

**COMPETITIVE NEUTRALITY AND THE ROLE OF COMPETITION AUTHORITIES: A
GLANCE AT EXPERIENCES IN EUROPE AND ASIA-PACIFIC**

Deborah Healey¹²⁷

ABSTRACT

Competition law traditionally focused on the conduct of business enterprises which had an anti-competitive impact on market competition. It is clear that the impact of government on competition in markets is likely to be significant and lasting: “...for harms to competition, the State is the biggest culprit because it can erect impenetrable barriers and privilege itself, its businesses and its friend as no private actor can do without the help of the State. But, of course, the State is also a guardian of the public good.”¹²⁸ It is only relatively recently that the anticompetitive impact of government in the market has been fully recognised and law and policy steps taken to address the issue. While some jurisdictions such as the EU and Australia have had formal structures in place for some time to address competitive neutrality issues, the pace of acceptance has been slower in others, particularly in developing jurisdictions. At the time of a research project led by the author with results published in 2014, for example, of 7 countries involved in the research (China, India, Malaysia, Pakistan, Russia, Switzerland and Vietnam), only India showed any real appetite for competitive neutrality policy reform.¹²⁹ This chapter will briefly examine competitive neutrality policy frameworks in several developed and developing jurisdictions to show the diversity of approaches currently being delivered.¹³⁰

¹²⁷ Deborah Healey is Professor at the University of New South Wales Law School, Sydney.

¹²⁸ Eleanor M. Fox and Damien Gerard, *EU Competition Law: Cases, Texts and Context* (2017) Edward Elgar Cheltenham UK, 333.

¹²⁹ See Deborah Healey (ed) *Competitive Neutrality and its Application in Selected Developing Countries* (United Nations Conference on Trade and Development, 2014) available at <https://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Competitive-Neutrality.aspx>. China did have its administrative monopoly provisions but has since embarked on a much broader policy to deal with the issue- see later.

¹³⁰ It takes an expansive view of the problem in examining the issue and includes some reference to policies and laws dealing with anti-competitive regulation and policy making.

Introduction: The role of government in the market

Competition law and policy assume that a level playing field will deliver the most efficient competitors who will provide goods and services at the lowest prices, stimulating innovation, to the benefit of the economy generally and to consumers.¹³¹

Governments impact markets by the laws and regulations which they make, and by their policy decisions and other market interventions. Governments also conduct business in the market by way of their state-owned enterprises (SOEs) and other bodies which they own, control or influence. SOEs impact markets when they are engaged in business in competition with private businesses or are engaged in business which might otherwise attract private players to the market. Government influence in markets may be inadvertent or by design and may include market impact by way of the implementation of industrial policy.¹³²¹³³

A number of meanings are attributed to “competitive neutrality”. The OECD has addressed the issue by stating that “...the legal and regulatory framework for state-owned enterprises should ensure a level playing field in markets where state-owned enterprises and private sector companies compete in order to avoid market distortions.”

The OECD approach focuses on the application of the same legal and regulatory frameworks to SOEs and private market participants and the application of the competition law of the jurisdiction to SOEs where they are engaged in business. The Australian approach assumes that this has been done and focusses on the idea that “...government business activities that are in competition with the private sector should not have a competitive advantage merely by virtue of government ownership and control.”¹³⁴

Several approaches to implementing competitive neutrality are explored in this chapter. The structural models can be placed along a continuum from the most comprehensive to the

¹³¹ Different jurisdictions take an individual approach to the goals of competition law and there is current debate on the appropriateness of some goals, such as a privacy. However, this chapter takes a fairly traditional simple economic approach as the backdrop to the discussion. [cite Hilmer? Eleanor book? Other?]

¹³² Link to OECD paper? Other refs

¹³³ OECD, OECD Guidelines on Corporate Governance of State-Owned Enterprises, (2005), 18, available at <http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf>, noted in Thomas K. Cheng, Competitive Neutrality from an Asian Perspective, OECD, DAF/COMP/WD (2015)49, 2.

¹³⁴ Deborah Healey, Competitive Neutrality: the Concept, in UNCTAD Research Partnership Platform: Competitive Neutrality and Its Application in Selected Developing Countries (2014), 12. Other authors have suggested that competitive neutrality also applies to the behaviour of regulators in the selection and enforcement of competition law provisions. This chapter assumes that this will be the case. See Nicolas Petit, Implications of Competitive Neutrality for Competition Agencies: A Process Perspective, OECD RoundTable on Competition Neutrality (, 2015) DAF/COMP/WD(2015) 50, 2. The chapter does not address ideas relating to competitive neutrality involving issues of privatisation or where government is not involved. See Cheng, n 6, 3.

most light-handed, the models discussed here being: a specific competitive neutrality policy, either alone or as part of a comprehensive competition policy; a specific law, regulation or agreement (enforceable or not); and addressing the problem by advocacy, with or without a legislative mandate for the regulator, and with or without accountability of government.

