished through other means. **Any exceptions from regulations should be transparent, should be justified by clear policy objectives and should be narrowly applied.** When exceptions are adopted in a transparent way and are publicly known, this can allow for open discussion on the merits of the exception, and for objections and alternative proposals to be put forward and considered. Moreover,

good practices highlight that exceptions adopted in order to achieve a specific public objective do not go beyond what is strictly necessary to achieve that objective, so that distortions to competition are limited to the extent possible.

Public-procurement rules should treat all potential bidders in a similar way, without discrimination and irrespective of ownership, legal form, nationality and origin of goods. Government procurement processes should follow open, fair, non-discriminatory and transparent conditions, so that all potential suppliers can take part in public tenders, and all bidders (including SOEs, incumbents, domestic companies or firms providing goods that are produced largely domestically) are treated in an equitable manner.

State support measures should identify and disclose the specific public policy objective to address and the extent to which the measures are likely to address it. Authorities are expected to spell out how state support contributes to achieving the policy objective and to what extent it addresses it.

State support measures, such as loans, guarantees and capital injections/investments, should be assessed to identify if they are granted in line with market principles. Jurisdictions are expected to evaluate if an enterprise receives a benefit, i.e. better conditions than those available in a market transaction. If this is the case, the next step would be to analyse if this is a selective benefit and to examine the distortions of competition the measure creates.

Any public service obligation placed upon an enterprise should be identified in a transparent and specific manner. A clear definition of the services within the scope of the public service obligation helps potential providers assess the business case and, if applicable, submit a bid to supply the services. In turn, meaningful bids contribute to selecting the best placed public service provider and to keeping the necessary compensation to a minimum.

Decisions regarding the compensation for public service obligations are also a crucial aspect to consider in order to maintain a level playing field. **When a public service obligation is placed upon an enterprise, measures should be taken to avoid both over-compensation and under-compensation, in order not to unduly advantage or harm a competitor.**

1 Introduction

This chapter provides an introduction to the Competitive Neutrality Toolkit, including its structure and main objectives. It also highlights the importance of competitive neutrality and clarifies how the toolkit relates to the Competition Assessment Toolkit and how both documents can be used in a complementary way.

The OECD Recommendation on Competitive Neutrality [[OECD/LEGAL/0462](#)], hereafter the Recommendation, which was adopted by the OECD Council meeting at Ministerial Level in May 2021, defines competitive neutrality as “a principle according to which all enterprises are provided a level playing field with respect to a state’s (including central, regional, federal, provincial, county, or municipal levels of the state) ownership, regulation or activity in the market.” The Recommendation establishes a set of principles to ensure that the actions of OECD Members and non-Members having adhered to it (hereafter the “Adherents”) are competitively neutral and that all enterprises face a level playing field, irrespective of factors such as the enterprises’ ownership, location or legal form, so that competition is not unduly prevented, restricted or distorted.

The Competitive Neutrality Toolkit (hereafter the “Toolkit”) supports Adherents in their implementation of the competitive neutrality principles set out in the Recommendation. While recognising that this is the primary objective of the Toolkit, the document could potentially be useful also to non-Adherents that are interested in following competitive neutrality principles and benefit from the good practices collected in the Toolkit. Acknowledging this potential audience, the Toolkit often refers generically to jurisdictions and not necessarily to Adherents.

The Toolkit deals with the five main areas of the Recommendation: (1) competition law and enforcement; (2) regulatory environment; (3) public procurement; (4) state support; and (5) public service obligations. The Toolkit highlights a range of ways the Recommendation can be implemented, through good practice approaches based on examples drawn from international experience.

- The good practice approaches included in this Toolkit aim at clarifying how the Recommendation can be implemented and are deliberately broad, so that their objective can be achieved in various ways to account for each jurisdiction’s specificities. In line with the Recommendation, which recognises that “achieving public policy objectives will in certain circumstances require exceptions to competitive neutrality”, the good practice approaches are not prescriptive and aim at highlighting good practices, while flagging potentially problematic policies, rather than reaching firm conclusions.
- Each good practice approach is complemented by a series of examples from Adherents and other jurisdictions beyond them. The examples listed may concern one or more elements addressed in the good practice approach. They are indicative and do not attempt to provide an exhaustive list of all the practices across jurisdictions.
- To assist public officials to identify policies that potentially distort competition, in each of the five areas a set of questions complement the good practice approaches and the related examples. When a regulation or another policy is not in line with at least one of the questions or good practice approaches, it has the potential to distort competition and should be analysed in detail. Chapter 8 sets out the main steps of the analysis.

The Competitive Neutrality Toolkit is complementary to the [Competition Assessment Toolkit](#). The former provides good practice approaches and related examples on competitive neutrality measures, covering the different areas of the Recommendation. The latter provides the overall framework of analysis (i.e. the methodology), including the identification of the policy maker’s objective in the in-depth assessment of regulations or state support measures. The framework of analysis included in this Toolkit is consistent with the overall methodology set out in the Competition Assessment Toolkit.

The combined tools support competition authorities and other public officials in identifying policies and actions that distort competition and suggest alternatives that minimise such distortions. This assessment can be conducted by competition authorities or by other bodies, such as government departments that are responsible for developing new regulations or central units in charge of regulatory impact assessment. Moreover, the Toolkit can support the analysis of both new regulations and policies as they are being developed and of existing ones.

The Recommendation and the Toolkit are relevant for the state's ownership, regulation or activity at all levels of the state, "including central, regional, federal, provincial, county, or municipal levels".

Finally, the Recommendation rests on the premise that "competition promotes efficiency, helping to ensure that goods or services offered to consumers more closely match consumer preferences, producing benefits such as lower prices, greater choice, improved quality, increased innovation, and higher productivity". These benefits can be delivered through the promotion of competitive neutrality (see Box 1.1).

Box 1.1. Why is Competitive Neutrality important?

Ensuring competitive neutrality means that firms compete on the merits regardless of factors such as ownership, nationality or legal form. Therefore, competitive neutrality promotes competition by eliminating or reducing undue competitive advantages that some players may enjoy over their competitors, such as support granted by the state or regulations that favour incumbents.

Indeed, competition delivers many benefits at both micro and macro-economic levels. At the micro-economic level, competition delivers greater consumer welfare, by promoting lower prices, greater choice and higher quality of goods and services (OECD, 2019^[1]). At the macro-economic level, competition between firms increases productivity and economic growth, multiplying business opportunities and employment. In fact, competition improves allocative efficiency by allowing more efficient firms to enter and gain market share at the expense of less efficient firms, which may exit the market and be replaced by higher productivity firms (CMA, 2015^[2]). The effects of stronger competition can spill over to adjacent markets, for instance by improving productivity and employment in downstream sectors (OECD, 2014^[3]).

In addition, competitive markets increase innovation. When the market is contestable (that is barriers to entry are low) and the innovation is appropriable (i.e. successful innovators can capture the benefits from innovation, at least temporarily) firms have an incentive to innovate (OECD, 2023^[4]). Competition also drives technology adoption, as well as organisational and managerial improvements (Andrews, Criscuolo and Gal, 2016^[5]).

Preserving a level playing field between competitors can bring tangible benefits to consumers and to citizens more broadly. Examples include:

- More new entrants and higher employment levels, when regulations do not shield incumbents from the requirements that new entrants must comply with, as described in Chapter 4;
- Value for money in public procurement, for example when local authorities do not favour their enterprises and award tenders to the most suitable bidders, in line with the good practice approaches and examples in Chapter 5;
- Better use of limited financial resources, such as when public authorities grant state support at the same terms as a market operator does, as discussed in Chapter 6.

Source: OECD (2019^[1]), Competition Assessment Toolkit: Volume 1. Principles, <https://www.oecd.org/competition/assessment-toolkit.htm>; CMA (2015^[2]) Productivity and competition: A summary of the evidence, <https://www.gov.uk/government/publications/productivity-and-competition-a-summary-of-the-evidence>; OECD (2014^[3]), Factsheet on how competition affects macroeconomic outcomes, <https://www.oecd.org/daf/competition/factsheet-macroeconomics-competition.htm>; OECD (2023^[4]), Competition and Innovation: A Theoretical Perspective, OECD Competition Policy Roundtable Background Note, <https://www.oecd.org/daf/competition/competition-and-innovation-a-theoretical-perspective-2023.pdf>; Andrews, Criscuolo and Gal (2016^[5]), "The Best versus the Rest: The Global Productivity Slowdown, Divergence across Firms and the Role of Public Policy", *OECD Productivity Working Papers*, No. 5, OECD Publishing, Paris, <https://doi.org/10.1787/63629cc9-en>.

The rest of the document is structured as follows. Chapter 2 provides an overview of ways in which the state intervenes in markets and how the Recommendation addresses them. Chapters 3 to 7 are devoted to the five main policy areas covered by the Recommendation. Each chapter consists of a set of questions to guide the analysis, good practice approaches and related examples. Chapter 8 provides a framework to analyse policies that, based on the questions and the good practice approaches, can potentially distort competition.

References

- Andrews, D., C. Criscuolo and P. Gal (2016), “The Best versus the Rest: The Global Productivity Slowdown, Divergence across Firms and the Role of Public Policy”, *OECD Productivity Working Papers*, No. 5, OECD Publishing, Paris, <https://doi.org/10.1787/63629cc9-en>. [5]
- CMA (2015), *Productivity and competition: A summary of the evidence*, <https://www.gov.uk/government/publications/productivity-and-competition-a-summary-of-the-evidence>. [2]
- OECD (2023), *Competition and Innovation: A Theoretical Perspective*, *OECD Competition Policy Roundtable Background Note*, <https://www.oecd.org/daf/competition/competition-and-innovation-a-theoretical-perspective-2023.pdf>. [4]
- OECD (2019), *Competition Assessment Toolkit: Volume 1. Principles*, <https://www.oecd.org/competition/assessment-toolkit.htm>. [1]
- OECD (2014), *Factsheet on how competition affects macroeconomic outcomes*, <https://www.oecd.org/daf/competition/factsheet-macroeconomics-competition.htm>. [3]

2 State intervention and competitive neutrality

This chapter provides an overview of the main ways in which the state intervenes in markets, including when it (i) establishes and enforces the regulatory environment, including competition law; (ii) acts as a buyer or supplier of goods and services; (iii) influences the choices of suppliers through state support; and (iv) supports the provision of public services by either privately-owned or publicly-owned enterprises. In addition, it describes the potential to distort competition of each of these state interventions and how they are addressed by the OECD Recommendation on Competitive Neutrality. It also presents the scope of the Recommendation.

When markets work well, they allocate resources efficiently and can maximise welfare (OECD, 2014^[1]). Markets, however, may not always work effectively or achieve desired outcomes and therefore state intervention may be helpful. The rationale for state intervention in the economy is often described in terms of two main groups of objectives (Stiglitz, 2009^[2]). The first concerns efficiency considerations, that is situations in which markets do not work well on their own, due to so-called market failures. Intervention that addresses market failures attempts to correct issues such as externalities, natural monopolies or information asymmetries.¹ The second consists of wider policy objectives, for instance ensuring that all citizens have access to basic goods and services, such as water, or promoting security of food and energy supply.²

This chapter lists the main forms of intervention and flags their potential to distort competition. These different ways in which governments intervene in markets are addressed by the Recommendation, whose scope is also described in the chapter. The last section summarises why competitive neutrality matters.

2.1. State intervention in markets

Government pursues its objectives by intervening in markets in a variety of ways. Intervention can be direct, if the government is a buyer of goods and services or is a market player, or indirect, when it acts as a regulator or tries to influence consumer behaviour (Office of Fair Trading, 2009^[3]).

The Recommendation lists the various forms of state intervention in markets and calls for the state not to distort competition while trying to achieve their policy objectives, “to the maximum extent practicable and unless overriding Public Policy Objectives require otherwise”. Competitors have a level playing field, or in other words competitive neutrality, “where no entity operating in an economic market is subject to undue competitive advantages or disadvantages” (OECD, 2012^[4]).

The Recommendation focuses on preserving competitive neutrality when the state intervenes:

1. **establishing and enforcing the regulatory environment** (addressed in more detail in Chapter 3 on competition law and enforcement; Chapter 4 on regulatory environment);
2. **government’s role as a buyer or supplier of goods and services** (Chapter 5 on public procurement);
3. **influencing the choices of suppliers through state support** (Chapter 6 on state support);
4. **supporting the provision of public services by either privately-owned or state-owned enterprises** (Chapter 7 on public service obligations).

Government’s behaviour as an owner of enterprises is addressed in detail by the OECD Recommendation on Guidelines on Corporate Governance of State-Owned Enterprises, reviewed in 2024 [[OECD/LEGAL/0414](#)] (hereafter the “SOE Guidelines”).

2.1.1. Competition law and enforcement

The state ensures the functioning of basic institutions, such as property rights and the enforcement of contracts, that are necessary for markets to work. Establishing and enforcing a competition law framework is part of the state’s function of creating the conditions for markets to exist. This is especially important from a competitive neutrality point of view. When large companies can use their market power to distort market outcomes or certain market players, such as SOEs, enjoy implicit benefits, competition law has a role in addressing these situations. In the absence of competitive neutrality, competition is distorted causing markets to operate less efficiently and welfare to be reduced. Thus, the Recommendation singles out neutrality in the competition law and its enforcement when stating the more general principle of competitive neutrality in the regulatory framework.

In some countries, some or all types of government activity, including as a market actor through SOEs, may be specifically exempted from competition law. Such an exclusion is not competitively neutral – for example, if the conduct of SOEs is not subject to competition law but that of their private sector rivals is, SOEs can engage in anti-competitive conduct without the risk of prosecution. In addition, the cost of compliance with competition law is not borne by the SOEs but by the private sector business. The result is distortionary. Moreover, the enforcement of competition law and preserving competitive neutrality may also be more challenging when it comes to SOEs (OECD, 2018^[5]).

The enforcement of competition law may interact with other government policies and may therefore need to take the effects of these policies into account. For example, when state support is involved, this may have an impact on a company's ability to recoup losses from predation. When undertaking an analysis of the effects of alleged anti-competitive conduct, the competition authority should therefore consider whether any non-competitively neutral public policy has had an impact on this analysis (OECD, 2022^[6]).

Chapter 3 of this document provides guidance on promoting competitive neutrality in the enforcement of competition law.

2.1.2. Regulatory environment

“Regulatory environment” refers to a broad range of actions by the state, from primary legislation establishing framework laws, such as the competition law, to detailed technical regulations introduced and enforced by specialised bodies such as sector regulators. Regulation is crucial to help markets work and to ensure that they deliver outcomes that are in line with government's policy goals.

Policy makers, however, should be aware that regulation may sometimes have unintended consequences on competition. For instance, imposing product standards that are used by certain competitors, but not others, will tilt the playing field in their favour. Competition will also be distorted if some market players, for example incumbents, are subject to old regulations that are less costly to comply with, while new entrants must abide by new and stricter regulations.

The intervention of policy makers should have a clear rationale and minimise “the distortion of competition subject to achieving the [policy] goal” (Office of Fair Trading, 2009^[3]). This can be done by carrying out a competition assessment to analyse the potential impact of regulation on competition, as set out in the OECD Recommendation on Competition Assessment [[OECDLEGAL\0455](#)].

Chapter 4 of this document provides guidance on conducting such analysis from a competitive neutrality point of view.

2.1.3. Public procurement

Government participates in markets both as a seller and as a buyer of goods and services. As a buyer of goods and services, government usually accounts for a significant proportion of the economy.³ It usually procures goods and services through open tenders with competing bidders, to ensure value for money. When government is an important buyer in a given market, it can also affect its competitive dynamics. For example, it can push suppliers to lower prices in the short term and encourage bidders to innovate and develop new solutions in the longer term (Office of Fair Trading, 2009^[3]).

Public procurement tenders may contain terms that favour one supplier (or group of suppliers) over others. This could be intended to promote domestic manufacturing and reduce imports, for instance by requiring product standards unique to the country or a surcharge on the price quoted by offshore suppliers. There may be good reason for doing so; for example, disruptions to supply chains during the recent pandemic have highlighted various security issues associated with reliance on imports of essential products. These limitations, especially if used outside emergency situations, have the effect of tilting the level playing field in favour of certain market players.

In countries where there are SOEs supplying goods and services to the state, there is the risk that these market players will have a favourable treatment compared with their privately-owned competitors. Good practice shows that the public procurement framework does not unduly benefit SOEs as sellers, ensuring at the same time that the framework promotes the participation of the largest number of suppliers (CNMC, 2021^[7]).

Chapter 5 of this document provides guidance on promoting competitive neutrality in public procurement.

2.1.4. State support

State support includes direct grants, loans, tax exemptions, capital injections, and guarantees, as well as other advantages such as allowing enterprises to rent public land or buildings at a price that is lower than the market price.

State support can be used to change the incentives and the behaviour of enterprises, for instance when there are market failures and the market on its own would not achieve an outcome that is desirable for society. Governments may also wish to temporarily support companies that are in financial difficulties, for instance as seen during the Covid-19 pandemic. Support can be granted to both privately-owned companies and SOEs. Given their important role in many economies, SOEs are important recipients of state support and tend to receive relatively more support than privately-owned companies (OECD, 2023^[8]) and they can also be providers of subsidised inputs such as energy or capital.

From a competitive neutrality perspective, state support has the potential to distort competition, both in domestic markets and internationally. This occurs when state support benefits some competitors but not others, i.e. it involves a certain degree of selectivity. As a result, the competitors benefitting from support would have less incentives to be efficient and competitive. Similarly, state support may result in inefficient firms, which would have otherwise exited the market, remaining in the market.

The definition of when state support grants a selective advantage varies across jurisdictions, as does the legal and institutional framework to identify and address the potential distortions resulting from state support (OECD, 2010^[9]). Among the good practices identified, if the support by policy makers benefits specific competitors, it is expected that it has a clear policy objective. The examples of good practices also show that it should be demonstrated to what extent the support helps achieve that objective and only proceed with a selective support measure when it is not possible to identify a less distortive measure that can meet the same goal.

Chapter 6 of this document provides guidance on preserving competitive neutrality when granting state support.

2.1.5. Public Service Obligations

Public services include services that governments consider important for all citizens and therefore supports their provision and affordability, such as water and sanitation, electricity or rail services. The state can provide them directly, through an SOE, or through private firms. The state may contribute financially to ensure that the public services are available at affordable prices to all citizens, including those living in areas that are costly to serve. This contribution is necessary if the public service provision results in a financial burden for the supplier, who would not have an incentive to provide it if there was no government intervention.

From a competitive neutrality perspective, if the supplier or suppliers of public services compete with other market players, there is a risk that public service provision is either an advantage or a disadvantage, resulting in distortions to competition. If the public service obligation is overcompensated, the additional financial resources can be used to cross-subsidise the services provided in competition with other market players. Vice versa, if the compensation for the public service obligation is not sufficient, the supplier or

suppliers will have to use their financial resources to cover the provision of public services. In both cases, the compensation of the public service tilts the playing field.

While the availability and affordability of certain services are important, it is good practice to follow competitive neutrality principles both when awarding the provision of those services and when establishing the compensation for their provision.

Chapter 7 of this document provides guidance on preserving competitive neutrality in the award and compensation of public service obligations.

2.2. What is the scope of the OECD Recommendation on Competitive Neutrality?

The Recommendation defines competitive neutrality as a “principle according to which all [e]nterprises are provided a level playing field with respect to a state’s (including central, regional, federal, provincial, county, or municipal levels of the state) ownership, regulation or activity in the market.” It recommends that government intervention, as described in Section 2.1, does not distort competition in markets, that is, that it does not tilt the playing field in favour of certain market participants.

The definition comprises a number of elements, including the following:⁴

- It covers the state’s intervention directly in the market (“activity in the market”), as well as its role as an owner and as a regulator.⁵
- It concerns “enterprises” active in a market and potential competitors. The Recommendation defines an enterprise as “any entity engaged in offering goods or services on a market, irrespective of its legal form”.
- It covers the state’s ownership, regulation and activities at all the levels of the state, which may depend on how jurisdictions are organised. For instance, in some jurisdictions local authorities may issue regulations and also be active in the economy, through fully or partially-owned enterprises.

The definition of competitive neutrality is useful when there could be more than one enterprise on a market. The implication is that competitive neutrality is not strictly a concern, for example, when goods and services are only provided by the public sector. It may become an issue for international competitors, though, or for markets that are vertically related to the one in question.

The Recommendation refers to enterprises that should be guaranteed a level playing field, regardless of factors such as their ownership, location or nationality. Therefore, it does not concern only competitive neutrality between state-owned enterprises and privately-owned enterprises, but it is much broader. It covers, for example, a differential treatment between privately-owned competitors, such as new entrants and incumbents, and between enterprises located in different regions or different countries.

More specifically about ownership, the Recommendation recognises that different jurisdictions may have different institutional set-ups concerning SOEs. For this reason, it defines SOEs as enterprises that engage in economic activities rather than focusing on their legal form. Consistently with the SOE Guidelines, according to the Recommendation an SOE is recognised by national law as an enterprise and the state exercises ownership or control of that enterprise [\[OECD/LEGAL/0414\]](#).⁶

In practice, establishing if an entity qualifies as an SOE involves ascertaining both its ownership and control structure and the economic nature of its activities, noting that it may conduct economic activities either exclusively or alongside public-policy objectives.

Competitive neutrality is also important in relation to competition between domestic and foreign enterprises and the Recommendation aims at promoting a level playing field between domestic and foreign competitors. State support and favourable regulations can be used to support domestic enterprises competing in international markets. This is especially relevant for SOEs: the public sector is estimated to

hold more than 50% of shares in almost 10% of the largest listed companies worldwide (De La Cruz, Medina and Tang, 2019^[10]). SOEs are also increasingly active internationally, through trade and investment, as well as playing important roles in supply value chains. Therefore, any state support they benefit from in a selective way can distort competition in international markets too.

References

- CNMC (2021), *Recommendations to the public authorities for an intervention in favour of market competition and an inclusive economic recovery*, https://www.cnmc.es/sites/default/files/3812928_0.pdf. [7]
- De La Cruz, A., A. Medina and Y. Tang (2019), “Owners of the World’s Listed Companies”, *OECD Capital Market Series*, <http://www.oecd.org/corporate/Owners-of-the-Worlds-Listed-Companies.pdf>. [10]
- Moss, D. and J. Cisternino (eds.) (2009), *Regulation and Failure*, The Tobin Project, <https://tobinproject.org/books-papers/new-perspectives-regulation>. [2]
- OECD (2023), “Government support in industrial sectors: A synthesis report”, *OECD Trade Policy Papers*, No. 270, OECD Publishing, Paris, <https://doi.org/10.1787/1d28d299-en>. [8]
- OECD (2022), “Competition, Subsidies and Trade”, *OECD Competition Policy Roundtable Background Note*, <http://www.oecd.org/daf/competition/subsidies-competition-and-trade-2022.pdf>. [6]
- OECD (2018), *Competition Law and State-Owned Enterprises*, [https://one.oecd.org/document/DAF/COMP/GF\(2018\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf). [5]
- OECD (2014), *Factsheet on how competition affects macroeconomic outcomes*, <https://www.oecd.org/daf/competition/factsheet-macroeconomics-competition.htm>. [1]
- OECD (2012), *Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264178953-en>. [4]
- OECD (2010), *Roundtable on Competition, State Aids and Subsidies*, <https://www.oecd.org/daf/competition/sectors/48070736.pdf>. [9]
- Office of Fair Trading (2009), *Government in markets. Why competition matters - a guide for policy makers*, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284451/OFT1113.pdf (accessed on 3 May 2023). [3]

Notes

¹ Externalities refer to situations when certain individual choices create costs or benefits for other consumers or firms. The individual that makes the choice, however, does not internalise these additional costs or benefits and therefore their choices are not optimal for society. While in many markets some suppliers can exercise market power to some extent, in some markets it is more efficient for only one supplier to deliver the good or service. This situation, which usually arises due to significant fixed costs required to enter the market, is called natural monopoly. It calls for government intervention to constrain the natural monopolist's market power. When consumers only have imperfect information about goods or services before buying them, it can be hard for them to distinguish higher quality alternatives from lower quality ones. Due to this problem, higher quality suppliers will find it difficult to sell their goods at higher prices. Government can help by improving the information available to consumers, for instance imposing labelling requirements on producers.

² These types of intervention are additional to the basic institutional structure in which firms can operate and compete, such as establishing “the rules of law” and providing national defence.

³ According to OECD data, OECD countries spend more than 10% of GDP on government procurement. See www.oecd.org/gov/public-procurement, accessed on 9 May 2023.

⁴ The definitions used in the OECD Recommendation on Competitive Neutrality are consistent with those in the SOE Guidelines [[OECD/LEGAL/0414](https://www.oecd.org/legal/0414)]. They are explained and illustrated with examples in the introductory chapter of OECD (2012^[4]).

⁵ The SOE Guidelines [[OECD/LEGAL/0414](https://www.oecd.org/legal/0414)] deal with the state as an owner, for instance concerning the appointment of boards and the arms-length relationship between the owner and the SOEs.

⁶ For the avoidance of doubt, competitive neutrality is concerned with SOEs performing economic activities such as commerce and not with public entities charged with economic policy-making.

3 Competition law and enforcement


A well designed and effectively enforced competition law can bring many benefits, such as lower prices, better quality products and services, more choices to consumers, and ultimately economic growth and development. To reap the benefits of competition, all competitors in a given market should be subject to the same competition rules. This chapter presents a set of questions to guide the analysis, good practices and examples on how to implement the OECD Recommendation on Competitive Neutrality in competition law and enforcement.

A well-designed and effectively enforced competition law can bring many benefits, including lower prices, better quality products and services, more choices to consumers, and ultimately economic growth and development (OECD, 2014^[11]). In order for this to happen, all competitors in a given market should be subject to the same competition rules. Exceptions for some enterprises that are not subject to the application or enforcement of the competition law result in a non-neutral competition framework. In turn, an uneven playing field undercuts the benefits of competition (OECD, 2021, pp. 7-9^[21]).

For these reasons, the Recommendation on Competitive Neutrality provides that jurisdictions should ensure competitive neutrality in their competition law and in its enforcement.

A set of questions to help identify policies that can potentially distort competitive neutrality is presented below. When a policy is not in line with at least one of the questions or good practice approaches, it has the potential to distort competition and should be analysed in detail. Chapter 8 sets out the main steps of the analysis.

Figure 3.1. Suggested questions to assess competition law and enforcement



Competition law and enforcement

Competition law and enforcement are likely to distort competitive neutrality and should be analysed in detail when the answer is “no” to one or more of the following questions (see methodology in Chapter 8):

- Are all enterprises (including SOEs) in all sectors subject to antitrust law and to merger control? In particular:
 - Is the rationale for any exception reasonable and clearly spelled out?
 - Are these exceptions transparent and periodically reviewed?
- Are all enterprises subject to the same procedural rules?
- Are sanctions in your jurisdiction based on the same methodology for all enterprises?
- Do all enterprises have access to judicial review of the competition authority’s decisions?

3.1. Adopt or maintain, and enforce, a competitively neutral competition legal framework

According to the Recommendation, jurisdictions should “adopt or maintain, as appropriate, a competitively neutral competition law that addresses anti-competitive conduct and includes merger control”. This mostly concerns the question of who is subject to competition law. As stated in (OECD, 2015^[31]), competition law normally applies “to any ‘person’ or ‘undertaking’, which are interpreted broadly as encompassing any entity engaged in an economic activity, regardless of its ownership, source of financing, legal status, place of business or nationality”.¹

The Recommendation therefore recommends that jurisdictions make sure their competition rules are applied to all competitors in the same manner, so as not to distort the level playing field. However, there may be jurisdictions where competition law only applies to corporatised SOEs, while other types of public companies may not be subject to competition law even though they perform economic activities. Additionally, certain companies in charge of delivering public services may not be subject to competition law regardless of their ownership.

The Recommendation states the principle that jurisdictions should maintain competitive neutrality in the enforcement of competition law. It recognises that while rules may appear to be competitively neutral *de jure*, in practice their enforcement may be discriminatory, for example SOEs may enjoy a more favourable treatment in merger control or antitrust enforcement. The challenges of competition enforcement when

dealing with SOEs have attracted significant attention. OECD (2015^[3]) discusses substantive, institutional and practical challenges with enforcement. For example, it may not be straightforward to assess if various SOEs qualify as separate entities or not. This has various implications, such as whether co-ordinated practices among SOEs may amount to collusion or whether the concentration of two or more SOE undertakings is subject to merger control. On the institutional front, there is the risk of undue influence by the government on the competition authority, despite its independence, when an SOE is being investigated for competition law violations. There are also practical challenges with investigation and information gathering. For instance, government entities may be reluctant to respond to requests for information in some jurisdictions.

While competition law and its enforcement should be neutral, the Recommendation clarifies that this principle “would not rule out measures aimed at safeguarding competitive neutrality”. Therefore, the Recommendation allows for rules that may be applicable to certain types of enterprises, such as SOEs, to achieve competitive neutrality. Some jurisdictions have specific legal frameworks and powers designed to promote competitive neutrality (see Box 3.1).

The principle of competitive neutrality in competition enforcement is also encapsulated in the Recommendation on Transparency and Procedural Fairness [[OECD/LEGAL/0465](#)], which sets standards concerning impartial and non-discriminatory competition law enforcement. In particular, it calls for jurisdictions to carry out “*competition law enforcement in a reasonable, consistent and non-discriminatory manner, including without prejudice to the nationalities and ownership of parties under investigation*”.

Examples

The following selected examples are meant to show that SOEs are subject to competition law in the majority of jurisdictions:

- In 2008, the **Chilean Competition Tribunal** (TDLC) found that the state-owned Chilean Railway Company abused its dominant position by charging excessive prices. The company was ordered to change its pricing and avoid arbitrary discrimination.² This case clarified that the tribunal “can impose sanctions against the State when: (a) it acts as an economic agent, and (b) acts against the Competition Law” (OECD, 2015, p. 3^[4]). This decision was confirmed by the Chilean Supreme Court in 2009.³
- In 2015, the **European Commission** imposed fines on two subsidiaries of the Austrian and German railway incumbents (SOEs Österreichische Bundesbahnen and Schenker, respectively), for fixing prices, allocating customers, as well as exchanging information for nearly eight years. Swiss Kühne+Nagel, privately-owned, was also part of this agreement, but was not fined under the EU’s leniency program (OECD, 2016, p. 105^[5]).⁴
- In 2007, the **Japan Fair Trade Commission** (JFTC) enforced a case against a subsidiary of an SOE in the telecom industry. The undertaking had been setting prices for end-users in the downstream market that were lower than prices for its competitors in the upstream market, foreclosing its competitors, i.e. other telecom providers, from the downstream market (OECD, 2015, p. 3^[6]).
- In 2016, the **Norwegian Competition Authority** imposed fines on Lindum AS, a company 100% owned by the municipality of Drammen, and a private firm for illegal collusion by submitting a joint bid for the collection, transport and final treatment of sewage sludge in Bergen municipality (Norwegian Competition Authority, 2016^[7]).
- In 2008, the **Office for Fair Trading** (OFT), one of the predecessors of the UK’s Competition and Markets Authority (CMA), issued a decision against publicly-owned bus company Cardiff Bus for engaging in predatory behaviour designed to eliminate a competitor (OECD, 2015, p. 5^[8]).

Box 3.1. Jurisdictions with a legal framework or specific provisions on competitive neutrality

Australia has a comprehensive framework for promoting competitive neutrality between government-owned enterprises and private enterprises. Both the federal and state governments have established competitive neutrality policies and guidelines to ensure that the government's acts and decisions do not benefit its own businesses over the private sector. When a government-owned business benefits from more favourable conditions than private enterprises, for instance lower borrowing rates, the Australian policy provides for a "neutrality adjustment" to balance this advantage. Complaints against violations of federal rules are handled by the Australian Government Competitive Neutrality Complaints Office (AGCNCO).

The **Finnish** Competition Act (Section 30a) gives the Finnish Competition and Consumer Authority (FCCA) the power to intervene in markets where public entities engage in business activities if a business practice or organisational structure prevents or distorts competition on the market or conflicts with the requirement of market-based pricing in the Local Government Act. The FCCA shall first strive to abolish the distortion of competition through negotiations. If this approach does not succeed, the FCCA shall prohibit the use of the business practice or organisational structure, or impose conditions to ensure neutral competitive neutrality in the market.