How big a problem is this?

Historical, cultural, political and economic factors will dictate the nature of government involvement in markets. Given the number of jurisdictions which have now adopted initiatives around competitive neutrality, it is clear that the competition issues involving government and competitive neutrality are well recognised. Notably in the Russian Federation, for example, it is acknowledged that more than 50% of antitrust complaints considered by FAS annually relate to government agencies and SOEs.¹³⁵ It is likely that competitive neutrality issues will be prominent in jurisdictions which have a large number of SOEs, but the nature of other government market interventions will also be important in determining the significance of competitive neutrality issues in a jurisdiction. In China, for example, a country with a very large number of SOEs at all levels of government, and with a history of laws and regulations protecting government and SOEs, particularly at a provincial level, powerful initiatives in law and policy are now being implemented to address government market interventions.¹³⁶ Both developed and developing countries now recognise competitive neutrality as an important competition law and policy issue.

What is competitive neutrality?

The most basic step in levelling the playing field for competition between government bodies and private companies is the application of the competition law to government businesses. Most jurisdictions apply competition law to SOEs where they are engaged in trade or carrying on business.¹³⁷ Secondly, laws, regulations and policies should not advantage SOEs or other government bodies. As noted above, competitive neutrality policy in some jurisdictions also recognises the advantage which government businesses often have when competing in

¹³⁵ Response to research questionnaire by Federal Antimonopoly Service of the Russian Federation, Eleanor Fox and Deborah Healey, Competition Law and the State Part II, on-going project, UNCTAD Research Partnership Platform.

¹³⁶ See below.

¹³⁷ Eleanor Fox and Deborah Healey, When the State Harms Competition- The Role for Competition Law 79 *Antitrust Law Journal* 769 (2014). See also International Competition Network, Annual Conference, Special Project of Moroccan Conseil de la Concurrence, State-Owned Enterprises and Competition, Marrakesh 23-25 April 2014, 14.

markets. It recognises that significant government businesses in competition with the private sector should not have a competitive advantage merely because they are owned and controlled by government. Competitive neutrality policy in this context is thus the steps or mechanisms put in place to ensure that the market is “neutral” in respect of SOEs.

Many examples of these competitive advantages exist. SOEs may have advantages linked to immunity from taxes, charges and regulatory requirements; explicit or implicit government guarantee of debt; concessional interest rates on loans; no accounting for depreciation expenses; no expectation of achieving a commercial rate of return; effective immunity from bankruptcy; and pricing policies which do not fully account for production costs. In some countries SOEs find it much easier than other companies to get bank finance. Of course, and depending upon the circumstances, there are also potential disadvantages of being a government business: greater accountability; community service obligations; reduced managerial autonomy; compliance with other government policies. These also need to be factored into any assessment of competitive neutrality.

Finally, competitive neutrality has both national and international implications. Within a jurisdiction where SOEs are advantaged, more efficient competitors may be driven out of the market because of the advantages of their SOE competitor. Internationally, SOEs supported by their government may enter foreign jurisdictions and disadvantage or drive out more efficient local competitors. Competitive neutrality has an interesting relationship with industrial policy and the whole idea of “state capitalism”.

The next section discusses current approaches to the issue of competitive neutrality with specific case studies from representative jurisdictions.

Competitive neutrality: adoption of a policy

A competitive neutrality policy can be implemented either alone or as part of a more comprehensive competition policy.¹³⁸ It may be binding on participants if it forms part of an agreement between them. The outcomes which can be achieved will depend upon the extent to which the policy is enforceable.

¹³⁸ “Competition Policy refers to government policy to preserve or promote competition among market players and to promote other government policies and processes that enable a competitive environment to develop.” UNCTAD, *the relationship between competition and industrial policies in promoting economic development*, TD/B/C. I/CLP/3, 27 April 2009.

Australia

Australia, which has been described as having the “most comprehensive competition policy” worldwide by the OECD,¹³⁹ has had a working competition law for more than 40 years. It is important to note, however, that competitive neutrality in Australia is a *policy*, and that the competition regulator, the Australian Competition and Consumer Commission (ACCC), does not enforce it. Australia undertook a comprehensive and influential review of competition law and policy in 1992.¹⁴⁰ The Hilmer Review, as it became known after the leader of the review group, recommended reform to the competition law (then known as the Trade Practices Act) to ensure that all market participants, including most government bodies engaged in business at Commonwealth, State, Territory and local government levels were subject to its provisions. The Review also made many recommendations about competition policy, many based on the idea of creation of true national market, including competitive neutrality. It recommended both retrospective and on-going prospective review of the anti-competitive impact of laws at both national and state level, and made recommendations on the reform, restructure and privatisation of SOEs and other government bodies. It recommended the implementation of competitive neutrality policy for government bodies at state and national levels.¹⁴¹ Competitive neutrality was to be applied to significant business activities charging for goods and services, with an actual or potential competitor, when its application would result in a net benefit to society. For a number of years financial rewards based on estimated efficiency gains of policy implementation were given by the Commonwealth government to state and territory governments as incentives for implementation of these and other NCP reforms.