The **Lithuanian** Competition Act (Article 4) provides that public administration entities should not grant privileges to or discriminate in favour of undertakings that distort competition, except "where the different competitive conditions may not be avoided when meeting the requirements of the parliamentary laws". The Competition Council of Lithuania has enforcement powers against public authorities' decisions that result in a differential treatment of competitors, whether they are state-owned enterprises or privately-owned enterprises.

The **Swedish** Competition Act (Chapter 3, Section 27) prohibits anti-competitive sales activities by public entities. The Competition Authority can investigate conduct falling under this provision and ask the Patent and Market Court to issue a decision prohibiting "conduct by the state, a municipality or a county council within a sales activity if the conduct distorts [...] the conditions for effective competition in the market". As opposed to the general antitrust rules on unilateral conduct, this provision does not require the entity conducting the sales activity to be dominant.

Sources: OECD (2015^[9]), OECD Roundtable on Competitive Neutrality in Competition in Competition Enforcement – Note [https://one.oecd.org/document/DAF/COMP/WD\(2015\)19/En/pdf](https://one.oecd.org/document/DAF/COMP/WD(2015)19/En/pdf); OECD (2021^[10]), OECD Roundtable on the Promotion of Competitive Neutrality by Competition Authorities – Note by Finland, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)41/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)41/en/pdf); OECD (2021^[11]), OECD Roundtable on the Promotion of Competitive Neutrality by Competition Authorities – Note by Lithuania, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)32/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)32/en/pdf).

3.2. Restrict exceptions, if any, from the coverage of competition laws to those indispensable to achieve their overriding policy objectives

Despite the overarching principle that competition law and its enforcement should be competitively neutral, some jurisdictions may still grant exceptions to certain enterprises, such as large employers or national champions. These exceptions reduce the scope of competition law and may result in anti-competitive conduct not being sanctioned by the authorities. In addition, the exempted enterprises benefit from a more lenient framework than their competitors and have lower competition law compliance costs. For these reasons, legal exceptions should be limited. However, a number of jurisdictions still grant exceptions to specific entities. For instance, in some jurisdictions the competition act gives a minister the power to

exempt a specific business or activity from competition law. Moreover, as described in Section 3.6, there may be provisions that enable the government to intervene in merger control in view of public interest considerations (OECD, 2016^[12]), effectively introducing an exception from competitive neutrality principles.

For competition law to be neutral, any exceptions should be limited to those that are indispensable to achieve a country's overriding policy objectives, as outlined in the Recommendation on Hard Core Cartels [OECD/LEGAL/0452] and the Recommendation on Competition Assessment [OECD/LEGAL/0455]. The former calls on jurisdictions to “restrict exemptions, if any, from the coverage of Adherents’ laws against hard core cartels to those indispensable to achieve their overriding policy objectives”. The latter calls for exceptions to be “no broader than necessary to achieve their public interest objectives and that these [...] are interpreted narrowly”.

Examples

The following are examples showing criteria adopted by selected jurisdictions to identify exceptions needed to achieve specific public objectives:

- In **Colombia**, Article 28 of the Competition Law established that “restrictive competition practices and particularly those relating to the control of merger transactions” do not apply to cases when the Superintendence of Finance, the financial regulator that oversees competition law in the financial sector, imposes “mechanisms designed to rescue and protect the public trust”. In particular, the competition law defines these mechanisms narrowly as those deemed necessary for maintaining public confidence in the financial system (OECD, 2016, p. 90^[13]).
- In **EU** and **EEA** member states, there are no exceptions from competition rules. There is certain room for limiting their application though. Undertakings providing services of general economic interest (SGEI), as per Article 106(2) of the Treaty on the Functioning of the European Union (TFEU), are subject to competition law to the extent that it does not “obstruct the performance [...] of the particular tasks assigned to them”. This holds for both public and private undertakings, and it is applied very narrowly and to ensure specific strategic interests (OECD, 2012, p. 19;71^[14]).
- In a 2006 case, the **United States** Court of Appeals for the Sixth Circuit held that the Tennessee Valley Authority, a large public power provider, was entitled to an implied exemption from anti-trust laws for certain conduct. This was in light of a federal statute that expressly authorised it to enter into contracts for the purpose of “promot[ing] the wider and better use of electric power for agricultural and domestic use, or for small or local industries” (OECD, 2015, p. 5^[15]).⁵ In this case, the exemption was directly related to a specific public policy objective.

3.3. Any legal exceptions from competition law should be adopted through a formal legislative process and should periodically be subject to a formal competition assessment process

The good practices identified show that exceptions from competition law, if any, should be widely discussed through a formal legislative process. This helps ensure that exceptions are adopted in a transparent way and are publicly known, as well as allows for open discussion on the merits of the exceptions, and for objections and alternative proposals to be put forward and considered. In addition, those legal exceptions should be reviewed periodically through a formal competition assessment process following transparent criteria for evaluating suitable alternatives. Nevertheless, as mentioned above, in some jurisdictions the government can exempt specific companies from competition law without a legislative process and without defining a clear policy objective to justify the exception.

These good practices, i.e. transparency and regular review, are in line with the OECD Recommendation on Effective Action against Hard Core Cartels [OECD/LEGAL/0452] and the OECD Recommendation on

Competition Assessment [[OECD/LEGAL/0455](#)]. The former provides that jurisdictions “should make their exemptions transparent and periodically assess their exemptions to determine whether they are necessary and limited to achieving their objective”. The latter recommends that any new exemptions from competition law be “defined for a limited period of time, typically by including a sunset date, so that no exception would persist when it is no longer necessary to achieve the identified policy objective”.

Examples

The following are selected examples where exceptions are transparently granted by law or where they are being assessed:

- In **Costa Rica**, the competition act grants exceptions to certain entities, such as some concessionaries of public services and monopolies awarded by the State. In a recent review, the OECD recommended their periodic assessment to evaluate if those exceptions continued to be justified, noting that the competition authority had already advocated for repealing some of them in the past (OECD, 2020^[16]).
- In **Israel**, restrictive agreements can be exempt from competition law if they are established by law (not by mere policy or administrative decisions), and only if the application of competition rules would otherwise create an irresolvable conflict with the legislation in question (OECD, 2011, p. 76^[17]).
- **Japan**, through the Antimonopoly Act and other pieces of legislation, had previously granted many exceptions in different industries in order to develop and strengthen these industries. However, the Japan Fair Trade Commission, in co-operation with different relevant ministries, is now reviewing these exceptions to see if they are still necessary. In 2021, there were 25 exceptions in 18 laws, which have been reduced from 89 exceptions in 30 pieces of legislation in 1996 (OECD, 2021, p. 3^[18]).
- In a case between the **US** Postal Service (USPS) and Flamingo Industries, a supplier of mail sacks, the latter claimed that the former purposefully excluded it from the market for providing mail sacks. The Supreme Court held that USPS was not subject to antitrust liability, as it was considered part of the federal government and was hence not subject to antitrust laws.⁶ In later years, Congress opened some postal services to competition from private entities and provided that regarding these services, the US Postal Service is subject to federal antitrust laws as are its privately-owned competitors (OECD, 2015, p. 4^[15]).

3.4. There should be no defences that are available to an enterprise based on criteria such as its ownership, nationality or legal form but denied to other enterprises

Competition law may not apply in a neutral way because certain enterprises benefit from exceptions, as seen in Sections 3.2 and 3.3. Moreover, enterprises that are subject to competition law could claim defences against its enforcement. These are claims raised by antitrust defendants in order to prove that even if competition law is applicable, it should not be enforced in that case (OECD, 2021^[21]).

An example is the state action defence or regulated conduct defence, which shields conduct from competition law enforcement when it is required or authorised by law. There is a risk that SOEs or enterprises in strategic sectors may find it easier than their competitors to justify their actions as being directed or authorised by the State. This concern is mitigated by the fact that enterprises invoking this defence must provide, in the jurisdictions where it is admitted, substantial evidence to show that their actions were required or authorised by law (OECD, 2018^[19]).

In order to ensure competitive neutrality in the enforcement of competition law, good practices among jurisdictions show that legal provisions that make defences available only to certain enterprises should be avoided. Specific criteria may help clarify the circumstances under which certain defences can be claimed.

Examples

The following are meant to show selected examples of this good practice approach:

- In 2018, the **Chinese State Administration for Market Regulation** (SAMR) found two undertakings, associated with Chinese SOEs, were in violation of competition laws for price-fixing in the market for freight shipping. While the parties argued that they formed a single entity, SAMR found that they operated independently. The parties also argued that their pricing strategies were directed by the state. SAMR also disagreed with this view, noting that even in the presence of government intervention, competing undertakings should not collude (OECD, 2018, p. 10_[19]). The single entity defence can be invoked by all enterprises.
- In **Israel**, competition law does not apply to conduct if it is part of a governmental directive, leaving “no latitude for individual choice” for the undertaking. This holds for any undertakings (OECD, 2011, p. 76_[17]).
- Though disfavoured, **US** states may, under narrow circumstances, regulate their economies by adopting measures that shield anticompetitive conduct from the reach of the federal antitrust laws. A state acting in its sovereign capacity may impose restrictions on competition, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. Private actors, including state regulatory boards controlled by market participants, are exempt from antitrust liability if acting pursuant to a clearly articulated and affirmatively expressed state policy and if their actions are actively supervised by the state, including by a state official or state agency that is not a participant in the market being regulated. The first element seeks to ensure that the anticompetitive mechanisms adopted by the governmental entity operate because of a deliberate and intended state policy. The second element, active state supervision, ensures that entities that include active market participants are acting pursuant to a state policy rather than their private interests in restricting competition. For regulatory boards controlled by market participants, the state must review the substantive merits of particular acts to ensure consistency with state goals. Although the US Supreme Court has addressed aspects of the “state action defence” in a number of cases, most recently in *North Carolina State Board of Dental Examiners v. FTC*, the Supreme Court clarified when actions by a state regulatory board that includes active market participants satisfy this defence. In this case, the North Carolina State Board of Dental Examiners (NC Board) was a state agency responsible for administering and enforcing a licensing system for dentists. The challenged competitive restraint was a rule prohibiting non-dentists from providing teeth whitening services in competition with licensed dentists. Significantly, a majority of the NC Board’s decisionmakers were practicing dentists, and, thus, they had a private incentive to limit competition from non-dentist providers of teeth whitening services. The NC Board invoked the state action defence, asserting that the prohibition did not violate the antitrust laws because the NC Board was a state agency. The Supreme Court rejected this argument, holding that the NC Board’s actions required active supervision by the state because a majority of the NC Board’s members were active participants in the market it was regulating (OECD, 2015, pp. 6-10_[15]).⁷

3.5. Sanctions should not discriminate between enterprises based on criteria such as ownership, nationality or legal form

Sanctions, including monetary penalties, are an integral part of competition law frameworks to ensure deterrence. Even though many jurisdictions have guidelines in place for transparency purposes, there is

still wide discretion in the sanctions (and in particular fines) that authorities and courts can set (OECD, 2018_[20]). In turn, this discretion could result in discriminatory treatment of competitors. Sanctions should be set following the same criteria for any type of entity conducting an economic activity. Guidelines issued by competition authorities, if any, should not discriminate between different competitors. In some jurisdictions, courts rather than competition authorities determine sanctions for certain anti-competitive conducts. In those cases, it is possible that the relevant guidelines will not be specific to competition cases but will apply more generally. Even when not issued by the competition authority, any guidelines should still be in line with the principle of competitive neutrality.

For example, SOEs should have the same treatment as private entities. Determining the appropriate sanction or remedy for an anti-competitive behaviour of an SOE is important to ensure an effective degree of deterrence (OECD, 2021_[2]). However, there may be some implementation challenges that are especially relevant when dealing with SOEs, for example concerning the identification of the relevant turnover to calculate fines, due to the different financial standards applicable to SOEs that may provide less transparency than for privately-owned enterprises.⁸ Another issue concerns the deterrence effect of financial penalties if SOEs benefit from State transfers and can pass fines on to taxpayers. Some of these factors will likely depend on wider country policies and set-up rather than the competition law itself or the competition authority's fining guidelines.

Examples

The following are meant to show selected examples of this good practice approach, in particular in relation to the treatment of SOEs:

- In 2016, the **Administrative Council for Economic Defense** (CADE) sanctioned an international cartel in the market of compressors used in refrigeration, involving both domestic and foreign companies. The fines imposed by CADE amounted to BRL 21 million and all firms were sanctioned on the same criteria (OECD, 2017_[21]).
- In 2013, the **Competition Commission of India** (CCI) imposed a fine on an SOE, Coal India Limited, for imposing discriminatory conditions in its fuel supply agreements (OECD, 2021, p. 5_[22]).⁹ In another case, the CCI found that four public sector general insurance companies had formed a cartel to increase the premium for a subscriber.¹⁰ The four undertakings were fined. Similarly, in 2021, the CCI found an SOE to have abused its dominant position in the milling market and ordered it to cease and desist its actions (OECD, 2021, p. 6_[22]).¹¹
- Following an investigation for discriminatory practices and margin squeeze, in 2013 the **Italian Competition Authority** (AGCM) imposed commitments on the state-owned incumbent in the market for high-speed passenger rail transport services. The state-owned incumbent did not abide by these commitments, leading to another investigation by the AGCM in 2015 (OECD, 2018, p. 17_[19]).¹²
- The **Commission for the Protection of Competition of Serbia** has enforced competition rules against SOEs multiple times, mainly concerning abuse of dominance in the energy, railways, and telecommunications sectors. In general, the Commission “does not distinguish between SOEs and other firms when applying rules concerning restrictive agreements, abuse of dominance and merger control to firms in all sectors of the economy” (OECD, 2021, p. 3_[23]).
- In a **Swedish** bid-rigging scheme among several construction firms, the Swedish Road Authority acted both as damaged procuring authority and supplier of asphalt that participated in the cartel. In 2009, the Swedish Market Court decided that a public authority carrying out multiple functions could be part of a cartel in its role as a supplier and be held accountable for the anti-competitive infringement. Thus, the Road Authority was sanctioned according to the same principles as the other cartel participants (Nilsson, 2009_[24]).

- In 2017, the **Antimonopoly Committee of Ukraine** (AMCU) fined state-owned Boryspil International Airport for abusing its position in the aircraft ground handling services by refusing to approve applications by other entrants (OECD, 2018, p. 21^[19]).

3.6. Merger control frameworks should be competitively neutral, in particular with regard to establishing jurisdiction over transactions

Good practices show that merger control frameworks apply in a neutral manner to all entities conducting an economic activity, for instance regarding their ownership and nationality. In this respect, a number of challenges arise in the design and application of merger control rules. For example, assessing if the merging parties can be considered two separate economic entities may be more complicated in the case of SOEs than other competitors. This is due to difficulties in determining the extent to which the State is involved in decision-making and therefore can impose its decisions on both entities, which in this case would not be seen as separate. As a consequence, calculating the relevant turnover, in order to ascertain if a transaction has to be notified, can be challenging. If the corporate perimeter is incorrectly identified, transactions that do not require notification because the entities are already part of the same group will be reviewed or, conversely, some mergers may not be notified even though the parties were separate economic entities.

The challenge of identifying the correct boundaries of merging SOEs is also linked to the ownership and governance structure of SOEs. In some countries, a central state authority may be responsible for managing the State's shareholdings. Therefore, when assessing mergers involving foreign SOEs, competition authorities need to understand the specificities of the country in order to investigate if the merging parties are independent or belong to a wider economic unit.

In addition, there is a risk that competition authorities are or feel pressed to analyse mergers involving foreign entities somewhat more strictly, especially when they involve state assets or so-called national champions.

The legal framework may set different requirements for different competitors or there may be calls for competition authorities to treat certain cases differently in their enforcement of the legal framework. As an example of the former, in an Adherent the ex-ante merger control regime has a specific exception in some sectors. Mergers, concessions, transfers or control changes by and among non-dominant economic agents are not subject to merger control if they comply with certain requirements provided in the law. Moreover, if the competition authority identifies competition concerns following a merger, non-dominant players may not be subject to divestment rules, and only regulation and behavioural remedies may be imposed by the competition authority.

Some transactions may take place in strategic sectors, involve national security considerations or other policy objectives such as preserving media plurality, regardless of whether the entities involved are SOEs or privately-owned, foreign or domestic companies. In these cases, the legal framework may provide for such considerations in the merger review process, either by the competition authority or, more frequently within Adherents, by another entity, often a government department. However, as discussed in the OECD Roundtable on Public Interest Considerations in Merger Control (OECD, 2016^[12]), public interest clauses may result in lack of predictability and transparency. For these reasons, it is a good practice to make sure that “government intervention is exercised under exceptional circumstances and in a transparent manner; and that there is effective judicial review of how the merger-specific public interest concerns outweigh the drawbacks in competition” (OECD, 2016^[25]). Finally, other tools may be more suitable to address non-competition related objectives, such as foreign direct investment (FDI) screening mechanisms, although such mechanisms can also distort competitive neutrality, for example if acquisitions by foreign players are discouraged for protectionist purposes.

Examples

The following are meant to show selected examples of this good practice approach:

- In **Brazil**, the Administrative Council for Economic Defense (CADE) acts on the premise that competition law applies to all individuals in all sectors, meaning that SOEs are subject to merger control by CADE. Accordingly, CADE reviewed a transaction between two publicly controlled banks, and the transaction was cleared with remedies (OECD, 2015, p. 4_[26]). CADE has also analysed mergers involving SOEs in the fuel sector. In one case, in 2007, it imposed both structural and behavioural remedies (OECD, 2015, p. 6_[26]).¹³
- The **EU Merger Regulation** applies to all types of undertakings. Its preamble, as well as Article 1, highlights that certain transactions have a “community dimension”, and thus are within the jurisdiction of the Commission, if they surpass certain turnover thresholds. These thresholds are calculated “with respect [to] the principle of non-discrimination between the public and private sectors ... irrespective of the way in which the [undertakings]’ capital is held or of the rules of administrative supervision applicable to them”.¹⁴
 - More specifically, the EU Merger Regulation (preamble 22) deals with the calculation of turnover in a concentration in the public sector, stating that it should “*take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them*”. Therefore, under the Merger Regulation, the European Commission assesses if an SOE has an independent power of decision. If not, it will need to identify the ultimate State entity that controls that SOE, together with any other SOEs owned by the same State entity.
 - Such transactions can then be analysed by the Commission or can be referred to the competition authority of a Member State, if a preliminary analysis finds that assessment by the national competition authority would be more appropriate. For example, in 2009, the EC assessed a merger between GDF Suez and EDF, in both of which the French State held significant shareholding interest. The EC found some concerns with the merger and approved it subject to commitments, specifically a divestiture remedy.¹⁵ In 1998, the EC reviewed a merger between two Finnish SOEs operating in the energy sector, Neste and IVO, and approved it subject to commitments by both undertakings and by the Finnish government (OECD, 2016, p. 109_[5]).¹⁶
- The **Hungarian Competition Act** allows for exemptions for undertakings (mainly SOEs) from having to fulfil merger control clearance obligations if they are of national strategic importance and serve the public interest. This exemption has been applied in a number of cases, mainly in the public utilities sector (OECD, 2018, p. 8_[19]). For instance, in the energy sector the exemption was used to facilitate affordable energy supply for consumers, and in the financial sector, with the goal of preserving jobs. These exemptions have been used to achieve clear and specific policy objectives and strategic goals (Eötvös and Christoph, 2016_[27]).
- In 2022, **Mexico’s Federal Telecommunications Institute** (IFT) examined a merger involving a Private Public Partnership (PPP) created to supply wholesale services to retail telecommunications providers. The private partner of the PPP notified IFT that its shareholders and the Mexican Development Bank would set up a financial agreement, and the government would hold 60% of the assets. In its competition assessment, IFT analysed who would be the stakeholders and if they participate in the market, as well as the equity participation and stakeholders’ rights post-merger (IFT, 2022_[28]).
- In 2021, the **National Markets and Competition Commission** (CNMC) applied competition rules to a foreign undertaking carrying out a merger under its jurisdiction, fining a Portuguese SOE for gun-jumping (OECD, 2021, p. 5_[29]).¹⁷

References

- Eötvös, O. and H. Christoph (2016), “No merger control for concentrations of national strategic importance”, *International Law Office*, <https://www.lexology.com/commentary/competition-antitrust/hungary/schoenherr-attorneys-at-law/no-merger-control-for-concentrations-of-national-strategic-importance>. [27]
- Fox, E. and D. Gerard (2023), *EU Competition Law: Cases, Texts and Context*, Edward Elgar Publishing, <https://www.e-elgar.com/shop/gbp/eu-competition-law-9781839104688.html>. [30]
- IFT (2022), *El Pleno del IFT autoriza concentración en Altán y emite opinión en competencia económica para modificar el contrato APP de la Red Compartida Mayorista. (Comunicado 60/2022) 21 de junio*, <https://www.ift.org.mx/comunicacion-y-medios/comunicados-ift/es/el-pleno-del-ift-autoriza-concentracion-en-altan-y-emite-opinion-en-competencia-economica-para>. [28]
- Nilsson, D. (2009), *The Swedish Market Court ends asphalt cartel case by increasing fines up to € 46 M, reaching the highest ever fine in a cartel case (NCC)*, <https://www.concurrences.com/en/bulletin/news-issues/may-2009/The-Swedish-Market-Court-ends>. [24]
- Norwegian Competition Authority (2016), *Fined for collusive bidding*, <https://konkurransetilsynet.no/fined-for-collusive-bidding/?lang=en>. [7]
- OECD (2022), *Monitoring the Performance of State-Owned Enterprises: Good Practice Guide for Annual Aggregate Reporting*, <http://www.oecd.org/corporate/monitoring-performance-state-owned-enterprises.htm> (accessed on 12 May 2022). [31]
- OECD (2021), *OECD Roundtable on the Promotion of Competitive Neutrality by Competition Authorities – Note by Finland*, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)41/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)41/en/pdf). [10]
- OECD (2021), *OECD Roundtable on the Promotion of Competitive Neutrality by Competition Authorities - Note by Lithuania*, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)32/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)32/en/pdf). [11]
- OECD (2021), *Roundtable on The Promotion of Competitive Neutrality by Competition Authorities - Note by India*, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)28/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)28/en/pdf). [22]
- OECD (2021), *Roundtable on The promotion of competitive neutrality by competition authorities - Note by Serbia*, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)33/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)33/en/pdf). [23]
- OECD (2021), *The Promotion of Competitive Neutrality by Competition Authorities, Contribution by Japan*, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)20/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)20/en/pdf). [18]
- OECD (2021), *The Promotion of Competitive Neutrality by Competition Authorities, Discussion Paper*, <https://www.oecd.org/daf/competition/the-promotion-of-competitive-neutrality-by-competition-authorities-2021.pdf>. [2]
- OECD (2021), *The Promotion of Competitive Neutrality by Competition Authorities, Note by Spain*, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)39/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)39/en/pdf). [29]

- OECD (2020), *Costa Rica: Assessment of Competition Law and Policy 2020*, [16]
<https://www.oecd.org/daf/competition/costa-rica-assessment-of-competition-law-and-policy2020.pdf>.
- OECD (2018), *Competition Law and State-Owned Enterprises*, [19]
[https://one.oecd.org/document/DAF/COMP/GF\(2018\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf).
- OECD (2018), *Pecuniary Penalties for Competition Law Infringements in Australia*, [20]
<http://www.oecd.org/daf/competition/pecuniary-penalties-competition-law-infringements-australia-2018.htm>.
- OECD (2017), *Annual Report on Competition Policy Developments in Brazil - 2016*, [21]
[https://one.oecd.org/document/DAF/COMP/AR\(2017\)19/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2017)19/en/pdf).
- OECD (2016), *Colombia: Assessment of Competition Law and Policy*, [13]
<https://www.oecd.org/daf/competition/Colombia-assessment-competition-report-2016.pdf>.
- OECD (2016), *Executive Summary of the Roundtable on Public Interest Considerations in Merger Control*, [25]
<https://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>.
- OECD (2016), *Public interest considerations in merger control*, [12]
<https://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>.
- OECD (2016), *State-Owned Enterprises as Global Competitors: A Challenge or an Opportunity?*, [5]
 OECD Publishing, Paris, <https://doi.org/10.1787/9789264262096-en>.
- OECD (2015), "Competition policy and competitive neutrality", *DAF/COMP(2015)13/FINAL*, [3]
[https://one.oecd.org/document/DAF/COMP\(2015\)13/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)13/FINAL/en/pdf).
- OECD (2015), *Discussion on Competitive Neutrality, Note by the Secretariat*, [8]
[https://one.oecd.org/document/DAF/COMP\(2015\)8/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)8/FINAL/en/pdf).
- OECD (2015), *OECD Roundtable on Competitive Neutrality in Competition in Competition Enforcement - Note by Australia*, [9]
[https://one.oecd.org/document/DAF/COMP/WD\(2015\)19/En/pdf](https://one.oecd.org/document/DAF/COMP/WD(2015)19/En/pdf).
- OECD (2015), *Roundtable on Competitive Neutrality in Competition Enforcement, Note by Brazil*, [26]
[https://one.oecd.org/document/DAF/COMP/WD\(2015\)25/En/pdf](https://one.oecd.org/document/DAF/COMP/WD(2015)25/En/pdf).
- OECD (2015), *Roundtable on Competitive Neutrality in Competition Enforcement, Note by Chile*, [4]
[https://one.oecd.org/document/DAF/COMP/WD\(2015\)40/En/pdf](https://one.oecd.org/document/DAF/COMP/WD(2015)40/En/pdf).
- OECD (2015), *Roundtable on Competitive Neutrality in Competition Enforcement, Note by Japan*, [6]
[https://one.oecd.org/document/DAF/COMP/WD\(2015\)6/En/pdf](https://one.oecd.org/document/DAF/COMP/WD(2015)6/En/pdf).
- OECD (2015), *Roundtable on Competitive Neutrality in Competition Enforcement, Note by the United States*, [15]
[https://one.oecd.org/document/DAF/COMP/WD\(2015\)42/En/pdf](https://one.oecd.org/document/DAF/COMP/WD(2015)42/En/pdf).
- OECD (2014), *Factsheet on how competition affects macroeconomic outcomes*, [1]
<https://www.oecd.org/daf/competition/factsheet-macroeconomics-competition.htm>.
- OECD (2012), *Competitive Neutrality: National Practices*, [14]
<https://www.oecd.org/daf/ca/50250966.pdf>.

OECD (2011), *Competition Law and Policy in Israel*, <https://doi.org/10.1787/9789264097667-en>. [17]

Notes

¹ An activity may broadly be considered of economic nature if it is carried out or can be carried out in a market by private undertakings. The interpretation can be left to court, as demonstrate by several EU cases that have contributed to clarifying the definition (Fox and Gerard, 2023, p. 28_[30])

² Decision 76/2008.

³ Case No. 6978-2008, decision of 13 January 2009.

⁴ European Commission Decision of 15.7.2015 CASE AT.40098 – Blocktrains.

⁵ McCarthy v. Middle Tennessee Electric Membership Corp., 466 F.3d 399, 414 (6th Cir. 2006).

⁶ US Postal Service v Flamingo Industries (USA), Ltd. (“*Flamingo*”) 540 US 736 (2004).

⁷ North Carolina State Board of Dental Examiners v. FTC case (574 U.S.2015, No. 13-534).

⁸ Work by the OECD Working Party on State Ownership and Privatisation Practices supports the improvement of transparency on the financial and non-financial performance of SOEs, for instance through (OECD, 2022_[31]).

⁹ Maharashtra State Power Generation Company Ltd. v. Coal India Ltd. (Case No. 03, 11 & 59 of 2012).

¹⁰ National Insurance Company Ltd. v. CCI.

¹¹ M/s MaaMetakani Rice Industries v. Odisha State Civil Supplies Corporation Ltd (Case No. 16 of 2019).

¹² Autorità Garante della Concorrenza e del Mercato, Bollettino settimanale Anno XXIII.

¹³ AC 08012.002820/2007-93.

¹⁴ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, preamble 22.

¹⁵ Case No. COMP/M.5549 - EDF/ SEGEBEL.

¹⁶ Case No. IV/M.931 - NESTE / IVO.

¹⁷ SNC/DC/048/21: DGTF/PARPÚBLICA/TAP.

4 Regulatory framework

Although regulation is often required to ensure that markets work well and deliver outcomes that are in line with government's policy objectives, it is necessary to ensure that the regulatory framework and its enforcement maintain a level playing field to all enterprises, regardless of their ownership, location or legal form. This chapter presents a set of questions to guide the analysis, good practices and examples on how to implement the OECD Recommendation on Competitive Neutrality in the regulatory environment.


The Recommendation provides that jurisdictions should maintain a level playing field in the regulatory environment, for instance concerning public procurement and bankruptcy law.

The regulatory framework can distort competitive neutrality, both in substance and application. In the first case, selected market players (e.g. SOEs, domestic or foreign enterprises) may be subject to a regulatory framework that is, in substance, different from and more favourable than that applying to their competitors. In the second case, although subject to the same framework, some players may be exempted from specific provisions. This can be formally foreseen in the law or result from the decision maker's discretion. In both circumstances, some enterprises will have preferential market access or enjoy special terms for operating in the market (OECD, 2021, p. 10^[1]).

The uneven application of a regulatory framework, or provisions, on market participants can be a source of competitive advantage (or disadvantage) and it is thus likely to distort the natural selection process of the most efficient firms in the market, which may lead to higher prices, lower quality and less innovation.

A set of questions to help identify policies that can potentially distort competitive neutrality is presented below. When a policy is not in line with at least one of the questions or good practice approaches, it has the potential to distort competition and should be analysed in detail. Chapter 8 sets out the main steps of the analysis.

Figure 4.1. Suggested questions to assess the regulatory framework



Regulatory framework

Regulation is likely to distort competitive neutrality and should be analysed in detail when the answer is "no" to one or more of the following questions (see methodology in Chapter 8):

- Is the regulation applicable to all enterprises, such as incumbents or SOEs? In particular:
 - Is the rationale for any exceptions reasonable and clearly spelled out?
 - Are these exceptions transparent and periodically reviewed?
- Are all enterprises subject to the same procedural rules?
- Is the market regulated by an entity separate and independent from the regulated enterprises?
- Are bankruptcy procedures equivalent for both privately-owned and state-owned enterprises?
- Do all enterprises have access to judicial review of regulations and public authorities' decisions?

4.1. The regulatory environment should be competitively neutral and should be enforced with equal rigour, appropriate deadlines and equivalent transparency with regard to all current or potential market participants

According to the Recommendation, jurisdictions should “*maintain Competitive Neutrality in the regulatory environment*”. Therefore, all market players, both current and potential, should receive a uniform treatment not only in terms of the legal framework but also its enforcement. Moreover, transparency should be ensured in the enforcement of regulations, for instance by publishing regulators' decisions, so that market participants gain a better understanding of how regulations are interpreted in practice and can monitor whether regulations are indeed being applied in a non-discriminatory way.

If the regulatory environment is not uniform or if regulations are not applied in an equal manner in a market, this risks distorting the level playing field, as some firms will enjoy the advantages of a more favourable regulatory environment.

As mentioned above, this may affect the competitive process driven by enterprises competing on the merits, unless a regulatory exception or asymmetric regulation is needed (see the good practice approaches 4.4 and 4.5). An uneven playing field may also discourage new entry, for instance if regulations set technical standards or other requirements in a prescriptive way, therefore excluding the possibility that new entrants may supply goods and services in alternative and innovative ways.

Examples

The following examples illustrate how this good practice approach is implemented in practice:

- In **Brazil**, a “proposal for amending the rules of the SeAC (conditional access services) emerged in a public consultation conducted by the Brazilian telecommunications regulatory agency (Anatel). The proposal sought to require premium television providers to employ Direct-to-Home technology to install Integrated Receiver Decoders (i.e. hybrid set-top boxes) in subscribers’ homes. [...], this obligation would only apply to Direct-to-Home service providers, not to cable TV providers who are part of SEAC, which would create a strong competitive distortion. Anatel properly decided not to make the installation mandatory” (OECD, 2021^[2]).
- In **Czechia**, a 2016 act aimed at preventing tax evasion required retailers to register sales electronically and send the corresponding payment information to the tax administration. However, e-shops did not have immediate access to payment information, which in certain cases could take place on delivery. The requirement was therefore adapted in the case of e-shops, who had to transmit the necessary information only when the payment took place and no later than the time of the delivery (OECD, 2019^[3]).
- In **Greece**, travel agencies operating online and without a physical office could not offer the full range of services provided by their counterparts with a physical presence. For instance, they could not provide package holidays. An OECD competition assessment review found that the regulation limited the range of suppliers and considered that the policy maker’s objective to protect consumers was ensured by the application of consumer protection legislation to all types of travel agencies (OECD, 2014^[4]). This distinction was removed from the legislation.
- In the **United Kingdom**, the Competition and Markets Authority (CMA) raised concerns that some providers in the higher education sector in England were not subject to the regulation designed to ensure quality of education. One of the negative consequences identified by the CMA was that unregulated providers would not have sufficient incentives for providing quality services to students. The authority also considered that the unequal treatment could harm students, who may not realise that some of the institutions were operating outside the regulatory framework (CMA, 2015^[5]). In 2017, the Higher Education and Research Act established the Office for Students, whose duties include the promotion of quality and greater choice and opportunities for students and the encouragement of competition between English higher education providers.¹

4.2. When a licensing or authorisation system is in place, no exceptions should be granted to enterprises, based on criteria such as ownership, nationality or legal form

Laws and regulations may require enterprises to obtain a licence or an authorisation to operate in the market, based on well-founded objectives, such as consumer protection (OECD, 2019^[6]). Nevertheless, competitive neutrality issues may arise if selected players are exempted from some or all licensing or operating requirements, or if there is discrimination in the application of requirements because of decision maker discretion. Indeed, instances where firms are fully or partially excluded from certain requirements because of their status (e.g. SOEs, previous monopolists or incumbents) can emerge, as also highlighted

in section 4.3 below. Likewise, regulatory bodies may have discretion as to whether to impose certain qualification requirements or grant a licence (OECD, 2021, p. 10_[11]).

Exempting certain enterprises from licensing or authorisation requirements based on criteria such as ownership, nationality or legal form may reduce entry costs, operating costs or administrative burdens of favoured firms compared to other market players. Such exceptions can distort competition in the relevant sectors, resulting in discrimination and providing advantages to selected market participants.

Examples

The following are meant to show selected examples of pursuing competitive neutrality in the regulatory framework:

- In the **EU**, when a licensing or authorisation framework is provided for by the legislation (e.g. air transport services² and electricity distribution), this framework applies to all enterprises, regardless of whether they are SOEs or private-sector providers.
- In **Greece**, state-owned marinas used to benefit from more favourable treatment in relation to licensing requirements (OECD, 2014, p. 180_[41]). In particular, according to Article 166, par. 6 of Law 4070/2012, marinas managed and used by the state-owned Greek Real Estate Company were exempt from the obligation to submit operational and sustainability plans and were not subject to control for the issuance of their licence by the relevant agency. According to Paragraph 7 of the same article existing marinas with no operating licence were not subject to control by the relevant agency if they submitted the documentation provided for in this article. An OECD competition assessment review found that these provisions discriminated in favour of state-owned marinas against those that were privately-owned. In 2014, a new law removed the differential treatment.
- In **Mexico**, licences and authorisations in the telecommunication and broadcasting sectors are required by all market players, including SOEs. For instance, in 2022, the Federal Telecommunications Institute (IFT) examined the request of the modification of concession titles held by an SOE and considered whether this would unduly affected competition (IFT, 2022_[71]).

4.3. Regulations should not exempt incumbents from new and stricter requirements

Good practices highlight that incumbent firms are not treated differently vis-à-vis new entrants, for example with regard to new and stricter requirements. For instance, this would be the case when regulations include so-called grandfather clauses, allowing incumbents to continue operations under older rules while new firms are subject to newly imposed rules and regulations. Grandfather clauses may grant temporary or permanent exceptions from the new rules to the incumbents (OECD, 2019, pp. 62-63_[8]). Where such exceptions exist, they are justified with the argument that incumbents entered the market and chose to invest under the previous rules, therefore a sudden change in rules would create uncertainty and possibly jeopardise return on investment.

Even though grandfather clauses can present a legitimate economic justification in specific cases, they generally impose asymmetric standards on market participants and are likely to impose considerably greater costs on new entrants and new capital investments by incumbents. Therefore, depending on the extent of the burden imposed and the cost asymmetry, grandfathered regulations can discourage new entry, reduce new investment by incumbents, allow continuation of inefficient production by older more inefficient plants and lead to higher prices (OECD, 2019, p. 65_[8]).

If grandfather clauses are inevitable, good practices show that consideration is given to reducing the duration of the adjustment period as much as possible, as well as making the period dependent on firm-specific characteristics, such as technology, vintage of capital and firm size (OECD, 2019, p. 67^[8]).

A recent country study conducted by the OECD showed that licensing requirements for private-sector providers did not apply equally to the relevant SOEs, nor were the SOEs subject to any regulatory fees. It was observed that the difference in the regulatory treatment between SOEs and private-sector providers often derives from the fact that the SOEs were already active (often as monopolists) in the countries before licensing systems were introduced. The conclusion was that the different treatment was a clear advantage for the relevant SOEs in terms of regulatory costs and burden, and recommended levelling the playing-field between the SOEs and their private-sector competitors.

Examples

The following are meant to show selected examples of this good practice approach:

- In **Brazil**, taxes could only be paid to the Federal Revenue Office through financial institutions. Other payment institutions, such as Fintechs, were prevented from providing such services, which compelled customers from these institutions to also have an account in a traditional bank to pay their taxes. In order to ensure a level playing field among all financial institutions, Fintechs were authorised to be part of the federal tax collection network since 2020, following an initiative by the Secretariat of Competition Advocacy and Competitiveness (SEAE) (OECD, 2021^[2]).
- In **Iceland**, the 1990 Fisheries Act introduced individual transferable quotas (ITQ) giving fishers permanent quotas that they could also lease or sell. The policy was introduced to restrict fishing given that marine resources were being irreparably depleted. Despite the regulation's success in achieving its policy objective, the grandfathering of ITQ led to the uneven treatment of incumbents and new entrants. Subsequent amendments attempted to mitigate this impact, for instance by granting exceptions to new entrants relying on more eco-friendly fishing methods (OECD, 2017^[9]).
- In the **Philippines**, a truck age limit was enforced for new entrants but not for incumbents. In practice, this meant that new applicants wanting to use trucks over a certain age would not be granted a licence, but incumbents could renew their licence. The discrimination ended on June 2020, when the new roadworthiness rules entered into force banning trucks over 15 years old from the market for trucks for hire (OECD, 2020, pp. 65-66^[10]).
- In the **US**, alternatives to grandfathering have been adopted in environmental legislation to control pollution. As opposed to some emission trading schemes granting allowances or credits to existing polluters, the Regional Greenhouse Gas Initiative (RGGI) established an auction system for all allowances. Under the RGGI, set up by ten US states, existing plants did not benefit from free allowances or less-stringent emissions standards (Damon et al., 2019^[11]).

4.4. Any exceptions from regulations should be transparent, should be justified by clear policy objectives and should be narrowly applied

While the Recommendation calls for competitive neutrality in the regulatory environment, it recognises that “achieving public policy objectives will in certain circumstances require exceptions to competitive neutrality”. Exempting certain players from regulations may be necessary to achieve policy objectives that could not be accomplished through other means. For instance, as market players launch new products and services, it may take time to consider whether new regulations are needed and if so, to design them. In these cases, policy makers may grant temporary exceptions from regulation.

Good practices show that distortions are limited by ensuring that the exceptions are transparent, duly justified and narrowly applied. Transparency means ensuring that all market participants are informed

about them and their rationale. When exceptions are adopted in a transparent way and are publicly known, this can allow for open discussion on the merits of the exception, and for objections and alternative proposals to be put forward and considered. Moreover, good practices highlight that exceptions adopted in order to achieve a specific public objective do not go beyond what is strictly necessary to achieve the objective, so that distortions to competition are limited to the extent possible.

For example, in many jurisdictions SOEs are exempted from regulatory requirements which private operators are required to comply with, without a clear and objective justification. In those cases, SOEs face reduced entry costs, operating costs and/or administrative burdens when compared to other market players, which unduly distorts competition.

Examples

The following examples are meant to show how exceptions can be justified by a specific policy objective, be transparent and narrowly applied:

- In **Korea**, following the 2008 financial crisis, the government decided to delay the application of 280 regulations for two years, during the economy's recovery from the crisis – so-called Temporary Regulatory Relief (The Republic of Korea, 2009^[12]). The initiative was time-bound, had a clear policy objective and applied to all enterprises. (Malyshev et al., 2021^[13]) notes that the “programme was successful in bolstering private sector investment and consumption and reducing the regulatory burden on small and medium enterprises”.
- Regulatory sandboxes grant temporary waivers from certain regulations to allow companies to experiment with innovative products or services in a predictable legal environment. Sandboxes allow regulators to observe the development of new products or services and to learn how best to regulate them at the end of the temporary waiver. These tools have emerged in a wide range of sectors (notably in finance, but also in health, transport, legal services, and energy), especially when involving innovations driven by digital technologies and data (Attrey, Leshner and Lomax, 2020^[14]). For instance, **Singapore** has launched a number of regulatory sandbox initiatives to support innovation in the areas of telemedicine, environmental technologies and agri-food innovation, among others. Innovators are given regulatory leeway in testing and implementing new business models, services and products (Leimüller and Wasserbacher-Schwarzer, 2020^[15]). Box 4.1 below illustrates the **UK** experience with sandboxes in the financial services market.
- Exempting SMEs from some requirements or making them less burdensome is often considered to promote SMEs development. A number of countries assess the impact of proposed regulations specifically on SMEs. One of the elements of these “SME Tests” is the identification of alternative or mitigating measures, including full or partial exceptions from the proposed regulation. For instance, in the **UK** the first step of the SME Test is to assess whether SMEs can be exempted from the proposed regulation. If an exception is not feasible, the potential impact of the draft regulation on SMEs is evaluated. When negative impacts are considered to be disproportionate, policy makers propose mitigating measures or, if these measures are not practicable, they explain why this is the case (OECD, 2021, p. 79^[16]).
- In the **US**, federal agencies have the flexibility to grant waivers or exceptions from regulations to individuals or entities, when those regulations may not be suitable to those individuals or entities. The Administrative Conference of the United States has issued a set of recommendations on this matter, including, for example, that “agencies should consider soliciting public comments before approving waivers or exceptions” (ACUS, 2017^[17]).

Box 4.1. The UK Financial Conduct Authority's Regulatory Sandbox

The **UK Financial Conduct Authority** (FCA) launched the Regulatory Sandbox initiative in 2016, aiming to promote more effective competition by allowing businesses in the financial services market to test innovative propositions in a live market environment, while ensuring that appropriate safeguards are in place.

The Regulatory Sandbox provides innovators, both incumbents and new players, with access to regulatory expertise, giving firms the ability to test products and services in a controlled environment; the opportunity to find out whether a business model is attractive to consumers, or how a particular technology works in the market; a reduced time to market at potentially lower cost; and support in identifying consumer protection safeguards that can be built into new products and services.

The Sandbox is dedicated to authorised firms, unauthorised firms that require authorisation and technology businesses that are looking to innovate in the UK financial services market. Firms of all sizes, at all stages of development and from all sectors of financial services are entitled to apply to the Regulatory Sandbox. Firms in the Sandbox may be provided with tools to conduct the test within the regulatory framework. These tools include restrict authorisation, signposting, informal steer, individual guidance, waivers or modifications to rules and no enforcement action letters.

In 2017, after the first year of operation of the Regulatory Sandbox, the UK FCA published a report on the lessons learned. The sandbox was considered successful in meeting its overall objectives, including reducing the time and cost of getting innovative ideas to market, helping access to finance for innovators and enabling products to be tested and introduced in the market. It has also allowed the regulator to work with innovators to build appropriate consumer protection safeguards into new products and services.

Sources: FCA (2022^[18]), Regulatory Sandbox, <https://www.fca.org.uk/firms/innovation/regulatory-sandbox>; FCA (2017^[19]), Regulatory sandbox lessons learned report, <https://www.fca.org.uk/publication/research-and-data/regulatory-sandbox-lessons-learned-report.pdf>.

4.5. Enterprises should not be ultimately responsible for regulating the market(s)

The Recommendation states that "*Enterprises, regardless of their ownership, location or legal form, should not be responsible for regulating the market(s) in which they currently or potentially compete, (especially regarding entry of expansion of existing players)*".

This provision is especially relevant in situations where the state both regulates a market and conducts economic activities, for example through SOEs. According to the SOE Guidelines, when SOEs undertake economic activities there should be a clear separation between the state's ownership function and other state functions that may affect the market conditions for SOEs, particularly with regard to market regulation and policy making [OECD/LEGAL/0414], in order to ensure a level playing field.

The independence of regulators from both the regulated entities and from the government is a tenet of good governance in sectors such as network industries and the financial sector (OECD, 2016^[20]). This is likely to be especially important where SOEs and privately-owned enterprises compete in the same market and are subject to regulation. (OECD, 2016, p. 36^[20]) notes that independence "helps create an assurance of a 'level playing field', whereby market competitors will not benefit from undue advantages or preferential treatment in light of their state-owned status".

While independent regulators have been set up in many countries, there are still certain activities where the same entity may be responsible both for the provision of services and for their regulation. According to

the European Bank for Reconstruction and Development (EBRD) there are SOEs with regulatory powers in about one in five countries in the EBRD regions (European Bank for Reconstruction and Development, 2020, p. 55^[21]).³ In addition, in some jurisdictions, sector regulators are not independent from the government. Given the role of the government as owner and as regulator, the latter may have an incentive to benefit SOEs, as promoting competitive neutrality may ultimately lower SOEs profitability.

Examples

The following are selected examples of regulatory bodies that are independent of enterprises that compete in markets:

- In **Czechia**, the Energy Regulatory Office (ERO) is the authority responsible for regulating the energy sector and was established by the Energy Act (No. 458/2000 Coll.). ERO does not “have any economic activities, any ownership interests in domestic or foreign companies” (OECD, 2019^[22]).
- In **Italy**, the incumbent consortia in the waste and recycling sector were also involved in the accreditation process of alternative systems, which created a conflict of interests. In 2022, following the enforcement and advocacy initiatives of the Italian Competition Authority (AGCM), a new independent entity was established to monitor the authorisation process for new collection and recycling consortia in compliance with the environmental legislation (OECD, 2023^[23]).
- In **Latvia**, the SOE “Road Traffic Safety Directorate” operated simultaneously as a market participant and a market supervisor. The SOE was responsible for accrediting companies to conduct vehicles’ technical inspections as well as for monitoring their compliance with the regulation, while at the same time it was a shareholder of these firms. In 2018, the Competition Council of Latvia (CC) carried out a market study and concluded that this framework distorted competitive neutrality, restricting entry of potential new competitors in the vehicles’ technical inspection market. The CC recommended to separate monitoring regulatory compliance and commercial activities. It also proposed the liberalisation of the market, removing state participation from the commercial activities. As a result, the Latvian government decided to remove state participation from the commercial activities, by selling the SOE’s shares in the accrediting companies (OECD, 2020^[24]).
- In **Mexico**, the Federal Telecommunications Institute (IFT) acts as an autonomous body from a functional and budgetary standpoint, free from political influence and able to provide independent regulation based on transparent processes and evidence-based decision making (OECD, 2017, pp. 27-28^[25]).

4.6. Regulations may be imposed asymmetrically when necessary to promote competition

In some cases, good practices across jurisdictions show that regulations may treat incumbents and smaller competitors differently to promote greater contestability. For instance, asymmetric regulation has been common in markets where SOEs used to provide services under exclusive rights that have been liberalised. This is especially the case in network industries where the incumbent often retains substantial market power. Moreover, some jurisdictions have recently introduced *ex ante* regulations to supplement existing *ex post* competition law enforcement in the digital economy. These regulations apply only to a sub-set of players (the largest digital firms) rather than to all firms in the market (OECD, 2022^[26]).

In these cases, some behaviours can be imposed on certain firms (usually those with significant market power) to promote competition, e.g. by allowing new entry and preventing small players from being

excluded from the market. It is necessary, however, that asymmetric regulations are justified by clear policy objectives and are regularly reviewed, in order to prevent unnecessary restrictions on competition.

For instance, some jurisdictions have implemented liberalisation initiatives in the rail sector, aiming to allow new entrants into the market at the downstream retail level. Nevertheless, the incumbent is usually both the operator of the network and one of the retail providers of services. When the legislation does not impose any asymmetric rules on the incumbent to ensure third-party access to the existing infrastructure, in practice such initiatives have not resulted in more competition.

Examples

The following are meant to show selected examples of this good practice approach:

- In network industries, vertically integrated companies that control a key infrastructure facility are often subject to asymmetric regulation. This regulation is imposed only on the companies that control the key infrastructure to address the risk that they favour their own subsidiary to the detriment of competing suppliers. For instance, under the **EU** regulatory framework for electronic communications networks and services, national regulatory authorities are required to assess if any undertaking holds Significant Market Power (SMP) in certain markets which are considered susceptible to ex ante regulation, such as the market for wholesale local access (European Commission, 2018^[27]). Wholesale local access is an input for the provision of broadband access at retail level. National regulatory authorities can impose regulatory requirements on those undertakings found to hold SMP.
- In **Lithuania**, in the context of the liberalisation of the retail electricity supply market, the Competition Council of Lithuania recommended to policy makers that the incumbent supplier be prevented from launching marketing campaigns towards customers, using data that only it had access to, before this opportunity became available to all other potential electricity providers in the liberalised market. To ensure effective competition between all electricity suppliers after the liberalisation of the market, the Competition Council recommended the removal of the advantage that the incumbent had compared with its competitors. The recommendation of the Competition Council was followed by the policy makers (OECD, 2022^[28]).
- In **Mexico**, the Federal Telecommunications Institute (IFT), which is the body enforcing competition law in the broadcasting and the telecommunications sectors, has the power to determine the existence of preponderant economic agents in the broadcasting and the telecommunications markets if they hold 50% of users, audience, traffic or use of network capacity. IFT can impose on the preponderant players measures needed to ensure fair and open competition. This comprises measures related to information, supply and quality of services, exclusive agreements, limitations on the use of terminal equipment between networks, asymmetric regulation on tariffs and network infrastructures, including the accounting, functional or structural separation of their essential elements. Every two years, based on economic and regulatory performance indicators, IFT assesses whether the asymmetric ex ante regulation imposed on the preponderant players should be eliminated or reviewed (Mexico, 2014^[29]).
- The **UK** government's newly created Digital Markets Unit (DMU) will have powers to designate tech firms that hold "substantial and entrenched market power". These will be required to follow a new code of conduct aimed at supporting and enhancing competition in the sector (United Kingdom, 2022^[30]).⁴ Similarly, the **EU's** Digital Markets Act (DMA)⁵ establishes a set of criteria for qualifying a large online platform as a "gatekeeper", which will be required to comply with obligations and prohibitions listed in the DMA.
- The **US** President's 2021 executive order on competition notes a deterioration of competition in the railway sector and identifies problems with access to infrastructure. To remedy this competition issue, it encourages the sector regulator to impose asymmetric regulation to "require railroad track

owners to provide rights of way to passenger rail and to strengthen their obligations to treat other freight companies fairly” (The White House, 2021^[31]).

4.7. Regulations should be regularly assessed, also in light of changed market circumstances, to ensure that they do not distort competition

The Recommendation provides that jurisdictions should “carry out competition assessments that identify and revise existing or proposed regulations that unduly restrict competition”. This provision is also consistent with the Recommendation on Competition Assessment [OECD/LEGAL/0455], according to which “governments should introduce an appropriate process for revision of existing or proposed public policies that unduly restrict competition and develop specific and transparent criteria for evaluating suitable alternatives.” More broadly, the provision is in line with the Recommendation on Regulatory Policy and Governance [OECD/LEGAL/0390], which state that jurisdictions should “conduct systematic programme reviews of the stock of significant regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and deliver the intended policy objectives”.

Laws and regulations may distort competition in the marketplace, for instance when new and stricter standards do not apply to incumbents. By regularly reviewing existing laws and regulations, governments may identify distortions of competition and develop alternative, less restrictive policies that still achieve government objectives. Moreover, regular review ensures that the level playing field is maintained over time as the regulatory environment evolves to address new market and technology developments. Box 4.2 describes the wide-ranging programme implemented by Australia in the 1990s.

However, ex post reviews of regulations (including as regards competition) are still limited in practice, even among OECD Members. For instance, in 2021 only one quarter of OECD Members had systematic requirements to carry out ex post evaluations, with numbers essentially unchanged since 2014 (OECD, 2021, p. 87^[16]).

Examples

The following are meant to show selected examples of assessment of regulations in practice:

- In **Italy**, there is an obligation to consult the competition authority on new regulatory proposals. In addition, the authority can submit to the government comprehensive proposals to amend laws and regulations to remove distortions and restrictions of competition. In 2021 the Italian Competition Authority (AGCM) issued a number of proposals on limiting the extension of concessions to incumbents and on improving competition for public contracts. The authority also identified some competitive distortions in the electricity market (Autorita' Garante della Concorrenza e del Mercato, 2021^[32]).
- In **Korea**, the Korea Fair Trade Commission (KFTC) has the power to conduct ex-ante and ex-post reviews of regulation. According to the latest data available, in 2022 the KFTC reviewed ex ante 941 new and amended regulations within 546 laws and made recommendations to revise 30 existing anti-competitive regulations which it assessed ex post (OECD, 2023^[33]).
- In **Latvia**, legislation proposals should be accompanied by ex-ante impact assessment, which includes their effect on competition. In addition, the opinion of the Competition Council (CC) is required on draft regulations related to matters of competition protection and development. The CC can also provide opinions on draft regulations, when they have a potential effect on competition, even in instances when the competent ministry has not requested its opinion (OECD, 2021^[34]).
- In **Mexico**, competition authorities Federal Economic Competition Commission (COFECE) and Federal Telecommunications Institute (IFT, with competition powers on the telecommunications

and broadcasting sectors) have the power to issue non-binding recommendations on laws and regulations that can have a negative impact on competition (OECD, 2022^[35]).

- In **Peru**, the National Institute of the Defence of Competition and Intellectual Property Protection (Indecopi) can “engage in the ex-post review of regulations of secondary legislation issued by any other public entities such as municipalities and ministries (secondary legislation, such as decrees, municipal ordinances, agreements and resolutions) in relation to their illegality or unreasonableness” (OECD - IDB, 2018^[36]). Indecopi has the power to order their removal and impose fines of up to USD 25 000 for non-compliance.
- In the **United Kingdom**, the Enterprise Act 2002 gives the Competition and Markets Authority (CMA) extensive powers to review sector regulations and make recommendations to the government and/or impose remedies where competition issues are identified. For instance, the CMA used this power to advocate for pro-competitive reforms regarding regulations on airport slot allocation (CMA, 2018^[37]) and legal services (CMA, 2016^[38]).

Box 4.2. Australia’s National Competition Policy Programme

One of the most successful examples of pro-competitive reform occurred when **Australia** implemented broad, pro-competitive reforms at both national and state level in the mid-1990s. Australian federal, state and municipal governments implemented the National Competition Policy (NCP), a decade-long process to systematically review regulation to remove anti-competitive provisions and strengthen pro-competitive regulation and institutions.

The NCP included measures such as improving governance and introducing structural reforms to government business to make them more commercially focused and expose them to competitive pressure; regulatory arrangements to secure third-party access to essential infrastructure services and, more generally, to guard against overcharging by monopoly service providers; review and amend of a wide range of legislation which restricted competition.

The NCP has delivered substantial benefits to Australia, including higher economic growth and associated strong growth in household incomes, reduced prices of goods and services, as well as stimulation of business innovation, customer responsiveness and choice.

Sources: OECD (2019^[39]), Competition Assessment Toolkit: Volume 1. Principles, <https://www.oecd.org/competition/assessment-toolkit.htm>; Australian Government Productivity Commission (2005^[40]), Review of National Competition Policy Reforms - Productivity Commission Inquiry Report, No. 33, 28 February 2005, <http://ncp.ncc.gov.au/docs/PC%20report%202005.pdf>; Corden (2009^[41]), Australia’s National Competition Policy: Possible Implications for Mexico, <https://www.oecd.org/daf/competition/45048033.pdf>.

4.8. Competitive Neutrality should be maintained in the enforcement of bankruptcy law

According to the Recommendation, competitive neutrality should be maintained in the enforcement of bankruptcy law, “so that competing Enterprises are subject to equivalent [...] bankruptcy rules, irrespective of their ownership, location or legal form, and that the enforcement of those laws does not discriminate between State-Owned Enterprises and their private competitors, or between different types of privately-owned Enterprises”. This good practice approach is consistent with the SOE Guidelines, according to which SOEs should be subject to bankruptcy and insolvency rules equivalent to those for comparable competing private enterprises [[OECD/LEGAL/0414](#)].

Although many jurisdictions' bankruptcy rules apply to both SOEs and privately-owned enterprises, in some cases there are exceptions due to SOEs' specific legal status (OECD, 2021^[1]). In addition, in some jurisdictions even though SOEs are formally subject to bankruptcy law, their creditors cannot initiate bankruptcy or administration procedures. In others, legislation exempts SOEs from liability to execution, which means that their assets cannot be taken away, either by execution of a judgement, debt or insolvency.

Moreover, even when SOEs may not be formally exempt from insolvency legislation, they may effectively be shielded from insolvency procedures due to soft budget constraints, that is limited financial discipline imposed by the state on SOEs. Bankruptcy risks are also mitigated by other forms of support received by financially troubled SOEs, such as bail outs and debits being frozen, restructured, eliminated, or transferred to other SOEs.

Providing some firms with more favourable bankruptcy rules may create barriers to exit and prevent the dynamic competitive process from selecting the most efficient players, as less efficient firms may remain in the market because of the different treatment provided by the legislation or its enforcement (OECD, 2019^[42]).

Examples

The following are meant to show selected examples of competitive neutrality in bankruptcy law:

- In **Latvia**, SOEs are not exempt from any laws and regulations that apply to private enterprises. This includes insolvency or bankruptcy procedures which are equally applicable to commercially and non-commercially oriented SOEs (OECD, 2015^[43]).
- In **Norway**, SOEs may go into bankruptcy, regardless of their legal form of incorporation, as they are subject to the same legislation as privately-owned companies (Norway Ministry of Trade, Industry and Fisheries, 2019^[44]).
- In **Spain**, the National Markets and Competition Commission (CNMC) published an opinion on the 2019 draft bill to reform the Consolidated Text of the Bankruptcy Law, noting that the new bankruptcy law leaves open the possibility of derogations from the application of the insolvency rules to public bodies. The CNMC underlined how tensions may arise in the application of bankruptcy rules to public operators active on the market which, in light of the principle of competitive neutrality expressed in the OECD Recommendation, should be treated in the same way as private operators (CNMC, 2021^[45]).

References

- ACUS (2017), *Administrative Conference Recommendation 2017-7, Regulatory Waivers and Exemptions, Adopted December 15, 2017*, <https://www.acus.gov/recommendation/regulatory-waivers-and-exemptions>. [17]
- Attrey, A., M. Leshner and C. Lomax (2020), *The role of sandboxes in promoting flexibility and innovation in the digital age, OECD Going Digital Toolkit Notes, No. 2*, OECD Publishing, <https://doi.org/10.1787/cdf5ed45-en>. [14]
- Australian Government Productivity Commission (2005), *Review of National Competition Policy Reforms - Productivity Commission Inquiry Report, No. 33, 28 February 2005*, <http://ncp.ncc.gov.au/docs/PC%20report%202005.pdf>. [40]

- Autorita' Garante della Concorrenza e del Mercato (2021), *Proposal for pro-competitive reforms*, [32]
[https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/\\$File/AS1730.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf).
- CMA (2018), *Advice for the Department for Transport on competition impacts of airport slot allocation*, [37]
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888765/CMA_advice_on_DfT_on_competition_impacts_of_airport_slot_allocation.pdf.
- CMA (2016), *Legal services market study - Final report*, [38]
<https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf>.
- CMA (2015), "An effective regulatory framework for higher education", *A policy paper*, [5]
https://assets.publishing.service.gov.uk/media/550bf3c740f0b61404000001/Policy_paper_on_higher_education.pdf.
- CNMC (2021), *IPN/CNMC/035/21: APL de Reforma del Texto Refundido de la Ley Concursal*, [45]
<https://www.cnmc.es/expedientes/ipncnmc03521>.
- Corden, S. (2009), *Australia's National Competition Policy: Possible Implications for Mexico*, [41]
<https://www.oecd.org/daf/competition/45048033.pdf>.
- Damon, M. et al. (2019), "Grandfathering: Environmental Uses and Impacts", *Review of Environmental Economics and Policy*, Vol. 13/1, pp. 23-42, [11]
<https://doi.org/10.1093/reep/rey017>.
- European Bank for Reconstruction and Development (2020), *Transition Report 2020-21*, [21]
<https://www.ebrd.com/news/publications/transition-report/transition-report-202021.html>.
- European Commission (2018), "Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services", *Communication from the Commission*, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0507\(01\)&rid=7](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0507(01)&rid=7). [27]
- FCA (2022), *Regulatory Sandbox*, <https://www.fca.org.uk/firms/innovation/regulatory-sandbox>. [18]
- FCA (2017), *Regulatory sandbox lessons learned report*, [19]
<https://www.fca.org.uk/publication/research-and-data/regulatory-sandbox-lessons-learned-report.pdf>.
- IFT (2022), *El Pleno del IFT autoriza concentración en Altán y emite opinión en competencia económica para modificar el contrato APP de la Red Compartida Mayorista. (Comunicado 60/2022) 21 de junio*, <https://www.ift.org.mx/comunicacion-y-medios/comunicados-ift/es/el-pleno-del-ift-autoriza-concentracion-en-altan-y-emite-opinion-en-competencia-economica-para>. [7]
- Leimüller, G. and S. Wasserbacher-Schwarzer (2020), *Regulatory Sandboxes - Analytical paper for BusinessEurope*, [15]
https://www.buinesseuropa.eu/sites/buseur/files/media/other_docs/regulatory_sandboxes_-_winnovation_analytical_paper_may_2020.pdf.