Most Hilmer recommendations were accepted and implemented by governments. The nature of Australia as a federal system of government with states and territories raised constitutional issues about how competitive neutrality policy might be implemented. Ultimately, competition policy as a whole, including competitive neutrality and regulatory review (NCP) was implemented under an agreement between the Commonwealth, the states and territories. Each of these parties was free to implement the competitive neutrality policy under its own agenda, subject to their agreement to specified basic elements.¹⁴²

¹³⁹ OECD, *Competitive Neutrality: Maintaining a Level Playing Field between Public and Private Business: Report on OECD and National Best Practices in Competitive Neutrality* (2012), 64.

¹⁴⁰ A full discussion of the Australian position, including history and current issues can be found in Deborah Healey and Rhonda Smith, *Competitive Neutrality in Australia: Opportunity for Policy Development* (2018) 25 *Competition and Consumer Law Journal* 223- 248.

¹⁴¹ See generally Deborah Healey, *Competitive Neutrality: addressing government advantage in Australian markets* in Josef Drexler and Vicente Bagnoli, *State Initiated restraints of Competition* Edward Elgar (2015) 3 -39.

¹⁴² See Council of Australian Governments, *Competition Principles Agreement* (11 April 1995) as amended (13

Competitive neutrality in this context is achieved by the initiatives addressing the advantages of SOEs, such as by: the payment of taxes or tax equivalents by significant government bodies engaged in significant business activities. These bodies should achieve a commercial rate of return on assets, should pay commercial interest rates or debt neutrality charges, and comply with regulations which apply to private sector competitors. Pricing should account for all costs.

Competitive neutrality does not prevent government from pursuing other legitimate policy objectives.

In practical terms the procedure policy of competitive neutrality policy was undertaken in the following way: competitive neutrality complaints at Commonwealth, state and territory level are dealt with by independent units, regulators or departments. It should be remembered that each jurisdiction approaches the implementation of competitive neutrality policy slightly differently, but this chapter will focus on competitive neutrality at Commonwealth level. At Commonwealth level competitive neutrality complaints are dealt with by the Australian Government Competitive Neutrality Complaints Office (AGCNCO), which is an autonomous unit within the Australian Productivity Commission. AGCNCO assesses complaints and provides advice to the body involved. If a suitable resolution of the complaint cannot be achieved, it may inform the Treasurer, but the Government is not obliged to comply with the advice. It may recommend a public inquiry. There are no penalties for non-compliance, but transparent examination of conduct and publication of outcomes increases the accountability of government businesses and portfolio Ministers.¹⁴³

Various complaints about competitive neutrality have been considered by the Commonwealth, the States and territories. Complaints surrounding the implementation of the National Broadband Network led to a detailed review¹⁴⁴ which indicated that NBN Co had breached competitive neutrality policy in a number of respects, but also indicated a number of issues of policy uncertainty. Issues related to pricing of infrastructure in green fields

April 2007).

¹⁴³ The process has been reviewed several times: Productivity Commission Review of National Competition Policy Arrangements, 21 June 2004; Competition and Infrastructure Reform Agreement (CIRA) 1.4.6.1 in 2006 enhanced and clarified obligations of State, Territories and Commonwealth; Competition Policy Review 2015 (Harper Review). Arising out of the Harper Review recommendations Treasury commenced a Review of Commonwealth Government's Competitive Neutrality Policy in March 2017, which is on-going. Treasury proposes to release a revised competitive neutrality policy and supporting statement that reflects submissions from stakeholders and the Secretariat's report following completion of the review.

¹⁴⁴ AGCNCO, NBN Co, Investigation NO 14, 2011, <https://www.pc.gov.au/inquiries/completed/nbnco/report14-nbnco.pdf>.

development and appropriate rate of return on assets. Other issues which have arisen in relation to competitive neutrality policy which are currently under review by the Treasury inquiry include review of the definition of “significant business activity”; the nature of the “public interest test”; lack of certainty that noncompliance will be addressed; lack of compensation for private sector firms injured by the conduct; and relatively high cost in dollars and time for businesses pursuing complaints.¹⁴⁵

Competitive neutrality is generally regarded as a positive initiative.¹⁴⁶ The Treasury Review outcome is awaited with interest.

Philippines

The Philippine Competition Act was implemented in 2015 and its competition regulator is the Philippines Competition Commission. Its objectives include to:¹⁴⁷

“...enhance economic efficiency and promote free and fair competition in trade, industry and all commercial economic activities, as well as establish a National Competition Policy to be implemented by the Government of the Republic of the Philippines and all of its political agencies as a whole”

In short, the Act is aimed at steering regulations and administrative procedures of government agencies toward promotion of competition, as well as strengthening the enforcement of antitrust laws and ensuring competitive neutrality.¹⁴⁸

The Philippines Development Plan (“Development Plan”) (PDP) 2017-2022 is a broad and impressive economic initiative which among other things foreshadows the NCP.¹⁴⁹ The Development Plan expressly “seeks to enhance market competition by fostering an environment that penalizes anti-competitive practices, facilitates entry of players and supports regulatory reforms to stimulate investments and innovation.”¹⁵⁰ The Development Plan aims to level the playing field and in this context examines laws and regulations, enforcement, and competitive neutrality. The Development Plan states:

“Competition law and the corresponding mechanism to enforce it is an essential

¹⁴⁵ See Healey and Smith, above n 14 for further discussion of these issues.

¹⁴⁶ See reviews mentioned at fn. 16.

¹⁴⁷ Philippine Competition Act, s.2 (a).

¹⁴⁸ Philippine Development Plan 2017-2022, 246.

¹⁴⁹ Philippine development Plan 2017-2022, available at <http://www.neda.gov.ph/2017/07/26/philippine-development-plan-2017-2022/>

¹⁵⁰ See Philippine Development Plan, 245.

component of a national competition policy. In formulating the NCP, the other equally essential components, such as policies relating to competitive neutrality, consumer protection, government regulations that do not impede competition, and removal of structural barriers are established, and that an effective institutional mechanism to coordinate and oversee the implementation of these inter-related components is put in place.”¹⁵¹

In the context of government in the market, the Development Plan refers to specific existing areas of preferential treatment enjoyed by government-owned and controlled corporations (GOCCs), and notes that they currently also enjoy tax exemptions and other incentives. In the circumstances, the Development Plan concludes that:

“... measures must be made to ensure that they are not given undue advantage when they directly or indirectly compete with firms in the provision of goods and services.”¹⁵²

The Development Plan also refers to State-enabled policies and barriers which have created distortions in the market such as by government monopolies, government authorised private monopolies, government control of entry and expansion of market players, and government provision of goods and services in competition with private participants. Reference is made to government actions which address important social objectives but also create market distortions by limiting the entry and expansion of current players and protecting vested interests; other government-authorised monopolies; controlled pricing of some essential foods; and discriminatory laws and regulations.

The Philippines is targeting a move to the top 25% of all economies for market efficiency and consumer welfare by the end of the Plan following the implementation of the NCP.¹⁵³ To ensure that these results will be achieved the PCC will undertake the following activities:

- Review legislation and policies that may substantially prevent, restrict or lessen competition;
- Analyse competition issues in priority sectors;
- Investigate conduct and agreements that may substantially prevent restrict or lessen competition;
- Promote competition-related policies and best practices;
- Conduct capacity building activities;
- Institutionalise a mechanism for the implementation of NCP.

¹⁵¹ Philippine Development Plan, 246.

¹⁵² Philippine Development Plan, 247.

¹⁵³ Philippine Development Plan, 249.

The NCP itself has competitive neutrality as one of its pillars, with commitment to holding SOEs to the same standards as private sector businesses and not allowing them to enjoy any competitive advantages over private sector businesses simply by virtue of public sector ownership, unless it can be clearly demonstrated that the greater public interest will be served and there is a lack of commercial viability.¹⁵⁴

The National Competition Policy (NCP) is still under development and it is expected that it will be adopted by Executive Order in early 2019. There is, however, significant commitment to the implementation of NCP within the jurisdiction.

In addition to the NCP, the Philippines envisages a significant role for regulator advocacy. The PCC has specific advocacy roles under the Competition Act in relation to competition generally, and to competitive neutrality. In addition to enforcement and other roles, the PCC is charged with reviewing economic and administrative regulations and advising government on competitive implications of its policies and programs (Philippines Competition Act, s.12(r)). It is also required to assist the National Economic and Development Authority in the formulation of the National Competition Policy (NCP) policies and programs (Philippines Competition Act, s12(o)).

Thus, in the Philippines the PCC has legislative roles in relation to National Competition Policy (including competitive neutrality) and in relation to advocacy in areas which include competitive neutrality. The Philippines thus takes a broad approach to competition law and policy and has taken huge steps to create a level playing field for competition in a short space of time.

Both Australia and the Philippines have taken a comprehensive approach to competition law and policy and to addressing government involvement in markets. They both apply competition laws to SOEs and other government businesses. They have NCP initiatives addressing anti-competitive laws, regulation and policies favouring government. NCP policies also address competitive neutrality in the context of the advantages maintained merely because a body is owned or controlled by government.

Treatment under a specific law

The second category of approach is to address competition concerns by way of statute.