- Malyshev, N. et al. (2021), “Regulatory quality and competition policy in Korea”, *12 ways Korea is changing the world*, <http://www.oecd.org/country/korea/thematic-focus/regulatory-quality-and-competition-policy-in-korea-e5b4137d/>. [13]
- Mexico (2014), *Ley Federal de Telecomunicaciones y Radiodifusión*, https://www.gob.mx/cms/uploads/attachment/file/346846/LEY_FEDERAL_DE_TELECOMUNICACIONES_Y_RADIOFUSION.pdf. [29]
- Norway Ministry of Trade, Industry and Fisheries (2019), *The state’s direct ownership of companies*, <https://www.regjeringen.no/contentassets/44ee372146f44a3eb70fc0872a5e395c/en-gb/pdfs/stm201920200008000engpdfs.pdf>. [44]
- OECD (2023), *Annual Report on Competition Policy Developments in Korea - 2022*, [https://one.oecd.org/document/DAF/COMP/AR\(2023\)21/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2023)21/en/pdf). [33]
- OECD (2023), *Competition in the Circular Economy – Note by Italy*, [https://one.oecd.org/document/DAF/COMP/WD\(2023\)37/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2023)37/en/pdf). [23]
- OECD (2022), *Analytical note on the G7 inventory of new rules for digital markets*, <https://www.oecd.org/competition/analytical-note-on-the-g7-inventory-of-new-rules-for-digital-markets.pdf>. [26]
- OECD (2022), *Annual Report on Competition Policy Developments in Mexico - 2021*, [https://one.oecd.org/document/DAF/COMP/AR\(2022\)25/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2022)25/en/pdf). [35]
- OECD (2022), *Competition in Energy Markets – Note by Lithuania*, [https://one.oecd.org/document/DAF/COMP/WP2/WD\(2022\)19/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2022)19/en/pdf). [28]
- OECD (2021), *OECD Regulatory Policy Outlook 2021*, OECD Publishing, Paris, <https://doi.org/10.1787/38b0fdb1-en>. [16]
- OECD (2021), *OECD Roundtable on the Promotion of Competitive Neutrality by Competition Authorities - Note by Latvia*, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)22/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)22/en/pdf). [34]
- OECD (2021), *Roundtable on The promotion of competitive neutrality by competition authorities - Note by Brazil*, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)36/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)36/en/pdf). [2]
- OECD (2021), *The Promotion of Competitive Neutrality by Competition Authorities, Discussion Paper*, <https://www.oecd.org/daf/competition/the-promotion-of-competitive-neutrality-by-competition-authorities-2021.pdf>. [1]
- OECD (2020), *OECD Competition Assessment Reviews: Logistics Sector in the Philippines*, <https://doi.org/10.1787/28843772-en>. [10]
- OECD (2020), *OECD Roundtable on Using Market Studies to Tackle Emerging Competition Issues - Note by Latvia*, [https://one.oecd.org/document/DAF/COMP/GF/WD\(2020\)9/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2020)9/en/pdf). [24]
- OECD (2019), “Barriers to Exit”, *OECD Competition Policy Roundtable Background Note*, [https://one.oecd.org/document/DAF/COMP\(2019\)15/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)15/en/pdf). [42]
- OECD (2019), *Competition Assessment Toolkit: Volume 1. Principles*, <https://www.oecd.org/competition/assessment-toolkit.htm>. [39]

- OECD (2019), *Competition Assessment Toolkit: Volume 2. Guidance*, [8]
<https://www.oecd.org/competition/assessment-toolkit.htm>.
- OECD (2019), *Competition Assessment Toolkit: Volume 3. Operational Manual*, [6]
<https://www.oecd.org/competition/assessment-toolkit.htm>.
- OECD (2019), *OECD Roundtable on Independent Sector Regulators - Note by Czechia*, [22]
[https://one.oecd.org/document/DAF/COMP/WP2/WD\(2019\)14/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2/WD(2019)14/en/pdf).
- OECD (2019), *Survey of regulations affecting competition in light of digitalisation*, [3]
[https://one.oecd.org/document/DAF/COMP/WP2\(2019\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP2(2019)1/en/pdf).
- OECD (2017), *OECD Telecommunication and Broadcasting Review of Mexico 2017*, OECD [25]
 Publishing, <https://doi.org/10.1787/9789264278011-en>.
- OECD (2017), *Sustaining Iceland's fisheries through tradeable quotas*, *OECD Environment* [9]
Policy Paper No. 9, <https://www.oecd.org/environment/resources/Policy-Paper-Sustaining-Iceland-fisheries-through-tradeable-quotas.pdf>.
- OECD (2016), *Being an Independent Regulator*, *The Governance of Regulators*, OECD [20]
 Publishing, Paris, <https://doi.org/10.1787/9789264255401-en>.
- OECD (2015), *OECD Review of the Corporate Governance of State-Owned Enterprises: Latvia*, [43]
<https://www.oecd.org/corporate/ca/OECD-Review-Corporate-Governance-SOE-Latvia.pdf>.
- OECD (2014), *OECD Competition Assessment Reviews: Greece*, *OECD Competition* [4]
Assessment Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264206090-en>.
- OECD - IDB (2018), *OECD-IDB Peer Reviews of competition law and policy: Peru*, [36]
<http://www.oecd.org/daf/competition/oecd-idb-peer-reviews-of-competition-law-and-policy-peru-2018.htm>.
- The Republic of Korea (2009), *Temporary Regulatory Relief - A New Experiment in Regulatory* [12]
Reform in Korea, <https://www.oecd.org/gov/regulatory-policy/45347546.pdf>.
- The White House (2021), *Fact Sheet: Executive Order on Promoting Competition in the* [31]
American Economy, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.
- United Kingdom (2022), *A new pro-competition regime for digital markets - Consultation* [30]
document, <https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/consultation-document-html-version>.

Notes

¹ Another CMA proposal concerned a more flexible fee cap on accelerated courses, that is degrees where the number of weeks of teaching of a standard degree are condensed over a shorter and more intensive timespan. See <https://www.gov.uk/government/news/accelerated-degrees-approved-by-mps> (accessed on 29 September 2023).

² Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast).

³ The regions are Central Europe, the Baltics, South-eastern Europe, Eastern Europe and the Caucasus, Southern and Eastern Mediterranean, and Central Asia.

⁴ The Digital Markets, Competition and Consumers Act was passed in May 2024 but at the time of writing the relevant provisions have not yet commenced, see <https://bills.parliament.uk/bills/3453>.

⁵ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022.

5 Public Procurement

Competition is an integral dimension of public procurement. Establishing open, fair, non-discriminatory and transparent conditions in public procurement helps promote efficiency, ensure that goods and services offered to public entities match their preferences more closely, and lead to lower prices, better quality, more innovation and higher productivity. This chapter presents a set of questions to guide the analysis, good practices and examples on how to implement the OECD Recommendation on Competitive Neutrality in public procurement.


Competition is an integral dimension of public procurement, as more competitive tenders help achieve better value for money. The Recommendation on Fighting Bid Rigging in Public Procurement [OECD/LEGAL/0396] recognises that competition in public procurement promotes efficiency, helping to ensure that goods and services offered to public entities match their preferences more closely, leading to lower prices, better quality, more innovation and higher productivity.

Therefore, the Recommendation on Competitive Neutrality provides that government procurement processes should follow open, fair, non-discriminatory (e.g. ownership, nationality or legal form) and transparent conditions, so that all potential suppliers can take part in public tenders, and all bidders are treated in an equitable manner.

Competitive neutrality is meant to be ensured in both public procurement rules and practices. Public procurement rules comprise not just public procurement legislation, but also how it is implemented in tenders and actual processes.

A set of questions to help identify policies that can potentially distort competitive neutrality is presented below. When a policy is not in line with at least one of the questions or good practice approaches, it has the potential to distort competition and should be analysed in detail. Chapter 8 sets out the main steps of the analysis.

Figure 5.1. Suggested questions to assess public procurement



Public procurement

Public procurement rules and practices are likely to distort competitive neutrality and should be analysed in detail when the answer is “no” to one or more of the following questions (see methodology in Chapter 8):

- Do public procurement rules treat all enterprises similarly? In particular:
 - If the public procurement rules grant advantages to certain enterprises, is the rationale for these advantages reasonable and clearly spelled out?
 - Are these advantages transparent and periodically reviewed?
 - When SOEs engage in public procurement as bidders, are they subject to the same rules, practices and conditions that apply to any enterprise?
- When SOEs procure goods or services, do they follow the same rules and practices applicable to the general government sector?
- Do all enterprises have access to judicial review of tenders?

5.1. Ensure that public-procurement rules treat all potential bidders in a similar way, without discrimination and irrespective of ownership, legal form, nationality and origin of goods

According to the Recommendation, jurisdictions should ensure that potential bidders are treated in a similar way in government procurement processes, regardless of their ownership, nationality or legal form.

In addition, competition may be distorted if government procurement processes contain a preference for domestically produced goods. Recalling that the Recommendation calls on jurisdictions to maintain competitive neutrality irrespective of enterprises’ location, bidders should also be treated equally irrespective of the origin of goods they supply.

The Recommendation intends to ensure a level playing field among all potential bidders, increasing competition and therefore leading to better value for money. In practice, public procurement legislation often favours specific types of players, such as SOEs, incumbents, domestic companies or firms providing

goods that are produced largely domestically (see Box 5.1). For instance, there are jurisdictions where SOEs as bidders receive a more favoured treatment in public procurement processes. However, offering advantages to some market players over others can distort competition and ultimately lead to the selection of less suitable bidders, resulting in higher prices, lower quality and less innovation.

Box 5.1. Rules of origin

Rules of origin establish the criteria used to define where a product was made (i.e. the economic nationality or the country of origin of goods), which is particularly relevant for implementing trade policy measures, such as trade preferences and quotas. The **WTO** Agreement on Rules of Origin and the WCO International Convention on the Simplification and Harmonisation of Customs Procedures recognise two basic criteria for defining the origin of a product for non-preferential treatment: (i) wholly obtained or (ii) substantial transformation.

The wholly obtained criterion defines the country of origin of a good where the product has been wholly produced or (for non-manufactures goods) grown, harvested or extracted. Therefore, to be considered originally from a given jurisdiction, the product must not use any foreign components or materials.

The substantial transformation criterion determines the country of origin for processed goods where the last substantial transformation occurred, and this transformation can be broadly described as enough to give its essential character to a product.

Sources: WTO (2023^[1]), Rules of Origin, https://www.wto.org/english/tratop_e/roi_e/roi_e.htm; OECD (2016^[2]), Participation in Global Value Chains in Latin America: Implications for Trade and Trade-Related Policy, Working Party of the Trade Committee, [https://one.oecd.org/document/TAD/TC/WP\(2015\)28/FINAL/En/pdf](https://one.oecd.org/document/TAD/TC/WP(2015)28/FINAL/En/pdf).

This good practice approach is consistent with the Recommendation on Public Procurement [OECD/LEGAL/0411], which also calls for Adherents to “treat bidders, including foreign suppliers, in a fair, transparent and equitable manner, taking into account Adherents’ international commitments”. In this regard, the Checklist for Supporting the Implementation of the Recommendation on Public Procurement indicates that Adherents should ensure that their legal and regulatory framework eliminates any restrictions or barriers for foreign suppliers to participate in public procurement processes (OECD, 2016, p. 19^[3]).

It is recognised, however, that there may be sectors that could require a specific treatment for achieving legitimate policy objectives. For example, in the field of defence procurement, governments face a trade-off between open and non-discriminatory procurement processes, on the one hand, and security concerns, on the other hand (Sigma, 2016, p. 10^[4]). Defence procurement therefore tends to follow separate rules. For instance, the WTO Government Procurement Agreement (GPA) 2012, Article III (1), allows signatories to protect their national interest relating to “procurement indispensable for national security or for national defence purposes” (WTO, 2012^[5]). In the EU, defence procurement falls under the Defence and Security Directive (2009/81/EC), instead of the Public Procurement Directive (2014/24/EU).

Examples

The following are meant to show selected examples of the principle of non-discrimination among potential bidders:

- In **Australia**, the Commonwealth Procurement Guidelines lay out that there should be no discrimination between undertakings on the basis of government ownership. Additionally, the Australian Competitive Neutrality Guidelines clarify that all agencies conducting a tendering process must include a requirement for public sector bidders to declare that their tenders are compliant with competitive neutrality principles (OECD, 2012, p. 83^[6]).

- In **Costa Rica**, the Commission for the Promotion of Competition (COPROCOM) carried out a study on a directive issued by the National Treasury on public procurement and concluded that it favoured public enterprises. According to COPROCOM, this distorted competition as it disadvantaged private providers who could supply the same services at a lower price. The directive was later revoked following the advocacy efforts of COPROCOM (OECD, 2021, p. 29^[7]).
- Under the **EU** public procurement regime (Directive 2014/24/EU), national contracting authorities in the member states can exclude abnormally low tenders if they are a result of competitive advantages because the tenderer has obtained State aid. Where the contracting authority rejects a tender in those circumstances, it shall inform the EU Commission. The exclusion decision, however, can be challenged before a national court.
- In **Japan**, the standards and ratings concerning the qualification of participants in public procurement tenders shall be standardised and domestic and foreign suppliers shall be treated equally, without any discrimination based on the origin of goods they supply (Enforcement of the Cabinet Order for Partial Revision of the Cabinet Order on Procedures for the Procurement of National Goods, Circular Notice of the Ministry of Finance, 1987).¹
- In 2020, the **Competition Council of Latvia** (CC) conducted a market study on the procurement of car transport number plates by the SOE “Road Traffic Safety Directorate”. The study concluded that the tender imposed qualification requirements which favoured the market player that had been providing the service for more than 10 years and which was located in the same building as the SOE on the basis of a rental agreement. For example, bidders were required to produce and deliver car plates in 30 minutes, and only the incumbent was able to comply with it. The Competition Council made several recommendations to increase competition in the bidding process, and the SOE adopted most of them in the following tender. Although the same firm won the bid, the changes created substantial competitive pressure and the price dropped by three times (OECD, 2021^[8]).
- In **Spain**, in 2014 the National Markets and Competition Commission (CNMC) challenged an act by the Government of Catalonia, which established that certain purchases should take into consideration, as an evaluation factor, the geographic proximity of the bidder to the procurement authority. CNMC concluded that this lessened competition, as it reduced the ability of firms located further away to compete for the tender. Following the challenge, the Government of Catalonia decided to eliminate the restriction (OECD, 2021, p. 24^[7]).
- According to the **WTO** Government Procurement Agreement (GPA), “Parties to the Agreement are required to accord to the products, services and suppliers of any other Party to the Agreement treatment ‘no less favourable’ than they give to their domestic products, services and suppliers (...) Further, Parties may not discriminate among goods, services and suppliers of other Parties” The agreement currently covers 49 WTO members (WTO, 2024^[9]).

5.2. SOEs as bidders should be subject to the same rules and practices that apply to any other bidder

According to competitive neutrality principles, when SOEs engage in public procurement as suppliers to government entities or other SOEs, they should not be given an undue advantage that distorts competition. In addition, the Recommendation provides that bidding regimes should not favour any category of bidders, including SOEs. In practice, however, SOEs are often granted advantages in public procurement processes, which prevent private players to compete with SOEs on a level playing field.

Good practices show that direct awards of public contracts to SOEs, either from government entities or from other SOEs, are accepted only exceptionally, when this is duly justified and if there are no alternative, less restrictive options, as is the case for all exceptions from open tenders in public procurement. In those

cases, the conditions for direct awards are clearly defined in the law, transparent to all, proportionate and periodically reviewed.

This good practice approach is consistent with the SOE Guidelines, which highlight that “when SOEs engage in public procurement, whether as bidder or procurer, the procedures involved should be open, competitive, based on fair and objective selection criteria, promote supplier diversity and be safeguarded by appropriate standards of integrity and transparency, ensuring that SOEs and their potential suppliers or competitors are not subject to undue advantages or disadvantages” [\[OECD/LEGAL/0414\]](#).

Examples

The following are meant to show selected examples of this good practice approach:

- In **Argentina**, when SOEs act as bidders in public procurement, public ethics regulations act as safeguards to ensure that they do not benefit from undue advantages (OECD, 2018, p. 71_[10]).
- In **Bulgaria**, following EU law, SOEs as bidders for public procurement contracts are generally subject to the same requirements as private players. The Public Procurement Act applies equally to SOEs held at the central government and municipality levels. The exceptions to Bulgaria’s public procurement rules may confer an advantage to SOEs as bidders for public procurement contracts if they fulfil the conditions established in Article 12 of the EU Public Procurement Directive (2014/24/EU) (OECD, 2019, p. 102_[11]).
- The **EU** Public Procurement Directive (2014/24/EU) also applies to public contracts between entities within the public sector. Recital 31 notes that the “sole fact that both parties to an agreement are themselves public authorities does not as such rule out the application of procurement rules”. However, the Directive does not constrain the public authority’s freedom to perform the public interest tasks that have been conferred on it by using its own administrative, technical and other resources, without being obliged to organise a tendering procedure. Article 12 clarifies the circumstances in which a contract between a contracting authority and a legal person (governed by either public or private law) is not subject to EU public procurement rules. In particular, Article 12 covers the in-house exception, when a contracting authority decides to establish its own company to carry out specific activities provided that specific conditions are strictly met (related to the effective control of the contracting authority over the separate entity and the economic dependence of the separate entity on the contracting authority) (Sigma, 2016_[12]).
- In **Spain**, the National Markets and Competition Commission (CNMC) has issued a Guide on in-house procurement and horizontal co-operation agreements from a competition advocacy perspective. According to this Guide, public procurers should consider the impact on competition when opting for in-house procurement instead of a competitive tender. The Guide notes that, even if in-house procurement may offer a few advantages over public procurement (e.g. flexibility), its use can entail risks for competition and efficiency by reducing the size of the procurement market and potentially favouring certain suppliers (i.e. in-house providers, which are SOEs). The CNMC recommends that the use of in-house procurement be justified on a case-by-case basis through an ex-ante competition impact assessment. Moreover, for maintaining a level playing field between in-house suppliers and private enterprises, the CNMC recommends avoiding any undue competitive advantage when SOEs compete with other economic operators in both public procurement processes and commercial markets (CNMC, 2023_[13]).

5.3. SOEs as procurers should be encouraged to use open tenders, while having a margin of appreciation on the right procurement method if they compete with private sector entities in their market segment

When SOEs engage in public procurement as procurers, they should consider following competitive, transparent and non-discriminatory procedures. Indeed, the Recommendation on Public Procurement recommends that Adherents consider implementing the Recommendation in procurements carried out by SOEs.² However, SOEs may not necessarily follow public procurement rules, as these rules do not apply to private players that may compete with SOEs that undertake economic activities and could distort the playing field to the detriment of SOEs. Therefore, many jurisdictions provide SOEs with flexibility, while implementing measures to safeguard transparency (see Box 5.2).

Box 5.2. Application of public procurement rules to SOEs engaging as procurers

Countries can provide flexibility in procurement procedures while retaining safeguards to ensure that SOEs act responsibly. The following considerations may be applied when determining the applicability of procurement rules to SOEs:

- Funding sources and legal status: the exclusion of SOEs from procurement law may be determined by the percentage of funding they receive from public funds, as well as whether they are allowed to bid as suppliers for government contracts.
- Value and scope of in-scope procurements: often, revised rules for SOEs may involve a higher threshold for procurements to qualify for compulsory use of competitive tender. Similarly, specific goods, services and works can be excluded from procurement rules if they have a particular bearing on the SOE's need for flexibility in business operations.
- Approval processes and governance: consideration should be given to the processes surrounding the approval of procurement decisions. For example, ex ante controls can include the need for deviations from procurement rules to be approved by a procurement committee.
- Transparency and accountability: by ensuring that SOEs are still subject to rules on publishing contract award notices or justifications for the use of exceptions, governments can ensure that control authorities and civil society have the opportunity to hold SOEs to account.

Source: Reproduced from OECD (2019^[14]), Enhancing the Use of Competitive Tendering in Costa Rica's Public Procurement System, <https://www.oecd.org/costarica/costa-rica-public-procurement-system.pdf>.

Examples

The following are meant to show selected examples of this good practice approach:

- In **Brazil**, until 2016 SOEs had to follow the same procurement rules applied to all other public bodies, which are extremely strict and comprehensive. Since 2016, SOEs are subject to the SOE Statute (Law No. 13.303/2016), with rules designed to provide simultaneously more flexibility and transparency (OECD, 2020, pp. 108-109^[15]).
- In **Colombia**, SOEs are governed by private law when they compete with the domestic or international private and/or public sector and when they operate in regulated markets. SOEs are required to have a procurement manual aligned with the principles of the administrative and procurement function established in the general state procurement statute (OECD, 2015, p. 45^[16]).

- In the **European Union**, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (Utilities Directive) establishes that public procurement rules apply to the utilities sector, covering not only public entities but also the private undertakings operating on the basis of special or exclusive rights granted by a competent authority of a Member State. The rationale for this approach is that the public interest (i.e. the interest of all users of the service, particularly as regards value for money) must be protected by imposing special rules on how utilities operators (public or private) organise their purchases, in addition to other regulations that may govern their investments and operations. However, the rules on utilities are more flexible than the rules in the Directive 2014/24/EU on public procurement, as entities in the utilities sectors are operating in a more commercial market. This means that although the main principles of the public procurement rules need to be respected, it is also necessary to provide some flexibility to consider the reality of the environment in which they operate. Furthermore, the European Commission may grant an exception from the provisions of the Utilities Directive to contracting entities where, in the Member State in which it is performed, the relevant activity is directly exposed to competition and on a market to which access is not restricted (Sigma, 2016^[17]).
- In **Spain**, specific public procurement rules apply to contracts entered into by contracting authorities that are not classified as public administrations (so-called “contracts from other public entities”, such as commercial companies belonging to the public sector), in order to ensure the effectiveness of principles of equality, non-discrimination, transparency, publicity and free competition. However, this does not apply to contracts awarded to undertakings which are mutually owned or mutually-dependent in some cases: (a) if the contracts are aimed at the acquisition of goods or the provision of services that are necessary to carry out the commercial activity of the corporate purpose of the contracting entity and (b) this does not distort competition. The purpose of this exception is to allow companies belonging to the public sector that engage in purely commercial activities to compete on equal terms with the other private operators. Public procurement law envisages that the National Markets and Competition Commission (CNMC) has to issue an opinion assessing the impact on competition arising from contracts directly awarded to affiliated enterprises belonging to the same group (OECD, 2021^[18]).

5.4. Any advantages in the procedure granted to specific groups of bidders should be clearly defined in the law and justified by overriding public objectives

Although the Recommendation calls for competitive neutrality in public procurement, its preamble recognises that overriding public policy objectives may require otherwise. Nevertheless, good practices show that any advantages granted to specific groups of bidders are only adopted if necessary to achieve a public policy objective and if there are no alternative, less restrictive measures. Moreover, these advantages are often clearly defined in the law, as well as proportionate and periodically reviewed.

In addition to the primary procurement objective (which according to the Recommendation on Public Procurement “refers to delivering goods and services required to accomplish the government mission in a timely, economical and efficient manner”), some jurisdictions use public procurement to achieve secondary public policy objectives, such as the development of SMEs and standards for responsible business conduct.³ In this regard, the Recommendation on Public Procurement establishes that “any use of the public procurement system to pursue secondary policy objectives should be balanced against the primary procurement objective”. For that purpose, the aforementioned Recommendation provides that it is necessary to (i) evaluate the use of public procurement as one method of pursuing secondary policy objectives in accordance with clear national priorities, balancing the potential benefits against the need to achieve value for money; (ii) develop an appropriate strategy for the integration of secondary policy objectives in public procurement systems, including appropriate planning, baseline analysis, risk

assessment and target outcomes; and (iii) employ appropriate impact assessment methodology to measure the effectiveness of procurement in achieving secondary policy objectives.

For instance, some jurisdictions grant preferential measures to SMEs or historically disadvantaged individuals in order to boost their share of the public procurement market. These preferential measures include set-asides and bidding price preferences. In the case of set-asides, a certain share of public procurement contracts is set aside for a targeted category of bidders, meeting the preferential qualification criteria (OECD, 2018, p. 85_[19]). Price preferences can be granted to SMEs that take part in procurements not reserved for SMEs.⁴

In light of the relevance of competition in achieving value for money in public procurement, good practices highlight that governments carefully consider whether measures to promote other public-policy objectives are justified. To this end, governments assess the impact of the measure on the prices paid by public purchasers and compare it with the value obtained as regards the public-policy objective pursued. In addition, they evaluate how effective is the measure in achieving the desired objective and whether there are less restrictive alternatives (OECD, 2021, p. 14_[20]).

Examples

The following are meant to show selected examples of this good practice approach, in particular highlighting advantages specified in the law and addressing an overriding public objective:

- **Australia** has an Indigenous Procurement Policy, launched in 2015, that uses a mix of targets and set asides to increase the participation of indigenous groups in public procurement in terms of volume and value, in line with Exemption 16 of the Commonwealth Procurement Rules. The policy requires that certain contracts be set aside for indigenous businesses and that a number of other contracts include minimum indigenous employment or supplier use requirements. This includes incentives for participation in high value contracts, or those valued at AUD 7.5 million and higher (Australian Government, 2020_[21]). Consideration is given at various stages of public procurement procedures that are designed to support social outcomes and inclusion (OECD, 2019, p. 186_[22]).
- **Canada** has established a set-aside programme in 1996 for Aboriginal businesses, aiming to allow that First Nations, Inuit and Métis have a greater opportunity to share in the country in the country's economic opportunities and prosperity. This includes mandatory set-asides for all procurements over CAD 5 000 for which Aboriginal populations are the primary recipients, and voluntary set-asides that can be used by federal departments and agencies in procuring goods, services, or construction where Aboriginal capacity exists (OECD, 2018, p. 85_[19]).
- In **People's Republic of China**, the Law on Promotion of Small and Medium-sized Enterprises 2002 provides in Article 34 that "in government procurement, preference shall be arranged to goods or services originated from small and medium-sized enterprises". In addition, the 2011 Interim Measure on Facilitating the Development of SMEs in Government Procurement provides that 30% of government procurement budget shall be set aside to purchase goods and services from SMEs and 60% of such reserved contracts shall be awarded to small or micro enterprises. Furthermore, small and micro enterprises participating in procurement not reserved for SMEs shall be granted a price preference in the range of 6-10% with the exact margin to be determined by the relevant procuring entity or its agent. The Interim Measure also encourages big companies to use SMEs as subcontractors, to form consortia with SMEs, and encourages financial institutions to provide credits/guarantees for SMEs to pay deposits and perform the contract (OECD, 2018, p. 88_[19]).
- **Colombia** previously employed strategies that encouraged SMEs in public procurement, which it later consolidated in Decree No. 1082 of 2015. Provisions of this decree give preference to SMEs in public procurement, as well as to undertakings hiring at least 10% disabled people. Some contracts are set aside for micro-enterprises and SMEs exclusively, such as those with a

procurement process lower than USD 125 000 and those where at least three micro-enterprises or SMEs express their interest in doing so (OECD, 2018, pp. 218-219^[19]).

- In the **European Union**, Article 20 of Directive 2014/24/EU on public procurement allows Member States to “reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose aim is the social and professional integration of disabled or disadvantaged persons” (such as the unemployed, members of disadvantaged minorities or otherwise socially marginalised groups).
- **Japan** aims to support SMEs in public procurement, as laid out in the Act on Ensuring the Receipt of Orders from the Government and Other Public Agencies by Small and Medium-Sized Enterprises as well as the Basic Policy on State Contracts and Small and Medium Enterprises. The latter sets target amounts for contracts between public entities and micro-enterprises and SMEs, approved by the Cabinet (OECD, 2018, p. 180^[19]).
- **Korea’s** Public Procurement Service (PPS), the centralised purchasing body, legally prioritises SMEs in public procurement. Combined with other legislation, the Act on Facilitation of Purchase of Small and Medium Enterprise-Manufactured Produce and Support for Development of their Markets, as of 2009, allows PPS to set aside certain products to be exclusively procured from SMEs. It also gives SMEs bid preferences, by gaining additional “points” in their assessment, as well as priority to SME-developed technology products (OECD, 2018, pp. 182-183^[19]).
- **Mexico’s** Law for the Development of the Competitiveness of the Micro, Small, and Medium Enterprise, as well as the Law of Acquisitions, Leases, and Services of the Public Sector, aims to increase the participation of SMEs in the market, namely through promoting their participation in public procurement. This legal framework allows agencies to gradually increase their share of SME awarded contracts to reach 35% of their volume, to pay SMEs in advance, give extra points (where evaluation is based on points) to SMEs that employ innovation and technology, and give preference to bidders affiliated with national SMEs (OECD, 2018, pp. 189-190^[19]).
- In the **Philippines**, according to the General Appropriations Act, the government is asked to procure at least 10% of its total purchases from duly registered cooperatives and another 10% from SMEs (Gourdon, 2018, p. 27^[23]).
- **Poland’s** Public Procurement Law dictates that the contracting authority may limit competition in favour of businesses belonging to people from socially marginalised groups. These include those who are unemployed, have mental disorders, minorities, the homeless, and refugees. This follows Article 20 of the 2014 Directive, which also allows for such reserved contracts (OECD, 2019, p. 28^[24]).
- In **Spain**, the National Markets and Competition Commission (CNMC) has recommended to conduct an ex ante and ex post competition impact assessment when pursuing other secondary public policy objectives in public procurement. The CNMC recalls that the use of social or environmental criteria in public procurement procedures must be objective, strictly limited to the purpose of the contract and respectful of the principles of public procurement (i.e. value for money, transparency, no discrimination and free competition). The CNMC recommends achieving secondary public policy objectives through the promotion of competition and not at the expense of competition among potential bidders (CNMC, 2023^[25]; 2021^[26]).
- In the **United States**, Subpart 19.7 of the Federal Acquisition Regulation (FAR) also has set-asides for small businesses under federal law. When market research concludes that small businesses are available and able to perform the work or provide the products being procured by the government, those opportunities are “set aside” exclusively for small business concerns (OECD, 2018, pp. 86-87^[19]). The government also sets a contracting goal for awarding contracts to small business concerns. The government also sets additional goals for awarding contracts to women-owned small businesses, small disadvantaged businesses, service-disabled veteran-owned small businesses, and small businesses located in Historically Underutilized Business Zones.

5.5. All potential bidders should have access to the same level of information

Providing public procurement information to the general public allows all potential bidders (including firms from other countries or from other regions within the country) to have access to the same information about government procurement opportunities at the same time. This enables wider participation in public procurement processes, which can support greater competition (OECD, 2019, p. 63^[27]).

According to the Recommendation on Public Procurement, jurisdictions should ensure an adequate degree of transparency of the public procurement system in all stages of the procurement cycle. In particular, they should “allow free access, thorough an online portal, for all stakeholders, including potential domestic and foreign suppliers, civil society and the general public, to public procurement information”. Likewise, the Recommendation on Fighting Bid Rigging in Public Procurement provides that Adherents should maximise participation of potential bidders by encouraging procurement agencies to use electronic bidding systems, accessible to a broader group of bidders and less expensive.

The Checklist for Supporting the Implementation of the Recommendation on Public Procurement presents several actions to support jurisdictions’ implementation of the Recommendation by ensuring free access for all stakeholders to public procurement information, including: (i) creating an integrated information system providing up-to-date information for all interested parties; (ii) presenting information in a user-friendly and easily comprehensible manner for all interested parties; (iii) using an open data format that publishes information in an open and structured machined-readable format; (iv) using the same channels and timeframe for all interested parties; and (v) publishing the public procurement information free of cost (OECD, 2016, p. 7^[3]).

Distorting transparency and free access for all stakeholders to public procurement information can prevent competition being effective, as some players may be favoured over others. For instance, this would be the case if tender notices were only published in local newspapers or if they were accessible subject to the payment of a fee. Under such circumstances, incumbents and other local firms would be favoured to the detriment of SMEs and companies from other regions or countries, which could ultimately reduce the number of bidders, increase prices, and lower the quality of products and services.

Examples

The following are meant to show selected examples of this good practice approach:

- **Australia** uses a procurement information system, AusTender, to provide centralised publication of auctions, annual procurement plans, contract awards, as well as details of certain contracts and standing offers. Individuals can look up information on specific contracts, including the procuring entity, the procurement method, the contract value and period, the description of the contract, and supplier details (OECD, 2015, p. 6^[28]).
- In **Costa Rica**, the public procurement regulatory framework requires contracting authorities to use SICOP (Sistema Integrado de Compras Públicas, Integrated System of Public Procurement), which is the main source of information on public procurement. Since 2016, it is mandatory for all contracting authorities and bidders to publish relevant information on their procurement activities not only on their website but also through the e-procurement platform SICOP (OECD, 2020, p. 63^[29]).
- In the **European Union**, Section 2 of Chapter III of Title I of Directive 2014/24/EU on public procurement provides rules to ensure transparency and access to public procurement documents. For instance, the Tenders Electronic Daily (TED) provides free access to business opportunities from the EU, the European Economic Area and beyond in the 24 official EU languages. Procurement notices can be searched and sorted by country, region, and business sector (EU, 2023^[30]).