European Union

The European Union is a good example of a jurisdiction with specific legal provisions covering competitive neutrality, which it does in the context of its laws on state aids and also under various internal trade provisions of the Treaty on the Functioning of the European Union (TFEU).¹⁵⁵ In the case of the EU, the policy really has its basis in the need to maintain a level playing field in the context of both public and private competitors but also in the context of the goal of a single market. The Treaty on the Functioning of the European Union (TFEU) prohibits the grant of state aids which have the capacity to distort competition in the internal market (Art 107-109).¹⁵⁶ Basically, any aid granted by a Member State or through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the internal market if it affects trade between Member States. It is important to note that these provisions apply to state aids given to both government and private bodies. Certain specific exemptions are listed for aids which are declared to be compatible with the internal market, such as aids of a social character granted to individual consumers or aids to make good damage caused by national disasters or exceptions occurrences. (Article 107(2)). Other aids may be permitted such as those to remedy a serious disturbance in the economy of a Member State, which was invoked in relation to financial institutions following the Global Financial Crisis of 2008 “...so that Member States could adopt measures to safeguard the stability of their financial systems without unduly distorting competition.”¹⁵⁷ Article 107(3) provides for the balancing of benefits from addressing a market failure or other objective in the common interest against the distortionary effect of the conduct, with the Article only being contravened if the balance is negative.¹⁵⁸ Block exemptions have been enacted to permit conduct which falls within particular listed categories and which allows the Commission to concentrate on cases which are more important.¹⁵⁹

¹⁵⁵ See Arts. 107-109 on state aids;

¹⁵⁶ SOEs and government bodies are caught by the TFEU if they are classified as “undertakings”. Article 106 prohibits Member States from adopting, with regard to public undertakings and undertakings which have been given exclusive or special rights any measure which would lead to infringement of provisions including Articles 101, 102 or the free movement provisions. However, Article 106(2) provides that Services of General Economic Interest (SGEI) are excepted to the extent that the conduct is necessary to achieve the purposes entrusted to them.

¹⁵⁷ See Richard Whish and David Bailey, *Competition Law*, 7th Edition (2012) Oxford University Press, 246-7.

¹⁵⁸ See OECD, Roundtable on Competitive Neutrality in Competition Enforcement: Note by European Union (16-18 June 2015) 9-13, referred to in Healey and Smith, above n, where specific examples of state aids are noted.

¹⁵⁹ See General Block Exemption Regulation 651/2014, which include aid for environmental protection, risk capital, research and development and innovation, newly created small enterprises and broadband rollout. See

State aids may be approved prior to implementation for reasons listed in Arts 107(2) and 107(3). If permission is not granted or permission is not sought, the Commission must direct the State to abolish or alter the conduct and to recover aid granted. If the State fails to comply, the Commission or an interested Member State may refer the matter to the Court of Justice.¹⁶⁰

The Treaty also institutes a system “...ensuring that competition in the internal market is not distorted.”¹⁶¹ Member States are obliged to conduct their economic policy in accordance with the principles of an “open market economy with free competition”.¹⁶² Member States must take all appropriate measures to fulfil Treaty obligations¹⁶³ and abstain from all measures that would jeopardise Treaty obligations. The TFEU also guarantees four freedoms. These are the free movement of goods¹⁶⁴ and persons;¹⁶⁵ the freedom of establishment to provide services;¹⁶⁶ and the free movement of capital.¹⁶⁷

State aids account for half of the enforcement activity of the Directorate-General for Competition in the EU.¹⁶⁸ One important example where state aids were not involved was the Altmark case.¹⁶⁹ It involved provision of services to the state by a private business, in the form of a privatised transport service where the State continued to cover the costs of public service operations. The state thus required the business to supply services not otherwise provided by the market to meet social policy objectives. The European Court of Justice found that compensation for public services in that context does not constitute state aid where:

- The universal or public service obligation is clearly defined;
- The parameters for compensation are objective, transparent and established in advance;
- Compensation does not exceed the costs, including reasonable profit; and compensation is determined either through public procurement or on the basis of the typical costs of a well-run company.

While a full consideration of these provisions is beyond the scope of this chapter, and

¹⁶⁰ Eleanor M. Fox and Damien Gerard, *EU Competition Law: Cases, Texts and Context* (2017) Edward Elgar Cheltenham UK, 313.

¹⁶¹ Protocol on the internal market and competition (Protocol to the Lisbon Treaty).

¹⁶² Art. 119(1) TFEU.

¹⁶³ Art 4(3)(2) TEU (Treaty on European Union).

¹⁶⁴ Arts. 28-37 TFEU.

¹⁶⁵ Arts. 45-55 TFEU.

¹⁶⁶ Arts. 56-62 TFEU.

¹⁶⁷ Arts. 63- 66 TFEU.

¹⁶⁸ Eleanor M. Fox and Damien Gerard, *EU Competition Law: Cases, Texts and Context* (2017) Edward Elgar Cheltenham UK, 311.

¹⁶⁹ *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* (C-280/00) [2003] ECR I-7747.

they have been thoroughly considered in a number of well-known publications, it is important to understand that various issues relating to competitive neutrality are thoroughly considered under EU law.

China: law and policy

This material has emphasised that the nature of the political economy of a jurisdiction will dictate vastly different approaches to issues such as that under consideration.

The Constitution of China designates state-owned enterprises (SOEs) as a leading force of the national economy. China has adopted a hybrid system for dealing with the issue of competitive neutrality, having specific provisions in its competition law and implementing a sweeping policy. Given the very large number of SOEs in the country and the existing issues surrounding the level playing field, the two-pronged structure of ex ante and ex post regulation is well-justified.

Crucially for this chapter, it has recently been reported that:

“The seemingly unfamiliar expression ‘competitive neutrality’ has entered public discourse in China. On 14 October [2018] Yi Gong, the governor of the People’s Bank of China, told a G-30 meeting that China would accelerate domestic reform and opening-up to the rest of the world, strengthen protection of intellectual property, and consider treating state-owned enterprises (SOEs) with the principle of ‘competitive neutrality’ in order to solve the structural problem of the Chinese economy.”¹⁷⁰

China implemented its Anti-Monopoly Law (AML) in 2007 and it became operative in 2008. It is a competition law for a socialist market economy, with broad and somewhat unusual objectives, and provisions which in some parts reflect its political economy.

More recently the term “competitive neutrality” has been used in the context of economic reform, supporting existing provisions in the AML dealing with administrative monopoly, and a relatively new system which implements a legislative and policy review framework, the Fair Competition Review System (FCRS).¹⁷¹

The AML applies to SOEs, but a number of provisions give great discretion to regulators

¹⁷⁰ Caixin, Editorial, 23 October 2018, available at <https://www.caixing.com/2018-10-23/editorial-how-china-can-achieve-competitive-neutrality-101338043.html>

¹⁷¹ “On October 14 [2018], Yi Gang, the governor of the People’s bank of China, told the G-30 meeting that China would accelerate domestic reform and opening-up to the rest of the world, strengthen protection of intellectual property, and consider treating state-owned enterprises (SOEs) with the principle of ‘competitive neutrality’ in order to solve the structural problem of the Chinese economy”. Caixin, Editorial, 23 October 2018, available at <https://www.caixinglobal.com/2018-10--23/editorial-how-china-can-achieve-competitive-neutrality-101338043.html>

and courts, particularly in circumstances involving industries which are seen to be important to the economy. Using merger analysis as an example, a number of the merger factors do not focus on competitive impact and consider issues such as the effect of the merger on the national economy. The process is not always transparent- under the AML the regulator only needs to produce a written determination if the merger is rejected or approved subject to conditions. Most mergers are allowed, so there are relatively few written determinations to assess. Many of these involve SOE mergers.

On the other hand, the AML contains very unusual and detailed provisions on “administrative monopoly” which attack laws and regulations at provincial and local level which erect barriers, favour locals and establish exclusive contracts and arrangements. Many beneficiaries of this local protectionism are SOEs. These provisions are regularly enforced; however, under the AML there are no penalties involved for those breaching the provisions. The process is administrative: recommendations are made to the authorities which oversee the dealings of the authorities or SOEs which breach the administrative monopoly provisions. Those authorities may be instructed to rectify their behaviour. There is no oversight of whether the conduct is actually rectified and no compulsion on those administrative superiors to act on the recommendations. Administrative monopoly behaviours are also so pervasive and widespread that it is difficult to know the true impact of the of administrative monopoly provisions in the context of the economy as a whole, despite apparent active attempts to enforce it.

Finally, a Fair Competition Review System (FCRS) was implemented in 2016 under an Opinion.¹⁷² It is an ex ante review system which addresses restrictions on competition by laws, regulations and directives and to that extent it “pre-empts” administrative monopoly. FCRS addresses both existing and new regulation. The FCRS requires a review of all new laws, policies, regulations and rules to ensure that they have no anti-competitive effect in the interests of supporting a national market prior to implementation. Drafts of laws and regulations cannot be submitted to the State Council for implementation without such a review. The FCRS applies to all levels of government and very significant progress has been made in implementing the program since its inception.¹⁷³

¹⁷² Opinion on Establishing a Fair Competition Review System during the Development of Market -Orientated Systems, State Council, 1 June 2016. See Xiaoye Wang, Promoting the Fair Competition Assessment to Restrain Administrative Monopoly, 1 Competition Law and Policy Review 3 (2016).