- Since 2009, **Mexican** public bodies use Compranet, a procurement information system built for publishing annual procurement programmes, tender procedures (including minutes of clarification meetings), contract awards history, and formal complaints. Individuals can also use the system to file complaints (OECD, 2016^[31]).
- In the **United Kingdom**, the Crown Commercial Service (responsible for managing the procurement of common goods and services for customer organisations in the public sector), developed a website to increase information on available low-value contract opportunities.⁵ This website enables suppliers to search for information about contracts worth over GBP 12 000 with the government and its agencies. Suppliers can use Contracts Finder to search for contract opportunities in different sectors, find out what is coming up in the future and look up details of previous tenders and contracts (OECD, 2018, p. 75^[19]). There is also a dedicated website to find information on high value contracts, usually above GBP 138 760 including VAT.⁶

References

- ADB (2012), *SME Development - Government Procurement and Inclusive Growth*, [32]
<https://www.adb.org/sites/default/files/publication/30070/sme-development.pdf>.
- Australian Government (2020), *Indigenous Procurement Policy - December 2020*, [21]
<https://www.niaa.gov.au/resource-centre/indigenous-procurement-policy>.
- CNMC (2023), *CNMC Report on Draft Law to promote the social economy sector*, [25]
<https://www.cnmc.es/expedientes/ipncnmc01123>.
- CNMC (2023), *Guide on Public Procurement and Competition, In-house Procurement and Horizontal Cooperation*, [13]
<https://www.cnmc.es/expedientes/g-2020-01>.
- CNMC (2021), *Recommendations to the public authorities for an intervention in favour of market competition and an inclusive economic recovery*, [26]
https://www.cnmc.es/sites/default/files/3812928_0.pdf.
- EU (2023), *TED home*, [30]
<https://ted.europa.eu/TED/main/HomePage.do>.
- Gourdon, J. (2018), "Mapping the OECD Government Procurement Taxonomy with International Best Practices: An Implementation to ASEAN Countries", *OECD Trade Policy Papers*, No. 216, OECD Publishing, Paris, <https://doi.org/10.1787/1bd4d59a-en>. [23]
- OECD (2021), *OECD Roundtable on the Promotion of Competitive Neutrality by Competition Authorities - Note by Latvia*, [8]
[https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)22/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)22/en/pdf).
- OECD (2021), *Roundtable on The Promotion of Competitive Neutrality by Competition Authorities, Note by Spain*, [18]
[https://one.oecd.org/document/DAF/COMP/GF/WD\(2021\)39/en/pdf](https://one.oecd.org/document/DAF/COMP/GF/WD(2021)39/en/pdf).
- OECD (2021), "The promotion of competitive neutrality by competition authorities", *OECD Global Forum on Competition Background Paper*, [7]
<https://www.oecd.org/daf/competition/the-promotion-of-competitive-neutrality-by-competition-authorities.htm>.

- OECD (2021), *The Promotion of Competitive Neutrality by Competition Authorities*, Discussion Paper, <https://www.oecd.org/daf/competition/the-promotion-of-competitive-neutrality-by-competition-authorities-2021.pdf>. [20]
- OECD (2020), *OECD Review of the Corporate Governance of State-Owned Enterprises: Brazil*, <http://www.oecd.org/corporate/soe-review-brazil.htm>. [15]
- OECD (2020), *Towards a new vision for Costa Rica's Public Procurement System: Assessment of key challenges for the establishment of an action plan*, <https://www.oecd.org/costarica/Towards-a-new-vision-for-Costa-Rica's-public-procurement-system.pdf>. [29]
- OECD (2019), *Enhancing the Use of Competitive Tendering in Costa Rica's Public Procurement System*, <https://www.oecd.org/costarica/costa-rica-public-procurement-system.pdf>. [14]
- OECD (2019), *Linking Indigenous Communities with Regional Development*, OECD Rural Policy Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/3203c082-en>. [22]
- OECD (2019), *OECD Review of the Corporate Governance of State-Owned Enterprises: Bulgaria*, <https://www.oecd.org/corporate/ca/Corporate-Governance-of-SOEs-in-Bulgaria.pdf>. [11]
- OECD (2019), *Reforming Public Procurement: Progress in Implementing the 2015 OECD Recommendation*, <https://doi.org/10.1787/1de41738-en>. [24]
- OECD (2019), *Reforming Public Procurement: Progress in Implementing the 2015 OECD Recommendation*, OECD Public Governance Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/1de41738-en>. [27]
- OECD (2018), *OECD Review of the Corporate Governance of State-Owned Enterprises: Argentina*, <https://www.oecd.org/daf/ca/Argentina-SOE-Review.pdf>. [10]
- OECD (2018), *SMEs in Public Procurement: Practices and Strategies for Shared Benefits*, OECD Public Governance Reviews, OECD Publishing, Paris, <https://doi.org/10.1787/9789264307476-en>. [19]
- OECD (2016), *Checklist for Supporting the Implementation of the OECD Recommendation of the Council on Public Procurement*, OECD Publishing, <https://www.oecd.org/governance/procurement/toolbox/search/checklist-implementation-oecd-recommendation.pdf>. [3]
- OECD (2016), *Country case: Disclosure of information through the central procurement system Compranet in Mexico*, <https://www.oecd.org/governance/procurement/toolbox/search/disclosure-information-central-procurement-system-compranet.pdf>. [31]
- OECD (2016), *Participation in Global Value Chains in Latin America: Implications for Trade and Trade-Related Policy*, Working Party of the Trade Committee, [https://one.oecd.org/document/TAD/TC/WP\(2015\)28/FINAL/En/pdf](https://one.oecd.org/document/TAD/TC/WP(2015)28/FINAL/En/pdf). [2]
- OECD (2015), *Compendium of Good Practices for Integrity in Public Procurement*, [https://one.oecd.org/document/GOV/PGC/ETH\(2014\)2/REV1/En/pdf](https://one.oecd.org/document/GOV/PGC/ETH(2014)2/REV1/En/pdf). [28]
- OECD (2015), *OECD Review of the Corporate Governance of State-Owned Enterprises: Colombia*, https://www.oecd.org/daf/ca/Colombia_SOE_Review.pdf. [16]

- OECD (2012), *Competitive Neutrality: National Practices*, [6]
<https://www.oecd.org/daf/ca/50250966.pdf>.
- Sigma (2016), "Defence Procurement", *Public Procurement Brief 23*, [4]
<https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-23-200117.pdf>.
- Sigma (2016), *In-house Procurement and Public/Public Co-operation*, *Public Procurement Brief 39*, [12]
<https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-39-200117.pdf>.
- Sigma (2016), *Procurement by Utilities*, *Public Procurement Brief 16*, [17]
<https://www.sigmaweb.org/publications/Public-Procurement-Policy-Brief-16-200117.pdf>.
- WTO (2024), *Overview of the Agreement on Government Procurement*, [9]
https://www.wto.org/english/tratop_e/gproc_e/gpa_overview_e.htm.
- WTO (2023), *Rules of Origin*, https://www.wto.org/english/tratop_e/roi_e/roi_e.htm. [1]
- WTO (2012), *Agreement on Government Procurement (as amended on 30 March 2012)*, [5]
https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm.

Notes

¹ https://www.mof.go.jp/about_mof/act/kokuji_tsuutatsu/tsuutatsu/TU-19871225-3015-11.htm (accessed on 18 April 2024).

² According to the SOE Guidelines, “when SOEs engage in public procurement, whether as bidder or procurer, the procedures involved should be transparent, competitive and based on fair and objective selection criteria, promote supplier diversity and be safeguarded by appropriate standards of transparency. Generally, the activities of SOEs can be divided into two parts: activities that are for commercial sale or resale; and activities to fulfil a governmental purpose. In cases where an SOE is fulfilling a governmental purpose, or to the extent that a particular activity allows an SOE to fulfil such a purpose, the SOE should adopt government procurement procedures in line with best practices. Monopolies administered by SOEs should follow the same procurement rules applicable to the general government sector. SOEs as procurers should be encouraged to use open tenders, but be allowed a margin of appreciation on the right procurement method for their commercial activities if they compete with private sector companies in their market segment to ensure they are not subject to undue disadvantage” [OECD/LEGAL/0414].

³ According to the Recommendation on Public Procurement, “secondary policy objectives refers to any of a variety of objectives such as sustainable green growth, the development of small and medium-sized enterprises, innovation, standards for responsible business conduct or broader industrial policy objectives, which governments increasingly pursue through use of procurement as a policy lever, in addition to the primary procurement objective”.

⁴ Such preferences usually take one of the following forms: (i) bids from SMEs are discounted by a given margin (e.g. 5%) and the SME wins the bid if its offer is the lowest one; or (ii) the lowest offer from a non-SMEs bidder is handicapped by a given margin (e.g. 10%) and the competing SME win the bid if its offer is the lowest one (ADB, 2012_[32]).

⁵ www.contractsfinder.service.gov.uk/Search (accessed on 29 September 2023).

⁶ <https://www.gov.uk/find-tender> (accessed on 29 September 2023).

6 State support

Although state support can have a sound rationale and achieve important policy objectives, it might distort competition in favour of certain enterprises. As a result of state support, some enterprises may have artificially lower costs or a stronger financial position than their competitors. The competitors that gain market shares and are more successful would therefore be those that gain privileges instead of those that offer better value to consumers. This chapter presents a set of questions to guide the analysis, good practices and examples on how to implement the OECD Recommendation on Competitive Neutrality in state support.

State support can take many forms, including direct cash injections, loans granted at more favourable terms or conditions, or tax incentives. It can be disbursed directly by the state, or can flow indirectly to beneficiaries, for instance through state-owned banks (OECD, 2021^[1]) or state energy companies (OECD, 2023^[2]). As discussed in Chapter 2, state support has a variety of objectives, for instance to address environmental externalities or underinvestment in Research & Development (R&D). Subsidies can have sound rationales and achieve important policy objectives, in situations when markets may not deliver optimal outcomes or to pursue social objectives, such as regional cohesion.

An unintended consequence of state support may be that it might distort competition in favour of certain enterprises, which may, as a result, have lower costs or a stronger financial position than their competitors. For this reason, the Recommendation on Competitive Neutrality calls for jurisdictions to preserve “Competitive Neutrality when designing measures that may enhance an Enterprise’s market performance and distort competition”, in order to ensure a level playing field and reap its benefits. As state support can distort competition, it can become relevant in competition enforcement cases especially in light of the growth of state support measures in recent years (OECD, 2022^[3]).

This Competitive Neutrality Toolkit uses the generic term of state support measures to indicate the various forms of financial support provided by the state. The term covers both support provided to one or several specific recipients and general support provided to the whole economy. Crucially, it does not imply that this support necessarily benefits an enterprise in a selective way and distorts competition. The good practice approaches presented in this chapter are precisely meant to help evaluate if state support is indeed selective and distortive, inspired in particular by the State Aid framework in the European Union.

The overall principle, stated in Article 107 of the Treaty on the Functioning of the European Union (TFEU), is that *“any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market”*.¹ Under EU legislation, State Aid is generally prohibited but there are some circumstances in which it can be justified. This assessment results from a balancing exercise between the negative impact of aid in terms of distortion of competition, on the one hand, and its positive effect of achieving a public policy objective, on the other. Similarly, the approach outlined in Chapter 8 calls for an assessment of the policies that may distort competition. The good practice approaches in this chapter help identify those policies that deserve such in-depth assessment.


State support can distort international markets too, and for this reason it is regulated in the multi-lateral World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement) (IMF et al., 2021, pp. 17-22^[4]), as well as in certain preferential trade agreements (OECD, 2022^[5]).² The former contains a definition of a subsidy (defined as a financial contribution conferring a benefit that is specific to a certain company, group of companies or sector) and distinguishes between those subsidies that are prohibited, which are presumed to distort trade, and actionable subsidies, whose adverse trade effects need to be demonstrated before any countermeasures can be deployed. Some trade agreements contain provisions about state support granted specifically to SOEs (see Box 6.3). Recognising the important role of SOEs in many economies, as well as for international trade and investment, the Recommendation recognises that SOEs “may be subject to more stringent specific rules which limit the provision of government support to such entities”.

Support directly provided to consumers to purchase a certain product or service would not appear to fall within the scope of analysis, if consumers can use this financial support freely to purchase the good or service from any supplier. However, if support is only disbursed when consumers purchase from certain suppliers or from suppliers with certain characteristics, such as local suppliers, this may result in distortions and merit in-depth analysis (Hancher and Salerno, 2021, p. 75^[6]).³

A set of questions to help identify policies that can potentially distort competitive neutrality is presented below. When a policy is not in line with at least one of the questions or good practice approaches, it has

the potential to distort competition and should be analysed in detail. Chapter 8 sets out the main steps of the analysis.

Figure 6.1. Suggested questions to assess state support



State support

State support measures are likely to distort competitive neutrality and should be analysed in detail when the answer is “no” to one or more of the following questions (see methodology in Chapter 8):

- Is the objective of the state support measure specific and published?
- Is the specific state support measure granted to all possible beneficiaries without discriminating among competing enterprises?
- Are capital injections to SOEs granted on the same terms available on the market?
- Is information on state support measures public and easily accessible by all enterprises?
- Is the state support measure awarded based on pre-defined criteria?
- Is the state support measure limited in time?
- Do all enterprises have access to judicial review of decisions to grant support measures?

6.1. Identify and disclose the specific public policy objective to address and the extent to which the state support measure is likely to address it

Good practices show that state support measures are designed with a clear public policy objective in mind. As discussed in Chapter 2, the objective of state intervention may be to address market failures, such as externalities, or to promote social objectives, such as reducing inequality among a country’s regions. In addition, state support may be granted in exceptional circumstances to address emergency situations, such as the Covid-19 pandemic, or to restructure firms in financial difficulty.⁴

State support targeting a market failure is granted to influence business behaviour. As an example of intervention that addresses externalities, investment in R&D by a business produces spill overs that benefit other businesses that have not invested. The business that invests in R&D cannot appropriate all the returns on its investment and therefore would have an incentive to underinvest. This externality provides the rationale for state support of R&D. State support aims to increase R&D investment compared to the level that businesses would choose without support. There are alternative ways to support investment, for instance by lowering the cost of capital or by providing subsidies. However, the different alternatives may not be equally effective in influencing business behaviour, in this case increasing R&D investment (Criscuolo et al., 2022_[7]).

Authorities are expected to spell out how state support contributes to achieving the policy objective and to what extent it addresses it. For instance, in an opinion concerning purchase subsidies for vehicles by the Spanish government, the National Markets and Competition Commission (CNMC) recommended that state support measures be designed to closely address the specific policy objective at hand (CNMC, 2022_[8]).⁵

If the public policy objective and the mechanism through which it should affect behaviour are clear, policy makers can compare state support with alternative tools that might have a less distortive effect on competition. There may be equally effective policy interventions that require less financial support. Therefore policy makers should grant the minimum support necessary to achieve the desired change in behaviour while minimising potential distortions, in line with the examples below.

Finally, it is a good practice to disclose the objective of state support measures early on to promote accountability and limit discretion. In particular, it can facilitate ex post reviews of the effectiveness of state

support (Oxera, 2017^[9]). Nevertheless, as further discussed in Section 6.2, lack of transparency on state support is still an issue, which may prevent the identification and assessment of the objective of the measures.

Examples

The following are meant to show selected examples of this good practice approach:

- In the **EU**, the assessment of state support⁶ involves the identification of the possible objectives of common interest relating to economic and social development which are targeted by the support.⁷ This is necessary to conduct the so-called balancing test, which aims at balancing the support measure's negative effects on trade and competition within the EU with its positive effects in terms of achieving well-defined objectives of common interest (European Commission, 2009^[10]).
- In **Japan**, according to the guidelines by the Japan Fair Trade Commission (JFTC), when “public support for revitalization is necessary to achieve various policy objectives, it should be provided on a scale and with a method that are the minimum necessary for revitalizing the business concerned” (JFTC, 2016^[11]).
- In the **US**, during the 2008 financial crisis the government intervened in the car industry to rescue and restructure GM and Chrysler. The assessment conducted in order to decide how to respond to the companies' requests for extraordinary support involved economic arguments, as well as political and social ones. This required identifying what public policy objectives the government would be able to achieve through the rescue. It was agreed that the costs of not rescuing would be too high. This would have entailed extreme job losses, with “widespread spillovers into supplier industries and auto dealerships, as well as knock-on macroeconomic effects”. Overall, it was considered that the rescue was needed to “prevent an uncontrolled bankruptcy and the failure of countless suppliers, with potentially systemic effects that could sink the entire auto industry” (Goolsbee and Krueger, 2015^[12]). Following the intervention, the companies returned in private hands.

6.2. Identify and disclose state support measures

Transparency about the support granted by the state is considered a starting point to address state support issues (IMF et al., 2021, p. 26^[4]). Good practice approaches show that information on the support measures made available by the state and information on the actual support granted to individual enterprises is published:

- When the state issues programmes to fund directly or otherwise support certain activities. If these schemes are published and advertised clearly, any potential beneficiary will become aware and can request the support. Similar access to information is given to every competitor if they are to have similar access to the available support measures.
- Once the support has been granted, the specific measures that benefit individual enterprises are disclosed to help promote accountability, reducing the risk of discretionary behaviour by the authority in charge of state support. Making data available can also help assess the extent and the impact of the measures, including in an international context (OECD, 2023^[13]).

Transparency is addressed in other OECD standards, specifically the SOE Guidelines and the Voluntary Transparency Standard for Internationally Active SOEs (the “Voluntary Transparency Standard”). Building on transparency requirements in the SOE Guidelines, the OECD Voluntary Transparency Standard includes a recommendation to “disclose any subsidies and other forms of government support (direct or indirect) that confers an advantage to the recipient SOEs over private competitors and accorded by virtue of government ownership or control. [...] Disclose any relation with state-owned financial institutions.” The

standard applies to “large SOEs” that carry out economic activities and are active in international markets,⁸ while the good practice approach identified in this section, based on the OECD Recommendation on Competitive Neutrality, concerns government support granted to either SOEs or private competitors.

Lack of transparency on state support undermines confidence in a level playing field and opens the possibility for more discretion in granting support, potentially distorting competition. It also prevents the correct measurement of support measures and related analysis, such as evaluating their impact and whether they ultimately achieve their objective. There is evidence that this good practice approach is often not followed in practice, even though there is a WTO obligation to notify subsidies:⁹ “The share of WTO members that provide subsidy notifications to the SCM Committee decreased from 75 to 35 percent between 1995 and 2021” (IMF et al., 2021, p. 16_[4]). In part, this is because, under current rules, it is sometimes unclear whether a particular measure can be considered a subsidy and by whom. This makes it difficult to determine the amount of subsidies and, consequently, their degree of trade distortion. In addition, opacity is helped by funding granted indirectly through SOEs and other entities that are related to the government, instead of flowing directly from the State (OECD, 2021_[1]).¹⁰ Countries may differ in the definition of SOEs and the degree of disclosure of actions taken by them, contributing to the difficulty of assessing funding flowing through SOEs.

The growing importance of internationally active SOEs, combined with little transparency on support measures, is among the factors leading to the new Regulation on foreign subsidies distorting the internal market that came into force in the European Union in January 2023 (see Box 6.1).

Box 6.1. The EU Foreign Subsidies Regulation

The EU’s state aid regime seeks to promote the EU internal market by preventing EU Member States from granting distortive subsidies. Foreign subsidies granted to enterprises active in the EU are not subject to this framework.

In November 2022, the EU adopted a regulation *on foreign subsidies distorting the internal market*. The regulation seeks to address a regulatory gap in the control of foreign subsidies and aims to ensure a level playing field by addressing such market distortions.

Under the Regulation, two ex-ante notification regimes and a general screening tool apply. These tools address 1. Mergers and acquisitions, 2. Public procurement and 3. Other market situations, where there is a selective financial contribution by a non-EU government conferring a benefit on an undertaking that is carrying out an economic activity in the internal market (a foreign subsidy).

1. Mergers and acquisitions

Mergers and acquisitions involving financial contributions granted by non-EU governments, where at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the Union and generates an aggregate turnover in the Union of at least EUR 500 million and the parties were granted a foreign financial contribution of more than EUR 50 million over the previous three years) must be notified to the Commission and are subject to an ex-ante review.

2. Public procurement

The Regulation sets out a notification regime for bidders in public procurement processes above a certain threshold (value is equal to or higher than EUR 250 million). Bidders must submit information on any foreign financial contributions received in the preceding three-year period or confirm that no such contributions were received.

3. Other market situations

The Regulation sets out *ex officio* review powers where the Commission can examine potentially distortive foreign subsidies, which do not meet the stipulated thresholds and for other market situations, such as greenfield investments. The Commission may undertake a preliminary review and where there are sufficient grounds, can initiate an in-depth investigation.

The Commission will conduct an assessment to determine whether the transaction involves a distortive subsidy. The Regulation sets out a non-exhaustive list of indicators of distortions on the internal market such as the amount, purpose, and nature of the subsidy. It also sets out categories of foreign subsidies most likely to distort the internal market such as unlimited guarantees and those granted to failing undertakings without appropriate safeguards.

Where the Commission considers the subsidy distortive, it will conduct a balancing test, which involves considering the potential positive and distortive effects of the subsidy. Depending on the outcome, it may then accept commitments, impose redressive measures or prohibit the transaction.

Sources: European Union (2021^[14]), Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, <https://data.consilium.europa.eu/doc/document/PE-46-2022-INIT/en/pdf>.

Examples

The following examples show that selected jurisdictions publish information on state support:

- In the **European Union**, a portal makes available information on state support measures notified by Member States to the European Commission under its State Aid Framework.¹¹ It covers support schemes and individual awards, with information including the name of the beneficiary, the amount of State Aid and its objective (e.g. investment aid to SMEs, aid for broadband infrastructure). The European Commission also publishes yearly analyses of State Aid data provided by Member States.¹² In addition to reporting at EU level, member states publish information on state support, as in the following examples:
 - In **Latvia**, the individual ownership entities publish information on state funding, grants, or subsidies, both planned and received, by each SOE (OECD, 2022, p. 57^[15]).
 - In **Spain**, the National Markets and Competition Commission (CNMC) “has legislative power to release annual reports on national state aid. The annual report typically includes statistical information about the aid granted (e.g. whether it increased over the past year, the type of aid), and summaries of new legislation, case law and the initiatives of the CNMC in the field of State aid. The CNMC also has a database with the aid measures granted in Spain” (OECD, 2021, p. 37^[16]).
 - **Sweden** discloses the benefits applicable to SOEs including non-commercial assistance or other exemptions / immunities. In the case of enterprises that have public policy assignments for which they receive funds, the country annually publishes the amount of budget appropriation for the financial year and the total income of the SOE (OECD, 2022, p. 57^[15]).
- In **Japan**, the guidelines by the Japan Fair Trade Commission (JFTC) on public support for revitalisation (JFTC, 2016^[11]) recommend that “information on individual cases and on general matters such as support standards or procedures should be disclosed as much as possible, so that the possible impacts of public support for revitalization on the market mechanism can be identified, and competitors of beneficiaries are able to submit their opinions regarding the possible impacts of public support for revitalization on competition and can take appropriate measures in response.” In addition, the Regional Economy Vitalization Corporation of Japan (REVIC) was established with funds from the Japanese government and private financial institutions to provide business

revitalisation support to enterprises with useful management resources but excessive debts. REVIC's support standards have been published and follow the JFTC's guidelines. The relevant regulations also state that in case of supporting large-scale business, REVIC should disclose the name of the individual business and a summary of its revitalisation plan (Regional Economy Vitalization Corporation of Japan (REVIC), 2023^[17]).¹³

- In **Moldova**, the Competition Council implemented a “Register of State Aid in Moldova”, with the support of the World Bank. The State Aid Register has introduced a monitoring system for State Aid and its impact on the competitive environment (OECD-GVH, 2020, p. 8^[18]).
- In **Ukraine**, the Antimonopoly Committee of Ukraine (AMCU) is the body authorised to monitor and control State Aid. The competition authority maintains a State Aid Portal on its official website with information on state aid cases and decisions (OECD, 2021^[19]).
- In the **UK**, the subsidy transparency database provides information on all available schemes and the subsidies awarded to businesses.¹⁴
- The **WTO** Agreement on Subsidies and Countervailing Measures (SCM Agreement) requires the parties to disclose every year the specific subsidies they grant (WTO, 2021^[20]). Subsidies are defined as financial contributions “by a government or any public body within the territory of a member” as well as “income or price support which increases exports of any product from, or reduce imports into, a member’s territory” (IMF et al., 2021^[4]). For a financial contribution or for income or price support to constitute a subsidy, they must also confer a benefit to the recipient.

6.3. Assess if state support measures, such as loans, guarantees and state investment in capital, are granted in line with market principles

According to the Recommendation jurisdictions should “*avoid offering undue advantages that distort competition and selectively benefit some Enterprises over others*”. This provision can be broken down into its components to provide some practical guidance on how jurisdictions can implement the Recommendation by assessing if an Enterprise receives a benefit, i.e. better conditions than those available in a market transaction. If a support measure indeed confers an advantage, the next steps based on the Recommendation would be to analyse if this is a selective benefit (see the good practice approach 6.4) and to analyse the distortions of competition the measure creates, following the methodology in Chapter 8. In some cases, these benefits arise from the availability of state assets to SOEs from the time when they were not corporatised and markets were not liberalised yet. For instance, in a Competitive Neutrality Review of Small Parcel Delivery Services in ASEAN, the OECD found that in some countries SOEs benefitted from “wide distribution networks with facilities in prime locations on state-owned land, assigned under long-term leases at nominal rates” (OECD, 2021, p. 76^[21]).

The SOE Guidelines contain a similar provision, referring specifically to SOEs, while the present Competitive Neutrality Toolkit concerns also privately-owned market players. According to the SOE Guidelines, “SOEs’ economic activities should face market consistent conditions including with regard to debt and equity finance” [OECD/LEGAL/0414]. State ownership can grant benefits such as an implicit guarantee, which would lower the SOE’s cost of capital. These should be recognised as ongoing forms of support, as in the Australian framework (Australian Government, 2004^[22]). The SOE Guidelines also refer to funding by state-owned financial institutions, flagging the risk that granting finance at beneficial terms alters SOEs’ incentives and leads to wasted resources and market distortions. To address this risk, the SOE Guidelines provide that “the state should implement measures to ensure that inter-SOE transactions take place on purely commercial terms” [OECD/LEGAL/0414].

Determining in practice whether state support is granted in line with market principles involves comparing the conditions at which similar funding would be provided by the private sector. There is extensive guidance and case law in the EU on how to conduct this assessment, using the so-called Market Economy Operator

Principle (MEOP) (Box 6.2). Equally, several cases in Australia focus on the comparison between the terms at which funding is available to SOEs and those available on the market for competitors. More broadly, there is a question of whether SOEs earn a commercial rate of return on their activities, which is what a privately-owned competitor would be required to. Annex 6.A to this chapter includes some examples.

Box 6.2. The Market Economy Operator Principle (MEOP)

In the EU framework for State Aid control, if the State grants funding to an enterprise on terms that the enterprise could have received from the market, this funding does not confer an advantage to the enterprise, and it is allowed under EU rules. It is therefore important to assess if state support measures are granted in line with the terms that would be acceptable to a market operator. In essence, this is the Market Economy Operator Principle (MEOP).

Developed initially to assess investments by the State, the MEOP has evolved into a tool that is applied, for example, to loans, guarantees or tax measures. It is also relevant in transactions by SOEs, for instance when they supply products and services, based on the so-called “private vendor test”. Given the comparison with a market economy operator, the MEOP is applicable only when the State pursues economic activities and is not acting as a public authority. The circumstances under which the MEOP can be used, for instance whether to take into account previous State Aid, are an area subject to intense debate.

The European Commission establishes MEOP compliance using direct (*pari passu* transactions, tenders) and indirect (benchmarking, profitability) methods:

- The direct methods include situations when a transaction involves *pari passu* the State and private operators. This is interpreted to mean that the State and private operators enter the transaction at the same time, and they face the same risks and rewards. Another pre-requisite is that the role of private operators is not marginal, so their contribution to the transaction must be significant.
- MEOP compliance can also be established if a transaction is carried out using tender procedures. In this case, the tender should be “competitive, transparent, non-discriminatory, unconditional and in line with public procurement rules” (Robins and Puglisi, 2021, p. 23^[23]).
- Benchmarking involves comparing the price and other terms of a transaction with those of similar transactions conducted by private operators. When the price of the public transaction falls within the range of prices from similar transaction, the price is in line with the MEOP.
- Under profitability analysis, the State’s expected return from the transaction is compared with the return that a market operator would require in similar transactions, for instance with similar levels of risk. If the expected return of the State is greater than or equal to the return in similar transactions, the measure is MEOP compliant.

Source: Robins and Puglisi (2021^[23]), The market economy operator principle: an economic role model for assessing economic advantage, <https://doi.org/10.4337/9781789909258.00009>.

If support is not granted in line with market conditions, this suggests that absent state intervention a market operator would not provide the support or funding, for instance because the investment is not viable on its own. There may be other explanations for the lack of funding by a market operator, though, such as financing constraints. If the beneficiary of state support faces financing constraints it may not be able to fund the investment at market rates. For example, the availability of finance is one of the reasons that firms mention as a barrier to climate investment in a survey by the European Investment Bank (European

Investment Bank, 2022^[24]). The authors of the report conclude that policymakers should support firms in those countries where they face constraints.

Examples

The following examples show how different jurisdictions assess whether state support is granted in line with market conditions:

- In **Australia**, when government-owned enterprises are able to borrow at a lower cost than their competitors, thanks to the lower perceived risk of government-owned enterprises, they are required to make so called debt “neutrality adjustments” (Australian Government, 2004, p. 21^[22]). This involves comparing the government-owned enterprise’s cost of debt with the benchmarking rate that would be charged to the enterprise if it was privately-owned.
- Under the **EU** framework, benchmarking methods can be used to assess compliance with the MEOP. Portugal developed a methodology to calculate the market prices of state guarantees on loans provided to SMEs by the State under the so-called national system of mutual guarantees (Sistema Nacional de Garantia Mutua, “SNGM”).¹⁵ The pricing model established the market premium for State guarantees, building on the European Commission’s Guarantee Notice (European Commission, 2008^[25]). If the premiums charged by the State on loan guarantees are calculated based on the methodology, the guarantees are provided in line with market principles and are not considered to grant an advantage to the enterprises receiving those guarantees.

6.4. State support should be based on clear, objective and non-discriminatory criteria rather than the identity of the enterprise that receives it, except for emergency measures

As mentioned earlier, according to the Recommendation, jurisdictions should refrain from awarding *selective* benefits to certain market players. This provision is to be read in conjunction with the previous good practice approach, about assessing if a state support measure grants a *benefit* to enterprises. By its very nature, a selective benefit has the potential of distorting competition and would need to be assessed in detail using the methodology in Chapter 8.

Unlike benefits awarded horizontally to all market players, such as the option of paying taxes in instalments, some state support measures are granted only to enterprises in a certain sector or in a certain region. For instance, policies to reduce regional disparities include incentives for enterprises to invest in lagging regions, such as tax incentives dependent on location, investment subsidies and infrastructure policies. In some cases, these may distort competition, for example tax measures that benefit specific companies can be presumed to be selective.

Establishing whether a measure is selective in the first place is not clear-cut, though, and the details of the measure and its impact on competition need investigating on a case-by-case basis. While measures targeting specific sectors or regions may appear selective and discriminatory, this is not a foregone conclusion (see example on Redegal below).

When public policy objectives seem to require targeted interventions, it is at least important that those interventions follow clear, objective and non-discriminatory criteria. However, even in these cases support measures may still result in selective benefits with their impact on competition being assessed on a case-by-case basis.

Moreover, horizontal measures can also be deemed selective if authorities retain excessive discretion, enabling them to award support based on unclear criteria and favour specific competitors. Guidance by

the European Commission (2009^[10]), states that a scheme can be considered selective if the authorities “enjoy a degree of discretionary power”.

Given the importance of SOEs in certain economies and the fact that they tend to receive relatively more support than privately-owned companies (OECD, 2023^[13]), the Recommendation recognises that “State-Owned Enterprises may be subject to more stringent specific rules which limit the provision of government support to such entities”. Examples of provisions that address specifically SOEs can be found in some Preferential Trade Agreements (PTAs) (see Box 6.3).

Box 6.3. Provisions on SOEs in trade agreements

While the current WTO rules on subsidies apply both to privately-owned and state-owned enterprises, some Preferential Trade Agreements (PTAs) deal specifically with support provided to SOEs. These agreements are the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the Australia-Peru agreement and the United States, Mexico and Canada Agreement (USMCA).

The agreements deal with so-called “Non-Commercial Assistance” (NCA) provided directly or indirectly by a government to its SOEs. They prohibit NCAs that have “adverse effects to the interests” of another party to the agreement. The USMCA goes beyond this rule and prohibits certain types of subsidies to SOEs without the need to show their negative effects. For instance, this includes support to SOEs that are insolvent or almost insolvent, without having a restructuring plan. It also includes converting debt into equity, when this is not done according to the normal investment practice that a private investor would follow.

The clauses dealing with SOEs specifically improve the available legal tools to challenge NCAs, such as enabling the signatories to the agreement to request information on NCAs granted by another signatory. However, there are still difficulties in enforcing the provisions. For example, in the case of the NCAs provided to SOEs in financial difficulties, which are directly prohibited by the USMCA, it may not be easy for a signatory to assess the financial situation of an SOE located in another party to the agreement.

Source: OECD (2022^[5]), Government support and state enterprises in industrial sectors, [https://one.oecd.org/document/TAD/TC\(2022\)9/FINAL/en/pdf](https://one.oecd.org/document/TAD/TC(2022)9/FINAL/en/pdf).

In emergency situations, certain enterprises may require liquidity support or other targeted support that is not awarded through standard procedures. For example, during the Covid-19 pandemic, certain requirements for awarding state support in the European Union were relaxed (see example below about the so-called Temporary Framework). Under similar circumstances, the targeting might be necessary, for example to reach companies that are facing temporary liquidity constraints due to financial-market turmoil but are otherwise solvent.

Examples

The examples below illustrate the assessment of selectivity and refer to situations where state support was granted based on clear, transparent and objective criteria:

- As part of its plan to connect all Canadians to high-speed Internet, in 2020 the Government of **Canada** launched a \$2.75 billion Universal Broadband Fund (UBF) to support broadband projects that bring Internet at speeds of 50/10 Megabits per second (Mbps) to rural and remote communities. Applicants to the fund were required to have the ability to design, build and run broadband infrastructure and needed to identify who would build, own and operate the broadband network. The process to select the projects involved a 3-stage assessment: “Stage one involves meeting basic eligibility requirements. Stage two evaluates essential criteria such as managerial capacity, technical feasibility and sustainability, and stage three involves comparing projects in the

same geographic area against each other, focusing on relative technical and financial merits, as well as community benefits, such as commitment to local employment” (Government of Canada, 2021^[26]).

- In the Redegal case, the **European Commission** argued that a measure designed to facilitate the transition from analogue to digital terrestrial television in the Spanish region of Galicia was selective and constituted State Aid. The assessment of whether state support is State Aid is carried out on the basis of a set of criteria set out in the EU State Aid framework.¹⁶ These include whether the support measure grants an “*advantage on a selective basis*”. The European Court of Justice (ECJ) however found that a measure that applies only to a certain economic sector is not necessarily selective. It noted that the notion of “selectivity” means that a measure “has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are, in the light of the objective pursued by that regime, in a *comparable factual and legal situation*” (paragraph 61, emphasis added) (European Court of Justice, 2017^[27]). Therefore, it was not possible to presume that the measure would be selective only because it applied to a certain economic sector. The Court concluded that the situation of broadcasters using terrestrial technology, which benefitted from the measure, should have been analysed and compared with the situation of broadcasters using other technologies.
- To support the economy after the outbreak of the Covid-19 pandemic, the **European Commission** issued a Temporary Framework for State Aid Measures (European Commission, 2021^[28]).¹⁷ Under the framework, Member States could provide support to a company, e.g. for up to EUR 2.3 million under chapter 3.1 (“Limited amounts of aid”), through mechanisms such as direct grants, loans or equity, provided that the company was not in financial difficulty as of 31 December 2019. In the case of micro or small enterprises, the requirement about financial difficulty could be relaxed, provided that they did not benefit from rescue or restructuring aid. Lower limits were set for companies active in the agricultural and fisheries sectors. Further support measures were possible under other chapters of the Temporary Framework.
- In many countries, SMEs benefit from tax preferences that lower their taxes and from simplification measures to reduce their costs of compliance. These exceptions are available to all enterprises fulfilling objective criteria. For instance, Germany allows accelerated depreciation for SME assets that cost less than EUR 235 000 (OECD, 2015, p. 64^[29]).¹⁸
- Governments support investment in Research and Development (R&D) by private and public enterprises through measures such as tax incentives and direct funding (OECD, 2020^[30]). For instance, Italy uses tax credits to promote innovation in technologies for the technological and digital transformation of production processes. The tax credit consists of different percentages of the investment cost, depending on the amount of the investment itself. The credit can be granted to all enterprises, regardless of their ownership, size and legal form.¹⁹

6.5. State support measures should include clear exit strategies, in order not to perpetuate state support beyond the necessary

State support to achieve a specific public policy objective is likely to be timebound and to be withdrawn when that objective has been achieved. In practice, state support may be provided to certain market players on an ongoing basis, which reduces their incentives for greater efficiency and innovation. When this support grants a selective benefit to some competitors only, at the expense of others, it distorts competition, and its negative effects cumulate over time. At the extreme, overgenerous support risks keeping in the market firms that are not viable and would exit the market (so-called “zombie” firms), absent state support. In addition to distorting competition, this has a negative impact on the broader economy as zombies absorb resources from more productive competitors and reduce aggregate productivity (Fontoura Gouveia and Osterhold, 2018^[31]).

Long-standing support to certain sectors, such as agriculture, are well documented and over time even more sectors, including steel, aluminium and ship building, have benefitted from structural support which has resulted in market distortions and excess capacity (OECD, 2021, p. 80^[32]).

It may be useful to distinguish between state support to invest (e.g. to overcome market failures and provide incentives to recipients) and support to operating expenses. The former can be beneficial even though it may result in distortions if it becomes permanent, as highlighted in the paragraph above. Granting financial support to cover operating expenses may not have a clear time limit, unless it is provided to address very specific circumstances, such as the Covid-19 pandemic, and is not typically designed to address efficiency or equity considerations. These features make it more likely to be distortive compared to support to investment. In terms of type of support, equity investment by its own nature is not a one-off benefit but amounts to continuous support if the State accepts below-market returns (OECD, 2021, p. 85^[32]).

Examples

The following examples show how different jurisdictions have implemented this good practice approach:

- During the Covid-19 pandemic, several countries provided support to the air transport sector. Some of these measures included clear exit clauses. For instance, this was the case with **Estonia's** equity increase in AS Nordic Aviation Group and **Latvia's** equity investment in Air Baltic Corporation AS (OECD, 2021^[33]).
- In **Japan**, the guidelines by the Japan Fair Trade Commission (JFTC) on state support advise against providing rolling support to enterprises, given that this would reduce their incentives to become more efficient: “repeatedly providing support has a larger impact on competition compared to support provided on a once-only basis, in the sense that the former is likely to impair incentives for beneficiaries to improve their business efficiency” (JFTC, 2016^[11]).
- During the Covid-19 pandemic, the **Portuguese** Competition Authority (AdC) issued a publication on the role of competition in the economic recovery. In relation to state support, AdC advocated that, “in deploying financial support to firms, it is important to forestall a restructuring plan and an effective a transparent exit strategy for public financing” (Autoridade de Concorrência, 2021^[34]). This was motivated by empirical evidence on the negative effects that funding “zombie” firms (i.e. those that only survive in the market thanks to financial support) have on productivity and efficiency.
- In 2009, the **US** Congress approved a plan to respond to the economic crisis and promote growth. The Troubled Assets and Relief Programme (TARP) included, among other instruments, grants, loans and funds to recapitalise banks and corporates. Embedded in the programme was the aim to exit investments while “maximising returns, promoting financial stability and minimising market disruption” (OECD, 2020, p. 16^[35]).

6.6. Consider remedial measures that may reduce the competition distortions arising from state support

The checklist in annex includes a list of questions, based on good practice approaches in this Chapter, to help competition authorities and policy makers identify the state support measures that should be analysed to assess if they distort competition. Chapter 8 describes a general methodology to analyse the expected impact of state support measures and regulations. If, based on that methodology, a state measure is found to distort competition the authorities may look for alternatives that are less distortive. For instance, lowering the amount of support could still achieve the objective while not distorting competition or having a less distortive impact.

When the authorities cannot identify any alternative measures and consider proceeding with measures that distort competition, good practices show that remedies may reduce competition distortions arising

from state support. These remedies could include structural provisions or behavioural constraints. For instance, a support beneficiary, especially if it is a large company, may be required to divest certain assets to help competitors grow or to attract new entrants, ultimately increasing competition in the market. Remedial measures are usually considered carefully to make sure that they do not introduce further distortions. For instance, following the financial crisis and the provision of restructuring aid to banks in the European Union, there were some questions that behavioural constraints, such as those limiting the banks' abilities to lend or to access deposits, limited competition in the market and could restrict output further than was already the case, with negative effects on consumers and the economy (Ahlborn and Piccinin, 2009^[36]).

Examples

The following examples show how different jurisdictions have implemented this good practice approach:

- In the **European Commission's** 2010 decision (C 9/2009), the State Aid package to support Dexia was complemented by measures to limit distortions of competition. In particular, Dexia was required to divest some subsidiaries and faced a ban on acquisitions (Boudghene et al., 2010^[37]).
- In **Japan**, the 2016 guidelines by the Japan Fair Trade Commission (JFTC) on public support for revitalisation (JFTC, 2016^[11]) state that the following measures could be taken for minimising the effects of public support for vitalisation on market competition: (i) behavioural measures to restrict business activities, such as restricting investment in new production facilities and new business sectors for a certain period, when the absolute business size and market share of beneficiaries are expected to be large and they are expected to gain a significant competitive advantage due to the support; (ii) structural measures to reduce in advance the beneficiaries' production capacity within the market, such as transferring certain business and disposing of certain production facilities, when the beneficiaries' absolute size and market share are large at the time the details of support are finalised and they are expected to gain a significant competitive advantage due to public support for revitalisation, which can serve as leverage upon its completion. When impact minimisation measures are implemented, their specific details and timing should be determined when the support is decided, as there is a risk of reducing the incentives for beneficiaries to improve efficiency through their own business management efforts, and for their stakeholders to be involved in the business revitalisation.

6.7. Procedures and guidelines should provide transparency on how state support measures are assessed

As jurisdictions accumulate experience in assessing the impact of state support on competition, they may identify certain types of support that are less likely to create distortions. They may consider that there is limited benefit in investing resources in assessing all state support measures and choose to focus the assessment on those that are potentially more distortive. The checklist in Chapter 8 can provide an additional resource to identify problematic state support measures.

This experience can be encapsulated in guidelines, which can help policy makers when designing future state support (even though this is not a common practice in most jurisdictions). For example, there is a low risk of distortion from supporting investment in infrastructure in areas where this infrastructure is not present and is not likely to be deployed in the near future. Moreover, some state support does not concern economic activities (e.g. cultural and heritage conservation) and does not risk distorting the level playing field, therefore its assessment is not necessary.

State support granted to enterprises, when of limited amount, may be less likely to distort competition. Each jurisdiction may define monetary thresholds below which state support is presumed not to harm

competition. In setting these thresholds, they may consider factors such as the size of the economy and average turnover. In practice, monetary thresholds may be more straightforward to apply when the state provides direct grants or capital injections. In other cases, such as loans or guarantees, determining the actual amount of state support is more complex. For instance, since these instruments involve several instalments over time, it is necessary to calculate their value at the time they were granted, based on suitable assumptions about interest rates.

More generally, the assessment of state support measures should be transparent and predictable, in line with the Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement [OECD/LEGAL/0465]. Procedures to carry out the assessment can improve its predictability and reassure market players on the impartiality of the assessment.

Examples

The following examples show how different jurisdictions have implemented this good practice approach:

- **Australia** has published guides on competitive neutrality, including on how to assess whether government-backed enterprises enjoy benefits such as cost of equity or debt lower than their privately-owned competitors (Australian Government, 2004^[22]). The states and the federal government are expected to carry out this assessment.
- The **European Commission** has issued a regulation setting out criteria for the exemption of some types of aid from the notification requirement that applies to state support in the EU, specifically *de minimis* aid not exceeding EUR 200 000 per undertaking over any period of three fiscal years.²⁰ The Commission has published various regulations identifying thresholds for notification which may vary by sector, for instance there are different rules applicable to aid in the agriculture sector and to services of general economic interest.
- The **UK** has published guidance to help public authorities with the requirements under the Subsidy Control Act 2022. This provides step by step instructions, for instance to assess whether state support qualifies as a subsidy and needs assessment (Department for Business & Trade; Department for Business, Energy & Industrial Strategy, 2022^[38]). The government has also identified exemptions from assessment for so-called minimal financial assistance, capped at GBP 315 000 over three financial years.
- Finally, ex post evaluation can inform the design of future support measures and can help develop criteria to reduce competitive distortions. In the **EU**, ex post evaluation may be introduced as a requirement in state support measures, such as large schemes (Robins and Geldof, 2018^[39]). In addition, the European Commission publishes annual reports on State Aid amounts, based on information that member states are required to submit every year.

Annex 6.A. Assessing the commercial rate of return of an SOE – examples from the Australian experience

The good practice approach 6.3 covers assessing if state support measures are granted in line with market principles. This involves, for instance, that debt provided by the state, directly or indirectly, attracts the same interest rate, and be applied the same terms, as debt provided by privately-owned financial institutions. In addition, jurisdictions may monitor if an SOE receives implicit benefits, for example if loan rates charged by financial institutions are lower than those charged to the SOE's privately-owned competitors.

The Australian experience offers a practical illustration of this good practice approach. It is a well-established framework that focuses on competitive neutrality between SOEs and privately-owned businesses (Smith, Healey and Bai, 2023^[40]). Under the Australian Competitive Neutrality framework, SOEs are generally referred to as government businesses, therefore this annex adopts the same terminology.

To ensure competitive neutrality, government businesses are expected to earn a commercial rate of return, intended as the rate that justifies retaining the assets in the business over the medium to long term. Investors need to be compensated for the opportunity cost of investing in the business, that is “the return that they could have earned from the next best available investment” (IPART, 2023^[41]).

In order to assess if a government business earns a commercial rate of return, it is necessary to determine the following: (a) an appropriate commercial rate of return for the particular government business (the target rate of return); (b) the actual rate of return of the government business. If the actual rate of return falls short of the commercial rate of return, it means that the government accepts a lower return than a commercial investor would and therefore the business receives implicit benefits.

This Annex includes a high-level overview of the approach to set a target rate of return and to estimate the government business's actual rate of return, complemented by relevant examples. While the overall framework of assessment is specific to competitive neutrality, the concepts used in the assessment are also commonly used in antitrust and in regulatory assessments.

The rate of return

Setting the *target* rate of return may involve a different approach, depending on the situation. Where capital costs are not significant, the approach adopted in Australia is to require that a government business should earn a rate of return equal to the government's long-term bond rate plus a margin for risk (Australian Government, 2004, p. 30^[22]) (IPART, 2023, p. 84^[41]). For example, with a long-term (10-year) government bond rate of 5% and the margin for a medium risk of 5%, the target rate of return is 10%.

Where the capital costs of a business activity are significant, the weighted average cost of capital (WACC) could be used to estimate the target rate of return. This is essentially the average rate that a business pays to finance its assets.²¹ It quantifies the cost of the business's debt and equity and takes account of factors such as market risk. This approach will require benchmark data on similar activities in the private sector, therefore it is suitable for government businesses that are active in sectors with a reasonable number of relevant businesses.

In order to determine whether the target rate of return is being achieved, it is necessary to assess the *actual* rate of return of the government business. It should be noted that there are several methods to estimate the actual rate of return and the most suitable one may depend on factors such as the activity in question. For example, it may be reasonable to use indicators such as return on assets or return on capital employed in capital-intensive activities, while they may not be appropriate for services businesses, where the profit margin approach would be more appropriate.

Estimating a measure of rate of return requires assessing:

- a. the earnings of the government business (i.e. revenue minus costs);
- b. the market value of total assets (i.e. debt plus equity);
- c. the appropriate time period over which to make the assessment.

The remainder of this Annex provides examples from the Australian experience about point (a) above and some discussion of points (b) and (c).

Revenues and costs

Under the Australian Competitive Neutrality framework the relevant revenues and costs refer only to the particular business activity under consideration, not all activities of the government business (such as non-commercial activities). This information may be available from the standard business accounts of the business, but this may not necessarily be the case for businesses involved in more than one activity. Requests for information may be needed when the information is not readily available.

For a government-owned business to be competitively neutral all the costs attributable to its productive activity are to be paid. When the business supplies more than one product or service, there will inevitably be costs that need to be allocated to the activity under consideration. This can be accomplished in various ways, for instance by estimating the fully distributed cost or the avoidable cost of the business activity.

Costs can be measured based on all costs that are exclusive to the particular government-owned business plus any shared costs on a pro-rata basis, referred to as fully distributed cost. This method of allocating costs would be appropriate when the investment in the joint resource is not fully justified by the non-commercial use of the resource. For example, if a government body purchases a large building that it will partly use as a library and will partly rent out, the building is a joint cost between the two different uses. The cost of the building should therefore be shared between them. Fully distributed cost would be appropriate to allocate the cost of the building to the different activities (IPART, 2023, p. 81^[41]).

Avoidable cost is an alternative basis for allocating common costs where a business supplies multiple products or services. It measures those costs that would be avoided if the commercial activity did not occur. It is appropriate where a government-owned business supplies multiple products and the investment in the joint resource would have been justified even in the absence of the non-commercial activity. For example, if rural community is connected via a railway line for social policy reasons, there may be excess capacity on that line and it could be made available on commercial terms to a rail freight operator. Since a single track is the minimum possible unit of capacity, that is spare capacity is unavoidable, the suitable cost allocation method would be avoidable cost. The commercial activity of rail freight would therefore pay its avoidable cost (IPART, 2023, p. 81^[41]).

Further adjustments

A government may impose additional costs on government businesses that are not borne by their private sector competitors. For example, they may be required to meet more rigorous product or safety standards or to meet uncompensated public service obligations. Such costs would need to be deducted to determine the net cost of supply of the goods or service.

Non-cost advantages could include preferential access to information or customers, and the bundling of commercial and non-commercial products, while a non-cost disadvantage could be application of stricter regulation to government-owned businesses, such as adherence to stricter safety standards or the requirement to provide more product information (IPART, 2023, p. 90^[41]).

Non-cost advantages and disadvantages do not affect the cost base but are still a competitive neutrality concern because they change the relationship between SOEs and privately-owned businesses. The preferred approach to these is to remove them. However, if this is not possible, it may be possible to impute a monetary value derived from them. If this is not possible, adjustment could involve adding an arbitrarily determined premium to costs to represent advantages or a discount to reflect disadvantages.

Annex Box 6.A.1. Examples about cost allocation methods

EDI Post (EDI) is a division within Australia Post. EDI specialises in the electronic acceptance, preparation and printing of invoices, statements, accounts, cheques and direct mail from high-volume business mailers. Mailhouse services are the major product line within EDI. In its transactional mail business, EDI competes with a range of private mailhouses. It was alleged inter alia that in relation to its mailhouse services, EDI was not competitively neutral because it priced below commercial rates and it derived an advantage in the market because it had access to information about the mail volumes of competitors' clients. EDI is not a stand-alone government business; rather, it operates within Australia Post. Whether its operations are competitively neutral depends on whether it bears an appropriate share of Australia Post's common costs. Australia Post was found to allocate the cost of centrally provided services based on each activity's proportion of use, consumption and/or occupancy which was accepted as consistent with competitive neutrality.

Docimage Business Services (DBS) is an in-house competitive tendering and contracting business unit within the Australian Securities & Investment Commission (ASIC). DBS provides documentary imaging services to a variety of Commonwealth agencies, as well as to other organisations such as major public and private corporations, private law firms, various universities and local government authorities. In 2001, the Legal Services Association Australia (LSAA) lodged a complaint that DBS was able to undercut its competitors because its prices did not include the full cost of supplying the service. The investigation found that DBS used a fully distributed cost allocation methodology to attribute its share of joint agency costs and that its costs included an appropriate allowance for tax and that it did not receive any advantage in relation to interest. Fluctuations in ASIC's activities mean fluctuations in its requirement for the supply of services from DBS. DBS uses its document-imaging hardware capacity in excess of ASIC requirements to bid for competitive tenders and contracts. The Australian Government Competitive Neutrality Complaints Office (CCNCO) noted that 'competitive neutrality does not require pricing that will deliver a commercial rate of return on each and every bid.' Consequently, so long as 'DBS's pricing regime is, in aggregate, successfully recovering all relevant costs including a commercial rate of return, ...DBS's pricing regime is consistent with its obligations under competitive neutrality.' CCNCO also considered that this allowed 'ASIC to use its imaging equipment and human resources more efficiently and allowing ASIC to build its expertise in the area of electronic imaging and CD production which, in turn, allows it to better support its core functions.'

Source: Reproduced from Smith, Healey and Bai (2023^[40]), Competitive Neutrality: OECD Recommendations and the Australian Experience, *Journal of Competition Law & Economics*, Volume 19, Issue 2, June 2023, Pages 250–276, <https://doi.org/10.1093/joclec/nhad003>.

Value of assets

Information concerning the value of the business's assets may be available through normal government reporting responsibilities and would otherwise require an information request to the government business. Care is to be taken that the principles for valuing government assets correspond with those applied by private sector competitors. For example, if government policy is to value assets based on replacement cost but the private sector values assets based on historical cost, the appropriate valuation basis for achieving competitive neutrality will be historical value (IPART, 2023, p. 85⁽⁴¹⁾).

Time period

It is inappropriate to measure the rate of return over too short a period. In any given year, full cost recovery may not occur and the target rate of return may not be achieved. Year to year returns will vary, as for private sector businesses, due to factors such as the strength of demand, the level of competition, the competitiveness of the business (e.g. due to degree of technology advantages available to service providers) and market pricing strategies.

Given the year-on-year fluctuation in returns, it is reasonable to expect established government-owned businesses on average to achieve the target rate of return over a 5-year period, while for a start-up government business the period could be set at 10 years, although for highly capital-intensive businesses the period may need to be longer.

Annex Box 6.A.2. Petnet Australia

Petnet Australia Pty Limited (Petnet) was a government-owned body. In August 2011, Cyclopharm Limited (operating in Australia as Cyclopet) complained to AGCNCO that the conduct of Petnet, a wholly owned subsidiary of the Australian Nuclear Science and Technology Organisation (ANSTO), failed to comply with competitive neutrality policy. It was claimed that in a tender for a public hospital supply contract its prices '[did] not fully reflect its costs' and the business '[was] not generating commercially acceptable profits.' In March 2012, AGCNCO issued its finding that Petnet's business model could not be expected to yield a commercial rate of return over an appropriate period and so was not competitively neutral.

Petnet was established with a small amount of equity from ANSTO, but with most of the start-up finance provided as loans. ANSTO provided Petnet with four loans totalling AUD\$10 million between 2008 and 2009, which matured in 2015. In June 2011 (after it had won the NSW Health contract), following a review which found that the financing supplied to Petnet was inadequate, ANSTO entered into an agreement with Petnet to vary the terms of the existing loans and convert them into equity, thereby avoiding the requirement for ongoing interest payments.

In relation to the complaint, AGCNCO stated that '[w]hat is relevant for compliance with competitive neutrality policy is the rate of return earned on the total amount of capital invested (recognising that the cost of equity is higher than the cost of debt).' The financial restructuring of Petnet resulted in ANSTO having an investment of AUD\$ 17.228 million in Petnet. This provides the denominator for assessing the rate of return from the contract with NSW Health. It was necessary for AGCNCO to determine:

- the appropriate rate of return that should be achieved on this investment; and
- the period within which this should occur.

ANSTO originally stated that the payback period was 10 years but later increased it to 15 years, claiming it better reflected the useful life of the cyclotron machine.

The expected rate of return on investment in Petnet was 13.5%. However, ANSTO admitted that this was unlikely to be achieved, but not because its conduct was not competitively neutral. AGCNCO found that Petnet's expected internal rate of return over 10 years was around 5.3%, well below the weighted average cost of capital. Over a 15-year payback period, Petnet's commercial rate of return was found to be 9.2%, still well short of the 13.5% target of ANSTO. AGCNCO concluded that '[r]evenue and expenditure forecasts over 10 and 15 years demonstrate that PETNET Australia's commercial operations are unlikely to achieve a commercial rate of return on the equity invested over either time period.' Its conduct was found to be an ex-ante breach of competitive neutrality policy.

Source: Australian Government Competitive Neutrality Complaints Office (2012^[42]), PETNET Australia, Investigation No. 15, <https://www.pc.gov.au/competitive-neutrality/investigations/petnet/report15-petnet.pdf>.

References

- Ahlborn, C. and D. Piccinin (2009), "Bank restructuring aid in the financial crisis", *Oxera Agenda*, [36]
http://www.oxera.com/wp-content/uploads/2018/03/Bank-restructuring-aid_1.pdf (accessed on 2 May 2023).
- Australian Government (2004), *Competitive Neutrality Guidelines for Managers*, [22]
<https://www.pc.gov.au/about/core-functions/competitive-neutrality/2004-competitive-neutrality-guidelines-for-managers.pdf>.
- Australian Government Competitive Neutrality Complaints Office (2012), *PETNET Australia, Investigation No. 15*, <https://www.pc.gov.au/competitive-neutrality/investigations/petnet/report15-petnet.pdf>. [42]
- Autoridade de Concorrência (2021), *The Role of Competition in Implementing the Economic Recovery Strategy*, <http://www.concorrencia.pt/sites/default/files/2021-AdC-contribution-on-economic-recovery.pdf>. [34]
- Boudghene, Y. et al. (2010), "The Dexia restructuring decision", *Competition Policy Newsletter*, [37]
https://ec.europa.eu/competition/publications/cpn/2010_2_11.pdf.
- CNMC (2022), *Informe relativo a las ayudas concedidas mediante el plan MOVES III, PRO/CNMC/003/21*, <http://www.cnmc.es/sites/default/files/4111236.pdf>. [8]
- Criscuolo, C. et al. (2022), "Are industrial policy instruments effective?: A review of the evidence in OECD countries", *OECD Science, Technology and Industry Policy Papers*, No. 128, OECD Publishing, Paris, <https://doi.org/10.1787/57b3dae2-en>. [7]
- Department for Business & Trade; Department for Business, Energy & Industrial Strategy (2022), *Subsidy Control rules: quick guide to key requirements for public authorities*, [38]
<http://www.gov.uk/government/publications/subsidy-control-rules-key-requirements-for-public-authorities/subsidy-control-rules-quick-guide-to-key-requirements-for-public-authorities> (accessed on 8 March 2023).
- European Commission (2021), *Temporary Framework for State Aid Measures to Support the Economy in the Current Covid-19 Outbreak - Consolidated Version, C(2021) 8442 of 18 November 2021*, https://ec.europa.eu/competition-policy/system/files/2021-11/TF_consolidated_version_amended_18_nov_2021_en_2.pdf (accessed on 8 May 2022). [28]

- European Commission (2009), *Common Principles for an Economic Assessment of the Compatibility of State Aid under Article 87.3*, https://ec.europa.eu/competition/state_aid/reform/economic_assessment_en.pdf (accessed on 8 May 2022). [10]
- European Commission (2008), *Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008XC0620%2802%29>. [25]
- European Court of Justice (2017), *Retegal, Case C-70/16 P, ECLI:EU:C:2017:1002*, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=198062&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10734571>. [27]
- European Investment Bank (2022), *What drives firms' investment in climate action? Evidence from the 2021-2022 EIB Investment Survey*, <https://doi.org/10.2867/048422>. [24]
- European Union (2021), *Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market*, <https://data.consilium.europa.eu/doc/document/PE-46-2022-INIT/en/pdf>. [14]
- Fontoura Gouveia, A. and C. Osterhold (2018), "Fear the walking dead: Zombie firms, spillovers and exit barriers", *OECD Productivity Working Papers*, No. 13, OECD Publishing, Paris, <https://doi.org/10.1787/e6c6e51d-en>. [31]
- Goolsbee, A. and A. Krueger (2015), "A retrospective look at rescuing and restructuring General Motors and Chrysler", *NBER Working Paper 21000*, <https://www.nber.org/papers/w21000>. [12]
- Government of Canada (2021), *Universal Broadband Fund*, <https://ised-isde.canada.ca/site/high-speed-internet-canada/en/universal-broadband-fund>. [26]
- Hancher, L. and F. Salerno (2021), "Chapter 4. State aid in the energy sector", *Research Handbook on European State Aid Law*, pp. 64-86, <https://doi.org/10.4337/9781789909258>. [6]
- IMF et al. (2021), *Subsidies, Trade, and International Cooperation*, <http://www.elibrary.IMF.org>. [4]
- IPART (2023), *Competitive Neutrality in New South Wales - Final Report*, https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Final-Report-Competitive-neutrality-in-NSW-May-2023.PDF. [41]
- JFTC (2016), *Guidelines for Public Support for Revitalization in view of Competition Policy*, https://www.jftc.go.jp/en/pressreleases/yearly-2016/March/160331_files/160331_2.pdf. [11]
- OECD (2023), "Government support in industrial sectors: A synthesis report", *OECD Trade Policy Papers*, No. 270, OECD Publishing, Paris, <https://doi.org/10.1787/1d28d299-en>. [13]
- OECD (2023), "Measuring distortions in international markets: Below-market energy inputs", *OECD Trade Policy Papers*, No. 268, OECD Publishing, Paris, <https://doi.org/10.1787/b26140ff-en>. [2]
- OECD (2022), "Competition, Subsidies and Trade", *OECD Competition Policy Roundtable Background Note*, <http://www.oecd.org/daf/competition/subsidies-competition-and-trade-2022.pdf>. [3]

- OECD (2022), *Government support and state enterprises in industrial sectors*, [5]
[https://one.oecd.org/document/TAD/TC\(2022\)9/FINAL/en/pdf](https://one.oecd.org/document/TAD/TC(2022)9/FINAL/en/pdf).
- OECD (2022), *Monitoring the Performance of State-Owned Enterprises: Good Practice Guide for Annual Aggregate Reporting*, [15]
<http://www.oecd.org/corporate/monitoring-performance-state-owned-enterprises.htm> (accessed on 12 May 2022).
- OECD (2021), *Annual Report on Competition Policy Developments in Ukraine in 2020*, [19]
[https://one.oecd.org/document/DAF/COMP/AR\(2021\)55/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2021)55/en/pdf).
- OECD (2021), *Fostering economic resilience in a world of open and integrated markets*, [32]
<http://www.oecd.org/newsroom/OECD-G7-Report-Fostering-Economic-Resilience-in-a-World-of-Open-and-Integrated-Markets.pdf>.
- OECD (2021), “Measuring distortions in international markets: Below-market finance”, *OECD Trade Policy Papers*, No. 247, OECD Publishing, Paris, <https://doi.org/10.1787/a1a5aa8a-en>. [1]
- OECD (2021), *OECD Competitive Neutrality Reviews: Small-package delivery services in ASEAN*, [21]
<http://www.oecd.org/daf/competition/oecd-competitive-neutrality-reviews-asean-2021.pdf>.
- OECD (2021), *State Support to the Air Transport Sector: Monitoring developments related to the Covid-19 crisis*, [33]
<http://www.oecd.org/corporate/State-Support-to-the-Air-Transport-Sector-Monitoring-Developments-Related-to-the-COVID-19-Crisis.pdf> (accessed on 2 April 2023).
- OECD (2021), “The promotion of competitive neutrality by competition authorities”, *OECD Global Forum on Competition Background Paper*, [16]
<https://www.oecd.org/daf/competition/the-promotion-of-competitive-neutrality-by-competition-authorities.htm>.
- OECD (2020), “The effects of R&D tax incentives and their role in the innovation policy mix: Findings from the OECD microBeRD project, 2016-19”, *OECD Science, Technology and Industry Policy Papers*, No. 92, OECD Publishing, Paris, <https://doi.org/10.1787/65234003-en>. [30]
- OECD (2020), *The Role of Competition Policy in Promoting Economic Recovery*, [35]
<https://www.oecd.org/daf/competition/the-role-of-competition-policy-in-promoting-economic-recovery-2020.pdf>.
- OECD (2015), *Taxation of SMEs in OECD and G20 Countries*, OECD Tax Policy Studies, [29]
 No. 23, OECD Publishing, Paris, <https://doi.org/10.1787/9789264243507-en>.
- OECD-GVH (2020), “Competition Policy in Eastern Europe and Central Asia: Focus on Competitive Neutrality”, *OECD-GVH Regional Centre for Competition Newsletter*, [18]
<https://www.oecd.org/daf/competition/oecd-gvh-newsletter15-july2020-en.pdf>.
- Oxera (2017), *Ex post assessment of the impact of state aid on competition*, European Union, [9]
<https://ec.europa.eu/competition/publications/reports/kd0617275enn.pdf>.
- Regional Economy Vitalization Corporation of Japan (REVIC) (2023), *Company Profiles*, [17]
<http://www.revic.co.jp/en/about/index.html>.
- Robins, N. and H. Geldof (2018), “Ex Post Assessment of the Impact of State Aid on Competition”, *European State Aid Law Quarterly*, Vol. 17/4, pp. 494–508, [39]
<http://www.jstor.org/stable/26694276>.