¹⁷³ At the end of 2018, all departments in the State Council and provincial governments, 98% of municipal governments, and 85% of county governments had adopted the system. 17 provinces (including the municipality and prefecture) including Beijing, Tianjin and Hebei had reached province-municipality-county three-level implementation of the system. See China’s State Administration for Market Regulation discloses implementation of FCRS System in 2018,(in Chinese) available at http://www.gov.cn/xinwen/2019-01/27/content_5361519.htm.

The Opinion which sets out the processes for the FCRS requires the review of regulations and policy measures as areas such as market entry, industrial development, attraction of foreign investment, tendering and bidding, and government procurement in the context of standards on market entry and exit; standards on the free movement of goods and production factors; standards that affect production and operating costs; standards that affect production and business operations. Exceptions are allowed in areas such as safeguarding national security, national defence construction, poverty alleviation, national development, energy and resource conservation. Public interest is relevant, and a very broad view of public interest is taken.

Adjustments have been made to the implementing organisation, the system and rules. A SAMR Report in late 2018¹⁷⁴ indicates that a Guide for implementing third party assessment of the FCRS will be released and random audits of departments and provinces are proposed to check on progress. SAMR proposes to strengthen supervision of processes. While it is difficult to assess the overall impact of the FCRS, it is clear that a huge effort is being made to implement it. It is an enormous task given the size and power of the bureaucracy in China.

Thus, the EU approaches competitive neutrality issues by various provisions of the TFEU and the TEU and the provisions are actively enforced. China has adopted both legislative and policy approaches to these issues and appears to proactively enforce the law and impose the FCRS.

Advocacy

The final method of dealing with issues of competitive neutrality is advocacy. Advocacy is a key activity of competition regulators, and the activities of governments, including their business operations via SOEs and other entities, is generally an important part of competition law and policy advocacy. Various international bodies see a very broad role for competition advocacy by competition regulators.¹⁷⁵

Much has been written about the importance of advocacy and its political challenges.

(SAMR Report).

¹⁷⁴ See SAMR Report above.

¹⁷⁵ See World Bank and OECD, A Framework for Design and Implementation of Competition Law and Policy (1998),93; International Competition Network, Advocacy and Competition Policy, Report prepared by the Advocacy working Group (ICN Conference, Naples, Italy, 2002),i. Both reports are referred to in Hon Mr Robert French AC, former Chief Justice of Australia, Regulatory Advocacy, in Pamela Hanrahan and Ashley Black (eds) Contemporary Issues in Corporate and Competition Law, LexisNexis 2018, 75 at 80.

The independence of the regulator is generally an important factor in successful advocacy. Several templates for advocacy exist in competition laws. Competition regulators may have a specific mandate in the legislation establishing them to assist governments with drafting laws, regulations and policies. Regulators may have a general mandate to advocate for competition and that role would include advocacy in relation to government and its activities. Finally, even without a specific advocacy role mandated in legislation, many regulators advocate for competition generally. The political challenges of advocacy are acute where commentary on government and its activities is involved, particularly where the regulator makes findings which are critical of government. The independence of the regulator is particularly important in this context, and it is difficult for those regulators which are set up as part of government departments to fulfil this advocacy role effectively, although it is possible to do so.

However, even where regulators are independent there is a basic conflict between the right of the government as elected representative of the citizens of a country to implement laws and policies in what it considers to be the best interests of citizens, and goals such as the impact of government conduct on competition. The role of government requires balancing multiple policy goals, of which competition policy is just one. This feature sometimes leads to a clash of objectives. The subsequent material gives examples of the advocacy roles of some competition regulators.

Specific competition law provisions on advocacy vary greatly between jurisdictions. Jurisdictions with a formal advocacy role include the following:

- In the Czech Republic, the regulator can impose fines on public authorities for distortion of competition and the law includes a list of practices of government which cannot be undertaken without legitimate reasons.
- In French Polynesia, the regulator may advocate where the government asks for comment or on its own initiative. The regulator may give its opinion on any matter related to competition.
- In Indonesia the regulator, the KPPU may advocate on very many specified initiatives and it appears that the government is increasingly adopting the KPPU views on issues raised.
- In Mexico the regulator can give its views to government, but they are not necessarily adopted.
- In New Caledonia, the regulator consults on draft legal texts and any other matter in relation to competition. The regulator may be asked for its views on competition issues or may offer them of its own initiative. The government has an obligation to consult the regulator on issues such as price regulation and price setting.
- In Serbia the regulator is able to give opinions, but they have no binding effect.

Many other regulators take on advocacy where the laws establishing them do not

specifically give them an advocacy role at all, or only give them a specific but limited role.¹⁷⁶ Thus, advocacy is a tool which may be used by all regulators and its impact will depend upon a number of factors, which may not include the logic of the proposal or the damage occasioned by the conduct under consideration.

Policy and advocacy: ensuring outcomes

This chapter has explored approaches to competitive neutrality ranging from competition policy to specific legislative provisions to advocacy. Each has its shortcomings.