- Robins, N. and L. Puglisi (2021), *The market economy operator principle: an economic role model for assessing economic advantage*, Edward Elgar Publishing, <https://doi.org/10.4337/9781789909258.00009>. [23]
- Smith, R., D. Healey and X. Bai (2023), “Competitive Neutrality: OECD Recommendations and the Australian Experience”, *Journal of Competition Law & Economics*, Vol. 19/2, pp. 250-276, <https://doi.org/10.1093/joclec/nhad003>. [40]
- WTO (2021), *Notification Provisions under the Agreement on Subsidies and Countervailing Measures - Background Note by the Secretariat, G/SCM/W/546/Rev.12*, <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/SCM/W546R12.pdf&Open=True> (accessed on 8 May 2022). [20]

Notes

¹ Treaty on the Functioning of the European Union, Official Journal 115, 09/05/2008 P. 0091 – 0092, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A12008E107>.

² (OECD, 2022^[3]) discusses the effects of state support on trade and competition.

³ With reference to the WTO framework, local-content requirements confer benefits that are prohibited.

⁴ Supporting firms in distress keeps in the market inefficient firms and distorts competition. For this reason, any such support should be subject to significant scrutiny. For instance, in the European Union there are specific Guidelines on State aid for rescuing and restructuring firms, OJ C 249, 31.07.2014.

⁵ In the same opinion, the CNMC carefully examined the requirement imposed by some regions to purchase cars from local suppliers as a condition for the financial support to buy electric cars. Therefore, consumers are not free to choose any car supplier and the CNMC considered it as a restriction on competition. The CNMC recommended to avoid such unjustified geographical limitation.

⁶ More precisely, this concerns measures which have been found to fall under Article 107(1) of the Treaty, i.e. aid incompatible with the internal market.

⁷ The balancing between the beneficial effects of the aid and its negative effects is not required for aid that aims to “remedy a serious disturbance in the economy of a Member State”, under Article 107(3)(b) TFEU. This is because the result of the balancing is presumed positive: “the fact that a Member State manages to remedy a serious disturbance in its economy can only benefit the European Union in general and the internal market in particular.” (see the judgement of the General Court of 17 February 2021 in *Ryanair vs. European Commission*, Case T-238/20, [https://curia.europa.eu/juris/document/document.jsf?dir=&docid=237881&doclang=en&mode=req&occ=first&pageIndex=0&part=1&text=](https://curia.europa.eu/juris/document/document.jsf?dir=&docid=237881&doclang=en&mode=req&occ=first&pageIndex=0&part=1&text=;)).

⁸ According to the Voluntary Standard “large” “is defined based on thresholds established by national authorities in a given jurisdiction or as established in applicable international/multilateral/bilateral agreements”.

⁹ Article 25 of the SCM Agreement.

¹⁰ The EU Regulation on foreign subsidies distorting the internal market (article 3) includes in the definition of subsidies not only granted by governments and public entities, but also those provided by “a private entity whose actions can be attributed to the third country, taking into account all relevant circumstances”.

¹¹ <https://webgate.ec.europa.eu/competition/transparency/public/search/home/>.

¹² https://competition-policy.ec.europa.eu/state-aid/scoreboard_en.

¹³ See Article 34 of “The Act on Regional Economy Vitalization Corporation”, available in Japanese at <https://www5.cao.go.jp/revic/pdf/houan.pdf>.

Article 15, paragraph (2) Item(i) and (Article 15.) paragraph (5) Items (i)(a) and (i)(b) of “Ordinance for Enforcement of the Act on Regional Economy Vitalization Corporation”, available in Japanese at <https://www5.cao.go.jp/revic/pdf/houan.pdf>.

¹⁴ <https://searchforuksubsidies.beis.gov.uk/>.

¹⁵ European Commission Decision of 1.12.2020, Case SA.61340 – Pricing model proposed for guarantee schemes under the SNGM (Sistema Nacional de Garantia Mútua), https://ec.europa.eu/competition/state_aid/cases1/202132/294366_2304860_57_2.pdf.

¹⁶ The European Commission notes that a measure is State Aid if it has four features: “(1) *there has been an intervention by the State or through State resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.); (2) the intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions; (3) competition has been or may be distorted; (4) the intervention is likely to affect trade between Member States.*” Source: https://ec.europa.eu/competition-policy/state-aid/state-aid-overview_en (accessed on 22 October 2021).

¹⁷ The framework was first issued in March 2020 and amended a number of times, lately in November 2021. As of 18 April 2022, the framework is going to be valid until June 2022.

¹⁸ As a result of accelerated depreciation, i.e. higher depreciation at the beginning of the asset life, SMEs have lower profits and pay lower taxes.

¹⁹ Legge 11 dicembre 2016, n. 232, available at www.gazzettaufficiale.it/eli/id/2016/12/21/16G00242/sg. See also www.mimit.gov.it/it/incentivi/credito-dimposta-per-investimenti-in-beni-strumentali (accessed on 17 May 2023).

²⁰ European Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] OJ L352/1.

²¹ The WACC is calculated as follows (Australian Government, 2004, p. 31^[22]):

$$\text{WACC} = \text{Re} (E / V) + \text{Rd} (D / V)$$

Where:

- “Re is the target rate of return on equity (the risk-free rate plus a risk premium). [...] Determining the cost of equity is often done by reference to financial markets and/or benchmarking similar businesses.
- Rd is the required rate of return on debt (including any debt neutrality charges). The required RoR on debt (Rd) represents the business’s borrowings costs expressed as a percentage. It reflects the lenders’ required RoR.
- V is the market value of total assets (i.e. debt plus equity).
- E is the market value of equity.
- D is the market value of debt.”

7 Public Service Obligations

Public service obligations are placed upon selected market actors in order to ensure to all consumers an appropriate access to essential services, which would not be provided by the market under commercial conditions. The assignment and delivery of public service obligations can, under certain circumstances, distort competition. This chapter presents a set of questions to guide the analysis, good practices and examples on how to implement the OECD Recommendation on Competitive Neutrality in public service obligations.

Public service obligations (PSOs) are obligations placed upon selected market actors in order to ensure to all consumers an appropriate access to essential services, which would not be provided by the market under commercial conditions.¹ The design and mechanisms for the implementation of PSOs can vary greatly amongst jurisdictions. However, such obligations are generally found in sectors such as postal services, transport, energy, and telecommunications.

The assignment and delivery of PSOs can, under certain circumstances, distort competition (Harker, Kreutzmann and Waddams, 2013^[1]). For instance, when a market player is tasked with a PSO, this provision is supposed to be compensated by users and/or the state. However, how the compensation is determined, and its amount, can affect the level playing field and create challenges for competitive neutrality.

Moreover, it is a good practice that the scope of the PSO be clear, with a precise distinction between services included and excluded from it. This is particularly important when the market actor entrusted with a PSO also provides services open to competition. Once the scope is clearly defined, three aspects become of particular importance: (i) the selection of the public service provider (through an open competitive process or not); (ii) the privileges and powers attached to the public service (which may affect other providers, whether actual or potential); and (iii) how it is compensated (OECD, 2015^[2]).

In line with these considerations, the Recommendation on Competitive Neutrality calls for jurisdictions to:

- “Limit compensation for any public service obligation placed upon an enterprise, so that it is appropriate and proportionate to the value of the services” offered.
- Identify in a transparent and specific manner the public service obligation placed upon an enterprise, and “impose high standards of transparency, account separation and disclosure” around costs and revenues, to reduce the risk of cross-subsidisation.
- Establish independent oversight and monitoring, in order to “ensure that remuneration for public service obligations is calculated based on clear targets and objectives, and based on efficiently incurred costs, including capital costs”.

A set of questions to help identify policies that can potentially distort competitive neutrality is presented below. When a policy is not in line with at least one of the questions or good practice approaches, it has the potential to distort competition and should be analysed in detail. Chapter 8 sets out the main steps of the analysis.

Figure 7.1. Suggested questions to assess public service obligations



Public service obligations

Public service obligations are likely to distort competitive neutrality and should be analysed in detail when the answer is “no” to one or more of the following questions (see methodology in Chapter 8):

- Are public service obligations defined clearly in legislation or in specific regulations?
- Are public service obligations assigned to enterprises following an open and transparent procedure?
- If a market is opened up to competition, do all enterprises have to comply with public service obligations?
- Is there a methodology for estimating the costs and benefits of public service obligations?
- Is the entity responsible for public service obligations required to keep separate accounts?
- Does the entity responsible for public service obligations submit annual reports on the costs and benefits of public service obligations?
- Are these reports audited by an independent entity?

7.1. Public service obligations should not be automatically assigned to the incumbent (whether private or publicly owned) providing the service

This good practice approach addresses the need to ensure that no service provider is put at a competitive advantage or disadvantage due to the establishment of a PSO. Good practices across jurisdictions show that competitive neutrality is maintained also in the choice of the market player responsible for the PSO, as this comes with rights and responsibilities that can affect the level playing field. For instance, the PSO provider can benefit because its reputation/brand is enhanced by providing ubiquitous service and reaching more consumers, or it may gain economies of scope from supplying services that share some cost components (e.g. letters and small parcels if some parts of the network are shared). On the other hand, depending on its scope and design, the PSO can also represent a net cost for the provider.²

The application of effective and competitive selection rules, where interested public service operators are selected through an open, fair and transparent bidding process (OECD, 2015^[3]), can safeguard the level playing field by avoiding an automatic assignment, while at the same time limit any abuse of the selection process. The PSO requirements, however, may be so onerous that competitive tenders may not attract many bidders or even any bidders at all. Recognising these difficulties, the legislation may allow the competent authorities to select award mechanisms other than open tenders, provided that they justify the underlying rationale. For instance, EU Regulation 1370/2007 (Article 5) leaves open the possibility of direct awards for the provision of passenger transport services. By way of example, Box 7.1 below describes the framework for local transport in Italy.

Box 7.1. Award of local transport services provision in Italy

For the purposes of choosing the mechanism for awarding local transport service (in-house providing, direct awarding, competitive tendering or any other forms of awarding according to sectoral European legislation) and definition of the contractual relationship, the competent local authority is required to make a thorough assessment to justify the chosen awarding mechanism as well as the identified public service obligations and the economic compensation (if any, including the criteria for its calculation), in light of the principles and requirements of the EU legislation. Such an assessment shall be made in a written form in ad-hoc report by the local authority before the service award procedure starts, and published on the website of the local authority and ANAC, the anti-corruption agency responsible for the compliance with the public contracts code and transparency standards of all public bodies in Italy.

In particular, the selection of the awarding mechanism shall take into account the following elements:

- the technical and economic characteristics of the service to be provided, including aspects relating to quality of service and infrastructure investments;
- the state of public finances and the costs to the local authority and the users;
- the expected outcomes if different alternatives of awarding were to be chosen, also with reference to comparable experiences of other local authorities;
- the economic performance of the same service under previous regimes in terms of the effects on public finance, the quality of the service provided, the costs for the local authority and for users and the investments made;
- the data and information that emerge from the periodic monitoring exercise envisaged under Art. 30 of the legislative decree.

Source: Italian Government (2022^[4]), Legislative decree n. 201 of 23 December 2022, <https://www.gazzettaufficiale.it/eli/id/2022/12/30/22G00210/sg>, Italian Competition Authority (2021^[5]), Proposal for pro-competitive reforms, [https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/\\$File/AS1730.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf).

Examples

The following are meant to show selected examples of this good practice approach:

- In the **EU**, the legislation³ provides that “the responsible authority, when entrusting the provision of the service to the undertaking in question, has complied or commits to comply with the applicable Union rules in the area of public procurement. This includes any requirements of transparency, equal treatment and non-discrimination”. The selection of the PSO provider through a public procurement procedure is also addressed in the fourth Altmark criterion,⁴ which provides two alternatives⁵ to ensure that the choice of the provider is conducive to a compensation limited to the strict minimum (see also (Pesaresi et al., 2012^[6])).
- In **Norway**, since 1997 the Government has established aviation routes under PSO by means of public tenders, in order to guarantee services that competitive markets would not provide (e.g. remote regions). After the introduction of the invitation to tender mechanism, it was possible to ensure the same air services at a lower cost. This was mainly due to the incumbent carrier’s decision to lower its costs to be able to outplay potential rivals and win the tender (ICAO, 2003^[7]). Although tenders for the provision of air services PSOs are now founded on Regulation (EEC) No 1008/2008,⁶ which organises the EU internal market for air services, individual states, such as Norway (European Economic Area member), have discretion to decide upon which routes are “essential air services” and on which authority should be responsible for the tenders (Bråthen and Eriksen, 2018^[8]).
- In **Switzerland**, universal service guarantees basic telecommunications services to all citizens in the country. The universal service licence is awarded through an open and transparent tender or, when it is evident from the outset that a public tender cannot be carried out under competitive conditions or it will not attract suitable bids, through a survey of interest among telecommunications service providers, as per Article 14, items 3 and 4 of the Telecommunications Act of 30 April 1997. In 2017, the Federal Communications Commission (ComCom) awarded the universal service licence for the period from 2018 to 2022 to Swisscom, which already held the universal licence expiring in 2017. ComCom carried out a survey among providers in the Swiss market who were in principle able to provide the universal service and identified that Swisscom was the only enterprise interested in providing the universal service (ComCom, 2017^[9]). In 2022, ComCom extended the universal service licence for one year in light of the ongoing amendment to the regulation on the universal service for telecommunications (ComCom, 2022^[10]). Once the amendment was adopted by the Federal Council (The Federal Council, 2022^[11]), ComCom launched the procedure for granting the next universal service licence. In 2023, ComCom decided to re-award the licence to Swisscom for the period from 2024 to 2031. Again, a survey of interest among the largest providers on the Swiss market potentially capable of delivering the universal service indicated that Swisscom was the only one interested in fulfilling the universal service obligation for telecommunications (ComCom, 2023^[12]).
- In the **UK**, in order to implement the Broadband Universal Service Obligation (USO), Ofcom published in 2018 a request for expressions of interest in serving as Universal Service Provider for broadband.⁷ The call for expression of interest illustrated the process for the designation of the provider, clarifying both the objectives, the approach, and the expected compensation. In particular, Ofcom would implement an open and transparent process that would not exclude providers from participating, in line with the Universal Service Directive,⁸ following a direct designation approach. Once the prospective universal service providers submitted their expression of interest, Ofcom conducted an objective and transparent analysis to assess their ability to meet their obligations, as well as their plans for delivering the USO, against Ofcom’s objectives. These include ensuring that the USO is delivered as quickly as possible, that the USO specification is met, and that the cost of delivery is minimised. Ofcom then issued a public consultation on proposed designations before issuing a formal notice of designation.

7.2. Any public service obligation placed upon an enterprise should be identified in a transparent and specific manner

According to the Recommendation, the definition of the public service obligation should be specific and transparent. A clear definition of the services within the scope of the PSO helps the potential providers wishing to express their interest (see the previous good practice approach) assess the business case and, if applicable, submit a bid. In turn, meaningful bids contribute to the selection of the best placed public service provider and to keeping the necessary compensation to a minimum.

Importantly, it provides clarity to other market participants competing with the public service provider. It is sometimes the case that the definition of public service obligation overlaps with the services that, in certain markets, are provided by the incumbent under monopoly. A review of the PSO framework in the small-parcel delivery services sector in ASEAN has shown that unclear definitions and overlaps are not rare and result in regulatory uncertainty (OECD, 2021^[13]). This uncertainty itself distorts the level playing field since competitors are not sure which services they can provide and they risk sanctions by the authorities, depending on how the legislation is interpreted.

Despite the benefits that clarity brings to new entrants, there is a risk that specifying the content of the PSO leads to inflexibility, especially when the PSO definition is specified in a law, which may not be amended easily or quickly. This is because what is considered PSO varies over time, responding to technological developments and to changing consumer needs. In the telecommunications sector, for example, broadband services have become part of PSO as access to the internet is now considered a basic need. At the same time, payphones used to be included in the definition of PSO but are no longer used as frequently as in the past (Harker, Kreutzmann and Waddams, 2013, p. 16^[1]).

Examples

The following are meant to show selected examples of transparent and specific public service obligations:

- **Austria's** universal postal services are defined in Section 6 of the Postal Market Act (PMA), in line with Directive 97/67/EC of 15 December 1997. The Postal Market Act also stipulates that universal services must be affordable, comply with defined quality and be available throughout the country. The Universal Service Operator (USO) may submit proposals for the further development of the definition of universal service. The PMA defines specific requirements in terms of coverage, delivery times, frequency and information to be provided to the regulator.
- In **Italy**, the postal services included in the definition of universal service are set out in legislation.⁹ The definition has been amended over time. For instance, following advocacy by the Italian Competition Authority (AGCM), since 2017 the notification of fines and the transmission of judicial documents are no longer included in the universal service. An agreement between the state and the universal service provider covers more in detail the latter's obligations, while the quality of service and the targets are defined by the sector regulator.
- In **Sweden**, state-owned enterprises that have a public policy assignment, such as a public service obligation, have to clearly define it as well as the reason why the specific SOE performs it. Moreover, they have to set public policy targets that reflect the purpose of the assignment. As reported in (Government offices of Sweden, 2020^[14]) "the assignment and its public benefit must therefore be made clear before the public policy targets are formulated".
- In the **UK**, legislation sets out the minimum telephony services to be provided, at an affordable price, to all citizens that request them. In 2018, the government introduced a broadband universal service obligation. The sector regulator implements these definitions through conditions imposed on the universal service providers and these conditions are publicly available.¹⁰

7.3. When a public service obligation is placed upon an enterprise, measures should be taken to avoid both over-compensation and under-compensation, in order not to unduly advantage a competitor

As for the assignment of the public service obligation, decisions regarding its compensation are also a crucial aspect to consider in order to maintain a level playing field. The Recommendation calls for jurisdictions to “ensure that compensation provided to Enterprises for fulfilling public service obligations is not used to cross-subsidise the offering of goods or services on another market” (also see good practice approach 7.5 below on ensuring accounting separation).

(OECD, 2015^[15]) shows that almost all countries compensate undertakings (public or private) which deliver public service obligations alongside their commercial activities. Depending on the jurisdiction, the type of public service and the entity delivering such services compensation methods may vary. These range from direct transfers, capital grants, reimbursements (ex-post and ex-ante), and budget appropriations, to state aids/subsidies.

If an enterprise, public or private, is overcompensated for the fulfilment of a PSO, this can result in an indirect subsidy for its commercial activities that are in competition with other market actors. The enterprise may be able to use the PSO compensation to cross-subsidise its commercial activities, and for instance exclude competitors by pricing below cost. This was at the centre of the EU case against Deutsche Post, which was found to have engaged in predatory pricing in the market for business parcel services, which was open to competition (OECD, 2018, p. 15^[16]). Challenges for competitive neutrality can also arise due to under-compensation, as this can jeopardise the enterprise’s ability to effectively compete with rivals in commercial activities and ultimately affect its overall viability. In a review of competitive neutrality in the market for small parcel delivery services in ASEAN, the OECD found that under-compensation can be problematic for competitive neutrality and recommended the removal of this distortion (OECD, 2021^[13]).

Examples

The following examples illustrate measures to avoid over-compensation and under-compensation:

- The **EU** has a framework in place to determine adequate compensation¹¹ for public-service obligations, embodied in the 2012 Communication from the Commission.¹² The Communication builds on and aims at clarifying the 2003 Altmark judgement,¹³ in which the Court of Justice set four cumulative criteria to be met for a public service compensation not to constitute (unlawful) State aid:
 - The recipient firm must have public-service obligations and the obligations must be clearly defined.
 - The parameters for calculating the compensation must be objective, transparent and established in advance.
 - Compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public-service obligations, taking into account the relevant receipts and a reasonable profit.
 - Where the firm is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the lowest cost to the community, the level of compensation for the operator of public-service obligations must be determined on the basis of an analysis of the costs of a typical well-run company.

In cases where at least one of these “Altmark conditions” is not fulfilled, the public-service compensation will be examined under state aid rules.¹⁴

- In its Decision 542/15.05.2013 the **Bulgarian Commission on Protection of Competition (CPC)** issued an opinion regarding the Ordinance for the transportation of passengers and the conditions for travelling by trolley bus (electric bus that draws power from overhead wires) in the town of Vratsa. The ordinance obliges the trolley bus transportation companies to offer additional discounts on season tickets for certain categories of passengers. In return for this obligation, the companies received compensation from the municipal budget, calculated on the basis of the issued tickets. The authority argued that the granting of a privilege to a company to compensate it for a legally imposed obligation is not a deviation from the principle of competitive neutrality, provided that there is no overcompensation (OECD, 2015^[15]).
- The **Spanish National Markets and Competition Commission (CNMC)** issued recommendations about the public tender to select the provider of the PSO maritime connection between Ceuta and Algeciras. The CNMC highlighted the need for a better design of the tender as to the value, procedure, capacity requirements and technical terms and conditions, in order to promote competition (since 2011, the same shipping company won the contract as a single bidder). Due to the lack of effective competition in the bidding process, the CNMC pointed out that the economic compensation given to the service provider should comply with the Altmark criteria (see example above) and other State aid rules (CNMC, 2018^[17]).

7.4. Compensation should be based on criteria that are objective, transparent and established in advance

To avoid over or under-compensation, as outlined by the previous good practice approach, it is important to estimate the compensation based on the “correct” costs and benefits of the public service obligation. Good practices show that compensation only covers the costs incurred by the public service provider, net of any benefits it may gain from universal service provision. For instance, these benefits could include greater brand recognition because it supplies its services everywhere across the country.

Regardless of the chosen method for PSO compensation, clear and transparent parameters/rules are generally in place to ensure that compensation is overall fair and allows for services to be delivered, and to guarantee sufficient accountability of the calculation of the PSO compensation itself. As explained in (OECD, 2015^[15]), standards and benchmarks for PSO compensation are generally stipulated by law or regulation but can also be further clarified by case law. This means that the public service provider cannot arbitrarily select a methodology that could potentially result in higher costs and therefore higher compensation, for instance by allocating artificially a higher share of common costs to public service provision.

Examples

The following examples show how different jurisdictions have implemented this good practice approach:

- In **Austria**, most government businesses providing public services set prices to meet universal service obligations according to sector regulators’ requirements (e.g. postal and gas sectors); sector regulators are also responsible for determining compensation amounts (OECD, 2012^[18]). See Box 7.3 on universal service obligations in the Austrian post services.
- In the **Netherlands**, a price cap applies to the universal-service obligations (USO) for both letters and parcels, which is intended to limit the return on sales to a maximum of 10%. For this purpose, the Netherlands Authority for Consumers and Markets (ACM) has defined a basic tariff, called the tariff headroom, which is updated annually, taking into account – among other considerations – the general consumer price index and USO volumes. PostNL is allowed to set its tariffs within this

headroom. This price regulation ensures that PostNL is sufficiently compensated with a market-determined rate of return for its USO (OECD, 2021^[13]).

- In **Türkiye**, companies which provide public services are compensated according to duty-loss (according to Decree law no. 233) which allows the Treasury to compensate any duty losses up to 110% of losses incurred (OECD, 2012^[18]).

Box 7.2. Universal service obligation compensation in Italy: the case of Poste Italiane

Italy periodically grants compensation to Poste Italiane (PI), for the fulfilment of its universal service obligation (USO). The compensation mechanism comprises the following steps, as illustrated in the 2020 EC decision approving State compensation:

- Step 1: the Italian government determines the maximum amount of public financing it wants to grant to PI per year (currently laid down in Law n. 190/2014 of 23 December 2014, the “Stability Law”).
- Step 2: PI calculates the net cost of the USO by using the net avoided cost (hereinafter “NAC”) methodology and submits its calculations to the national regulatory authority (NRA) for verification.
- Step 3: the NRA (the Autorità per le Garanzie nelle Comunicazioni, hereinafter “AGCOM”) performs the ex-post verification (see previous step) on the net cost calculated by PI to determine the burden of the USO using the NAC methodology.
- Step 4: in line with the requirements of the Postal Services Directive, AGCOM then assesses whether the net cost of the USO represents an unfair financial burden which is excessive for PI to bear.
- Step 5: if the net cost of the USO is considered an unfair financial burden, the public financing can be granted to the extent that it does not exceed the net cost for USO as determined by AGCOM.

In particular, the calculation of the net cost of the USO using the NAC methodology (step 2) requires the definition of a factual scenario, and a counterfactual one, representing what PI would do without the obligation to provide the universal service. Revenues and costs in both scenarios are calculated. This allows a conservative estimation of the NAC before intangibles, which corresponds to the difference in profit between the factual and counterfactual scenario.

The NAC is then calculated after deducting the intangibles, i.e. “those benefits enjoyed by a provider due to its Universal Service Provider status, or, more generally, to the provision of other services, which entail an improvement of its profitability.”¹

Note: 1. These can include economies of scale and scope, brand value and demand complementarities, enhanced advertising effect, demand effects due to the VAT exemption, ubiquity and network advantages, lower transaction costs and better customer acquisition due to uniform price.

Source: European Commission (2020^[19]), Decision of 1.12.2020, Case SA.55270 – State compensations granted to Poste Italiane SpA for the delivery of the universal postal service for the period 2020-2024, https://ec.europa.eu/competition/state_aid/cases1/202110/288817_2_252302_118_2.pdf.

Box 7.3. Universal service obligation compensation in Austria: the case of Austrian Post

Under Article 12 of the Postal Market Act (PMA), Austrian Post is defined as a Universal Service Provider (USP), subject to review every five years.

The demonstrably accrued net costs of the universal services are those that cannot be recovered despite economic management and represent a disproportionate financial burden for the universal service operator. Such costs must be reimbursed to the universal service operator upon request within one year of the period for which the net costs were incurred.

A disproportionate financial burden in relation to universal services would exist if the net cost exceeded 2% of the total costs of the USO. The net costs above the 2% threshold must be reimbursed.

If the USO applies for such compensation, the sector regulator (PCK) must establish and administer a universal service fund to which all licensed postal services with an annual turnover of more than EUR 1 million have to contribute according to their market shares (excluding the USO's turnover from the US). Finally, PCK has to determine the shares of those who are obliged to contribute by means of a notification and inform the companies concerned of its calculation and the amount they have to contribute.

Article 15 of the PMA then describes how net costs are calculated. The estimation must be based on the costs of specific services that cannot be recovered through normal business operations and the costs to groups of users who would not receive a service in the absence of the obligation. Key elements to be considered include the costs that could be avoided by the USP in the absence of the obligations and the intangible benefits that the operator receives from the provision of the US.

For the time being, no application for compensation has been submitted.

Source: Austrian Government (2024^[20]), Postal Market Act, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20006582> and information provided by the Austrian Federal Competition Authority (BWB).

7.5. Accounting separation and reporting requirements should be established

The Recommendation recommends that jurisdictions “impose high standards of transparency, account separation and disclosure on Enterprises with public service obligations around their cost and revenue structures”. In order to calculate the optimal level of compensation for the fulfilment of public service obligations, any costs and revenues related to the fulfilment of public-service obligations are to be clearly identified and disclosed. For this purpose, accounting separation is crucial to ensure that activities reserved for the PSO provider do not provide a channel for cross-subsidisation, which may result in market distortions (OECD, 2021^[13]).

When a public service provider uses cross-subsidisation practices to fund its commercial activities, thus obtaining an advantage over its competitors, it negatively affects competitive neutrality. Therefore, in order to limit this risk, and to ensure transparency regarding funds received for the PSO, good practices show that accounts for the PSO and for commercial activities are kept separate.

Examples

The following examples show how different jurisdictions establish accounting separation and reporting requirements:

- In **Australia**, the Australian Government Competitive Neutrality Guidelines for Managers highlight that “there needs to be organisational separation (either accounting or legal) of commercial and non-commercial activities. It is necessary to separate business activities from other government activities to ensure that Budget-funded activities do not effectively cross-subsidise commercial operations. Cross-subsidisation of these activities is undesirable, as it is not a transparent use of government funds and places private sector competitors at a disadvantage” (Australian Government, 2004^[21]).
- In the land transport sector in **Poland**, compensation for public service obligations is regulated by the Act of 16 December 2010 on Public Transport.¹⁵ If the carriers conduct other business activity in addition to providing services in the field of public transport, it is obliged to keep separate accounts for both areas of activity (OECD, 2015^[15]).
- In **Spain**, Article 26 of the Law No. 43/2010 (Postal Act) establishes the obligation of the designated postal operator to use analytical accounting that make it possible to separate universal service obligation (USO) accounts from those of other services. Moreover, the operator must submit a calculation of the net cost of the USO for validation each financial year. The National Markets and Competition Commission (CNMC) has the power to verify the correct allocation of costs and revenues in the operator’s accounts annually (OECD, 2021^[13]).

Box 7.4. OECD Guidelines on Corporate Governance of State-Owned Enterprises

The OECD Guidelines on Corporate Governance of State-Owned Enterprises are recommendations to governments on how to ensure that SOEs operate efficiently, transparently, and in an accountable manner. They cover the following areas: 1) rationales for state ownership; 2) the state’s role as an owner; 3) SOEs in the marketplace; 4) equitable treatment of shareholders and other investors; 5) stakeholder relations and responsible business practices; 6) disclosure and transparency; and 7) responsibilities of SOE boards. The Guidelines underwent a new revision, finalised in May 2024, and now include a new chapter on sustainability.

Concerning public service obligations, the Guidelines recognise the important role of SOEs in pursuing public policy objectives and address situations when SOEs both engage in economic activities and pursue public policy objectives. Consistently with the OECD Recommendation on Competitive Neutrality, the Guidelines recommend “ensuring that compensation is not used for cross-subsidisation” and call for maintaining “high standards of transparency and disclosure regarding their costs and revenue”. More specifically, they note that “[i]t is important that compensation provided to SOEs be calibrated to the net costs of fulfilling well-defined public service obligations and not be used to offset any financial or operational inefficiencies. Compensation should never be used for financing SOEs’ economic activities other than public service obligations, including in other markets, or for cross-subsidisation of other SOEs or private companies”.

Source: [OECD/LEGAL/0414](https://www.oecd.org/legal/0414).

7.6. Independent oversight and monitoring should be established (or maintained)

In order to ensure that competitive neutrality is maintained, it is important that the optimal level of compensation for the fulfilment of public service obligations, established and used according to a clear and transparent methodology (see good practice approaches 7.3 and 7.4), is monitored and controlled by an

independent party, as indicated in the Recommendation (“Establish or maintain independent oversight and monitoring [...]”).

Independent oversight is necessary to ensure that over/under compensation are avoided, and that funds for the PSO are not used to cross-subsidise services outside the scope of the PSO and distort the level playing field. In the absence of external review of the estimated net cost of PSOs, there would be a risk of the PSO provider inflating those net costs in an attempt to cross-subsidise.

In practice, this means that a designated entity has an oversight and audit role of the estimates produced by the public service provider itself. From an institutional point of view, the sector regulator may have responsibilities for reviewing the estimates and assessing if they indeed reflect efficiently incurred costs. At the same time, if the jurisdiction has in place a broader framework for the control of state support measures, the compensation may be subject to this framework too, as is the case in the European Union (see Hungary example below).

Examples

The following examples show how different jurisdictions have implemented independent oversight and monitoring:

- In **Hungary**, the State Aid Monitoring Office (SAMO) ensures that compensation for public service provision is adequate and according to EU rules on State Aid. If the state/municipality intends to compensate a public service provider to fulfil a public service obligation, it should notify their aid plans to SAMO (according to Government Decree 37/2011, III. 22) and SAMO will decide on a preliminary opinion. Public service providers should co-operate and facilitate the controlling procedures. Furthermore, they have to prepare a report periodically. In certain cases, beneficiaries must submit a report on the fulfilment of the goals defined in the contract and a detailed financial report that should be approved by an external auditor (OECD, 2015_[15]).
- In **Switzerland**, compensation for entities entrusted with public service obligations is determined through sector specific laws, and calculations are assessed by sector regulators (e.g. postal, telecom, transportation and health sectors) (OECD, 2015_[15]). However, at national level compensation only takes place in the railway sector.

References

- Australian Government (2004), *Competitive Neutrality Guidelines for Managers*, [21]
<https://www.pc.gov.au/about/core-functions/competitive-neutrality/2004-competitive-neutrality-guidelines-for-managers.pdf>.
- Austrian Government (2024), *Postal Market Act*, [20]
<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20006582>.
- Bråthen and S. Eriksen (2018), “Regional aviation and the PSO system – Level of Service and social efficiency”, *Journal of Air Transport Management*, Vol. 69, [8]
<https://www.sciencedirect.com/science/article/pii/S096969971630223X>.
- CNMC (2018), *Assessment on PSO maritime transport services between Ceuta and Algeciras*, [17]
https://www.cnmc.es/sites/default/files/2247493_8.pdf.

- ComCom (2023), *Swisscom to retain universal service obligation*, [12]
<https://www.comcom.admin.ch/comcom/en/Homepage/documentation/media-information.msg-id-95118.html>.
- ComCom (2022), *ComCom extends universal service licence for one year*, [10]
<https://www.comcom.admin.ch/comcom/en/Homepage/documentation/media-information.msg-id-88887.html>.
- ComCom (2017), *ComCom awards telecoms universal service licence to Swisscom*, [9]
<https://www.bakom.admin.ch/bakom/en/homepage/ofcom/ofcom-s-information/press-releases-nsb.msg-id-66782.html>.
- Ennis, S. (2023), *The Natural Monopoly Paradox: Incumbent Inefficiency and Entry*, [22]
<https://doi.org/10.2139/ssrn.4364914>.
- European Commission (2020), *Decision of 1.12.2020, Case SA.55270 - State compensations granted to Poste Italiane SpA for the of the universal postal service for the period 2020-2024*, [19]
https://ec.europa.eu/competition/state_aid/cases/1/202110/288817_2252302_118_2.pdf.
- Government offices of Sweden (2020), *Annual report for state-owned enterprises 2020*, [14]
<https://www.government.se/reports/2021/09/annual-report-for-state-owned-enterprises-2020/>.
- Harker, M., A. Kreuzmann and C. Waddams (2013), “Public service obligations and competition”, *Final report for CERRE*, https://cerre.eu/wp-content/uploads/2013/01/130318_CERRE_PSOCompetition_Final_0.pdf. [1]
- ICAO (2003), *Operating subsidised regional routes in a liberalized market as exemplified by the Norwegian experience*, [7]
https://www.icao.int/sustainability/CaseStudies/StatesReplies/Norway_En.pdf.
- Italian Competition Authority (2021), *Proposal for pro-competitive reforms*, [5]
[https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/\\$File/AS1730.pdf](https://www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12563290035806C/0/914911A1FF8A4336C12586A1004C2060/$File/AS1730.pdf).
- Italian Government (2022), *Legislative decree n. 201 of 23 December 2022*, [4]
<https://www.gazzettaufficiale.it/eli/id/2022/12/30/22G00210/sq>.
- OECD (2021), *OECD Competitive Neutrality Reviews: Small-package delivery services in ASEAN*, <http://www.oecd.org/daf/competition/oecd-competitive-neutrality-reviews-asean-2021.pdf>. [13]
- OECD (2018), *Competition Law and State-Owned Enterprises*, [16]
[https://one.oecd.org/document/DAF/COMP/GF\(2018\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf).
- OECD (2015), *Discussion on Competitive Neutrality, Note by the Secretariat*, [15]
[https://one.oecd.org/document/DAF/COMP\(2015\)8/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)8/FINAL/en/pdf).
- OECD (2015), “Inventory of competitive neutrality distortions and measures”, *DAF/COMP(2015)8/FINAL*, [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]
- OECD (2015), “Roundtable on competition neutrality - Issues paper”, *DAF/COMP(2015)5*, [2]
[https://one.oecd.org/document/DAF/COMP\(2015\)5/En/pdf](https://one.oecd.org/document/DAF/COMP(2015)5/En/pdf).

- OECD (2012), *Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264178953-en>. [18]
- Pesaresi et al. (2012), *The SGEI Communication*, [6]
https://ec.europa.eu/competition/publications/cpn/2012_1_10_en.pdf.
- The Federal Council (2022), *Faster internet for universal service*, [11]
<https://www.bakom.admin.ch/bakom/en/homepage/ofcom/ofcom-s-information/press-releases-nsb.msg-id-92207.html>.

Notes

¹ Some countries may not need to require the provision of universal service, if market forces are sufficient to ensure delivery at affordable prices. For instance, France does not designate any longer a universal service provider in the telecommunications market. See www.arcep.fr/la-regulation/grands-dossiers-reseaux-fixes/le-service-universel-des-communications-electroniques.html (accessed on 14 April 2023).

² There may be unintended consequences from placing a PSO on an undertaking and compensating it for its provision. For instance, the residual market demand may not be sufficient for a competitor to be commercially viable. Moreover, as noted by (Ennis, 2023^[22]), under certain conditions the entry of a competitor reduces the total costs of delivering services in certain infrastructure and delivery products. This result has implications for public policy and the PSO: “those postal incumbents that have the lowest volumes and that are increasingly facing the most serious financial challenges may be exactly the postal services where subsidies are inappropriate and competition would have the most beneficial effects.” (p. 34).

³ 2011 Communication from the Commission on the EU framework for State aid in the form of public service compensation, 2012/C 8/03 [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0111\(03\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0111(03)&from=EN). Under EU legislation, public service compensation is assessed under the State Aid framework and it “will be considered compatible with the internal market on the basis of Article 106(2) of the Treaty only” when assigned following public procurement rules.

⁴ Case C-280/00, Judgment of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, and *Oberbundesanwalt beim Bundesverwaltungsgericht*, <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/00>.

⁵ The two alternatives are: (i) selection of the public service provider by a public procurement procedure and (ii) if there is no public procurement procedure, a benchmarking exercise with an efficient undertaking (details of how this exercise is performed are provided in the 2012 Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, para. 69 et seq., [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0111\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0111(02))).

⁶ The Regulation is applicable to third countries where it has been incorporated into agreements concluded with the EU. At present, this is the case of the EEA Agreement (as regards Norway, Iceland and Liechtenstein) and the EU-Switzerland Air Transport Agreement (OJ L 114, of 30.4.2002).

⁷ https://www.ofcom.org.uk/data/assets/pdf_file/0013/115042/implementing-broadband-uso.pdf

⁸ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, as amended by Directive 2009/136/EC. This legislation has been subsequently replaced by Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (Recast).

⁹ The definition is provided by Art. 2 of Legislative Decree 22 July 1999 n.261, as amended. Law 4 August 2017 n. 124 removed the notification of sanctions and of judicial documents from the scope of universal service. The agreement between the state and the universal service provider is available at www.mise.gov.it/images/stories/documenti/Contratto_di_programma_firmato_digitalmente-2020.pdf.

¹⁰ See the relevant legislation and conditions imposed on BT and KCOM at www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/general-conditions-of-entitlement/universal-service-obligation (accessed on 14 April 2023).

¹¹ Within the EU State Aid framework, in the context of the assessment to determine if a public service compensation constitutes State aid or not.

¹² Communication from the Commission — European Union framework for State aid in the form of public service compensation, 11/01/2012, 2012/C 8/03.

¹³ Case C-280/00, Judgment of 24 July 2003, Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht, ECLI:EU:C:2003:415.

¹⁴ The measure will be subject to the standard EU state aid procedures in order to determine if it constitutes unlawful aid. For more details see https://competition-policy.ec.europa.eu/system/files/2021-04/state_aid_procedures_factsheet_en.pdf.

¹⁵ Journal of Laws of 2011 No. 5, item 13.

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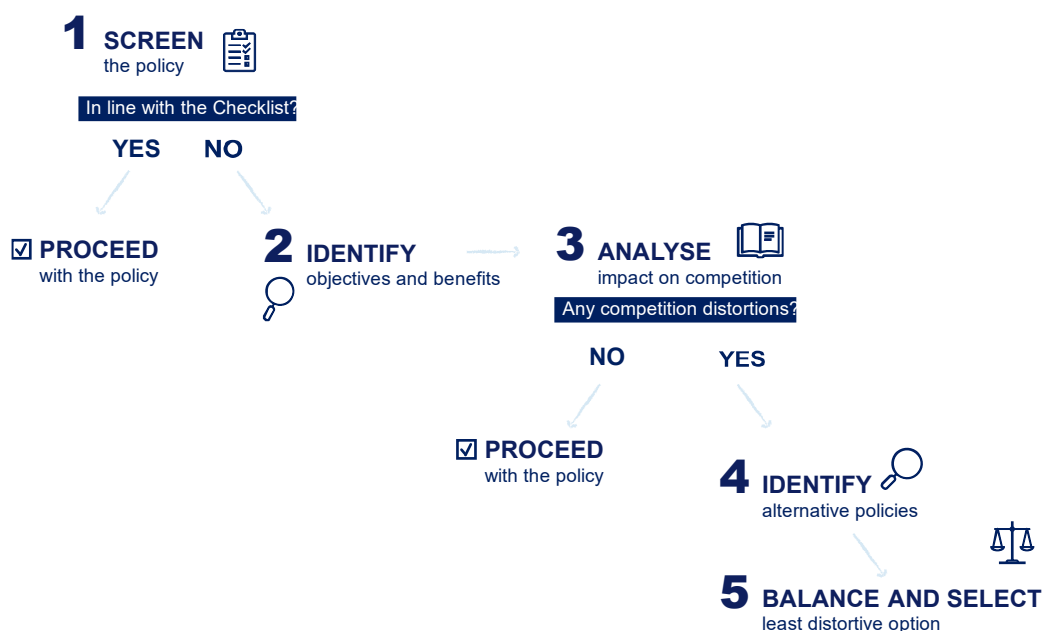
Framework of analysis

This chapter provides a framework of analysis for identifying and assessing policies that may distort competitive neutrality and for developing alternatives to avoid or reduce such distortions. It is set to be carried out in five steps: (i) screening of the policy intervention using the Competitive Neutrality Checklist; (ii) identification of the policy objective and benefits of the policy intervention; (iii) analysis of the impact of the policy intervention on competition; (iv) identification of alternative policy options; and (v) balancing of benefits and competition distortions, and selection of the most appropriate option.

The Recommendation recognises that while undue restrictions on competition can occur unintentionally, public policies may often be reformed in a way that promotes competition while achieving their objectives. While the previous chapters present good practice approaches to implement competitive neutrality principles, this chapter provides the overall framework of analysis for identifying and assessing regulations or state support measures that may distort competitive neutrality and for developing alternative policies to avoid or reduce such distortions.

The analysis described in this chapter follows the methodology developed in the OECD Competition Assessment Toolkit and is set to be carried out in five steps, as summarised below:

Figure 8.1. Steps for applying the Competitive Neutrality Toolkit



Note: Step 1 should be conducted for each relevant question of the Checklist. An in-depth analysis should be carried out if the policy intervention in question responds negatively to at least one question.

8.1. Screening of the policy intervention using the Checklist

The first step is to screen the policy intervention in question by using a set of questions (Competitive Neutrality Checklist) that indicate when regulations or state support measures may have the potential to distort competitive neutrality. When the Checklist elicits a negative response, an in-depth analysis is suggested, in order to further investigate the policy intervention.

The questions within the Competitive Neutrality Checklist cover the five areas of the Recommendation and aim to identify the most problematic policies that would deserve further analysis. The questions are based on the good practice approaches described in Chapters 3 to 7.¹

A few observations should be made:

- As the different sections of the Checklist are intended for different types of policy interventions, not all questions are relevant for all measures to be assessed. Thus, the relevant sections of the Checklist are meant to be selected depending on the type of policy intervention to be analysed.
- The questions overlap and are not mutually exclusive, which means that a given policy intervention may respond negatively to more than one question.

- The Checklist questions simplify the good practice approaches, therefore they do not entirely reflect the full content of the good practice approaches. In consequence, the Checklist should be used in conjunction with the good practices in Chapters 3 to 7.
- An in-depth analysis is suggested when a measure elicits a negative response to at least one question.

Figure 8.2. Competitive Neutrality Checklist

<h2 style="text-align: center;">COMPETITIVE NEUTRALITY CHECKLIST</h2> <p style="text-align: center;">Public officials can identify regulations or policies that potentially distort competitive neutrality and should carry out a detailed analysis when the answer is “no” to one or more of the following questions:</p>			
 <p>Competition law and enforcement</p> <ul style="list-style-type: none"> <input type="checkbox"/> Are all enterprises (including SOEs) in all sectors subject to antitrust law and to merger control? In particular: <ul style="list-style-type: none"> <input type="checkbox"/> Is the rationale for any exception reasonable and clearly spelled out? <input type="checkbox"/> Are these exceptions transparent and periodically reviewed? <input type="checkbox"/> Are all enterprises subject to the same procedural rules? <input type="checkbox"/> Are sanctions in your jurisdiction based on the same methodology for all enterprises? <input type="checkbox"/> Do all enterprises have access to judicial review of the competition authority’s decisions? 	 <p>Regulatory framework</p> <ul style="list-style-type: none"> <input type="checkbox"/> Is the regulation applicable to all enterprises, such as incumbents or SOEs? In particular: <ul style="list-style-type: none"> <input type="checkbox"/> Is the rationale for any exceptions reasonable and clearly spelled out? <input type="checkbox"/> Are these exceptions transparent and periodically reviewed? <input type="checkbox"/> Are all enterprises subject to the same procedural rules? <input type="checkbox"/> Is the market regulated by an entity separate and independent from the regulated enterprises? <input type="checkbox"/> Are bankruptcy procedures equivalent for both privately-owned and state-owned enterprises? <input type="checkbox"/> Do all enterprises have access to judicial review of regulations and public authorities’ decisions? 	 <p>Public procurement</p> <ul style="list-style-type: none"> <input type="checkbox"/> Do public procurement rules treat all enterprises similarly? In particular: <ul style="list-style-type: none"> <input type="checkbox"/> If the public procurement rules grant advantages to certain enterprises, is the rationale for these advantages reasonable and clearly spelled out? <input type="checkbox"/> Are these advantages transparent and periodically reviewed? <input type="checkbox"/> When SOEs engage in public procurement as bidders, are they subject to the same rules and practices and conditions that apply to any enterprise? <input type="checkbox"/> When SOEs procure goods or services, do they follow the same rules and practices applicable to the general government sector? <input type="checkbox"/> Do all enterprises have access to judicial review of tenders? 	
 <p>State support</p> <ul style="list-style-type: none"> <input type="checkbox"/> Is the objective of the state support measure specific and published? <input type="checkbox"/> Is the specific state support measure granted to all possible beneficiaries without discriminating among competing enterprises? <input type="checkbox"/> Are capital injections to SOEs granted on the same terms available on the market? <input type="checkbox"/> Is information on state support measures public and easily accessible by all enterprises? <input type="checkbox"/> Is the state support measure awarded based on pre-defined criteria? <input type="checkbox"/> Is the state support measure limited in time? <input type="checkbox"/> Do all enterprises have access to judicial review of decisions to grant support measures? 	 <p>Public service obligations</p> <ul style="list-style-type: none"> <input type="checkbox"/> Are public service obligations defined clearly in legislation or in specific regulations? <input type="checkbox"/> Are public service obligations assigned to enterprises following an open and transparent procedure? <input type="checkbox"/> If a market is opened up to competition, do all enterprises have to comply with public service obligations? <input type="checkbox"/> Is there a methodology for estimating the costs and benefits of public service obligations? <input type="checkbox"/> Is the entity responsible for public service obligations required to keep separate accounts? <input type="checkbox"/> Does the entity responsible for public service obligations submit annual reports on the costs and benefits of public service obligations? <input type="checkbox"/> Are these reports audited by an independent entity? 		

8.2. Identification of the objective and benefits of the policy intervention

After identifying a regulation or state support measure that is likely to distort competitive neutrality, it is suggested to identify the objective of the policy intervention and the tangible outcome that it intends to achieve. This is relevant to evaluate the benefits of the policy intervention and whether there are less restrictive alternatives that can achieve the same objective (see section 8.4). Besides the understanding of the rationale for the policy measure, an understanding of the broader regulatory environment and the technical features of the sector may also be useful, particularly to carry out the following steps.

In some cases, the policy objective can be identified in the regulation or state support measure itself. In other circumstances, this can be found in higher level legislation, in parliamentary debates or in supporting documents to the policy measure when it was enacted.²

When assessing a policy intervention, one should focus on whether and to what extent the relevant public policy is likely to result in economic benefits, such as lower production costs, better quality products or more innovative products. Nevertheless, there may be non-economic benefits from the government intervention, e.g. policies to address climate change to ensure a liveable environment, public health measures to protect the population from disease, support measures for defence purposes, etc. Each of these benefits are to be assessed at least qualitatively to determine whether they are significant, for example drawing from the Regulatory Impact Assessment (RIA) conducted for the policy.³

It is also suggested to determine, for each of the benefits identified, the extent to which the benefit is a public benefit as distinct from a private benefit. For example, if a grant or state support measure reduces the cost of R&D to a firm, this will be a private benefit (i.e. it saves money). However, it will also be a public benefit to the extent that the R&D successfully results in the development of new/different products or saves resources when producing existing products.

Furthermore, as public benefits may not be all equally significant, applying weights might be useful. These weights may not be precisely defined, but, for example, it is likely that more weight will be given to benefits which flow through to consumers or the broader community than to benefits which are retained by businesses themselves.

The following may be used to inform the weights that could be attached to the various types of public benefits claimed:

- A public benefit would generally be given more weight the broader its impact across the community and the more numerous the beneficiaries.
- Cost savings that release resources for use elsewhere in the economy attract greater weight than if there are no resource savings.
- The benefit will attract greater weight if it is likely to be sustained over time.

8.3. Analysis of the impact of the policy intervention on competition

Once the objective of the regulation or state support measure is identified, its impact on competition is to be evaluated. While the screening identifies policies that may have potential to distort competitive neutrality, it does not necessarily indicate the degree of competition harm that may be produced. Therefore, it is suggested to assess whether a policy intervention that is likely to harm competitive neutrality indeed distorts competition and if so, whether that distortion is significant.

First, it is good to build a basic understanding of the economics of the sector and key market characteristics. Second, the impact of the policy intervention on the market would be assessed as regards incumbents and new entrants, prices, quality / variety and innovation. While the Toolkit methodology does not cover the definition of relevant markets, some analysts using the Toolkit may choose to engage in

market definition, in line with the analysis usually conducted by competition authorities. Guidance in this respect can be found in (OECD, 2019^[1]), Appendix A.

Identifying the key characteristics of the market involves analysing both the supply side and the demand side (OECD, 2018^[2]).⁴ The characteristics of the product and whether any of them leads to market failures, such as asymmetric information or externalities, can be relevant to the process. On the supply side, the analysis includes understanding how firms compete, their production and pricing strategies, the distribution chain and the barriers to entry and exit. On the demand side, it may be useful to categorise consumers, for example based on their behaviour, the alternatives available to them and the costs associated to switching.

To assess the impact of the policy intervention, one should ask whether the policy under consideration could distort competition in the market in question or any of the related markets (OECD, 2019, pp. 19-30^[1]).⁵ This includes determining the effect of the public policy on existing or potential market participants, which will depend on the market characteristics, such as how concentrated the market is.

Several aspects could be considered when assessing the impact of the policy intervention on the market. The level of detail of the analysis will depend on factors such the availability of granular data (for instance, through information requests to the relevant market players) and of resources, as well as how quickly the assessment should be concluded. In particular, one could assess whether the regulation or state support measure affects (OECD, 2019, pp. 97-102^[1]):

- Incumbent businesses, for example whether these can substantially reduce the intensity of competition in the market.
- Entry of new firms, for instance whether the intervention creates barriers to entry or places new entrants at a disadvantage.
- Prices of goods and services, as well as production, for example whether the intervention imposes costs on one or more suppliers that may lead to higher prices paid by consumers and lower production by the market players.
- Quality and variety of goods and services, for instance whether the government measure will have a negative impact on quality and variety.
- Innovation, for instance whether firms will have less incentives or resources to pursue innovative activities.
- Market's growth, for example by assessing the growth of production and sales, as well as new capital investments.

There are certain market characteristics that can make distortions of competition more or less likely. These are related to how firms competed in the market before the intervention and include the degree of market concentration, product differentiation, barriers to entry and exit and switching costs (HM Treasury; Office of Fair Trading, 2007^[3]).

- Concentration.⁶ The more firms there are in a market the less impact is likely from providing one of those firms with a competitive advantage. However, if an advantage is provided to a single large firm in that market the presence of other firms may cease to provide much of a constraint on the recipient. For instance, this could be because the intervention helps the large firm acquire a position of market power, e.g. a regulation granting exclusive rights to a firm.
- Product differentiation. When products are differentiated, consumers do not consider them as easily substitutable and are less likely to modify their consumption in response to relative price changes. Therefore, the intensity of competition may be lower compared to a market where products are all nearly identical. In this situation, if a competitor receives assistance the distortion on competition may be less pronounced than if products were more similar.

- Barriers to entry and exit. If barriers to entry are low, the advantage acquired as a result of a policy intervention is likely to be relatively short-lived. Nevertheless, it is necessary to consider the likelihood that entry will occur, whether the entrants will be an effective market constraint and the timeliness of entry.
- In the presence of switching costs, for example when supplier-consumer relations are governed by long lasting or automatically renewed contracts, the intensity of competition may be reduced because it may be costly to convince existing customers to switch.

Besides assessing the effects on the primary market under consideration, it is also suggested to examine the impact of the government intervention on related markets, particularly upstream and downstream markets. If after a preliminary analysis it is observed that there are likely to be significant effects on competition in related markets, the assessment described in the paragraphs above could be carried out for each related market that might be affected (i.e. impact on incumbents and new entrants, prices, quality and variety, as well as innovation and market's growth) (OECD, 2019, pp. 104-105^[1]).

The box below presents some high-level assessments of the impact of policy interventions on competition.

Box 8.1. Examples of the impact of the policy intervention on competition

Example 1

There are four players in the market for production and distribution of tea in a small jurisdiction. Tea is a very popular drink and there are no substitutes.

Company A has a market share of 50%; B 20% and C and D each have a share of 15%. It is difficult to obtain approval from the Health Authorities in the jurisdiction to import tea because they are concerned about the quality and safety of imports. The following state support measures are applied:

- The government grants an advantage to all market players to improve their distribution methods. No anticompetitive impact since all market participants receive the advantage.
- The government grants an advantage to A aiming to create a national champion. This is likely to have an anticompetitive impact because A will have a substantial advantage over its far smaller competitors in circumstances where imports are unlikely.
- The government grants advantages to the three smaller players to make their production and distribution methods more sustainable given the critical issues facing the environment. It considers that Company A is profitable enough to do this for itself. The advantage will spur innovation in these relatively small companies. While this may raise issues of fairness, the advantage is unlikely to reduce competition on the basis that it is likely to spur innovation and efficiency. If in fact there is any anticompetitive market impact, it should be examined against its likely public benefits given the purpose of the advantage, and potential less restrictive alternatives.

Example 2

The government continues to consider the position of the tea industry. It decides that it will provide a guarantee to various companies in the market:

- The government guarantees a very large loan to Company A so that it can modernise its plant and produce the final product more efficiently. This is likely to have a substantially anticompetitive effect since the smaller competitors will not have the same advantage and a more efficient large competitor could price them out of the market.

- The government guarantees loans to all players to make their plants more efficient. This will not reduce competition since all receive the loan and can continue to compete on their merits, albeit more efficiently.
- The government guarantees loans to the smaller players so that they can better compete with Company A. This may or may not reduce competition but is more likely to increase it given the respective markets shares of the players in the tea market.

Example 3

The government brings in a procurement policy for its suppliers of tea to government offices in an effort to obtain tea at cheaper prices. The government buys 50% of the tea in the jurisdiction:

- The first policy term requires the winning provider to supply all of the tea for government for the foreseeable future. This is likely to reduce competition in the market for the production and supply of tea, since only company A has the stock levels to satisfy this condition into the long term. There is no good reason why others should not be able to compete for market share on price in this situation, since all of the products are the same. Companies B, C and D will effectively be excluded from a large share of the tea market.
- The second policy term is that the contract uses an exclusive digital ordering platform which only Company A has access to. It is new to the government and only larger companies can really afford to use it. It offers little benefit over and above the current ordering mechanism which all players can access and which works well. This is likely to reduce competition in the market for the supply of tea since not all the players can use it and there appears to be no good reason for using it.

8.4. Identification of alternative policy options

As stated in the preamble of the Recommendation, “public policies may often be reformed in a way that promotes competition while achieving their objectives”. In addition, “other things being equal, public policies with lesser harm to competition should be preferred over those with greater harm to competition, provided they achieve the identified objectives”. Therefore, when steps 1 to 3 of the methodology lead to the conclusion that a regulation or state support measure distorts competition, the next step would be to look for alternative options that may achieve the policy objective without distorting competitive neutrality or by distorting competitive neutrality to a lower extent, and that equally and efficiently fulfil the objective of the regulation or support measure.

It is therefore advisable to identify all the alternative policies that can achieve the public objective, assessing both the benefits and the impact on competition of each option. As indicated in the Competition Assessment Toolkit, identifying feasible alternatives to a public policy is a fact-specific exercise and requires a good understanding of the policy and a substantial industry expertise (OECD, 2019, p. 72^[4]).

The Competition Assessment Toolkit presents some guidance that can help develop alternatives. For example, it suggests looking at the experience of other jurisdictions, as well as to consult relevant stakeholders and potential new players. It also provides some examples of less restrictive measures that may be used in a wide range of cases dealing with the regulatory framework (OECD, 2019, pp. 72-79^[4]).

When more than one alternative is possible, it is a good practice to analyse each of the options in order to determine which of them is the less distortive way of achieving the policy objective (see section 8.5). However, if some of the potential alternatives are not feasible, they are not to be considered in the next step.

In some circumstances one alternative can be removing (or not introducing, depending on the situation) the regulation or state support measure in question, for example when the policy objective can be achieved

without any state intervention or when the policy objective is not achieved in practice by the policy.⁷ In other cases, abolishing the policy in question may not be a conceivable alternative, for instance when there are relevant policy objectives that cannot be achieved without state intervention (e.g. for environmental or security reasons). In addition, addressing competitive neutrality issues may sometimes require changing the structure of the intervention (e.g. introducing tax credits may be less distortive than granting exclusive rights).

Finally, it should be noted that in some circumstances there may be no alternatives that can achieve the policy objective. As a result, the regulation or state support measure will be maintained provided they are indeed justified by clear policy objectives. As recognised in the preamble of the Recommendation, “achieving public policy objectives will in certain circumstances require exceptions to competitive neutrality”. This is part of the balancing process between the objective and benefits of the intervention and the distortions of competition (see Section 8.5). Nonetheless, as highlighted in the good practice approaches, exceptions to competitive neutrality necessary to accomplish an overriding public policy objective should be transparent, narrowly applied and periodically reviewed to determine whether they are necessary and limited to achieving their objective.

8.5. Balance of benefits and competition distortions and selection of the least distortive option

The last step of the exercise is balancing the benefits and the competition distortion for the policy intervention in question and the alternatives that were identified. This aims to determine which of the options is the least distortive way of achieving the policy objective. For that purpose, one should consider the benefits and restrictions of each of the options. The feasibility and institutional capacity for each option, as well as the unintended consequences that can arise from each of the alternatives, should also be taken into account.

The Competition Assessment Toolkit provides relevant guidance on how to compare the options, presenting several techniques of qualitative and quantitative comparison, as summarised in Box 8.2 below.

Box 8.2. Qualitative and quantitative techniques to compare the options

According to the OECD Competition Assessment Toolkit, comparison between different options can be based on qualitative or quantitative analysis.

Qualitative assessment mixes facts and argumentation to indicate reasoned judgments about which is the preferable option. While qualitative analyses are widely understood, require little data and are quickly and practically carried out, they are more subject to external criticism and do not identify the value of enhancing competition.

The following are examples of qualitative techniques to compare alternatives:

- Argumentation (i.e. use of critical thinking or informal logic)
- Comparison of pros and cons in a list
- Points-based analysis

Quantitative assessment involves careful and rigorous estimation of the benefits of some options compared to others, providing numerical range of impacts. Since quantitative analyses require more technical skills, availability of data and time to be completed, they are more frequently used for significant or controversial issues.

The examples below show quantitative methods that can be used to compare options:

- Price comparisons
- Outcome effect in regulatory reform elsewhere
- Experiments
- Demonstration projects
- Consumer benefits estimates

Source: OECD (2019, pp. 81-113^[4]), *Competition Assessment Toolkit: Volume 3. Operational Manual*, <https://www.oecd.org/competition/assessment-toolkit.htm>.

After comparing all the options in question, it might be possible to conclude that the existing (in case of ex post evaluations) or the proposed (in case of ex ante evaluations) measure is the least distortive alternative, meaning that the government could proceed with the policy intervention. As already mentioned, the Recommendation recognises that exceptions to competitive neutrality may be accepted if required to achieve a country's overriding policy objectives, as long as they do not go beyond what is strictly necessary to achieve such objectives and that distortions to competition are limited to the extent possible. Additionally, the good practice approach is for any exceptions to competitive neutrality to be transparent, narrowly applied and regularly reviewed.

On the other hand, if an alternative policy is considered to be less distortive than the original measure under consideration, it would be good practice to promote that option, either through advocacy initiatives (if the exercise is conducted by the competition authority) or through actual implementation (if conducted by the policy maker itself), if both are equally efficient and adequate for achieving the goal.

References

- HM Treasury; Office of Fair Trading (2007), *Guidance on how to assess the competition effects of subsidies*, <https://www.gov.uk/government/publications/competition-impact-assessment-guidelines-for-policymakers>. [3]
- OECD (2021), "Methodologies to measure market competition", *OECD Competition Committee Issues Paper*, <https://www.oecd.org/daf/competition/methodologies-to-measure-market-competition.htm>. [6]
- OECD (2019), *Competition Assessment Toolkit: Volume 2. Guidance*, <https://www.oecd.org/competition/assessment-toolkit.htm>. [1]
- OECD (2019), *Competition Assessment Toolkit: Volume 3. Operational Manual*, <https://www.oecd.org/competition/assessment-toolkit.htm>. [4]
- OECD (2018), *OECD Review of the Corporate Governance of State-Owned Enterprises: Argentina*, <https://www.oecd.org/daf/ca/Argentina-SOE-Review.pdf>. [2]
- OECD (2017), *OECD Telecommunication and Broadcasting Review of Mexico 2017*, OECD Publishing, <https://doi.org/10.1787/9789264278011-en>. [5]
- US Office of Management and Budget (2023), *Guidance on Accounting for Competition Effects when Developing and Analyzing Regulatory Actions*, <https://www.whitehouse.gov/wp-content/uploads/2023/10/RegulatoryCompetitionGuidance.pdf>. [7]

Notes

¹ In line with the Recommendation on Transparency and Procedural Fairness, the Competitive Neutrality Checklist also includes questions about judicial review.

² The Competition Assessment Toolkit provides further guidance on how to identify the purpose of the policy (OECD, 2019, pp. 65-66^[4]).

³ Information about the benefits expected to result from a public policy may be available because they are included as policy objectives and because governments are required to justify their public policy initiatives given that they are funded from the public purse. To this end, there is likely to be a requirement that new policy initiatives or adjustments to existing policies are justified using a Regulatory Impact Assessment, whether applied formally or informally. In this consideration, what is accepted as a benefit must be considered a realistic outcome from the policy, rather than something that is merely speculative.

⁴ More details on the process and methodologies to analyse market characteristics can be found in (OECD, 2017^[5]).

⁵ The OECD Competition Assessment Toolkit (OECD, 2019, pp. 19-30^[1]) provides an overview of the concepts and framework to assess competition in markets. See also (US Office of Management and Budget, 2023^[7]).

⁶ Concentration is one of various measures of competition, see (OECD, 2021^[6]).

⁷ In some cases, the policy objective is not specific or is not clearly related to the intervention. Under these circumstances, the real policy objective may not be the one stated explicitly. If there is no relation between the stated policy objective and the intervention, one reasonable course of action may be not to proceed with the intervention.

Competitive Neutrality Toolkit

PROMOTING A LEVEL PLAYING FIELD

The Competitive Neutrality Toolkit provides a set of good practices, based on examples from international experience, to support public officials in identifying and reducing distortions to competition due to state intervention. It supports the implementation of the principles set out in the OECD Recommendation on Competitive Neutrality to promote a level playing field, and covers the Recommendation's main themes: competition law and enforcement, regulatory environment, public procurement, state support, and public service obligations.



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