Laws are enforceable but there must be sufficient enforcement actions by the regulator to act as a deterrent to governments and SOEs in relation to their anti-competitive conduct. Even where these provisions exist it may also be politically difficult for regulators to enforce laws against governments and their SOEs, which may, for example, be very powerful or contribute substantially to government funds.

Policy and advocacy do not generate enforceable outcomes. Often change following advocacy is left to the goodwill of governments which may or may not feel inclined to adopt recommendations or change their behaviour.

But should government have an obligation to rectify conduct or take other action?

This chapter accepts that government does not have an obligation to adopt all recommendations of regulators but argues that where competition policy mandates investigation of a competition issues such as involving competitive neutrality, or where regulators are obliged under laws to advocate on specific issues, government should provide a response to the regulator in the interests of transparency.

Australia

As noted above, Australia's National Competition Policy which is implemented by agreement between the Commonwealth, the States and territories contains Competitive Neutrality obligations. The numbers of complaints about competitive neutrality at all levels are relatively small. Some of the problems in relation to CN policy were highlighted in the earlier section. There is no obligation for the relevant government body or SOE to do anything if a negative finding is made about conduct following the investigation of a competitive neutrality complaint. Given that a system of complaints and investigation are set out in the Competition

¹⁷⁶ As to the limits of regulatory advocacy in this context see Hon Mr Robert French AC, former Chief Justice of Australia, *Regulatory Advocacy*, in Pamela Hanrahan and Ashley Black (eds) *Contemporary Issues in Corporate and Competition Law*, LexisNexis 2018, 75, where the author examines the advocacy role of the Australian Competition and Consumer Commission.

Principles Agreement,¹⁷⁷ it would seem reasonable that should a breach of the policy be found, the owner or controller of the SOE or other government body should accept the determination, consider it and then act to alter its conduct. However, there is generally no obligation to do so. In this context it should be remembered that competitive neutrality is a policy and not a law in Australia. One must accept that the government has policy imperatives other than competitive markets and that it has been elected to prioritise for the benefit of citizens. Ultimately it is answerable to citizens at the ballot box. But where does this leave the complainant whose complaint has been accepted?

Two possibilities might address this situation. The first would be for government to take a matter of competitive neutrality where it disagrees with the finding of an investigation to the Australian Competition Tribunal in relation to Commonwealth complaints for a review (or to other state or territory tribunals in respect of findings in relation to their jurisdictions). However, this would be a quasi-judicial consideration of the implementation of policy, which would be unusual.

Alternatively, an obligation might be imposed on the government body and its Minister to formally notify the investigating agency and the complainant of the reasons for its inaction following the successful complaint. The Minister might be obliged to lay the notification and reasons before Parliament, and also to include them in the Annual Report of the organisation.

Such obligations imposing transparency might have the effect of changing behaviour in circumstances where the government involved was under an obligation to apply competitive neutrality policy under the Competition Principles Agreement.¹⁷⁸ Of course these obligations would need to be the subject of amendment between the parties to the Competition Principles Agreement.¹⁷⁹

The lack of obligation on governments to act on regulator advocacy is also a frustration in the context of the issues discussed in this chapter, particularly in relation to circumstances where regulators have a legislative obligation to contribute to legislative development or have a general obligation to advocate more generally on competition issues, including competitive neutrality. As is recognised above, it is not argued here that governments should necessarily

¹⁷⁷ See fn 15.

¹⁷⁸ See fn 15.

¹⁷⁹ It appears that such a commitment has been given by the Government of Ireland in relation to recommendations of the Competition Commission arising from market studies. The Government has stated that it will act on recommendations contained in reports of the Competition Authority within nine months of their publication. See Program for Government, 10 October 2009. However, it is unclear whether this commitment involves transparent consideration or is limited to intra governmental consideration.

adopt the views of regulators advocating for competition. But it is suggested that transparency of decision making in this area is important given the potential impact of government in the market.

In both examples noted above, this chapter argues that adding transparency would significantly improve the current models for competition policy and for mandated advocacy.

Conclusion

This paper has provided a detailed examination of mechanisms employed under three structural models in various jurisdictions to deal with issues of competitive neutrality under its broad and narrow constructions.

Of course, none of this works where concerted industrial policy is implemented in a jurisdiction- where governments choose to encourage and promote a specific industry or sector with an array of policy tools. Traditionally the absence of competitive neutrality policies for government and its SOEs and other bodies meant that the benefits of effective competition would be decreased within that jurisdiction. Given globalisation, however, the impact on competition of this failure is now greater where competitive neutrality does not exist in the jurisdiction of the foreign competitor. The impact has gone from inside the jurisdiction to another jurisdiction.

Ultimately addressing competitive neutrality is an important feature of competition law and policy which must be addressed to level the playing field for competition.